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LIBELLETTER

March 1995

Direct Evidence Required to Prove Evasion of Truth

The New York Court of Appeals has held that a public official/figure plaintiff must offer direct evidence that a defendant is aware that it is publishing a statement which is "probably false," in order to meet his burden of proving that defendant had an intent to avoid the truth for purposes of actual malice. In *Sweeney v. Prisoner's Legal Service*, the Court of Appeals emphasized a critical distinction between intentional evasion of the truth and negligent failure to investigate. In so doing, the court reversed the appellate division, and held that the plaintiff, a prison guard at Elmira correctional facility, had not established actual malice in his suit against Prisoner's Legal Services (hereinafter "PLS").

PLS, a non-profit corporation that provides legal services to inmates, had been conducting a study of prisoner complaints of prison guard brutality at Elmira, and had sent a list of alleged incidents to the Superintendent of Elmira Correctional Facility as well as to the Chief Counsel and the Commissioner for Facility Operations for the Department of Corrections in Albany. The list identified specific guards whom various prisoners' had accused of using excessive force against them. Plaintiff's name was at the top of this chronologically-arranged list. Later, it was determined that the prisoner who had accused plaintiff of using excessive force had mistaken him for a different guard.

At trial, plaintiff obtained a jury verdict and was awarded compensatory and punitive damages. On defendant's motion the trial court vacated the verdict, but a divided Appellate Division reinstated it, providing plaintiff stipulated to reduced compensatory damages and no punitive damages. In its analysis of the

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Seventh Circuit Strengthens Involuntary Public Figure Doctrine

By Robert J. Dreps

The U.S. Court of Appeals for the Seventh Circuit has reminded news media defamation defendants they have a very potent weapon – state law on who is, or is not, a public figure. In upholding a federal district court decision granting summary judgment to *Milwaukee Magazine*, the Seventh Circuit relied solely on Wisconsin law to find that the plaintiff, Lynette Harris, was an "involuntary public figure." *See, Harris v. Milwaukee Magazine*, No. 94-2834 (decided February 15, 1995).

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Ninth Circuit Adopts Three-Part Test In Nonconfidential Source

The Court of Appeals for the Ninth Circuit has held that in order to overcome a non-party journalist's First Amendment privilege against compelled production of nonconfidential information, a civil litigant must show that "the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Shoen v. Shoen*, 1995 WL 59776 (9th Cir. (Ariz.)) at 4 ("Shoen II").

The ruling marks the second time in

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SCIENTISTS ENJOIN INTERNET AUTHOR

FAIL TO GET PRELIMINARY INJUNCTION AGAINST BULLETIN BOARD AND NETCOM

A religious corporation licensed by the Church of Scientology, which had obtained a TRO in its copyright and trade secrets suit against a local bulletin board proprietor, the California-based Internet provider and Netcom, a critic of Scientology who posted critical discussions about the cult, has failed to obtain a preliminary injunction against Netcom and the bulletin board. Netcom and the local bulletin board service succeeded in dissolving the TRO obtained by the Scientologists on February 10 in the federal district court in the Northern District of California.

Dennis Erlich, the author of the commentary, however, remains under the court order, and is enjoined from using excerpts of church material in postings critical of Scientology.

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D.C. Federal Court Clarifies Misappropriation Law, Extends *Moldea II*

By Bruce W. Sanford

Can advertisers use celebrities' pictures and even criticize them provocatively in promotions for books, movies or news shows? Yes, according to a ground-breaking new decision from federal court in Washington, D.C.

The decision comes from well-regarded Judge Royce Lamberth and involves an advertisement placed in *The New York Times* by Random House for Gerald Posner's book *Case Closed*. The book's premise -- that Lee Harvey Oswald acted alone -- is succinctly captured in the advertisement with the words: "ONE MAN. ONE GUN. ONE INESCAPABLE CONCLUSION."

Warren Commission critic Mark Lane sued over the body of the advertisement where his photograph appears along with five other conspiracy theorists such as filmmaker Oliver Stone. Each photograph was accompanied by a

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Libel Per Se: Plaintiff Has Cancer

Stating that an individual engaged in a personal services business has cancer can constitute libel per se in New York according to a recent New York trial court decision. The New York Supreme Court recently denied a defendant's request for summary judgment in *Sam v. Enquirer/Star Group Inc.*, N.Y.L.J., Mar. 2, 1995, at 27 (N.Y. Sup. Ct. Mar. 2, 1995) on the grounds that a statement alleging that the plaintiff, a noted public relations professional and sole owner of her own firm, had cancer could affect her adversely in her trade and business. The statement thus was actionable in New York without proof of special damages.

Plaintiff, Chen Sam, runs a public relations service, Chen Sam Associates. The corporation, in which Sam was sole shareholder, is also a plaintiff in this action. Together, plaintiffs allege that defendant's statements were libelous per se because "they impugn [plaintiffs'] ability to conduct their business and because cancer should be regarded as a loathsome disease since it has become entwined in the public mind with AIDS."

The court first dealt with Ms. Sam as plaintiff. Although the court did not reach the question of whether a relationship between cancer and AIDS exists, or whether either should be viewed a "loathsome disease" in defamation law parlance, it held that this type of allegation could surely affect plaintiff in her trade or business; that even if "educated [people] would not consider cancer to be a loathsome disease", there are still "many people who would shy away from doing business with a person having such an illness." To buttress its decision, the court relied on previous appellate courts decisions which also found that a cause of action should go forward, even in the absence of special damages, when a defendant has alleged that plaintiff has a condition that could affect his or her business adversely. See *Four Star Stage Lighting v. Merrick*, 56 A.D.2d 767 (1st Dep't 1977); *Privitera v. Town of Phelps*, 79 A.D.2d 1 (4th Dep't 1981).

Next, the court held that, at this early stage, the corporation should also be permitted to maintain its action without alleging special damages, because the defendant had disparaged "some aspect of its business in such a manner as to directly prejudice the successful conduct or imperil the very continuation of that business." (Quoting *Greyhound Securities v. Greyhound Corporation*, 11 A.D.2d 390, 391 (1960). Finally, the Supreme Court noted that the issue would have been more complex if the corporate plaintiff existed independently of its principal, and insured that plaintiffs would not receive a "double recovery."

UPDATE: *Philip Morris v. Capital Cities/ABC*: Amex Errs!

On March 1, in the libel suit brought by Philip Morris against Capital Cities/ABC, the court heard argument on CapCities/ABC's Motion for Reconsideration of the court's order, compelling defendants to disclose certain confidential sources to plaintiff. Philip Morris has sought the identity of various ABC confidential sources, used in a *Day One* network news magazine report on the cigarette industry and its handling of nicotine in cigarettes, by direct discovery of ABC and its reporters. But it has also sought to identify the sources through third-party subpoenas to credit card, telephone, rental car and like companies for records that might allow Philip Morris to identify the confidential sources by following the reporters' activities during the time in which they were preparing the report. In its decision dated January 26, 1995, the trial court rejected ABC's motion to quash the subpoenas directed to the third parties and granted Philip Morris' Motion to Compel against ABC. *See, ABC Loses Philip Morris Source Motion* LDRC LibelLetter , Feb. 1995, at 1.

Very promptly after receipt of the court's decision in January, ABC obtained a stay of the court's order. Before ABC could obtain the stay, however, Philip Morris apparently managed to reach American Express and seek the materials called for in its subpoena. According to an article in The Wall Street Journal, February 24, on the morning after the court released its decision denying ABC's Motion to Quash, Philip Morris began calling the companies it had subpoenaed -- including AT&T, Hertz, MCI and American Express -- seeking the documents subject to the various subpoenas. While other companies were not quite as prompt to respond, Philip Morris obviously hit it big with AMEX, where Philip Morris was told it could send a messenger that very day to pick up the documents.

Not only had AMEX put together the documents called for by the subpoena -- one month's worth of credit card records for the *Day One* producer and associate producer -- but AMEX produced approximately seven years worth of records for these individuals. In addition, according to the Journal, AMEX produced the corporate credit card receipts from at least six other journalists with no involvement whatsoever in the *Day One* news report, including reporters at *The Wall Street Journal.*

This whole episode is a cautionary tale for all investigative reporters. The paper trail left in modern reporting by use of credit cards and telephones may result in third-party production of documents that identify confidential sources and newsgathering efforts. And organizations such as AMEX may make mistakes that result in production of materials that otherwise should have remained private.

Matusevitch v. Telnikoff: Notice of Appeal Filed

Vladimir Ivanovich Telnikoff, the Soviet-emigre libel plaintiff, who is seeking to enforce a British libel judgment in the United States against his critic and fellow Soviet-emigre Vladimir Matusevitch, has filed a notice of appeal from a decision of the District Court for the District of Columbia holding that the British libel judgment was not enforceable under U.S. law. The district court analyzed that recognition of the British judgment, decided under law that was so different from that required by the First Amendment, would effectively deprive Matusevitch of his constitutional rights. *See, British Law Rejected Again* LDRC LibelLetter, Feb. 1995, at 1.

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The Globe Granted Summary Judgment: Issues of • Defamatory Meaning * Substantial Truth

In a decision that takes a broad, context based view of what is or is not defamatory, United States District Judge Thomas A. Higgins, Middle District of Tennessee, Nashville Division granted summary judgment in a libel action to Globe International, Inc., on February 21, 1995. The judge ruled that an article in the supermarket tabloid, *The Globe*, was simply not defamatory or was substantially true. The suit, *Stilts v. Globe International, et al*, No. 3-94-0420 (M.D.Tenn. Feb. 21, 1995), was brought by Ken Stilts, the former business manager of Naomi and Wynonna Judd, in response to an article published in *The Globe* on April 5, 1994, reporting on the acrimonious dissolution of the business relationship between Stilts and the Judds.

The article, running under the headline, "Wynonna and Naomi: We were ripped off for $20 million, they blame ex-business manager say pals," describes a dispute between the Judds and Mr. Stilts over money received while Stilts served as the business manager to the country music mother-daughter duo. Attributing the allegations to the Judds or their friends, the article reports that Stilts is accused of exploiting his business relationship with the Judds for his own financial benefit. In addition to the headline, the article states, among other things, that the Judds believed that Stilts was "bleeding [them] dry," because he "pocketed most of what [they] had earned," and that the Judds have demanded an accounting of their business dealings handled by Stilts while investigating legal options. The article further states that Stilts, through his attorney, denied any misappropriation or improper behavior.

Stilts claimed that the article implied that he had stolen money from the Judds, "impugn[ing] his honesty and integrity and damag[ing] his career as a manager of professional musical artists." *Id.* at 2. Globe countered Stilts' claim by arguing that "the published statements at issue are all either opinion or characterizing statements, substantially true or not defamatory." *Id.* at 3-4. The Honorable Judge Higgins agreed with Globe's arguments.

Judge Higgins began his analysis by applying *Milkovich* to determine whether the headline was factually verifiable. Addressing the nature of the headline, Judge Higgins went on to state that its "decidedly "imaginative expression" or "rhetorical hyperbole" . . . cannot reasonably be construed as stating actual facts about Mr. Stilts." *Id.* at 8, citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S.Ct. 2695, 2706, 111 L.Ed.2d 1, 19 (1990). Judge Higgins reasoned that "it is impossible to believe that any reader of this headline would have understood *The Globe* to be charging Mr. Stilts with committing the crime of stealing or with any other improper act. Rather, a reader would understand the words for their obvious meaning, namely, that the Judds blame their former business manager for having lost money." *Stilts* at 8-9.

Turning next to the text of the article, Judge Higgins also utilized *Milkovich* to conclude that "the language employed within the text is the very 'sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining that' the plaintiff committed the misdeeds in question." *Id.* at 9, *citing Milkovich*, 497 U.S. at 21, 100 S.Ct. at 2707, 111 L.Ed.2d at 19. The Judge then found that "the article cannot reasonably be construed as stating that Mr. Stilts did *in fact* exploit his business relationship with the Judds or engage in any financial wrongdoing." *Stilts* at 10, (emphasis in original).

In addition, Judge Higgins pointed out that the controversy reported in the article did, in fact, exist between the Judds and Stilts. Relying on the Judds' depositions which describe "numerous aspects of their business relationship with Mr. Stilts which they found troublesome," Judge Higgins found the "'gist' or substance of the article [to be] accurate." *Id.* at 11-12. On this basis, Judge Higgins stated that "[a]lthough the article is cleverly written in order to heighten interest and sensationalize its contents for the tabloid press, when read for a true appreciation of the subject matter, it is clear that the article simply recounts the existence of an actual controversy between the Judds and Mr. Stilts, with comments attributed to the respective parties." *Stilts* at 8. Acknowledging that "the *Globe* article is simply a sensationalized report of a rather garden variety controversy," Judge Higgins concluded by granting summary judgment on the ground that, "the substance or 'gist' of the article, which is that the plaintiff is involved in a dispute with the Judds concerning their dissatisfaction with their prior business relationship with him . . . cannot be denied." *Id.* at 12-13.

Deutsch, Levy & Engel of Chicago act as General Counsel to Globe International, Inc. The firm and Michael B. Kahane, a partner in the firm, were counsel to Globe International, Inc. in this matter.

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Ninth Circuit Adopts Three-Part Test in Nonconfidential Source Case

(Continued from page 1)

the history of the underlying lawsuit that the investigative author, Ronald J. Watkins, has faced an order of contempt only to have the Court of Appeals vacate the order. The case arose out of the battle over control of the U-Haul corporation within the Shoen family, and allegations concerning the violent murder of one of the family members, Eva Berg Shoen. Watkins, who would subsequently publish *Birthright*, chronicling the bad blood, entered into an agreement with Leonard Shoen, the founder of U-Haul, to exchange a percentage of book royalties and an interest in a possible future movie deal for in-depth interviews that would be used in the writing of the book. Prior to the interviews, Leonard Shoen had made at least 29 statements to the press implicating his sons, Mark and Edward, in the murder of Eva Berg Shoen.

In response to statements made by their father alleging involvement in the death of their sister-in-law, Mark and Edward Shoen brought this suit for defamation. Shortly after commencing the action, the brothers served Watkins with a "subpoena duces tecum" ordering him to appear with all documents and recordings in his possession regarding the interviews with Leonard Shoen. Watkins refused to appear at the deposition and was subsequently held in contempt. On appeal of the contempt order, the court of appeals vacated the holding reasoning that since the brothers had not even deposed Leonard Shoen himself, there was no way they could have exhausted all reasonable alternative means for obtaining the information sought from Watkins. *Shoen v. Shoen*, 5 F.3d 1289, 1296-98 (9th Cir. 1993) ("Shoen I").

The court also held that the privilege applied to investigative book authors and protected nonconfidential sources and materials -- both issues characterized by the court as ones of first impression for the Circuit. By the time the decision was announced, however, Leonard Shoen had been deposed and the brothers merely renewed their demand for Watkins' tapes and notes of his conversations with Leonard Shoen. Watkins also refused to comply with this second demand, contending that the result of *Shoen I* required satisfaction of a four-part test including a showing that the information sought goes to the "heart of the seeker's case." The district court disagreed and once again held Watkins in contempt.

The court of appeals, while vacating the order of contempt, also found Watkins' contention unpersuasive. Rather, beginning with the premise that any test that they would adopt "must ensure that compelled disclosure is the exception, not the rule." *Shoen II*, at 4, the court set out a three-part test that must be met before litigants can compel disclosure of information provided by a nonconfidential source. The court held that "where information sought is not confidential, a civil litigant is entitled to request discovery notwithstanding a valid assertion of the journalist's privilege by a non party only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Shoen II*, at 4. As to the third criteria, the court emphasized that a showing of potential relevance would not suffice; there must be a showing of actual relevance.

Turning to the facts of the case, the court then found that the plaintiffs had not made the requested showing necessary to satisfy the second and third prongs of the test. Plaintiffs argued that they sought evidence of defendant's ill will toward them. The plaintiffs had been found to be limited purpose public figures by the district court and a showing of actual malice would be required to sustain an action for defamation. Although actual malice can be shown by circumstantial evidence of ill will under Arizona law, the court found that the interviews conducted by Watkins occurred between one and six months before the allegedly defamatory statements were made by Leonard Shoen to the press, and therefore could not alone provide the evidence of ill will necessary to establish actual malice. The court reasoned that "Leonard Shoen's September 1991 statements, if any, regarding his attitude toward plaintiffs are not clearly relevant to an important issue in this litigation." *Shoen II*, at 5. In addition, the court pointed out that any information that could be gleaned from Watkins' notes on the issue of Leonard Shoen's ill will towards his sons would merely be cumulative since Leonard Shoen's deposition alone, during which he repeatedly referred to one of his sons as "Hitler," would allow a jury to "reasonably infer . . . that Leonard Shoen had ill will toward his sons." *Id.* at 5.

In response to plaintiffs' further contentions that Watkins' tapes and notes would provide evidence of Leonard Shoen's motivations for agreeing to the interviews, as well as valuable impeachment information, the court also held that the test was not met since the issues raised by the plaintiffs did not relate to an important issue in the case. *Id.* at 6.

In his dissent, Circuit Judge Leavy does not disagree with the three-part test set out by the majority, but rather argues that the plaintiffs have met the requirements demanded by the majority's test. Pointing out that Leonard Shoen was a "paid, nonconfidential informant," whose disclosures to Watkins were now largely "a matter of public record," while "the plaintiffs have been frustrated in their efforts to obtain [the] information," Judge Leavy states, "I can think of no more relevant evidence available to any party that would help the trier of fact to determine whether, at the time Shoen published the allegedly defamatory statements, he may have known they were false or acted with reckless disregard for the truth." *Id.* at 6-7.

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Following the Lead of Other States, California Considers Agricultural Product Disparagement Legislation

By Thomas Newton, James Grossberg and Seth Berlin

Legislation has been introduced in California that would strip speech about food products of much of its constitutional protection. California Senate Bill No. 492 would create a cause of action for producers and their trade associations against individuals or groups who "disparage" food products. The legislation was introduced by Freshman Senator and Chairman of California's Agriculture and Water Resources Committee Jim Costa (D-Hanford), and is sponsored by the Western Growers Association, whose members are responsible for growing about half of the fresh fruit, vegetables and nuts consumed in the United States. An identical bill, AB 558, has been introduced in the California Assembly by Assembly member Tom Bordonaro (R-Pismo Beach).

The legislation would allow a lawsuit against any person who "willfully disseminates false information to the public that a perishable food *product is not safe for* human consumption." Under the legislation's terms, information is considered "false" that is "not based on reliable scientific facts and reliable scientific data, and that the disseminator knows or should have known to be false." The legislation permits an award of compensatory and punitive damages and specifies that treble damages shall be awarded if the dissemination is intended "for the purpose of harming a producer."

At least seven other states have enacted some form of agricultural products disparagement statute, including Alabama, Florida, Georgia, Idaho, Louisiana, Mississippi and South Dakota. Several other states have considered and rejected similar legislation, including Colorado, Delaware, North Dakota, Pennsylvania and Texas. A number of states are currently considering legislation similar to that proposed in California, including Illinois, Iowa, Nebraska, Oklahoma, South Carolina, Washington (which has rejected several earlier proposed bills) and Wyoming. The Illinois bill goes so far as to criminalize such speech. These proposals are typically supported by growers and chemical producers. Opponents generally include consumer and environmental groups, in addition to the news media.

The California legislation, like that introduced in other states, would seriously undermine First Amendment and common law limitations on claims for disparagement and defamation. First, the legislation allows a cause of action by anyone with an economic stake in a generic product, including "trade associations" under the California bills, regardless of whether the plaintiff was identified in the speech at issue. By doing so, the legislation abrogates the constitutional mandate -- embodied, along with the constitutional malice requirement, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) -- that the publication at issue be "of and concerning" the plaintiff.

It would appear that, if anything, the "of and concerning" requirement should be applied with greater strictness to trade disparagement actions than to defamation claims brought to vindicate personal *reputational interests*. *Compare* Restatement (Second) of Torts § 623A, at 342, Introductory Note (at issue in product disparagement law is nothing more than a person's "legally protected interest in things") *with Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) ("the right of a man to the protection of his own reputation" reflects "our basic concept of the essential dignity and worth of every human being").

Notably, the California legislation does not even limit its cause of action to statements that "are clearly directed at a particular plaintiff's product," as does a similar statute recently enacted in Idaho. Idaho Code § 6-2003(4) (a "statement regarding a generic group of products, as opposed to a specific producer's product, shall not serve as the basis for a cause of action").

Second, the proposed legislation *fundamentally alters the plaintiff's* obligation to prove falsity. The California proposal would permit a plaintiff to meet that burden merely by convincing the trier of fact that the *allegedly disparaging* speech was based on scientific facts and data the reliability of which was not sufficiently established. Yet, it has become increasingly evident that whether scientific facts or data are reliable is not easily ascertained. As the Supreme Court recently observed, "there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory." *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2798-99 (1993).

By requiring the news media to assume the risk of a damage award if a jury later determines that a news report regarding the potential dangers arising from a food product was not based on scientific information shown to be reliable, the California legislation would impede the media's ability to disseminate news and information vital to the public's health and safety. Thus, for example, a newspaper would have to think twice before reporting the results of conflicting scientific studies on possible carcinogenic risks arising from the use of certain pesticides on fruit, for fear that a jury would not be convinced that the disparaging studies were based on "reliable scientific facts and . . . data."

Third, the proposed California legislation circumvents the constitutional malice requirement by allowing a cause of action where the "disseminator knows or <u>should have known</u>" the reported information to be false. As the Supreme Court reaffirmed in *Harte-Hanks Communication, Inc. v. Connaughton*, 491 U.S. 665-67 (1989), the constitutional malice test is a

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Product Disparagement

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subjective one; even a showing of "highly unreasonable conduct" will not satisfy it.

The genesis of this wave of product disparagement legislation appears to be a 1989 *60 Minutes* broadcast entitled "A is for Apple." The broadcast examined the health risks, especially to children, posed by various chemicals sprayed on apples, including Alar, a growth regulator then widely used on apples. A product disparagement suit based on the broadcast was filed on behalf of Washington state apple growers. The plaintiffs claimed the broadcast caused as much as $75 million in losses to their industry and forced some growers into bankruptcy. CBS won summary judgment in the lawsuit, *Auvil v. CBS "60 Minutes,"* 836 F. Supp. 740 (E.D. Wash. 1993), which is currently on appeal to the Ninth Circuit. The California Newspaper Publishers Association and over 40 other media entities have filed an amicus brief in support of CBS.

Legislative debate on food product disparagement proposals has sometimes appeared comical. In the Texas legislature, for instance, one legislator offered an amendment to a disparagement bill that would exempt from liability those, "including a sitting president," who make disparaging statements "about broccoli, succotash, breadfruit, liver, brussel sprouts or any other demonstrably 'icky' tasting food or food additive." Nevertheless, such legislation enjoys the support of powerful economic interests, and threatens to inhibit the vigor of public discussion and debate on the safety of the nation's food supply.

Thomas Newton is General Counsel/Legislative Advocate of the California Newspaper Publishers Association. James Grossberg and Seth Berlin are partners in the firm of Ross, Dixon & Masback (Irvine, California and Washington, D.C.), which authored the media amicus brief in the appeal of Auvil v. CBS "60 Minutes".)

Arizona's "Agricultural Protection Act"

By David J. Bodney

The Arizona legislature is well on its way to passing an "Agricultural Protection Act," which would enable the producer or shipper of perishable agricultural food products to sue for compensatory and punitive damages "as a result of wilful or malicious public dissemination of false information that the food product is not safe for human consumption...." [H.B. 2257, 42d Leg., 1995 Ariz. 1st Sess.] In addition, the Bill would permit such producers, shippers or their trade associations to collect treble damages upon proof that a person had "intentionally disseminate[d] false information to the public that a perishable agricultural food product is not safe for human consumption for the purpose of harming a producer or a shipper." The Bill defines "false information" as "information that is not based on reliable scientific facts and reliable scientific data and that the disseminator knows or should have known to be false."

On February 16, 1995, House Bill 2257 passed the Arizona House of Representatives, and traveled across the mall to the Arizona Senate. Despite an attempt by the Arizona Newspapers Association ("ANA") to derail the legislation, and an array of editorial criticism in the state's major newspapers, the Bill on March 8 passed the Senate's Natural Resources, Agriculture and Environmental Committee by a seven to one vote. Following the March 8 vote, the Senate president briefly assigned the Bill to the Judiciary Committee, but withdrew H.B. 2257 from further consideration after receiving "heavy pressure" from agricultural interests, according to the ANA. Before the Bill leaves the legislature and reached the Governor's desk, it must withstand consideration by the party caucuses and the Committee of the whole.

While most of the editorial slings and arrows have ridiculed the proposed legislation -- the *Arizona Republic*'s Pulitzer Prize winning cartoonist Steve Benson lampooned the Bill by sketching a child on trial for calling his carrot "yucky" -- Arizona's Republican-dominated legislature does not appear daunted by the attacks. (Arizona's legislature is, as a March 13 *Republic* editorial pointed out, "the same body that voted not too long ago to secede from the union.") At bottom, the Bill contains a local provision that should give non-Arizona agricultural producers pause before rejoicing: House Bill 2257 defines "perishable agricultural food product" as any agricultural or aquacultural food product or commodity that is grown or produced in this state...."

And who said "it's not easy bein' green"?

Mr. Bodney is a partner with Steptoe & Johnson in Phoenix, Arizona.

WISCONSIN MEDIA LAW REPORT

The Wisconsin law firm of La Follette Sinykin, a longstanding member of the LDRC Defense Counsel Section, has prepared a Media Law Report 1994, summarizing the significant Wisconsin state and federal court decisions and legislation in 1994 that affect the media. This valuable summary is available to LDRC members upon request to Brady C. Williamson, Esq., La Follette Sinykin, One East Main Street, Post Office Box 2719, Madison, WI 53701-2719.

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Scientologists Enjoin Internet

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These claims by plaintiff, Religious Technology Center, are just a recent example of the use of copyright infringement and trade secret causes of action to limit, if not halt, unwanted discussion.

Plaintiff's arguments posit that the critical discussions make unauthorized use of the writings of L. Ron Hubbard in violation of copyright and trademark law. Armed with an ex parte TRO, off-duty police officers and church members raided Ehrlich's home and seized six boxes of computer diskettes and other material, according to a report in the *San Jose Mercury News*. According to that report, church members had earlier demanded that Netcom use church-supplied software to monitor and "filter out" any messages that Erlich may post regarding Scientology.

On February 21, U.S. District Court Judge Ronald Whyte in the Northern District of California dissolved the TRO against Netcom and the local bulletin board which has a contract with Netcom to obtain USENET access for its subscribers. Although the plaintiff's motion for a preliminary injunction against Netcom and the local bulletin board was denied, U.S. District Court Judge Ronald Whyte granted the restraining order against Erlich, who used the local bulletin board in Los Angeles to post his commentary to USENET.

As of this writing, Erlich, a former church member, is without counsel. Ehrlich asserted in newspaper interviews that in their raid, church members also took dozens of books and personal material from his home. (For more on the structure of the Internet, see "Media Lawyers' Guide to The Internet", this issue).

The plaintiff has renewed its motion for injunction against Netcom. Pillsbury Madison and Sutro, which represents Netcom, plans to file a motion to dismiss on copyright and First Amendment grounds.

Media Lawyers' Guide to the Internet

By Charles Glasser

"Internet" is one of the most hard to define, yet overused buzzwords in the information age. It has generally come to mean some kind of super-network, the vaunted information superhighway that will deliver tremendous amounts of material to almost anyone, anywhere.

It's true that the Internet has opened lines of communications for millions of people in the last few years. But the complicated structure of the 'net makes navigating through legal issues difficult, particularly with regard to liability. How is counsel to understand this structure?

To begin with, there is no such thing as a network called the "Internet." Rather, the Internet is a decentralized collection of networks managed by several different groups like the non-profit Internet Society. In 1984, the National Science Foundation adopted technologies created by the Pentagon's ARPANET experiments, and created a backbone network linking existing supercomputer centers and funding regional networks at universities, government labs, and corporate research facilities.

In short, the Internet is really a network of smaller networks, all linked in web-like fashion. Each smaller network establishes their own Acceptable Use Policies, and establishes *rates for their constituent distributors*, who are called "service providers" or "access providers". These service providers, like Delphi, America OnLine or Prodigy, in turn, sell Internet access directly to the consumer.

So just how big is this thing? According to the Internet Society, in 1994 there were 15,000,000 users with 1,500,000 computers on 30,000 different networks in more than 200 countries: each one tied to the Internet. It is small wonder then, that plaintiff's counsel sees in the 'net a bonanza of opportunity to claim harm to their clients.

We thought that it would be helpful to explain the structure of the Internet in a manner that could help members of the media bar to visualize the 'net , as a guide to developing legal theories and applications.

Addresses

Each Internet user has an address that is unique, and indicates where an

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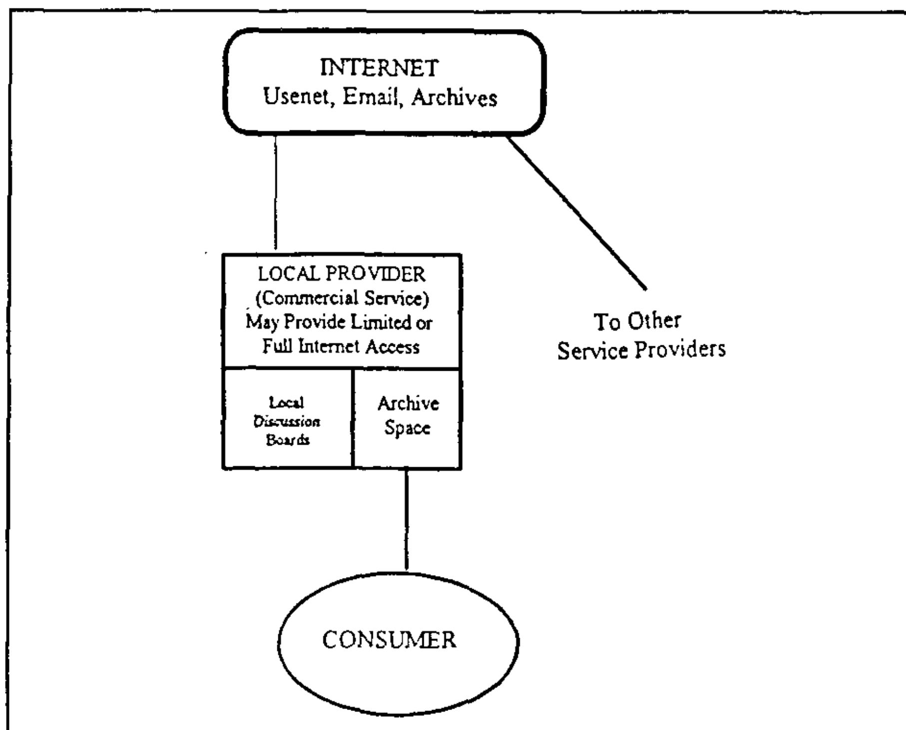

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Media Lawyers' Guide to the Internet

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account resides. For example, my address is CJG6159@is.NYU.EDU. The part in front of the @ is my account name, the ".is" indicates a section at New York University School of Law (also tipped off by the ".nyu" appellation) and the ".edu" indicates that my provider is an educational institution. This part behind the @ sign is also called a "host name." Host names vary from ".com" which indicates a commercial provider such as Prodigy or Delphi, to ".org" which indicates a non-profit group such as the ACLU or Greenpeace.

Because the 'net is a network of networks, there is no single route for information to go from one computer to another. A message from the Columbia Law Review to the Library of Congress may actually go through a computer at the University of Chicago, or even farther, depending on how much traffic is on-line at the time.

Malicious computer experts are able to forge the address of a sender, but a sent message collects a string of codes that indicate the route of the message, allowing them to be traced. These "headers" can be forged as well, however, albeit with more difficulty.

Commercial Providers

When a user subscribes to a local bulletin board, or a service provider such as Prodigy, Compuserve, or America OnLine (AOL), that person is not necessarily on the Internet. These providers do offer varying degrees of access to the larger Internet. Commercial providers are independent networks accessible only to other subscribers. Many of these providers maintain their own discussion groups, which some refer to as bulletin boards. Although these boards are not accessible on the Internet, the number who read these boards is not small: Prodigy boasts more than 2,000,000 subscribers, and Compuserve, Delphi, AOL and others can lay claim to just as many. Unlike the Internet's USENET newsgroups (*see below*) some of the commercial providers have hired staff or employed software to monitor messages placed on commercial boards, and sometimes delete offensive or inappropriate postings, a structure which has suggested the assumption of a duty of care.

The huge growth rate of these commercial services is partially due to the recent offering of Internet access to their consumers. As detailed below, service providers may offer all, or just small parts of the Internet to the consumer. In other words, although there are certain boards accessible to only Prodigy members, Prodigy (and others) also provide a "gateway" to the larger Internet, and all of its world-wide lists, boards, archives and Email.

E-mail

The simplest aspect of the Internet, E-mail is a person-to-person messaging system, not unlike a telegram. Each user has a mailbox that collects incoming messages. The only caveat here is to distinguish Internet E-mail from E-mail that is sent around an office's Local Area Network, or LAN. In other words, a corporation may have a LAN which passes messages around an office, but this is not the same thing as sending mail through the 'net.

A few small providers do not supply each user with a private mailbox, but rather all users share a common mailbox, accessible to anyone on that system. This arrangement, however, is increasingly rare.

USENET Newsgroups

Ed Krol, author of *The Whole Internet*, describes the 'net as "ordered anarchy." No aspect of the Internet better fits this description better than USENET. Also called "newsgroups," these bulletin boards range from the innocuous, such as groups for Volkswagen enthusiasts or country-and-western songwriters, to the downright strange, such as sexual bondage and UFO conspiracies. There are at this writing more than 6,000 different newsgroups, which receive millions of messages a day.

There is no central administration for these boards, nor do they reside in one place and then get sent out. Rather, each newsgroup is a collection of messages that constantly circulates around the globe. Each service provider chooses whether or not to provide access to USENET for its members, selecting which ones are appropriate. Most educational institutions, for example, allow access to all USENET groups, however Carnegie-Mellon, concerned with liability exposure on behalf of its underaged student; subscribers, has recently stopped receiving boards of a sexual nature. Commercial providers pay regional networks for access to USENET, and some commercial providers, in order to maintain a "family" theme, also restrict members' access to more controversial boards.

Once a subscriber does have access to a board, that subscriber can add a message or reply to the board. (This is called a "posting.") This posting is then attached to the newsgroup and can be read by anyone with access to the board. As newer messages replace older ones, the older messages are deleted. The time that a message stays on the board varies with the board's activity, and a message can stay on the circuit for several weeks, or be replaced in a few days. However, republication and statute of limitation issues emerge here, as an older message can be copied by any user and "re-posted" to the board.

The anarchistic culture of the 'net eschews approval and censorship, and for the most part, anything can (and often is) posted on these boards. However, there are a number of boards that are "moderated." This means that postings to these boards are first sent to a moderator (usually a volunteer with an interest in the subject matter) who reviews the message for content and appropriateness. Once the message passes muster, it is affixed with an approval code and then sent on to the board. Industrious hackers have

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Media Lawyers' Guide to the Internet

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managed to forge the codes.

LISTSERV's

Unlike USENET, a LISTSERV is a board that *does* have a central administrator and a single source of distribution. The best way to think of a LISTSERV is like a pooled mailing list. A message is sent to a central point, and is them automatically copied and sent to every other member of the list. These boards are also subject specific, and range from Law School professors to Elvis impersonators. Each individual user must subscribe to be on the list by requesting subscription from the person managing the list, called a "list owner." (List owners, like moderators, are also volunteers with an interest in the subject matter.) Messages to these boards are sent to the host computer of the list owner, and are then redistributed via E-mail to each person on the list. These boards are sometimes, but not often moderated. Most lists also publish a Frequently Asked Question document (called an FAQ) every few months, setting forth policies and guidelines of that list.

For the most part, only list members will receive messages from the LISTSERV board, