For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.
520 Eighth Avenue, 20th Floor, New York, New York 10018 (212) 337-0200 www.medialaw.org

MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through June 30, 2009

LIBEL & PRIVACY

11th Cir. **Eleventh Circuit Reinstates Right of Publicity Claim Rejecting Newsworthiness Defense** 3
Court Requires "Substantial Relevance" to Matter of Legitimate Public Interest
Benoit v. LFP Publishing, Inc., dba Hustler Magazine

D. N.M. **Federal Court Denies Summary Judgment to CBS on Libel Claim** 5
Government Purchasing Agent Not a Public Official; Sufficient Evidence of Actual Malice
Anaya v. CBS Broadcasting

Utah **Utah Supreme Court Limits State Anti-SLAPP Statute** 6
Newspaper Editorial Too General to Fall Within Ambit of Statute
Jacob v. Bezzant

Congress **House of Representatives Passes Bill to Limit Enforcement of Foreign Libel Judgments** 7
Publishers Group Seeks Stronger Version
H.R. 2765

Fla. **Florida Governor Signs Libel Tourism Bill** 10
Statute Limits Enforceability of Foreign Libel Judgments
HB 949

Hawaii **Libel Tourism Bill Dies in Hawaii Legislature** 10
Bill Stalled in State Senate
HB 130

S.C. C.P. **Lawyer Wins $40,000 Judgment Against South Carolina Alternative Newspaper** 11
Article About Divorce Case Referred to "Two-Bit Lawyers"
West v. Morehead

Cal. App. **Court Affirms Denial of Anti-SLAPP Motion** 12
Use of Plaintiff's Photo in Documentary Not Within Scope of Statute
Whitaker v. A & E Television Networks et al.

Tex. App. **Online Journalist Wins Summary Judgment on Interlocutory Appeal** 13
Court Rejects Argument that Statute Does Not Apply to Online Reporters
Kaufman v. Islamic Society of Arlington

NEWSGATHERING

E.D.N.Y. **Federal Judge Refuses To Enjoin Publication Of Photographs Of Public Official's "Perp Walk"** 15
Court "Troubled" By Images, But Won't Instruct Press on Newsworthiness
U.S. v. Corbin

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

REPORTERS PRIVILEGE

Ill. Cir. Ct. **Illinois Court Considers Whether Shield Law Applies to Online Posters** **17**
Prosecution Allowed to Obtain ID of Two Posters Who Discussed Murder Case
Alton Telegraph v. Illinois

D. Nev. **Prosecutor in Nevada Subpoenas Newspaper for Identity of Online Posters** **19**
Sought ID's of Over 100 Posters Who Commented on Tax Evasion Case
In re Grand Jury Subpoena to Las Vegas Review Journal

INTERNATIONAL

Canada **Fresh Winds from the North** **20**
Developments in Canadian Media Law

ACCESS

Neb. **Supreme Court Allows Access to Burial Records** **24**
Court Ends Century Long Ban on Access to Burials at Mental Hospital
State Ex Rel. Adams Cty. Historical Soc. v. Kinyoun

D.D.C. **Court Denies Government Request for Blanket Sealing of Factual Returns in Gitmo Habeas Cases** **26**
Public Has First Amendment Right of Access to Records of Habeas Proceedings
In re Guantanamo Bay Detainee Litigation

Ky. Cir. Ct. **Court Orders Kentucky State Police To Provide Sex Offender Database And To Pay Newspaper's Costs And Fees** **28**
Commonwealth of Kentucky v. Courier Journal

N.D. Cal. **Federal Court Dismisses News Photographer's Claim Over Arrest** **29**
No Right to Take Photos at Closed Accident Scene
Chavez v. City of Oakland

COPYRIGHT

Comment **Little Is "Fair" in Love and War** **30**
News Aggregation and Fair Use – A Response

Bing's Video Preview Feature Stretches Fair Use – But Too Far? **33**

SUPREME COPURT

U.S. **Supreme Court to Decide Whether Restrictions on "Debt Relief Agencies" Violate First Amendment** **32**
Eighth Circuit Held Statute Violated Lawyers' Right to Advise Clients
Milavetz, Gallop, & Milavetz, P.A., et al.

U.S. **Supreme Court Orders Reargument in Campaign Finance Case** **32**
Court Will Consider Overruling Restrictions on Corporations and Labor
Citizens United v. F.E.C.

ETHICS

Corporate Counsel as Ambulance Chaser? **36**
Ethical Rules Prohibit In-Person Solicitation of Non-Party Employees

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Eleventh Circuit Reinstates Right of Publicity Claim Rejecting Newsworthiness Defense

Court Requires "Substantial Relevance" to Matter of Legitimate Public Interest

The Eleventh Circuit reinstated a right of publicity claim over the use of old nude modeling photographs as part of a biographical sketch. *Benoit v. LFP Publishing Inc., dba Hustler Magazine*, No. 08-16148 (11th Cir. June 25, 2009) (Anderson, Wilson, Goldberg, JJ.). The photographs were published together with an article that discussed the model's death in a tragic double-murder suicide that received substantial attention.

The Court of Appeals panel, like the district court below, was deeply troubled by the use of the photographs. But while the district court held that even "distasteful and offensive" photos are protected when used in connection with a newsworthy article, the Court of Appeals required "substantial relevance" to a matter of legitimate public interest for the newsworthiness defense to apply. The court concluded that the photos were not "related in time nor concept" to the murder case and therefore publication was not protected by the newsworthiness exception to the right of publicity.

Background

In 2007, professional wrestler Chris Benoit murdered his wife and their young son and then took his own life. The double murder-suicide received extensive press coverage. His wife Nancy Benoit had been a professional female wrestler and manager. In March 2008, Hustler magazine published 20-year old nude modeling photographs of Benoit together with an article about her life and murder. The nude photos were touted on the magazine cover and table of contents with such tag lines as "Exclusive Nude Pics of Wrestlers Doomed Wife."

Nancy Benoit's mother brought a right of publicity lawsuit on behalf of her daughter's estate, alleging among other things that the photographer had disobeyed Nancy Benoit's instruction to destroy the photographs. The federal district court dismissed the lawsuit for failure to state a claim. *See* No. 1:08 CV 421, 2008 WL 4559866 (N.D. Ga. Oct. 6, 2008). The court held that the publication of the photos related to a matter of public interest – her murder – and was therefore protected by the First Amendment, notwithstanding the court's personal view that publication was "distasteful and offensive." The court interpreted Georgia law broadly to find that even publication of gratuitous and sensational photographs is protected when published with a legitimate news article.

Court of Appeal Decision

Reversing and reinstating the claim, the Court of Appeal agreed that the magazine article "in and of itself, certainly falls within the newsworthiness exception." But the question for the Court was "whether a brief biographical piece can ratchet otherwise protected, personal photographs into the newsworthiness exception."

The Court cautioned that "someone's notorious death" is not "carte blanche for the publication of any and all images of that person during his or her life." The Court cited several sections from the *Restatement (Second) Torts* on private fact claims, including a comment that public figures may be "entitled" to keep private "some intimate details … such as sexual relations." *See* § 652D cmt. h.

Interestingly, the *Restatement* portions cited the Court have never been adopted or endorsed by Georgia state courts in the context of a right of publicity claim.

Nevertheless, the Court factored this protection for intimate details of a person's private life into the newsworthiness analysis, concluding that the photographs "were in no conceivable way related to the 'incident of public concern' or current 'drama'– Benoit's death."

> The photographs bear no relevance– let alone "substantial relevance"– to the "matter of legitimate public interest." On these facts, were we to hold otherwise, LFP would be free to publish any nude photographs of almost anyone without their

(Continued on page 4)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Eleventh Circuit Reinstates Right of Publicity Claim Rejecting Newsworthiness Defense

(Continued from page 3)

> permission, simply because the fact that they were caught nude on camera strikes someone as "newsworthy." Surely that debases the very concept of a right to privacy.

In support of its right of publicity conclusion, the Eleventh Circuit relied on the Seventh Circuit's 1985 decision in *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985). In *Douglass*, an actress sued Hustler Magazine for false light and misappropriation for publishing nude photos of her without consent. The photos were leftovers from a pictorial published by Playboy magazine. While plaintiff was featured in *Playboy* several times she objected to the implications of being featured in a notoriously vulgar and tasteless magazine.

Judge Posner, writing for the panel, affirmed that *Hustler* could be liable for misappropriation. He did not address the newsworthiness exception, instead he found a sort of quasi-copyright liability. Judge Posner also noted that a "little niche of the law of privacy is dominated by Larry Flynt's publications" -- an observation that's perhaps still true nearly 25 years later.

Hustler Magazine intends to seek rehearing en banc.

Defendant is represented by James C. Rawls, Barry J. Armstrong and S. Derek Bauer, McKenna Long & Aldridge, Atlanta, GA; and William M. Feigenbaum, Lipsitz Green Scime Cambria LLP Buffalo, NY. Plaintiff is represented by Richard Paul Decker, Decker Hallman Barber & Briggs, Atlanta, GA.

©2009
MEDIA LAW RESOURCE CENTER, INC.
520 Eighth Ave., North Tower, 20 Fl.
New York, NY 10018

BOARD OF DIRECTORS

Kenneth A. Richieri (Chair)
Kelli Sager
Dale Cohen
Stephen Fuzesi, Jr.
Ralph P. Huber
Henry S. Hoberman
Marc Lawrence-Apfelbaum
Karole Morgan-Prager
Elisa Rivlin
Susan E. Weiner
Kurt Wimmer

STAFF

Executive Director: Sandra Baron
Staff Attorney: David Heller
Staff Attorney: Eric Robinson
Staff Attorney: Maherin Gangat
MLRC Fellow: Stephanie Shaffer
MLRC Administrator: Debra Danis Seiden
MLRC Publications Assistant: Philip J. Heijmans

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

New Mexico Federal Court Denies Summary Judgment to CBS on Libel Claim

Government Purchasing Agent Not a Public Official; Sufficient Evidence of Actual Malice

In a lengthy decision, a federal court in New Mexico granted in part and denied in part summary judgment to CBS on a libel claim over a series of investigative news broadcasts about questionable spending practices at Los Alamos National Laboratory. *Anaya v. CBS Broadcasting*, No. CIV 06-0476, 2009 WL 1562537 (D.N.M. May 29, 2009) (Browning, J.).

At issue in the case, were five CBS news broadcasts that aired in 2002 and 2003 concerning highly publicized allegations of mismanagement at the federally owned Los Alamos National Laboratory. Attention centered on plaintiff after it appeared that she charged a $30,000 customized Ford Mustang on her official purchasing credit card. She was suspended pending an investigation and ultimately cleared by an internal government investigation. That investigation attributed her order of a Mustang to a mistakenly faxed purchase order, but whistler blower sources for the broadcasts and the Mustang dealer disputed the government's findings.

A key issue on the summary judgment motion was whether the plaintiff, a procurement assistant for over 30 years at the laboratory, was a public official for purposes of her libel suit. After an extensive review of Supreme Court and 10th Circuit decisions, the court concluded that plaintiff was not a public official, finding she did not have sufficient independent authority to justify being treated as a public official. "The public obviously has a generalized interest in how tax dollars are spent," the court reasoned, "[n]evertheless, the public's interest in how tax dollars are spent is more likely to be directed at those who get to choose how such tax dollars are spent rather than at someone as far down the bureaucratic chain-of-command as a procurement assistant …."

The court acknowledged contrary authority, in particular a Louisiana Supreme Court decision which held that a state university purchasing agent was a public official. *See Davis v. Borskey*, 660 So.2d 17, 21 (La. 1995). The court could not distinguish the result and stated that it disagreed with the holding.

The court also analyzed plaintiff's public figure status, finding her to be a private figure for the first three broadcasts, but a limited purpose public figure for the remaining two broadcasts which aired after plaintiff had taken a public role in defending herself from accusations of fraud.

As for fault, the court found no evidence of actual malice to support punitive damages on any of plaintiff's negligence-based claims. The court noted that given competing theories about the mismanagement at Los Alamos, CBS "was entitled to pick a side" and present plaintiff's version in a less favorable light.

However, the court found sufficient evidence of actual malice to defeat summary judgment on some of the statements in the final two broadcasts which aired after a government report exonerated plaintiff of allegations she intentionally purchased the Mustang. Among other things, these reports and teasers for the reports stated: "Hey nice car. She bought it with your tax dollars." "She's at it again." The report also stated that plaintiff was "tricked" into buying the car. Although conflicting evidence as to what actually happened still existed, the court relied on the government's report to conclude that inconsistencies between the official report and the broadcasts could allow a jury to find actual malice.

Michael L. Raiff, Thomas S. Leatherbury, Marc A. Fuller, Vinson & Elkins L.L.P., Dallas, TX, represent CBS Broadcasting Inc., reporter Sharyl Attkisson, and Emmis Communications, Corp. Plaintiff is represented by Todd M. Lopez, Julie Sakura, Lopez & Sakura LLP, Jesse A. Boyd, Attorney at Law, Santa Fe, NM, John W. Boyd, Michael Lee Goldberg, Freedman Boyd Hollander Goldberg & Ives, Albuquerque, NM.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Utah Supreme Court Limits State Anti-SLAPP Statute

Newspaper Editorial Too General to Fall Within Ambit of Statute

By David C. Reymann and Jeffrey J. Hunt

On June 16, 2009, the Utah Supreme Court issued an opinion in which it addressed, for the first time, the scope of Utah's anti-SLAPP statute as applied to speech in a newspaper editorial. *Jacob v. Bezzant*, 2009 UT 37 (June 16, 2009).

The Court ruled that the newspaper editorial at issue was not covered by the anti-SLAPP statute because it did not constitute "public participation in the process of government." This decision appears to limit the scope of Utah's act to speech that is clearly designed, both in content and context, to directly influence the decisions of the legislative and executive branches of government. Speech that is directed to the public at large, such as a newspaper editorial, may be too general to fall within the ambit of the statute.

The case arose out of newspaper editorial published during an election for the American Fork City Council in 1999. William T. Jacob, a wealthy real estate developer, had previously circulated a flyer in which he accused two of the candidates running for City Council of having a conflict of interest under a particular city ordinance. Brett Bezzant, the publisher of the *American Fork Citizen,* the paper in which the flyer had been disseminated, published an editorial responding to Mr. Jacob's flyer, disagreeing with the way in which Mr. Jacob had interpreted the ordinance and communicating the city's longstanding interpretation of the ordinance contrary to Mr. Jacob's position. Mr. Jacob reacted by suing Mr. Bezzant and the *Citizen* for defamation, false light, and violation of unspecified constitutional rights under Section 1983.

The district court dismissed all of Mr. Jacob's claims on the pleadings, finding them wholly without merit. The court further granted the *Citizen* summary judgment on its anti-SLAPP counterclaim and awarded the *Citizen* its attorneys fees, finding that Mr. Bezzant's editorial did constitute public participation in the "process of government," which the act defines as "the mechanisms and procedures by which the legislative and executive branches of government make decisions, and the activities leading up to the decisions, including the exercise by a citizen of the right to influence those decisions under the First Amendment to the U.S. Constitution." Utah Code Ann. § 78-58-102(5).

On appeal, the Utah Supreme Court affirmed the dismissal of all of the plaintiff's claims on the merits, finding them riddled with multiple legal defects. The Court reversed, however, on the finding that Mr. Bezzant's conduct fell within the anti-SLAPP act. Though Mr. Bezzant had argued that a citizen's readiest and most effective means of speaking to and influencing the decisions of government is often by speaking through the news media, as several other courts around the country have recently held, the Utah Supreme Court disagreed. It found that the context of Mr. Bezzant's speech, directed to the electorate at large, as well as the content of the speech, concerning two candidates for office rather than a live issue pending before a governmental agency, meant that his speech was not primarily an exercise of his right to influence legislative and executive decision-making.

The Court decision is disappointing in its failure to recognize the importance of the news media as a means for the public to influence the decisions of government. Often the public pressure generated by news coverage is far more effective in steering the mechanisms of government than a single letter mailed to a congressman, though the former speech would not be covered under Utah's anti-SLAPP law while the latter would. The Court's opinion does appear, however, to be somewhat limited to the particular facts of the case, and there is certainly the possibility that speech through the media, if it were directed at a live issue and clearly meant to influence governmental decisions, would fall within the scope of the Utah anti-SLAPP act.

In the meantime, the decision leaves the news media in a somewhat unsettled situation in seeking remedies for retaliatory and meritless defamation suits. Hopefully this uncertainty will be resolved by possible amendment of the anti-SLAPP statute to clarify its scope, or by future appellate decisions recognizing that some speech through the media, directed to the public at large, is a crucial part of democratic participation and deserving of protection.

David C. Reymann and Jeffrey J. Hunt of Parr Brown Gee & Loveless in Salt Lake City, Utah, represented the defendant. Plaintiff was represented by Randall K. Spencer and Jennifer K. Gowans, Provo, Utah.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

House of Representatives Passes Bill to Limit Enforcement of Foreign Libel Judgments

Publishers Group Seeks Stronger Version

By Jonathan Bloom

On June 15, 2009, the House of Representatives, by voice vote, unanimously passed H.R. 2765, a bill introduced by Rep. Steve Cohen (D-Ten.) that would amend Title 28 of the U.S. Code to prohibit the recognition and enforcement of foreign defamation judgments and certain foreign judgments against interactive computer service providers (ISPs) unless they are consistent with the First Amendment or (in the case of ISPs) with section 230 of the Communications Decency Act.

The bill also would bar recognition and enforcement of a foreign defamation judgment if the exercise of personal jurisdiction by the foreign court did not comport with due process under the U.S. Constitution. Finally, the bill provides for an award of attorney's fees to a party who successfully blocks recognition or enforcement on one of such grounds.

The Cohen bill is, for the most part, a codification of court rulings to the effect that foreign defamation judgments that are inconsistent with fundamental principles of U.S. law or public policy are not entitled to recognition and enforcement in the United States as a matter of comity. As such, it would be a welcome governmental statement of support for the First Amendment rights of U.S. speakers and condemnation of libel tourism.

The issue of libel tourism has become a hot topic over the past year. The dismissal of Rachel Ehrenfeld's declaratory judgment action against Khalid Bin Mahfouz, a wealthy Saudi businessman who obtained substantial libel judgment against her in England based on her 2003 book *Funding Evil*, helped focus attention on the national security implications of allowing individuals whose activities may pose a threat to the United States to circumvent the First Amendment, and to chill the speech of a U.S. author, by suing for libel abroad and then holding out the possibility of a U.S. enforcement proceeding.

The Association of American Publishers (AAP) explained in a February 12, 2009 statement for the record submitted to the House Judiciary Committee Subcommittee on Commercial and Administrative Law that the Cohen bill would leave U.S. authors "lacking the legal tools needed to maintain a declaratory judgment action aimed at defusing the threat of an enforcement proceeding."

Companion federal bills (entitled the "Free Speech Protection Act") introduced earlier this year in the House by Rep. Peter King (R-NY) and Anthony Weiner (D-NY) (H.R. 1304) and in the Senate by Senators Arlen Specter (then R-Pa.), Joseph Lieberman (I-CT.), Charles Schumer (D-NY), and Ron Wyden (D-OR) (S.449) would go even further by creating a damages cause of action against libel tourists that would be triggered by the mere filing of a foreign libel action – reflecting the sponsors' objective of discouraging the filing of such suits.

In addition, those bills would authorize an award of treble damages (three times the amount of the foreign judgment) where the foreign plaintiff can be shown to have initiated the foreign action part of a scheme to suppress speech in the United States.

In its February 2009 statement to the House Subcommittee and in a June 12, 2009 letter to all members of the House prior to passage of the Cohen bill, AAP expressed support for legislation stronger than the Cohen bill but less aggressive in some respects than the King/Specter bill.

Mindful of due process, Article III jurisdictional requirements, and norms of customary international law, among the changes AAP has suggested are: (1) requiring that a foreign libel judgment be rendered and some additional U.S. contacts be present before personal jurisdiction can be exercise over the foreign plaintiff; (2) limiting recoverable damages to compensatory damages as well as costs and attorney's fees; and (3) authorizing a declaratory judgment action only when the publication in question was not published in or targeted at the foreign jurisdiction.

AAP believes a bill along these lines would allow U.S. authors to alleviate the chilling effect of the outstanding foreign judgment and mitigate any adverse financial impact without interfering with legitimate foreign defamation actions or the due process rights of foreign defamation plaintiffs.

Jonathan Bloom of Weil, Gotshal & Manges LLP is counsel to the Association of American Publishers, Inc. Freedom to Read Committee.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

House Bill to Limit Foreign Libel Judgment Extends Protection to ISPs

Requires Foreign Judgments Against ISPs to Comply with Section 230

As discussed in the preceding article, the House this month passed a bill introduced by Tennessee Republican Steve Cohen to limit the enforceability of foreign libel judgments. An earlier version of the bill passed the House last year.

The current version of the bill extends protection to providers of interactive computer services. Under Section 4102 (c) a foreign defamation judgment against an interactive computer service could only be enforced in the United States if the judgment was consistent with the protections provided by Section 230 of the Communications Decency Act.

The full text of the bill is reprinted below.

111th CONGRESS
1st Session
H. R. 2765
IN THE SENATE OF THE UNITED STATES

June 16, 2009
Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend title 28, United States Code, to prohibit recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. RECOGNITION OF FOREIGN DEFAMATION JUDGMENTS.

(a) In General- Part VI of title 28, United States Code, is amended by adding at the end the following:

CHAPTER 181--FOREIGN JUDGMENTS

Sec.
4101. Definitions.
4102. Recognition of foreign defamation judgments.
4103. Attorneys' fees.

Sec. 4101. Definitions

In this chapter:

(1) DOMESTIC COURT- The term domestic court' means a Federal court or a court of any State.

(2) FOREIGN COURT- The term foreign court means a court, administrative body, or other tribunal of a foreign country.

(3) FOREIGN JUDGMENT- The term foreign judgment means a final judgment rendered by a foreign court.

(Continued on page 9)

RETURN TO TABLE OF CONTENTS

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

(Continued from page 8)

(4) STATE- The term State means each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Sec. 4102. Recognition of foreign defamation judgments

(a) First Amendment Considerations- Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation whenever the party opposing recognition or enforcement of the judgment claims that the judgment is inconsistent with the first amendment to the Constitution of the United States, unless the domestic court determines that the judgment is consistent with the first amendment. The burden of establishing that the foreign judgment is consistent with the first amendment shall lie with the party seeking recognition or enforcement of the judgment.

(b) Jurisdictional Considerations- Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation if the party opposing recognition or enforcement establishes that the exercise of personal jurisdiction over such party by the foreign court that rendered the judgment failed to comport with the due process requirements imposed on domestic courts by the Constitution of the United States.

(c) Judgment Against Provider of Interactive Computer Service- Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation against the provider of an interactive computer service, as defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230), whenever the party opposing recognition or enforcement of the judgment claims that the judgment is inconsistent with such section 230, unless the domestic court determines that the judgment is consistent with such section 230. The burden of establishing that the foreign judgment is consistent with such section 230 shall lie with the party seeking recognition or enforcement of the judgment.

(d) Appearances Not a Bar- An appearance by a party in a foreign court rendering a foreign judgment to which this section applies for the purpose of contesting the foreign court's exercise of jurisdiction in the case, moving the foreign court to abstain from exercising jurisdiction in the case, defending on the merits any claims brought before the foreign court, or for any other purpose, shall not deprive such party of the right to oppose the recognition or enforcement of the judgment under this section.

Sec. 4103. Attorneys' fees

In any action brought in a domestic court to enforce a foreign judgment for defamation, the court may allow the party opposing recognition or enforcement of the judgment a reasonable attorney's fee if such party prevails in the action on a ground specified in subsection (a), (b), or (c) of section 4102.

(b) Clerical Amendment- The table of chapters for part VI of title 28, United States Code, is amended by adding at the end the following:

4101.

Passed the House of Representatives June 15, 2009.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Florida Governor Signs Libel Tourism Bill

On June 25, Florida Governor Charlie Crist signed into law HB 949 to limit the enforceability of foreign defamation judgments. The bill had passed unanimously in the state house and senate. *See MLRC MediaLawLetter* May 2009 at 29.

The bill is substantively the same as legislation enacted in New York and Illinois. It amends the state's foreign money judgment recognition act to make limit enforceability of foreign judgments that are not First Amendment complaint, providing in relevant part that:

> An out-of-country foreign judgment need not be recognized if … The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state before which the matter is brought first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided the United States Constitution and the State Constitution.

The bill also amends the state's long arm statute to take jurisdiction over foreign defamation plaintiffs for purposes of obtaining a declaratory judgment on non-enforceability of the foreign judgment. The law takes effect July 1, 2009 but will apply retroactively.

Hawaii Libel Tourism Bill Dies in State Senate

A substantially similar libel tourism bill was introduced earlier this year in the Hawaii state legislature. HB 130 would limit enforcement of foreign defamation judgments and allow for declaratory judgment actions of nonenforceability. The bill was introduced on January 23, 2009 and was passed by the House Judiciary Committee. The bill was referred to the Senate Judiciary and Government Operations Committee which did not act on it.

The bill was introduced with the support of the ACLU of Hawaii. It's letter of support cited the Rachel Ehrenfeld case and also the recent UN Nations Human Rights Committee recommendation that the UK reform its defamation law to conform to international standards. The Human Rights Committee noted:

> The Committee is concerned that the practical application of [UK] libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism." The advent of the internet and the international distribution of foreign media also create the danger that a State party's unduly restrictive libel will affect freedom of expression worldwide on matters of valid public interest.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Lawyer Wins $40,000 Judgment Against South Carolina Alternative Newspaper

A divorce attorney won a $40,000 libel judgment against the Columbia, South Carolina *City Paper* over an article about a contentious divorce case. *West v. Morehead*, No. 2008CP4000074 (S.C. C.P. jury verdict June 2, 2009).

The case stemmed from an article published on October 24, 2007, on the divorce proceedings of Harold Whitney ("Whit") Black and his wife Stella Black. Whit Black is the owner of a large South Carolina furniture retailer.

The article described the divorce case as having "all the ingredients of a cheap detective novel," including "two-bit lawyers who'll even turn on their own clients if the retainer is juicy enough." The article also said that once the divorce case was concluded, no one would recall the "corruptible attorneys" involved.

The plaintiff, attorney Rebecca West of the Masella Law Firm, P.A. in Columbia, was initially hired to represent Stella Black on legal issues related to her musical career, which was encouraged by Harold Black.. Later, however, she represented Harold Black in the divorce proceeding, apparently without consulting Stella Black. (Stella Black filed a civil suit for malpractice against her husband and West, which was settled. *See Black v. Black*, No. 2007CP4002204 (S.C. C.P. dismissed June 19, 2008)).

In the libel suit, plaintiff claimed that even though she was not named in the statements, they referred to her. She also claimed the reference to her by name in the article as Stella Black's "entertainment lawyer" was libelous, and that the location of her name in the article, on the top line of the middle column in a section noting her role in Stella Black's singing career, made her name prominent to readers and led them to associate her with the allegedly libelous comments.

After West called to complain about the article, the newspaper printed and added to its web version of the article a statement that "references to 'two-bit lawyers' and 'corruptible attorneys' [in the article] were not intended as references to any particular attorney in South Carolina." The publisher also claimed that the paper offered West the opportunity to respond in its pages. West filed suit on Jan. 4, 2008.

After a defense motion for summary judgment was denied on May 19, 2009, the case proceeded to trial under a negligence standard.

Plaintiff's counsel began his opening argument by telling the jury that once the article was printed, he advised Rebecca West to demand a retraction. Defense counsel moved for a mistrial, saying that the attorney had introduced irrelevant evidence – the post-publication behavior of the parties – and had made himself a witness. The motion was denied. Later, defense counsel attempted to call plaintiff's counsel as a witness, which the judge did not allow.

Plaintiff's negligence theory was that a motion to disqualify the plaintiff from the marital litigation was denied before the article was published. The order in that matter, however, was in a family court file to which the paper did not have ready access. Plaintiff also focused on the alleged harm caused by the article, including $800 in psychiatric bills, a reduced number of referrals, and the anxiety from people asking her about the article; but she offered little proof of pecuniary injury. The newspaper argued that the statements in the article were accurate, and based on court documents from the divorce case.

After a two-day trial and two hours of deliberation, on June 2 the 12-person jury returned a verdict for the plaintiff, awarding a total of $40,000: $10,000 in compensatory damages and $30,000 in punitive damages. Defendants' post-trial motions for judgment not withstanding the verdict and for a new trial were denied June 25. The defendants expect to appeal.

The defendants were represented by Kirby D. Shealy III of Baker, Ravenel & Bender, L.L.P. in Columbia. Plaintiff was represented by S. Jahue Moore of Moore, Taylor & Thomas in Columbia.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

California Appeals Court Affirms Denial of Anti-SLAPP Motion

Use of Plaintiff's Photo in Documentary Not Within Scope of Statute

A California appellate court affirmed denial of a special motion to strike the defamation complaint of a man who was briefly depicted in an A&E documentary titled "The History of Sex." *Whitaker v. A & E Television Networks et al.*, No. G040880, 2009 WL 1383617 (Cal. App. May 18, 2009) (O'Leary, J., Sills, P.J., Bedsworth, J.).

Plaintiff, Miles Whitaker, alleged that the brief use of his image in the documentary's discussion of the AIDS epidemic, falsely implied he was a drug user or HIV/AIDS sufferer. The court rejected A&E's argument that the case involved an issue of clear public interest, the AIDS epidemic, and was thus within the scope of the anti-SLAPP statute. Instead, the court found that the principal thrust or gravamen of the complaint—namely, the alleged portrayal of plaintiff as a drug user and/or HIV/AIDS sufferer was not a matter of public interest that triggered application of the anti-SLAPP statute.

Background

Defendant A&E is the producer, broadcaster, and DVD distributor of a documentary titled "The History of Sex," whose chapter on the 20th century discusses the HIV/AIDS epidemic. Plaintiff's complaint was based on the documentary's three-second inclusion of a picture of him that is featured simultaneously with an audio narration about drug users, homosexual men, and the AIDS virus. Plaintiff's name is not mentioned at any time, nor does the narration say he is a drug user, a homosexual, or an AIDS sufferer.

Plaintiff sued A&E for defamation, invasion of privacy-false light, intentional infliction of emotional distress, and injunctive relief. A&E filed a special motion to strike, which was denied by the Superior Court. That court held that A&E had failed to prove that the challenged conduct arose from protected activity, since plaintiff was not connected to any matter of public interest, including the one that constituted the film's main topic: the HIV/AIDS epidemic.

Appellate Court Decision

On appeal, A&E argued that the act underlying Whitaker's causes of action was an act in furtherance of A&E's free speech rights and thus protected activity. While A&E defined the act underlying Whitaker's suit as the "exercise of their free speech rights on an issue of clear public interest, the AIDS epidemic," Whitaker defined the act underlying his suit as "stating (by clear implication) that he is a homosexual or an intravenous drug user and that he suffers from AIDS." *Id.*

The Court of Appeal rejected A&E's perspective in favor of Whitaker's. Citing the Court of Appeal holding *Dyer v. Childress* that the "*principal thrust* or *gravamen*" of a plaintiff's claim determines whether the challenged conduct qualifies for protection under the anti-SLAPP statute, the instant court held that "the principal thrust or gravamen of Whitaker's causes of action is the assertedly false portrayal of Whitaker as an intravenous drug user and HIV/AIDS sufferer." This portrayal was not a matter of public interest since no one claimed Whitaker was a public figure. Thus, the Court concluded that the anti-SLAPP statute was inapplicable to the instant case.

The Court followed and relied on a troubling 2007 appellate court decision that refused to strike claims brought by a plaintiff over a like named fictional movie character. *Dyer v. Childress*, 147 Cal.App.4th 1273, 55 Cal.Rptr.3d 544, 35 Media L. Rep. 1746 (Cal. App. 2007). The plaintiff in the case, Troy Dyer, sued the producers of the movie Reality Bites alleging that a character in the movie with the same name portrayed plaintiff in a false and defamatory way. The court curiously reasoned that the case was not within the scope of the anti-SLAPP statute because it did not involve a matter of public interest. Although the movie as a whole addressed topics of public interest. "[T]he representation of Troy Dyer as a rebellious slacker is not a matter of public interest and there is no discernable public interest in Dyer's persona."

A & E Television was represented on the motion by Jeffrey D. McFarland,Christopher E. Price, Stan Karas, George R. Hedges, and Timothy L. Alger, Quinn Emanuel Urquhart Oliver & Hedges, LLP. Plaintiff is represented by Todd A. Green, Turner Green Afrasiabi & Arledge, Costa Mesa, CA.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Online Journalist Wins Summary Judgment on Interlocutory Appeal

Texas Court Rejects Argument that Statute Does Not Apply to Online Reporters

The Texas Court of Appeals applied the state's interlocutory appeal statute to grant summary judgment to an online journalist accused of libeling a group of Muslim civic organizations. *Kaufman v. Islamic Society of Arlington*, et al., No. 2-09-023-CV (Tex. App. June 25, 2009) (Livingston, Walker, Meier, JJ.).

The court rejected the plaintiffs' argument that the defendant was not a member of the media within the meaning of the state's interlocutory appeals statute. Instead, the court applied a functional test, looking at the defendant's work and the website that published his article. Turning to the merits of the appeal, the court held that the complained of article could not reasonably be understood to be "of and concerning" the plaintiffs.

Background

At issue in the case was an article published on FrontPage Magazine, a web-based conservative news and opinion site that frequently features news and comments about Islamic extremism. The defendant Joe Kaufman wrote an article entitled "Fanatic Muslim Family Day," that criticized the role of two Islamic organizations in sponsoring a theme day event at an amusement park. The article began by stating:

> Six Flags Over Texas, a Dallas-area amusement park, will be invaded by a radical Muslim organization that has physical ties with the Muslim Brotherhood and financial ties to Hamas. While most patrons of the park come for the games and rides, those involved with this group's event, Muslim Family Day, may very well have found an original and appealing way to spread anti-Western hatred.

The article criticized by name the Islamic Circle of North America and the Islamic Association of North America for alleged ties and support to extremist groups. A group of seven Texas-based Islamic groups that were not named in the article but that supported the event and were identified as event sponsors in a promotional flyer sued Kaufman for defamation.

The trial court denied summary judgment without opinion.

Appeals Court Decision

On appeal, the plaintiffs argued that there was no jurisdiction to hear an interlocutory appeal. The Texas interlocutory appeal statute provides in relevant part for appeals from denials of

> a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73.

Plaintiffs argued that the defendant was not a media defendant for the purposes of First Amendment protection "because he only communicates his articles through the internet" and "has not demonstrated that he has the training associated with traditional journalism."

Plaintiffs also argued against extending protection to internet journalism, writing the internet "has become a combination of gossip fence, coffee house, back alley, and bathroom stall for the dissemination of gossip, rumor, innuendo, and outright falsehood."

FRONTPAGEMAG.COM

Home | Jihad Watch | Horowitz | Archive | Columnists | DHFC | Contact | Links | Search

efending Indoctrination | Victory for Religious Liberty at Wright State University | A University's Decline | Cal Poly Sus

FrontPageMag Article

Write Comment | 0 Comments | Printable Article | Email Article | Font: 14pt

Fanatic Muslim Family Day

By: Joe Kaufman

FrontPageMagazine.com | Friday, September 28, 2007

On Sunday, October 14, 2007, Six Flags Over Texas, a Dallas-area amusement park, will be invaded by a radical Muslim organization that has physical ties with the Muslim Brotherhood and financial ties to Hamas. While most patrons of the park come for the games and rides, those involved with this group's event, Muslim Family Day, may very well have found an original and appealing way to spread anti-Western hatred.

SIGN UP TODAY FOR FRONTPAGEMAG E-MAIL UPDATES

KEEP FRONTPAGE RUNNING! HELP FPM NOW!

STUDENTS FOR ACADEMIC FREEDOM

Academic Freedom

(Continued on page 14)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Online Journalist Wins Summary Judgment on Interlocutory Appeal

(Continued from page 13)

Granting summary judgment for the defendant, the court first looked to his long experience as a journalist and the wide-spread readership of the website (500,000 monthly vistors).

> An internet author's status as a member of the electronic media should be adjudged by the same principles that courts should use to determine the author's status under more traditional media. In other words, we hold that a person who communicates facts or opinions through the internet is entitled to appeal under section 51.014(a)(6) when that person's communication, under circumstances relating to the character and text of the communication itself, its editorial process, its volume of dissemination, the communicator's extrinsic notoriety unconnected to the communication, the communicator's compensation for or professional relationship to making the communication, and other relevant circumstances as the facts may dictate, would otherwise qualify as a communication covered by that section through more traditional electronic or print media.

The court next outlined several reasons to treat Internet publications the same as traditional print media, including 1) the application of the single publication rule to the Internet; 2) the broad application of Texas' new shield law to nontraditional electronic media; and 3) express protection of Internet speech recognized by the U.S. Supreme Court in Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874–85 (1997).

Article Not "Of and Concerning" Plaintiffs

As for defendant's substantive defense, the Court of Appeals agreed that the article could not reasonably be understood as referring to plaintiffs. The court noted that none of the plaintiffs were named in the article. Furthermore, the reference in the article to "those involved with this group's event" did not refer to plaintiffs "merely because they were tacitly incorporated as sponsors on a promotional flyer." The phrase "those involved" could be read to refer to a wide range of people, including vendors and Six Flags own management. Thus the article as a whole could not be interpreted as referring to plaintiffs.

MLRC *MediaLawLetter* Committee

Thomas M. Clyde (Chair)
David Tomlin (Chair)
Dave Heller (Editor)
Robert D. Balin
Michael Berry
Katherine M. Bolger
Jay Ward Brown
Robert J. Dreps
Jon Epstein
Rachel E. Fugate
Michael A. Giudicessi
Charles J. Glasser
Richard M. Goehler
Karlene Goller
Shelley M. Hall
Russell T. Hickey
David Hooper
Leslie Machado
John Paterson
Deborah H. Patterson
Bruce S. Rosen
Indira Satyendra

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Federal Judge Refuses To Enjoin Publication Of Photographs Of Public Official's "Perp Walk"

By Nicole A. Auerbach

After two hearings and extensive briefing, U.S. District Judge Arthur D. Spatt refused to restrain *Newsday* and local cable news network News 12 Long Island from publishing photographs taken during the "perp walk" of Nassau County legislator Roger Corbin. *U.S. v. Corbin*, No. 09-MJ-0444 (E.D.N.Y. June 1, 2009).

Corbin was arrested in early May on charges of tax evasion and making false statements to federal investigators. Although Judge Spatt initially expressed concern about whether the "continued publication of a photograph showing the defendant in handcuffs" was "necessary," the court ultimately concluded that he was "simply without authority to censor the press" and could not "instruct the press as to what images are newsworthy." Judge Spatt also refused the defendant's request to enjoin the U.S. Attorney from conducting "perp walks" in the future or making substantive comments to the press about its prosecution of Mr. Corbin.

Background

Roger Corbin has served as a County Legislator in Nassau County, New York, since 1995, and is seeking reelection. On May 5, 2009, Corbin was charged by federal investigators with failing to report on his federal tax returns $226,000 which he had received from a New York real estate developer, as well as making false statements to federal agents in connection with the investigation.

The court cannot instruct the press as to what images are newsworthy.

After voluntarily surrendering on May 6, 2009, Corbin was publicly led to his arraignment in handcuffs. Both *Newsday* and News 12 (whose reader- and viewership includes Corbin's legislative district) had the opportunity to photograph this event, which is colloquially termed a "perp walk." In the days immediately following his surrender, both *Newsday* and News 12 used photographs and footage of Corbin's "perp walk" to illustrate their reports on the criminal charges facing him.

Request for a TRO and Permanent Injunction

On May 20, 2009, Corbin petitioned the United States District Court for the Eastern District of New York for (among other things):

(1) a temporary restraining order barring "the media," the FBI, and the Eastern District U.S. Attorney's Office from publishing any "photos of the defendant taken during a purported 'perp walk'" or any "comments or opinions concerning the guilt of this defendant,"

(2) a permanent injunction against "Newsday, News12 and the United States Government" barring the dissemination of any photos of defendant in handcuffs, and

(3) a permanent injunction barring the Government from "conducting 'perp walks' or issuing other information of the defendant aside from pedigree information" "except as directed by the Court."

In support of his requests, Corbin asserted that "Newsday and News 12, among others," had "blanketed and saturated Long Island with their news accounts and photos" showing defendant's surrender, and that his "opportunity for a fair trial" had thereby "been totally negated." He also contended that injunctions against press photographs of arrests should "be a national policy which can begin right now by this Court granting this application."

Newsday and News 12 opposed the defendant's application, arguing that enjoining continued news coverage of the arrest of a local public official was patently unconstitutional, and would constitute a prior restraint the likes of which had never been upheld by either the United States Supreme Court or the United States Court of Appeals for

(Continued on page 16)

RETURN TO TABLE OF CONTENTS

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Federal Judge Refuses To Enjoin Publication Of Photographs Of Public Official's "Perp Walk"

(Continued from page 15)

the Second Circuit. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *United States v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005).

Specifically, they argued that: (a) the defendant had failed to provide evidence that his right to a fair trial would be prejudiced by the "nature and extent" of the news coverage; (b) there existed numerous alternatives to a prior restraint that would safeguard defendant's right to a fair trial, including most notably a thorough voir dire of prospective jurors; and (c) in any event, forbidding two specified news outlets from carrying the photographs was not an effective way to ensure a fair trial. They also urged that the defendant had not met his burden in seeking to impose a gag order on the government. *See In re Dow Jones & Co.*, 842 F.2d 603, 607 (2nd Cir. 1988).

At an initial hearing on defendant's application for a TRO, Judge Spatt expressed concern about "why photographs of the defendant in handcuffs were published in the newspaper after the day he was arraigned." "Especially troubling to me," the Court stated, "is that this defendant had many photographs available to Newsday and Channel 12, because he is a legislator in the Nassau County Legislature and has been photographed I would say dozens, and maybe a hundred times. So the newspaper has photographs of him. Why would they use a photograph showing handcuffs? And that's very troubling to me, especially after the first day." While Judge Spatt denied Corbin's request for a TRO, but invited further briefing on the request for a permanent injunction, and set the case down for a second hearing.

Judge Spatt's Ruling

On May 29, 2009, following further briefing from the parties, Judge Spatt announced his decision from the bench. After finding that Corbin was a public figure, and that news coverage of the criminal charges against him were "of interest" to local citizens, the Court acknowledged that "recurring images of the defendant being transported in handcuffs carries with it some risk that the defendant's right to a fair trial will be jeopardized." He went on, however, to find that the Eastern District of New York included "more than seven million people residing in its five counties," and that publicity of the case had not been "ubiquitous."

"Accordingly," the Court stated that although "the Court is troubled by the repeated use of images of Corbin in handcuffs despite the availability of numerous other photographs from his years of service as a public official, it is simply without authority to censor the press in this matter and cannot instruct the press as to what images are newsworthy."

Finally, the court found that with respect to Mr. Corbin, the United States Attorney's decision to conduct the "perp walk" was moot, and therefore not ripe for review, stating that it "declines the defendant's invitation to issue an advisory opinion on the legality of the practice." Further, while questioning whether the United States Attorney's Office might have violated its ethical obligations and its own internal guidelines by issuing press releases that took a position with respect to the guilt of the defendant, the Court noted that "in ruling in this criminal case, it is not my obligation to determine such matters involving the Rules of Professional Conduct."

Stating that the court presumed "that the Government, its attorneys, agents and investigators are aware of and will comply with their ethical obligations concerning trial publicity," Judge Spatt declined to enjoin the government from making future statements about the case. While Corbin asked that the court issue a certificate of appealability, Judge Spatt declined to do so.

Newsday and News 12 Company were represented by David A. Schulz and Nicole A. Auerbach of Levine, Sullivan Koch & Schulz. Roger Corbin was represented by Thomas F. Liotti. The government was represented by Assistant United States Attorney Richard P. Donoghue.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Illinois Court Considers Whether Shield Law Applies to Online Posters

Prosecution Allowed to Obtain ID of Two Posters Who Discussed Murder Case

In an interesting decision, an Illinois trial court denied in part a newspaper's motion to quash a grand jury subpoena seeking the identity of pseudonymous posters to the newspaper's website. *Alton Telegraph v. Illinois*, 08-MR-548 (Ill. Cir. Ct. May 15, 2009) (Tognarelli, J.). The newspaper sought to protect the identity of the posters under the state shield law, arguing the posters were "sources" of information covered by the statute.

The court gave serious consideration to the newspaper's argument, but concluded that "unsolicited" and "voluntary" postings to an online forum designed to elicit public comment are outside the scope of the shield law. Alternatively, even if the shield law applied, the court found that the state was entitled to identifying information about some of the posters because their comments were relevant to a first degree murder prosecution and the state had exhausted all other available sources to obtain the information.

Applying this standard, the court quashed the subpoena for the identity of three posters on relevance grounds, finding their comments to be mere ""conversation/discussion" about the murder case. But the court ruled the newspaper had to disclose identifying information about two posters who made factual statements about the murder victim.

Background

In September 2008, the *Alton Telegraph* published an article about the arrest of Frank D. Price for beating his girlfriend's five year old son to death. The online version of the article was comment enabled and numerous people posted comments and opinions to the piece. Several days later, Price was indicted for first degree murder. Prosecutors then subpoenaed the newspaper for information on the identities of five pseudonymous posters.

> Pnbcme discussed the defendant's drug use and relationship with the victim's mother.
>
> iohn 3418 wrote about defendant's prior criminal history, including an arson.
>
> Cstyle wrote that the victim's mother was an enabler of a "drug slinging, alcohol guzzling, and child beating man."
>
> Purlpebutterfly described how other children had suffered because of defendant's conduct.
>
> Mrssully wrote that she saw the child with two black eyes a week before his death and appeared to have information regarding prior incidents of abuse.

The *Telegraph* filed a motion to quash under the Illinois Reporter's Privilege Act, 735 Ill. Comp. Stat. 5/8-901, *et seq.* The statute shields from disclosure the identity of confidential and non-confidential sources. A "source" is broadly defined as "the person or means from or through which the news or information was obtained." The protection can be divested only if a court finds that "all other available sources of information have been exhausted and disclosure of the information is essential to the protection of the public interest involved." 735 ILCS 5/8-907 (2001).

At a hearing held in December 2008, the newspaper argued that the pseudonymous posters where "sources" within the meaning of the shield law because:

> the moment the persons at issue posted comments on the *Telegraph*'s web site, the newspaper had obtained information from them that it could use however it deemed appropriate at its editorial discretion. As a result, these persons plainly constitute "sources" under the Shield Statute, irrespective of whether the *Telegraph* ever used or incorporated the information it obtained from them in a separate news story.

Telegraph's Renewed Motion to Quash.

Circuit Court Decision

Noting this to be an issue of first impression in Illinois, the court reasoned that the online posters were not "sources" for two reasons. First, the court found it significant that the comments were not used to create the article.

> Here, it is clear that the "reporter" did not use any information from the bloggers in researching, investigating,

(Continued on page 18)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Illinois Court Considers Whether Shield Law Applies to Online Posters

(Continued from page 17)

> or writing the article. In fact, none of the comments were written until after the article was published. Comments were then made between various bloggers, between themselves, without comment, input or discussion from the reporter, it would not appear that the bloggers were "sources" for the Telegraph news article.

Second, the court noted the "unsolicited, public nature of the online comments" and concluded that such voluntary statements in "a forum designed to elicit citizen's opinions" are not within the scope of the shield law.

However, the court went on to find that even if the shield law did apply, prosecutors were entitled to the identity of some of the posters.

> The Telegraph has an interest in protecting its online blogger's identities while the State has an interest in prosecuting someone who has allegedly murdered a child. The Telegraph's interest, while not negligible, does not go far enough to serve the larger purpose of the reporter's privilege, …. It cannot be said that forcing The Telegraph to reveal what information it has about voluntary, unsolicited online commentators, in this case, will make the public unwilling to express their opinions or to provide information during the course of a reporter's actual investigation, in future cases, nor does it deny the public the right to receive complete unfettered information in this and future instances.

Under this standard the prosecution was entitled to obtain identifying information about two of the posters -- purplebutterfly and mrssully. These individuals had "relevant information about defendant's prior conduct, his propensities for violence, and relationship with the child." Moreover, the court accepted that the prosecution had no practical alternative to obtain their identification from other sources. Prosecutors had interviewed over 100 people and re-interviewing these people would be prohibitive in both cost and time, the court concluded.

At the time of this writing, *The Telegraph* was working to stop the disclosure of posters whose identities were not ordered by the Circuit Court and to resolve the litigation short of appeal.

The Alton Telegraph is represented by John Bussian, The Bussian Law Firm, Raleigh, NC; and Thomas Scott Steward and Noel Smith of Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC, St. Louis, MO.

UPCOMING EVENTS

MLRC London Conference
International Developments in Libel, Privacy Newsgathering and New Media Law
October 1-2, 2009

MLRC Annual Dinner
November 11, 2009

First Amendment Speakers Bureau
Upcoming MLRC Institute Events

Feel free to e-mail us with any questions regarding MLRC's upcoming events @ MediaLaw@MediaLaw.org

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Prosecutor in Nevada Subpoenas Newspaper for Identity of Online Posters

Sought ID's of Over 100 Posters Who Commented on Tax Evasion Case

Earlier this month, a federal prosecutor in Nevada issued a grand jury subpoena to the Las Vegas Review-Journal seeking the identity of over 100 online posters who left comments on the newspaper's website about a high-profile federal tax evasion case. The newspaper's editor, Thomas Mitchell, disclosed the subpoena in an opinion column published on June 7th in his paper.

The subpoena came in response to a May 26th article about the upcoming criminal tax evasion trial of Robert Kahre. Kahre, a Las Vegas construction company owner, came up with the novel and potentially illegal tax avoidance strategy of paying workers in gold and silver coins and calculating their payroll taxes at zero based on the face value of the coins.

The article elicited over 100 comments in its first week online, including many expressing anti-government and anti-tax sentiments. Examples include: "This man was doing a good thing for his clients and this country, end the fed!" "Just another tactic for the government to have TOTAL control of their "workers". GOLD and SILVER are legal tender coins. The Federal Reserve must be abolished. Its ok for the gov. to make fake money though." One poster even wrote: "I have not filed in over 30 years…. I am not allowed by my religion to commit perjury so I don't file, let alone the FACT that it is voluntary anyway. "

After publicity about the subpoena, the prosecutor significantly narrowed the subpoena to only two posters. One poster wrote that the jury "should be hung" if they convict Kahre. The other poster wrote that he would bet "quatloos" (a fictional currency on Star Trek) that one of prosecutors would not reach his next birthday.

The Las Vegas Review-Journal removed these posts for violating the site's terms of use and said it would comply with the subpoena. However, the Nevada ACLU moved to intervene on behalf of the posters to quash the subpoenas. The ACLU's motion argues that these posts do not constitute real threats and are therefore an abuse of the grand jury process.

india wrote on *June 26, 2009 09:50 AM*:

be advised that comments that may remotely be construed as hostile to government positions, especially with regard to tax and monetary policy, have no constitutional protection. expect punitive investigation, detention, trumped charges, life and death in legal hell.

John Galt wrote on *June 26, 2009 08:38 AM*:

15 quatloos for the suffering of "Christopher Maietta, the Justice Department prosecutor in the current trial of Las Vegas businessman Robert Kahre"

Trekie and IRS agent wrote on *June 24, 2009 12:02 AM*:

Dear Star Trek fan,

But can a IRS thug not also be a Star trek fan?

Cop and governemnt agent are allowed to lie to Americans. They do it all the time. Like they say "EVERYONE knows" and "EVERYONE files" and use lies like "fair share" and "good citizens" when talking about "taxpayers".

The fact is that if you pay income taxes you are not a "good citizen" you are just a slave. You don't pay for roads or the military or salaries of teachers or schools or health care. You pay for an artificially created debt that goes to the bankers. You are a slave. A voluntary slave. A serf. You are in bondage.

Am I clear?

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Fresh Winds from the North

Developments in Canadian Media Law

By Brian MacLeod Rogers

A "tidal wave" of Supreme Court of Canada appeals on free expression issues promises to reshape the legal landscape affecting the media in Canada. Some twelve key cases involving libel, confidential sources, statutory publication bans, courthouse access and freedom of information are either under reserve or awaiting hearing, and decisions could start appearing as early as next month. All SCC hearings are webcast live, and archived webcasts are available for viewing on the Court's website (www.scc-csc.gc.ca).

Libel

A year ago, the SCC released its first common law libel decision in 13 years. In *WIC Radio Ltd. v. Simpson*, 2008 SCC 41, the Court strengthened and clarified the defence of fair comment. Since then, the Court has heard two libel appeals on the *Reynolds/ Jameel* defence of "public interest responsible journalism"; both appeals were from Ontario, which was the first Canadian jurisdiction to adopt this defence developed by the English House of Lords. They were heard February 17 and April 23 and are currently under reserve, but no judgment is expected until next Fall. At present, Canada has no clear defence of privilege for media publications about matters of public interest, no matter the story's importance or the steps taken to verify the story.

In *Quan v. Cusson*, 2007 ONCA 771, a carefully reasoned judgment of highly respected jurist Justice Robert Sharpe, the Ontario Court of Appeal accepted the public interest defence but denied it to the *Ottawa Citizen* newspaper because it had not been sought at trial. The defendants sought leave to appeal, which was granted by the SCC (SCC no. 32420). This meant the new defence was put in jeopardy but also offered an opportunity to extend it across common-law Canada.

Another Ontario Court of Appeal decision, *Grant v. Torstar Corp.,* 2008 ONCA 796, soon followed. At trial, the public interest defence had been raised by the media defendants but rejected by the judge. The Court of Appeal set aside the jury verdict of $1.475 million but ordered a new trial, stipulating that the jury should decide the publication's defamatory meaning. Leave for the plaintiff's appeal and defendants' cross-appeal was granted by the SCC the day after it heard *Quan v. Cusson*, and an expedited hearing was ordered, with the focus again on the new defence (SCC no. 32932).

The two-month interval appeared to have given the Court a sharper focus, and the nine justices' questions were largely directed at how the public interest defence would really work in practice. In particular, the thorny issue of the role of judge versus jury was reflected in many of the justices' questions. Most observers came away believing the Court would likely adopt some significant change in present law but perhaps not quite the House of Lords' version.

Another defamation case is scheduled to be heard by the SCC on December 15, 2009. It arises under Quebec law and involves a class-action claim over an inflammatory talk-show radio broadcast that cast aspersions over Montreal's "Arab and Haitian" taxi drivers, alleging they were incompetent and had obtained their licences through bribery. At trial, damages of $220,000 were awarded, payable to a non-profit organization, on the basis that the various remarks were wrongful, defamatory and discriminatory. This was overturned by a majority in the Quebec Court of Appeal, which found the words were not defamatory. *Fares Bou Malhab v. Diffusion Metromedia CMR Inc.*, 2008 QCCA 1938; SCC no. 32931.

Confidential Sources

Without quite the same drama played out south of the border, protection of journalists' confidential sources has become a key issue for the media in Canada over the past few years. One case that particularly caught public attention involved *The Hamilton Spectator* reporter, Ken Peters, who was found in contempt and fined $31,600 for refusing to reveal a confidential source during a civil trial – even though the source actually testified after being identified through other means. That decision was soundly reversed by the Ontario Court of Appeal, which set out a journalist-friendly roadmap for the proper procedure and considerations where this issue arises, and another carefully reasoned precedent of Justice Robert Sharpe should serve as a useful guide for all Canadian courts. That case, *St. Elizabeth Home Society v. Hamilton (City) [Citation of Kenneth Peters]*, 2008 ONCA 182, was not appealed.

However, weeks earlier a different panel of the Ontario Court of Appeal created a very different precedent. In *R. v. National Post* (2008 ONCA 139), the Royal Canadian Mounted Police obtained a search warrant and assistance order requiring the newspaper and its reporter, Andrew McIntosh, to turn over a document and envelope

(Continued on page 21)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Fresh Winds from the North

(Continued from page 20)

for a criminal investigation. They had come from a confidential source who had been instrumental in the newspaper's coverage of major controversy involving then Prime Minister Jean Chrétien. The items had been preserved by McIntosh and kept in a secret location after allegations had been raised by Chretien and others that the document was a forgery. The suggestion was that the document had been altered to make it appear the Prime Minister was more involved in a financial transaction than he really was. The police said it was "real evidence" of the crime of forgery.

They wanted to use DNA and fingerprint evidence from it and the envelope to find the confidential source and question him/her as the next step in their investigation. An initial challenge succeeded in setting aside the search warrant; the judge held for the first time in Canada that protection of journalists' sources was an inherent part of free expression guarantees. However, the Court of Appeal reversed. It insisted that claims of journalistic privilege were outweighed by the law enforcement interest in disclosure. "It is not necessarily better to write about crime than to do something about it", the court borrowed from *Branzburg v. Hayes*.

The SCC granted leave (SCC no. 32601), and the *Post's* appeal was heard on May 22 by a very active Court, who were clearly troubled by the fact that the documents could be viewed as the very basis of the alleged crime and provided real evidence of it. However, there also appeared to be a strong interest in protecting journalists' confidential sources on the basis of a case-by-case privilege under the four-part test developed by US legal scholar John Henry Wigmore but infused with free expression considerations under the *Canadian Charter of Rights and Freedoms*.

As a sign of the SCC's interest in the issue, the day before the *National Post* hearing the Court granted leave to *The Globe & Mail* newspaper to appeal decisions in a Quebec civil case brought by the Government of Canada as a result of another political scandal involving the Liberal government under Prime Minister Chrétien that led to a major public inquiry. Much of this "Sponsorship Scandal" was exposed by *Globe* reporters, who relied heavily on confidential sources. The new Conservative government is trying to recover funds that went into the wrong hands in the scandal. In turn, the defendants are seeking to invoke limitation periods, saying the claim is too late, and are probing just who in the federal government knew about the unlawful payments and when, pointing to media reports prior to 2002. They are focusing on unnamed government sources for those stories.

The appeal focuses on a judge's order that the journalist, Daniel Leblanc, must identify his confidential source, whom he calls "Ma Chouette," to assist the defense. In addition, the SCC has accepted an appeal of an order by the same judge imposed specifically on Leblanc prohibiting him from publishing any news reports about confidential settlement negotiations between the government and defence, as he had previously during the case. The SCC has expedited the appeal process and will hear the appeals on October 21, 2009 (SCC no's 32975, 33114 and 33097).

Publication Bans

Canada's Criminal Code makes a publication ban on bail hearings mandatory at the request of the accused (section 517). The ban covers evidence, submissions and the judge's reasons and remains in force until the charges are dropped or the trial is ended. They are routinely requested by defense counsel, so any media reports on bail hearings are brief and uninformative. As a result, they are only covered in important cases, and the public has ended up with a very limited grasp of what goes on in the hearings and why bail is granted or refused.

In two provinces, compelling factual situations led to constitutional challenges to the mandatory nature of the provision. Appeals in both these cases will be heard by the SCC on November 16, 2009. In Alberta, it arose in the context of sensational proceedings of a man accused of murdering his wife who had initially been granted bail. That was reversed on appeal, and the Alberta Court of Appeal refused to extend the statutory publication ban to the proceedings before it, so everything became public.

The media then brought a constitutional challenge to s. 517 before the judge who had earlier granted bail, but he reserved his decision until after the accused was convicted in a jury trial. The judge then ruled the section was overly broad, and therefore unconstitutional, because it applied even to cases that were not being tried by a jury and was automatically available to all accused (*R. v. White*, 2007 ABQB 359). That ruling was appealed by the Crown, and the Alberta Court of Appeal took a different tack and upheld s. 517 on the basis that it contributed to a fair bail hearing and access to reasonable bail for accused (2008 ABCA 294). It found the provision only deferred publication and regarded media concerns over timeliness as "journalistic bootstrapping." The SCC granted the media leave to appeal and scheduled the case to be heard November 16, 2009 (SCC no. 32865).

(Continued on page 22)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Fresh Winds from the North

(Continued from page 21)

Also being heard at the same time will be an appeal by the Crown (SCC no. 33085) from an Ontario Court of Appeal ruling (*Toronto Star Newspapers Ltd. v. Canada*, 2009 ONCA 59) that held the mandatory ban was unconstitutional and required the statute to be amended so that it would only be mandatory on request where there may be a jury trial. In fact, there was a dissent by two of the five judges that would have gone further and struck down the law, giving the government a year to come up with a new provision. This case arose in the midst of sensational criminal proceedings against 18 accused, who were alleged to have hatched a terrorist plot in support of Islamic fundamentalists that involved fertilizer bombs similar to the one used in Oklahoma City. Only some of the accused requested the s. 517 ban, but the judge ordered that it applied to them all and upheld its constitutionality.

Access to Courts

Two Quebec cases recently accepted by the SCC are scheduled to be heard in March 2010. One appeal involves restrictions imposed by the judiciary restricting where cameras can be used and interviews conducted in courthouses. The Quebec Court of Appeal held these rules do not adversely affect freedom of the press since the media can still cover what goes on in court (*Canadian Broadcasting Corp. v. Attorney General of Quebec*, 2008 QCCA 1910; SCC no. 32920). The other case concerns broadcasting a video statement made to police by someone later charged with aiding his uncle to commit suicide. The video was made a trial exhibit and media access to it was allowed, but the trial court denied permission to broadcast it. The appeal was then made directly to the SCC. (*Canadian Broadcasting Corp. v. Quebec*, Sup. Ct. Quebec no. 160-01-000236-075; SCC no. 32987)

Freedom of Information

On December 4, 2008, the SCC heard an appeal from an Ontario Court of Appeal decision that remains under reserve (*Criminal Lawyers Assn. v. Ontario (Ministry of Public Safety and Security)*, 2007 ONCA 392; SCC no. 32172). It focused on whether s. 2(b) of the *Charter* included some basis for a right to government information – at least, to the extent that a "compelling public interest" override provision should apply even to law enforcement and solicitor/client privilege exemptions under Ontario's FOI legislation. At the hearing, the Court seemed very interested in the public's right of access to governmental information and its importance for informed democratic debate. However, the government insisted there was no right to any such information apart from what was specifically permitted by statute. The case arose after a judge stayed criminal proceedings because of abusive conduct by the police and other public officials. The Ontario Provincial Police investigated the allegations of misconduct and in a brief press release announced that there was no evidence of an attempt to obstruct justice. Despite demands, the report was never made public. In an effort to account for the discrepancies between the investigation and the judge's findings, the Criminal Lawyers Association sought access to records about the OPP review. The government refused disclosure based on various exemptions, including those for law enforcement and privilege that are not subject to any legislative public-interest override. That became the focus of the appeal at the Ontario Court of Appeal, where a majority found that the *Charter*'s free expression protection could extend to expanding the override in these circumstances.

Conclusion

It may only be a coincidence that all these free expression, media-related cases are finding their way onto the SCC's docket, but the cumulative effect could reshape the legal landscape for decades to come. In earlier decisions, the Court has firmly grasped the importance of the openness principle in court proceedings. The underlying logic of those cases for transparency of public institutions and the flow of information to the public, so that proper scrutiny and public discussion can take place, has pushed its way further afield. Vigorous, informed debate lies at the heart of democracy, and the Court has a chance to encourage and allow it to flourish through these pending cases.

Brian MacLeod Rogers (Toronto) is counsel to interventions by the Media Coalition (Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, Canadian Journalists for Free Expression, Canadian Association of Journalists, Professional Writers Association of Canada, RTNDA Canada/Association of Electronic Journalists, Magazines Canada, Canadian Publishers' Council, Book and Periodical Council, The Writers' Union of Canada and PEN Canada) at the Supreme Court of Canada in WIC Radio Ltd. v. Simpson, Quan v. Cusson, Grant v. Torstar Corp. and R. v. National Post.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Save the Date!

MLRC London Conference 2009

October 1-2, 2009

Stationers' Hall, London

International Developments in Libel, Privacy Newsgathering and New Media IP Law

Keynote Address: Lord Hoffmann, House of Lords
Speech by Justice Ruth McColl, Supreme Court New South Wales Australia
In-House Counsel Breakfast on practice and management issues
Delegates receptions on September 30th and October 1st

Discussion topics include:

- Liability for third-party content posted online in the UK and Europe
- Libel Terrorism Protection Acts and enforcement of judgments
- The right to be left alone in public – the continuing evolution of the Princess Caroline privacy decision
- Reporting on terrorism: How has the fight against terrorism impacted reporting?
- Fair use and fair dealing in the digital media environment

For information contact Dave Heller at dheller@medialaw.org

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Nebraska Supreme Court Allows Access to Burial Records

Court Ends Century Long Ban on Access to Burials at Mental Hospital

On May 15, 2009, the Nebraska Supreme Court unanimously ruled that the names of nearly 1,000 individuals buried in the state's largest mental health cemetery are "death records" and must be publicly released under Nebraska's Public Records statutes. *State Ex Rel. Adams Cty. Historical Soc. v. Kinyoun*, 765 N.W.2d 212 (Neb. May 15, 2009).

Overturning an opinion of the of the Nebraska Attorney General and a district court ruling that had found the historic burial records exempt from public disclosure under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Court held that "HIPAA does not bar release of the information" but instead, "provides for release of information when required by state law."

Noting that Nebraska's Public Records statutes provide that medical records "other than records of births and deaths" maybe withheld from the public, the high court determined that the cemetery records should be treated as "death records" noting that they contained information even more limited than found in death certificates, which have long been public under state law.

Thomas R. Burke, Ambika Doran, Clark Stanton, Sarah Duran, and Gwen Fanger of Davis Wright Tremaine LLP in San Francisco and Shawn D. Renner of Cline Williams Wright Johnson and Oldfather, L.L.P. in Lincoln, Nebraska represented the Adams County Historical Society.

Tom Burke discussed the interesting background facts of the case in an Op/Ed piece published in the *Omaha World-Herald* this past Memorial Day. The article is reprinted below.

Remembering Those Buried at the Hastings Regional Center

By Thomas R. Burke

On May 15th, the Nebraska Supreme Court removed a century-long ban against the public knowing who is buried in the cemetery on the grounds of the Hastings Regional Center, the state's largest mental health cemetery. In *State Ex Rel. Adams Cty. Historical Soc. v. Kinyoun*, the high court unanimously ruled that the federal Health Insurance Portability and Accountability Act of 1996 – enacted to safeguard personal medical information – did not bar the disclosure of "records of deaths" that are to be public under Nebraska's Public Records Act.

For two years, the Adams County Historical Society fought the Nebraska Department of Health and Human Services to learn the names of those buried in the cemetery during the period 1909 to 1957. Now, as DHHS prepares to comply with the Supreme Court's order, the Regional Center has uncovered some previously unknown records that appear to reflect burials from the late 1800's – perhaps the earliest burials of "inmates" that occurred at the institution then called the "Asylum for the Incurable Insane."

Long time Hastings residents recall that if a patient died and had no family to claim his/her body, the patient was simply buried "out back in the big field" on the hospital grounds. Each grave was hand-dug. The cemetery was and remains to this day, a serene and peaceful place on the former prairie, but the 957 graves are marked only by flat stones bearing only patient numbers. No names, no dates of birth, no dates of death or any remembrances of the patients. Often, families of patients were too poor to have their remains returned home. Others wanted nothing to do with their institutionalized relations.

(Continued on page 25)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

(Continued from page 24)

Years later, family members who sought to learn whether their relatives were buried in the cemetery also were stymied by the law. Even those relatives fortunate enough to know the precise name of a former patient had to hire a lawyer (at a cost of $1,000 or more) to secure a court order to have the State release burial information to them. The State never opposed such orders – but the economic barrier was steep and often enough to keep many relatives from connecting with their lost relatives.

Years ago, anyone who grew up in Hastings likely knew of someone who had been hospitalized there. Fueled by secrecy, stories were legion about what supposedly went on at "Ingleside," (as the facility was called when I was growing up) tales enhanced by the sheer size of the hospital grounds (some 630 acres) and mystery created by the tunnels that ran underneath the buildings. As the Supreme Court noted in its opinion, patients were "admitted to HRC for issues relating to substance abuse, senility and dementia relating to old age, various psychotic disorders, mental deficiencies and other undiagnosed mental disorders." Many others were admitted because they were simply old and poor and had no where else to go. Others were admitted against their will, as in one early instance reported in the *Hastings Tribune* where a wife testified that husband and daughter had her committed when she refused to sign over land to them.

Regardless of why they were admitted, those individuals buried in the HRC cemetery lived during an extensive period when there were no prescription drugs, little counseling, and when many medical "treatments" consisted of medical regimens long-since banned. In their own way, they were pioneers who helped advance the understanding and treatment of mental illnesses, veterans of a war that continues to be fought but fortunately, where significant progress has been made. Yet, until earlier this month, their burial was a shameful secret; the public could not know their names.

Catherine Renschler, executive director of the Adams County Historical Society, hailed the Supreme Court's decision as "a great victory for human rights, for the rights of the people who were institutionalized." A great victory, indeed.

Thomas R. Burke is a partner with Davis Wright Tremaine LLP in San Francisco. Mr. Burke and his law firm represented the Adams County Historical Society in State Ex Rel. Adams Cty. Historical Soc. v. Kinyoun. Mr. Burke was born and raised in Hastings.

MLRC 50-State Survey

Employment Libel and Privacy Law 2009

Reports from all fifty states, the District of Columbia and Puerto Rico.

Edited by the Media Law Resource Center, Inc.

MLRC 50-STATE SURVEY:

EMPLOYMENT LIBEL AND PRIVACY LAW 2009

TOPICS INCLUDE: Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort

For access to an order form please click this ad.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

U.S. District Court Denies Government Request for Blanket Sealing of Factual Returns in Gitmo Habeas Cases

By Jeanette Melendez Bead

The United States District Court for the District of Columbia recently rejected the government's request to seal completely the "factual return" in every habeas case filed by a Guantanamo Bay detainee, which would keep secret the government's factual basis for continued confinement. Agreeing with several news organizations on a matter of first impression in the D.C. Circuit, the court held that the public has a First Amendment right of access to the records of habeas proceedings, and that the government's request to seal lacked the specificity required to overcome the public access right. *In re Guantanamo Bay Detainee Litigation*, No. 08-0442, 2009 WL 1542776 (D.D.C. June 1, 2009) (Hogan, J.).

Background

In *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008), the U.S. Supreme Court ruled that Guantanamo detainees are entitled to challenge the legality of their detentions through habeas corpus. Following the ruling, the district court in July 2008 designated Judge Thomas F. Hogan to coordinate more than 200 habeas proceedings filed by Guantanamo detainees.

In each of the cases, the government was ordered to produce a factual return setting forth the factual basis upon which it is detaining the petitioner. The government served on counsel for each detainee an "unclassified version" of the factual return pertaining to that detainee, but also filed a motion asking that the unclassified returns be sealed in their entirety to protect sensitive national security information. The returns already had been redacted to remove any classified information, but the government claimed that in the rush to produce unclassified versions of the returns to each petitioner, unspecified, "inadvertent errors" may have been made, and the public disclosure of these unclassified returns *in their totality* could pose a threat to national security by revealing intelligence sources or techniques if someone were to put together all of the pieces of the "mosaic." The government sought to withhold the returns from the public until it could "produce versions of the returns that may be publicly disclosed."

... that the public has a First Amendment right of access to the records of habeas proceedings

In early January 2009, the detainees filed a consolidated opposition to the government's motion, and, one week later, the Associated Press, The New York Times Company and USA Today (collectively, the "Press Intervenors") moved to intervene in the consolidated action for the limited purpose of opposing the government's motion. The district court heard oral argument on the government's motion and the motion to intervene in March.

Requests to Seal Judicial Records Must Be Specific

Judge Hogan first addressed the specificity of the government's request to seal the factual returns under the protective order entered to govern the habeas cases. Relying on two decisions of the D.C. Circuit rejecting government attempts to designate unclassified information as protected in the context of Combatant Status Review Tribunals, Judge Hogan found that the government had again "failed to provide a court with a sufficient 'basis for withholding' the unclassified information in these cases," calling the government's warning that disclosure could threaten national security nothing more than a "spare, generic assertion." Stating that he was mindful of his obligation to "accommodate the government's 'legitimate interest in protecting sources and methods of intelligence gathering,'" Judge Hogan gave the government until July 29 to either: (1) publicly file a declassified or unclassified return; or (2) file under seal an unclassified factual return highlighting the exact words or lines for which it seeks protected status. If the government files a highlighted factual return, and the government and a petitioner cannot reach "an agreement" concerning the highlighted factual return, the government then is required to file a motion with the appropriate merits judge seeking to designate the highlighted portions of the return as protected information.

(Continued on page 27)

RETURN TO TABLE OF CONTENTS

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

U.S. District Court Denies Government Request for Blanket Sealing of Factual Returns in Gitmo Habeas Cases

(Continued from page 26)

The Public's Right of Access

Judge Hogan next turned to the Press Intervenors' contention that both the First Amendment and the common law afford the public a qualified right of access to the unclassified factual returns. He began by applying the "experience" and "logic" test articulated in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986). On the "experience" side, he noted the dearth of case law regarding whether judicial records in habeas proceedings historically have been available to the public, as well as the dearth of case law in the D.C. Circuit regarding the right of access to judicial records in civil cases. On the latter point, the court stated that the D.C. Circuit's silence on the question should not be interpreted as "a denial of the right." Relying on the case law of other circuits finding a history of public access to civil proceedings in general, the court concluded that the experience prong of the *Press-Enterprise II* test was satisfied. On the "logic" side, Judge Hogan concluded that public access would play a significant positive role in the function of habeas proceedings because, among other things, "opening the judicial process ensures actual fairness as well as the appearance of fairness." As for the factual returns, Judge Hogan observed that "they are fundamental to these proceedings" because "they detail what the detainees are accused of doing and who they are accused of being." "The public's understanding of the proceedings . . . is incomplete without the factual returns." This finding was conditional, however. According to Judge Hogan, public access to the factual returns would *not* play a positive role in the functioning of these habeas proceedings if: (1) the public gains access to classified information; (2) the government's efforts to declassify the returns for the public prevented it from declassifying information for the detainees; and (3) the process of providing public access consumes "substantial Court resources." In the end, however, the court found "that under the First Amendment the public has a limited right to access the unclassified factual returns in these habeas proceedings." (The court also found that the public has a common law right of access to the factual returns.)

The court then determined that "[p]rohibiting public access to every document in every factual return" was neither essential to achieve the government's interest in protecting national security nor narrowly tailored to achieve that interest. Accordingly, in any case in which the government does not file a declassified or unclassified factual return by July 29, 2009 and the detainee does not thereafter seek an unclassified factual return, the Press Intervenors may file on or after September 29, 2009 a motion with the appropriate merits judge requesting an unprotected factual return.

Further developments will be reported in a later edition of the MediaLawLetter.

The Press Intervenors were represented by David McCraw, Vice President and Assistant General Counsel of The New York Times Company; Barbara Wall, Vice President and Associate General Counsel of Gannett Co, Inc.; David Tomlin, Associate General Counsel of the Associated Press; and David Schulz and Jeanette Melendez Bead of Levine Sullivan Koch & Schulz, L.L.P.

ANY DEVELOPMENTS YOU THINK OTHER MLRC MEMBERS SHOULD KNOW ABOUT?

CALL US, OR SEND US A NOTE.

MEDIA LAW RESOURCE CENTER, INC.
520 EIGHTH AVE., NORTH TOWER 20TH FLOOR
NEW YORK, NY 10018

PH: 212.337.0200,
MEDIALAW@MEDIALAW.ORG

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Court Orders Kentucky State Police To Provide Sex Offender Database And To Pay Newspaper's Costs And Fees

By Jon L. Fleischaker and Jeremy S. Rogers

A Kentucky court recently held that the Kentucky State Police ("KSP") violated the state's Open Records Act by refusing to provide the an electronic copy of its sex offender registry database to the Louisville newspaper the *Courier-Journal*. *Commonwealth of Kentucky v. Courier Journal,* (Franklin Cir. Ct. (Frankfort, KY) May 15, 2009). The court also ruled that the KSP must pay the newspaper's costs and legal fees associated with the case.

Newspaper Request for Sex Offender Database

The KSP is responsible for maintaining Kentucky's sex offender registry and is also required by law to post the registry online. Among other things, the registry includes photos, home addresses and conviction histories for all registered sex offenders living in Kentucky. It is posted online at *http://kspsor.state.ky.us*.

On February 28, 2008, the Courier-Journal submitted a request under Kentucky's Open Records Act (Ky. Revised Stat. 61.870, et. seq.) to the KSP requesting a copy of the database from which the online sex offender registry is derived. In 2007, the KSP had provided the newspaper with a partial version of the database in Microsoft Excel format. In its February 2008 request, the newspaper stated a preference for Excel or other various software formats for the database. As an alternative, the newspaper requested a copy of the database in ASCII text format, which is the minimum required format for electronic records under Kentucky's Open Records Act.

The KSP denied the request in a March 3, 2008 letter, claiming that the request was too burdensome because similar records from the sex offender registry were available on the internet.

Kentucky Attorney General's Decision

The *Courier-Journal* appealed the KSP's denial to the Kentucky Attorney General, who is empowered by Kentucky law to adjudicate appeals of a public agencies' open records denials. At the Attorney General level, the KSP argued that the sex offender registry is maintained using proprietary software of a third-party vendor. The KSP also stated that it does maintain a portion of the data contained in the sex offender registry in Excel format, but the KSP nevertheless refused to provide the records to the *Courier-Journal*. On April 17, 2008, the Attorney General issued a decision, finding that the KSP violated the Open Records Act by refusing to provide the *Courier-Journal* with copies of the requested electronic records. *In re Courier Journal / Kentucky State Police*, 08-ORD-080.

Circuit Court's Decision

On May 16, 2008, the KSP filed suit in Frankfort to appeal the Attorney General's decision. The KSP argued in the lawsuit that it had mistakenly told the Attorney General that it maintained a portion of the database in Microsoft Excel when, in fact, the entire database is maintained in a proprietary format by a third-party vendor. The KSP argued that it had created a special program to convert parts of the database to Excel as a one-time-only accommodation to the newspaper and that requiring it to continue to do so would require it to create new records, which the Open Records Act does not mandate.

In the May 15 decision, Franklin Circuit Judge Phillip Shepherd ruled that the plain language of Kentucky's Open Records Act requires the KSP, like all of Kentucky's public agencies, to maintain its electronic records in a format that is readable by the public. The court stated that Kentucky's public agencies should be on notice that, when contracting with a private vendor for data management services, they should include provisions in their contracts to ensure that vendors enable them to maintain compliance with the Open Records Act's requirements.

The court also ruled that KSP must provide electronic copies of the database to the newspaper even though the database is available online. The Act does not allow a public agency to post online copies of records in lieu of providing the records themselves to a requester. In addition, the court pointed out that the raw database could be much more useful than what is posted online because the website only has limited search and query options.

Finally, the court awarded the *Courier-Journal* its fees and costs associated with the lawsuit. The court wrote that, as a matter of public policy, an agency should bear the costs of unsuccessfully appealing an adverse ruling of the Attorney General because to hold otherwise would create a chilling effect on requesters of public information, most of whom cannot afford to participate in protracted litigation.

Jon L. Fleischaker and Jeremy S. Rogers, of Dinsmore & Shohl LLP in Louisville, represented the Courier-Journal.

RETURN TO TABLE OF CONTENTS

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

California Federal Court Dismisses News Photographer's Claim Over Arrest

A newspaper photographer had no First Amendment right to take on-scene photos of a highway traffic accident, according to a California federal district court. *Chavez v. City of Oakland,* No. C 08-04015 CRB (N.D. Cal. June 2, 2009).

Raymundo Chavez of the *Oakland Tribune* brought a federal civil rights action against the City of Oakland after a pair of police officers arrested him in May of 2007 during a dispute over Chavez's camerawork on a clogged highway. The court approved the officers' claims of qualified immunity, granting both summary judgment on the First and Fourth Amendment claims.

Background

The dispute arose after Chavez, caught in a complete stoppage of northbound traffic on Interstate 880, spotted an overturned vehicle and a woman on the ground ahead. Wearing one press pass and with another in his windshield, he exited his car to take photos of the accident scene. He took photos for 15 minutes before an officer of the Oakland Police Department, upon discovering Chavez had left his car parked in the far-left lane, instructed him to leave the crime scene.

Chavez initially asserted he had a right to cover accident scenes, but then agreed to depart. While walking to his car, however, Chavez twice turned to look back at new developments at the crash site. After the first pause, the officer declared he would issue Chavez a citation. When Chavez turned a second time to photograph the arrival of a highway patrol car, the officer grabbed his camera and said, "That's it, you're under arrest. You don't need to take these kind of pictures."

Chavez was arrested for violating Section 22400 of the California Vehicle Code, which prohibits impeding or blocking "the normal and reasonable movement of traffic," and for failing to comply with a lawful directive. He was handcuffed and detained for 30 minutes before being released with an admonition to "never come there again and take those type of pictures." Chavez subsequently brought a Section 1983 suit against two officers for violating his First Amendment rights and arresting him without probable cause, as well as other state-law claims.

District Court Decision

The court roundly rejected his arguments. Under the qualified immunity test recently approved by the Supreme Court in *Pearson v. Callahan*, 556 U.S. __ (2009), Chavez had to show both the violation of a constitutional right and that the right was "clearly established" at the time of the alleged violation, with the court able to address the prongs in any order.

The court knocked out the First Amendment claim at the first prong, determining that Chavez had no right to take photos once police decided the accident scene was closed. "The press has no First Amendment right to access accident or crime scenes if the general public is excluded," the court wrote, citing the landmark reporters' privilege case of *Branzburg v. Hayes*, 408 U.S. 665 (1972). Moreover, state and local regulations allowing the press exactly that type of access did not expand or otherwise alter a reporter's federal rights.

On Chavez's Fourth Amendment probable cause claim, the court held that that an officer could reasonably believe that parking a car in a highway lane was a violation of Section 22400. Traffic in that lane remained blocked during the entire incident, but Chavez did not dispute an officer's assertion that a fire truck had to maneuver around the parked car to get to the accident scene, allowing the court to find the officer's position reasonable Likewise, the court found Chavez's initial retorts to the officer's demands could reasonably lead the officer to find probable cause for a failure to comply. As the law was not "clearly established," the officers were entitled to qualified immunity.

Plaintiff was represented by Terry Gross, Gross & Belsky LLP in San Francisco, CA.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

In the April 2009 issue of the MediaLawLetter we published an opinion article on news aggregation and fair use. In "What's "Fair" In Love And War?" David Hosp and Mark Puzella of Godwin Procter argued that established copyright law protects online sites that republish the headline, lede and hyperlink to an original source. David Tomlin of The Associated Press has written an opposing view on the application of fair use law to aggregation.

Little Is "Fair" in Love and War

By David Tomlin

David Hosp and Mark Puzella tried to show in their April *MediaLawLetter* article that a court would probably find that unlicensed aggregation of news headlines and lede paragraphs on a Web site is fair use under the Copyright Act. Their analysis goes wrong at every turn.

What "Fair Use" Means

Their first mistake is ignoring the most significant passage in Section 107 of the statute, the overture that describes a fair use as one made "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."

This language expressly confines fair uses to those in which the taker of a protected work does not merely copy and republish it but adds social value by creating original expressive content or context so that the new whole serves one of the specified purposes. Only then is the infringement entitled to the four-factor analysis that follows. Compiling unauthorized and unembellished copies of others' works as news aggregators do cannot satisfy this prerequisite.

Purpose and Character of the Use

Hosp and Puzella ignore the problem and skip straight to the first fair use factor. They say news aggregators win on the " purpose and character" question because they somehow "transform" copied headlines and ledes into news links and because such use is not commercial since online news is generally "free to consumers." Good faith is dismissed as immaterial.

Hosp and Puzella are wrong on all counts. Aggregating headlines and ledes does not change the purpose and character of their use in any way. They remain news content, published without permission for the same purpose intended by the rightful owner. Appending links to additional news content does not magically remove the curse of the unlawful taking.

Nor does it help, as Hope and Puzella seem to think, that courts in readily distinguishable cases have found that displaying works in search engine results is fair use. News aggregations are not search engines. They are finished products packaged, marketed, displayed, monetized and consumed as news pages. Hosp and Puzella cite no case that addresses any aggregator Web site, let alone one purporting, as many news aggregators do, to corner an entire global content category.

Hosp's and Puzella's argument that aggregations can't be commercial because most news published online is free to consumers misses the point entirely. News may be free to consumers, but it is not free to publishers. Aggregators' displays ape the main news and section front pages of good faith publishers who create or pay for content. Copyright law reserves to the content owner the exclusive right to control its display, and whether the audience pays is neither here nor there.

Free-riding news aggregators cannot pretend to be "good faith publishers," and Hosp and Puzella address this uncomfortable truth by wishing it away.

Nature of the Copyrighted Work

Hosp and Puzella claim to believe that the law provides only the scantiest protection to news reporting. They imply that news articles are little more than compilations of facts and therefore barely even copyrightable.

In fact, news content that consists of an unadorned accumulation of facts is the exception, not the rule. The vast majority of ledes and headlines are highly creative and expressive distillations not only of facts but ideas, analyses, hypotheses and arguments. Composing them calls for an agile mind and all the craft of highly skilled expository writing.

Notwithstanding Hosp's and Puzella's unsupported assertion, there is no "well established legal principle" that banishes journalism to the margins of what copyright law protects. On the contrary, courts have found the reverse in a variety of cases.

(Continued on page 31)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Little Is "Fair" in Love and War

(Continued from page 30)

Amount and Substantiality of the Portion Used

Hosp and Puzella argue that if a use "copies only as much as necessary for the intended use, then the third factor will not weigh against fair use." This is not true for uses that are unfair to begin with, as unlicensed news aggregations clearly are.

The argument also misstates the essence of the court's inquiry on the "amount" fair use factor, which must concern itself not just with the quantity but also the "substantiality" of the taking. Courts have found the taking of an entire work to be "fair" in some cases, but they have declared the taking of only a tiny fractional part to be unfair in others.

Headlines and ledes painstakingly crafted to encapsulate the hearts of the stories they tell are just the kind of takings that are much less than the whole but nevertheless highly substantial. News aggregators acknowledge as much by selecting them for compilation.

Effect Upon Potential Market or Value

Hosp and Puzella repeat here their misguided argument that since news content owners generally display their works without charge to their audiences, they cannot show any market harm from others' unauthorized displays.

But copyright law does not specify how a content owner must extract commercial benefit from his works. Most news publishers have exercised their exclusive rights to display their works online at no charge to users in order to engage and build their audience. The audience in turn is an opportunity for advertisers. Displays supported by ad revenue are entitled to the same copyright protection as displays supported by subscriber revenue.

Legitimate news publishers are now struggling in plain public view to replace their shrinking print revenues with new streams from digital distribution and display. It defies common sense to argue, as Hosp and Puzella do, that publishers suffer no commercial harm when aggregators copy the most substantial portions of their works, often within seconds of their first appearance on the Internet, and sell advertising against them just as they, the rightful owners, seek to do.

Hosp and Puzella also ignore the plight of news wholesalers whose business is licensing their original content to good faith publishers. The commercial harm that follows when unlicensed aggregators appropriate and publish without paying the license fee is self evident.

Hosp and Puzella speculate that a court in a news aggregation case would blame a victim for failing to block scraping by aggregators. Copyright law imposes no such burden on a content owner, any more than a burglary victim can't press charges if he failed to lock his door.

The Value of News Collections

As they rush to the wrong judgment on the four factors, Hosp and Puzella make a more fundamental logical error. They apply their fair news analysis as if a news aggregation were an individual work and as if the taking under discussion were of a single headline and lede from a single news article.

In fact aggregations are continuously updated headlines and lede paragraphs from hundreds, even thousands, of articles. While each individually protectable item has beneficial usefulness by itself, its market value is multiplied by its inclusion in a collection.

This enhanced value is what prompts consumers to buy newspapers, tune in to newscasts, and visit Web sites operated by real news publishers. Consumers know they are likely to find what interests them among the contents of a collection. This is exactly the value proposition that unlicensed news aggregators wrongfully appropriate for themselves.

Conclusion

Every copyright lawyer knows that fair use analysis of the unauthorized use of a single work can be highly subjective and the outcome in any particular case difficult to predict. But in a copyright case against a news service that copies and aggregates unlicensed news headlines and ledes, the outcome is far easier to predict. A calculating stranger who times his surprise arrival for the dinner hour, after the groceries are bought, the cooking done and the table set, is not entitled to share the meal.

David Tomlin is Associate General Counsel of The Associated Press.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

U.S. Supreme Court to Decide Whether Restrictions on "Debt Relief Agencies" Violate First Amendment

The Supreme Court this month agreed to review an Eighth Circuit decision which 1) declared portions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) unconstitutional as applied to lawyers; and 2) upheld certain advertising restrictions. Milavetz, Gallop, & Milavetz, P.A., et al. v. U.S., 541 F.3d 785 (8th Cir. 2008), cert. granted, 2009 WL 908452 (U.S. June 8, 2009) (Nos. 08-1225, 08-1119).

A divided panel held that a provision preventing "debt relief agencies" (a new term in the Bankruptcy Code) from advising clients to "incur more debt in contemplation" of bankruptcy unconstitutionally restricted the advice lawyers could give to clients. The majority noted that the statute encompassed scenarios where incurring additional debt was both legal and desirable for debtors and creditors.

A Minnesota law firm challenged the application of the statute. The government argued that the statute could be interpreted narrowly to include only advice focused on manipulating the bankruptcy system or other unfair tactics, but the majority could not reconcile that stance with what it saw as a "plain language of [a] … blanket prohibition."

The entire panel agreed that BAPCPA's restrictions on debt relief agency advertising was constitutional, finding the rules reasonably related to the government's interest in preventing deceptive advertising. The attorneys had only a "minimal" protected constitutional interest in refusing to provide factual information in their advertisements.

The Supreme Court accepted for review the petitions from both sides in the case. The government's petition contains the following questions: 1) Whether Section 526(a)(4) precludes only advice to incur more debt with a purpose to abuse the bankruptcy system. 2) Whether Section 526(a)(4), construed with due regard for the principle of constitutional avoidance, violates the First Amendment.

The petition from the law firm Milavetz, Gallop & Milavetz, P.A. contains the following questions. 1) Whether the appellate court's interpretation of attorneys as "debt relief agencies" is contrary to the plain meaning of 11 U.S.C. § 101(12A). 2) Whether 11 U.S.C. § 528, which as applied to attorneys, restrains commercial speech by requiring mandatory deceptive disclosures in their advertisements, violates the First Amendment free speech guarantee of the United States Constitution. 3) Whether 11 U.S.C. § 528 requiring deceptive disclosures in advertisements for consumers and attorneys, violates Fifth Amendment Due Process.

Supreme Court Orders Reargument in Campaign Finance Case

May Overrule Restrictions on Corporate and Union Campaign Spending

On the final day of the term, the Supreme Court ordered reargument in a campaign finance case that raises the question of whether a polemical political documentary can be regulated as an "electioneering communication" under the Bipartisan Campaign Reform Act of 2002 (BCRA). *Citizens United v. Federal Election Commission*, No. 08-205 (U.S. June 29, 2009).

In its order, the Court asked the parties to address whether the Court should overrule two prior decisions that upheld campaign spending restrictions on corporations and unions. *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990) (upholding restrictions on corporations) and *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (upholding facial validity of BCRA's restrictions on corporate and union election ads).

The case will be argued on September 9 with briefing to be completed by August 19.

At issue is a political documentary entitled "Hillary: The Movie," which featured more than 20 conservative journalists and commentators, including Dick Morris, Ann Coulter, Newt Gingrich, Tony Blankley, Dick Armey and Bay Buchanan, criticizing Clinton's then potential presidential candidacy. A three-judge district court panel held that the documentary was "express advocacy" to vote against Clinton and was therefore subject to BCRA's campaign advertising regulations. *See* 530 F. Supp. 2d 274 (D.D.C. 2008) (denying motion for preliminary injunction). The district court panel noted that Citizens United was asking it to overrule the Supreme Court's decision in *McConnell* and stated "Only the Supreme Court may overrule its decisions." Under BCRA the district court decision is directly appealable to the U.S. Supreme Court.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Bing's Video Preview Feature Stretches Fair Use – But Too Far?

By Mark S. Puzella

Microsoft recently made some waves by re-releasing and re-branding its search engine technology under a new name, "Bing." Bing brings with it a slew of improvements and new features intended to make it competitive with the world's top search engines. Rumors abound that Google immediately ordered a high level strategy assessment of Bing, suggesting that the search leader believes Microsoft's search offering may have finally become a worthy competitor.

One of the flashy features touted by Bing is the provision of video "previews" directly on the search results page. Most other search engines provide only a single still frame of a video accompanied by some descriptive text, requiring the user to click the associated link to see the video in its entirety. On Bing's search results page, however, simply passing the mouse cursor over a video thumbnail causes it to spring to life, playing a partial clip of the original that even includes the original sound. Thus without even clicking on the thumbnails the users can see short clips of the original video that can assist them in finding the particular video they are looking for.

This feature might give Microsoft a slight edge in its fight for relevance in the search space, but could it also run afoul of "fair use" doctrine? In recent years the doctrine has been forced to rapidly evolve and adapt to new technologies and Internet practices. There can be little doubt that Bing's video previews push the concept of "fair use" in ways that are untested. But, while there are plausible arguments on both sides of the issue, if courts follow established precedent, it is most likely that Bing's video previews are a fair use.

Fair Use Factors

Fair use is a common law doctrine that was codified in 17 U.S.C. § 107. That section provides that when assessing whether a use falls within the realm of fair use, four factors are to be considered: (1) the purpose and character of the use, including whether it is of commercial or nonprofit nature; (2) the nature of the copyrighted work, with factual works receiving less protection than artistic ones; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use on the potential market for or value of the work.

Courts have found that none of these factors is determinative in and of itself, but instead, each must be consider in relation to the others, and to the purposes of copyright itself, "[t]o promote the Progress of Science and useful Arts" and to serve the welfare of the public.

In a number of cases courts have found that search engine results containing thumbnails—versions of original images that are substantially reduced in both size and detail—of copyrighted images fall clearly within the bounds of fair use. *See, e.g.,* *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003).

In doing so they have provided a roadmap for how courts are likely to apply the four factors of fair use in similar situations. For instance, the fact that search engines reproduce the copyrighted works for commercial gain is not determinative where there has been a substantial transformation of the work.

Similarly, the artistic, rather than factual, nature of images and videos has only limited importance where the market for the work has not been harmed. To examine whether functioning video previews fall within fair use, we follow the courts' lead, and focus on the factors they tend to consider the most determinative: how transformative the new use is, the amount used in relation to the original, and the effect on the market.

Transformative Nature of Video Preview Clips

In cases involving thumbnails in search results, courts have placed heavy emphasis on whether use of the thumbnails is "transformative" in the sense that it changes the purpose or character of the original work by adding new expression or meaning. Although this is most directly related to the "purpose and character" prong of the fair use doctrine, it strongly influences the court's view of each of the other factors.

In the seminal case of *Campbell v. Acuff-Rose Music Inc.*, the Supreme Court plainly stated its view, saying that "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that

(Continued on page 34)

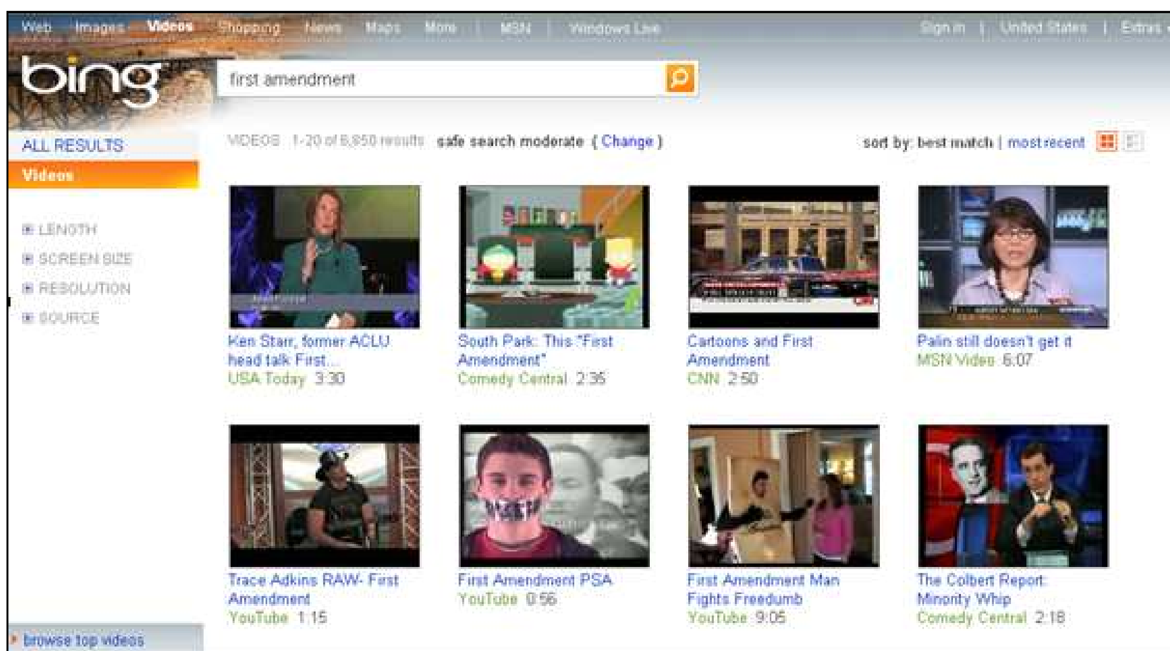
For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Bing's Video Preview Feature Stretches Fair Use – But Too Far?

(Continued from page 33)

may weigh against a finding of fair use." 510 U.S. 569, 579 (1994). If the new use serves a substantially different function than the original use, then courts tend to find that the new use is transformative. In the case of search results containing thumbnails, whereas the original work of an artist serves the function of artistic expression, the purpose of a thumbnail in search results is to improve access to information on the Internet. The work is no longer a *picture*, but a *pointer*, and therefore the use is transformative.

The question then is whether the provision of video and sound are—compared to provision of simply a single still frame—still a transformative use. Plaintiffs would argue the use is not transformative because a user could identify the desired content from a still image and it is unnecessary (and thus not transformative) to add movement and sound, i.e., more of the original work. However, defendants have a good argument that the addition of movement and sound ultimately makes the search more efficient and is thus more transformative.



Stated another way, the addition of movement and sound makes a better pointer. A few seconds of video is likely to help further assist the user to find the video sought. For example, imagine that a user is searching for a particular episode of a show. The user might be at a loss to distinguish twenty different images each showing a single still frame from different episodes. However, a few seconds of video—containing a snippet of dialogue or a flash of a prop or an actor's changing expression—might quickly identify for them which episode they are viewing. Once identified, the user could then click through and get the original content directly from the copyright owner.

While a reduced size partial clip may include a part of the original artistic expression, if its primary and overriding function is to improve identification and location of the original, then courts are likely to find the use to be transformative.

Amount And Substantiality of the Portion Used

When considering the amount and substantiality of the portion used the court will not simply look at the fraction in use but will focus on how the amount relates to the transformed purpose of the use. For example, in *Kelly v. Arriba Soft Corp.*, the court noted that "[i]t was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating [website]. If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine." 336 F.3d 811, 822 (9th Cir. 2003).

Plaintiffs have a strong argument that a video clip, even reduced in size and duration, can easily express much of the artistic intent of the original work: for example, the setup and punch-line of a joke, or the melody of a song. But while this is clearly true, a thumbnail too can communicate the artistic effect of an original image. Indeed one could

(Continued on page 35)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Bing's Video Preview Feature Stretches Fair Use – But Too Far?

(Continued from page 34)

easily imagine a court finding that Bing's use involves *less* use of the original, because, whereas thumbnails only reduce the size of an image, the video previews reduce the size of the image, as well as the duration of the video and the quality of the sound. In other words, a thumbnail image is smaller version of an entire work, whereas Bing's video previews are a smaller version of less than the entire work. To the extent that less of the original work is reproduced it buttresses the claim that the function is not to communicate the artist's expression, but rather to locate particular videos.

Effect Of Use On The Market

The underlying purpose of the Copyright Act is to encourage creative expression by allowing authors to capitalize on their creative works. To the extent that the "use" defeats this purpose by denying the author of a work to reap financial benefits, the use is not likely to be deemed "fair." Ultimately, whether video previews qualify as fair use will hinge in large part on the court's perception of how they will impact the market for the original content. Although a presumption of market harm exists for cases where the intended use of an image is for commercial gain, that presumption is not available where the court has found a work transformative, because where a work is transformative market substitution is less certain.

It is not clear how video previews would harm the market for the original content. Consider, how often does a user want to hear just 15 randomly selected seconds of a five minute music video? Or 60 randomly selected seconds of a half hour sitcom? These are not normal Internet user interests, and therefore video previews probably would not supply a substitute for the original videos. Furthermore, even if video previews have some harmful effect, that does not mean that they have a *net* harmful effect.

Presumably, Bing is only indexing that content which it can reach by crawling the web, and thus is only providing content that is otherwise freely available to users. If so, users would have little reason not to follow the links to the full size and complete video. Thus, rather than serve as a substitute, and thereby reduce viewership and advertising revenues, Bing is likely to drive viewership by helping users find the links to the videos they want, subsequent to which they will click on the provided link and get the full version directly from the content owner.

Ultimately, whether Bing harms or helps the market for original video content is likely to be a highly factual determination that will depend in large part on how the service is used. Will users watch video previews for their entertainment value, or simply to help find the videos they are seeking? As a result, any litigation may turn, at least in part, on competing analyses of click-through and other user metrics.

Conclusion

Ultimately the court will consider all of these factors in light of what "promotes the purposes of copyright and serves the interests of the public." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007). There "is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." *Id*. Thus, the courts will likely look at this issue, not only with an eye towards what has been done in the past, but also with consideration for where copyright law is and should be moving.

Will allowing video previews in search results substantially inhibit the development of quality video content? Will it substantially improve access to content, thereby enriching the experience of consumers? As content owners continue to challenge search engines on fair use, courts seem to be increasingly interpreting the traditional fair use factors with reference to these questions. Although there are arguments on both sides, it seems that Bing's video preview function is likely within the bounds of fair use.

Mark Puzella is a partner in Goodwin Procter LLP who focus his practice on copyright and trademark litigation. He has represented parties in several widely followed copyright matters, including the Cablevision RS-DVR case and the recent GateHouse Media v. New York Times news aggregation litigation. *He thanks summer associate Isaac Kriegman for his assistance with this article.*

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

ETHICS CORNER

Corporate Counsel as Ambulance Chaser?

Ethical Rules Prohibit In-Person Solicitation of Non-Party Employees

By Theresa M. House

Contrary to popular opinion (perhaps), most lawyers would agree the era of the proverbial ambulance chaser – who solicited potential clients before they left the scene of an accident – came to an end with ethical rules prohibiting in-person, telephone, or electronic solicitations of prospective clients known to be in need of specific legal services.

The traditional reasoning for such rules, including Rule 7.3(a) of the ABA Model Rules of Professional Conduct[1], is straightforward: Soliciting a potential client in such circumstances unduly compromises a client's right to counsel of his or her own choosing because it subjects the client to persuasion from an advocate whose training and experience may make it difficult for the client to fully evaluate available alternatives.

The exception to this general rule is likewise thought to be straightforward: Lawyers are permitted to solicit members of certain designated groups where the potential for the lawyer to abuse his or her position for profit is considered to be less likely, such as in the case where the lawyer solicits other attorneys, close friends, relatives, or former or existing clients. But how do these rules apply when the person known to be in need of legal services is so closely affiliated with an existing client that the person is already playing a role in that client's litigation – such as an employee of a represented corporate client?

A recent opinion by a New York state court holds that in these situations lawyers must follow the same rule that applies to solicitations of any other non-clients: Representation of corporate employees is permitted, but only if the employee witness requests it first. For corporate counsel as well as ambulance chasers, in-person solicitation simply is not permitted.

The Rivera Ruling

In *Rivera v. Lutheran Medical Center,* 22 Misc.3d 178, 866 N.Y.S.2d 520 (N.Y. Sup. Ct. 2008), plaintiff, himself a former employee of the corporate defendant, brought suit against a hospital for employment discrimination based on allegations that he had been fired from his job in retaliation for a civil rights claim that had been brought against the hospital by his deaf sister-in-law.

To prepare the hospitals' defense to these claims, defense counsel took the natural next step in informal factual discovery and began interviewing current and former employees of their corporate client – including employees who were merely fact witnesses with no risk of exposure in the case. But defense counsel then took it one step too far. During the interviews, defense counsel offered to represent the employee witnesses at the hospital's expense – first orally and then later through written retainer agreements, which the witnesses ultimately signed.

In a motion to disqualify the firm from representing the employee witnesses, plaintiff argued that defense counsels' actions violated New York's former state analogue to ABA Rule 7.3(a), Rule DR 2-103(A)(1) of the former New York Lawyer's Code of Professional Responsibility[2], which prohibits improper solicitations. Over defendant's opposition, the court sided with plaintiff. It found that defense counsel's verbal, in-person solicitation of nonparty employee witnesses was a "clear violation" of the solicitations rule, and disqualified defense counsel from representing employee witnesses who did not qualify as corporate representatives.

Niesig *Rule and the Important Role of Informal Discovery*

The reasoning behind the Court's decision in *Rivera*, however, had little to do with the traditional justification for the solicitations rule. The employee witnesses the defense counsel took on as clients were not alleged to have been deprived of their choice of counsel nor to have been strong-armed in any way into accepting the firm's offer of representation. Indeed, by all accounts, the witnesses' decisions to retain the hospital's counsel as their own, at the hospital's expense, was not only voluntary, but welcomed.

What, then, was the problem?

Central to the court's analysis in *Rivera* was its finding that the defense counsel, who had a history in the litigation of thwarting plaintiff's requests for discovery, had offered to represent the employee witnesses in an effort to end-run established legal rules crafted to promote avenues of informal discovery, in particular, private interviews of fact witnesses.

(Continued on page 37)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Ethics Corner: Corporate Counsel as Ambulance Chaser?

(Continued from page 36)

Among these rules was that established in *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990). There, in the context of interpreting DR 7-104(A)(1), the former state-law equivalent[3] of ABA Rule 4.2[4] prohibiting lawyers from communicating "with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized to do so," the New York Court of Appeals examined the issue of under what circumstances employees could be considered "parties" – and therefore within the scope of the represented party rule – in a suit involving a corporation.

In *Niesig*, counsel for plaintiff faced a similar situation as the defense lawyers in *Rivera*: Litigating in a private suit, they wished to interview witnesses who were employed by a corporate party. Unlike the *Rivera* defense counsel, however, the *Niesig* plaintiff spotted the ethical issue before it became an ethical problem. Realizing that communications with corporate employees may violate the represented party rule, plaintiff sought an order in advance that would permit their counsel to conduct private interviews with the defendant's employees who had witnessed, but not participated in, an accident that was the subject of the suit.

The Court of Appeals granted plaintiff's request, and in so doing, articulated an important public policy favoring informal discovery that came to be known as the *Niesig* rule[5]. The Court of Appeals reasoned that the term "party," as used in the disciplinary rule, did not include mere witnesses to an event for which the corporate employer is sued. Instead, only those "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel" would be considered represented "parties" to the litigation and therefore off-limits under the represented party rule.

On this basis, the Court ruled generally that, ethical rules notwithstanding, counsel is entitled to conduct private interviews with employees of an adverse corporate party, so long as the employee at issue is not a "party" to the ligation based on his or her affiliation with the corporation. "All other employees," the Court concluded, "may be interviewed informally."

In so holding, the *Niesig* Court rejected defendant's argument that the represented party rule created a blanket prohibition against communicating with adverse corporate employees. Such a rule would be contrary to public policy because it would impede litigants' ability to uncover relevant facts without incurring the substantial costs of formal discovery – and thereby would undermine the important public policy in favor of expeditious resolution of claims. Through the *Niesig* rule, the Court of Appeals established a strong public policy in favor of off-the-record private efforts to learn and assemble information relevant to a suit.

Solicit Clients, Not Witnesses

How does *Niesig*'s rule on represented party communications factor into Rule 7.3's prohibition on in-person solicitations? But for the defense counsel's offer of representation, plaintiff's counsel in *Rivera* would have been entitled under *Niesig* to conduct informal interviews with those employees whose actions were not binding on the corporate party or who could not otherwise qualify as corporate representatives. The *Rivera* defense counsel's offer to represent those non-party employee witnesses, therefore, had the ingenious result – if not design – of cutting off the informal avenues of discovery deliberately left open by the Court of Appeals in *Niesig*.

But this the *Rivera* court would not allow defense counsel to do. The *Rivera* court found that the reasoning behind the Court of Appeals' interpretation of the represented party rule applied with equal force to the solicitations rule. If the employee witnesses at issue did not qualify as parties under *Niesig*, then counsel was not permitted to solicit them as clients in an effort to cut off plaintiff's right to informal discovery.

In so ruling, the court departed from the traditional justifications for Rule 7.3 – namely, promoting client autonomy and free choice by limiting the potential for lawyers to engage in undue influence, intimidation, and over-reaching in their solicitations for new business. Indeed, the court noted that the effect of its decision was to *deprive* clients of representation by counsel of their own choosing. The court, however, concluded that public policy in favor of open discovery was best served by a system of rules that would not encourage a method of obtaining legal work that results in one side gaining even a minor tactical advantage in litigation.

In so doing, the court adopted the strategy favored by the Court of Appeals in *Niesig* and used ethical rules that were originally conceived as limitations on attorneys' ability to exert undue influence over non-lawyers to instead limit attorneys' ability to unfairly manipulate their clients' discovery obligations.

(Continued on page 38)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Ethics Corner: Corporate Counsel as Ambulance Chaser?

(Continued from page 37)

Rivera's Limits

Although the *Rivera* rule is certainly cause for any corporate counsel to think twice before offering to represent employees of their corporate client, the scope of the rule is limited. Neither *Rivera* nor *Niesig*, after all, applies to communications with or solicitations of employees who are not "mere witnesses" to a dispute and instead whose actions could be imputed to the corporation. Indeed, *Rivera*'s limited scope is express in its holding, which ruled that there was no violation of the solicitations rule based on defense counsels' offers to represent employees who were considered "parties" to the litigation by virtue of their status as corporate representatives. The court reasoned that such party-employees would not be available for informal interviews by plaintiff's counsel even under *Niesig*, and so the solicitations rule did not apply to them, either.

Accordingly, the rule in *Rivera* only goes so far, and determining when it applies requires corporate counsel to engage in the familiar exercise of evaluating whether a witness qualifies as a corporate representative. Where an interview with a corporate employee reveals that his or her acts or omissions would be binding on the corporation or imputed to the corporation, or that the employee was implementing the advice of counsel, corporate counsel may offer their services to that employee in whatever non-harassing fashion they choose. But where the employee does not fall into any of these categories, corporate counsel offer their representation at their own peril.

Thus, the court's holding in *Rivera* creates some uncertainty regarding the common practice of defense counsel to represent corporate employees at depositions and at other stages of litigation. Accordingly, defense counsel may be advised to make sure that they agree to represent corporate employees only where the initial request for representation comes from the employee rather than the solicitation of counsel.

Theresa M. House is an associate in the New York office of Hogan & Hartson, LLP

1. Rule 7.3(a) of the ABA Model Rules of Professional Conduct, which prohibits direct contact with prospective clients, reads as follows: "(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer." For a discussion of the ambiguity of the term "pecuniary gain" in this context, see Louise L. Hill, "A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation," *Georgetown Journal of Legal Ethics* 5 (1991): 393.

2. On December 16, 2008, the Administrative Board of the New York Courts announced that New York would replace all of the existing Disciplinary Rules and Definitions in the New York Lawyer's Code of Professional Responsibility with reformulated versions set forth in a new set of ethical rules called the New York Rules of Professional Conduct. These changes took effect on April 1, 2009, after the *Rivera* ruling. The text of the rule interpreted in the *Rivera* ruling, DR 2-103(A)(1), is identical to its analogue in the New York Rules of Professional Conduct, Rule 7.3(a). Both provide that "[a] lawyer shall not engage in solicitation . . . by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client . . . ."

3. Under the newly-enacted New York Rules of Professional Conduct, DR 7-104(A)(1) has been replaced with Rule 4.2, which governs communication with a person represented by counsel. Rule 4.2 makes minor changes to DR 7-104(A)(1)'s wording without changing its substance, providing that a lawyer shall not communicate "with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law."

4. Rule 4.2 of the ABA Model Rules of Professional Conduct provides, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

5. Comment 7 to Rule 4.2 of the New York Rules of Professional Conduct, which replaced DR 7-104, conforms with *Niesig's* holding, instructing that in the case of a represented organization Rule 4.2 prohibits communications with "a constituent of the organization" who "(i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Comment 7 further specifies, also consistent with *Niesig*, that "[c]onsent of the organization's lawyer is not required for communication with a former unrepresented constituent." The final version of the New York Rules of Professional Conduct with comments is available at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm.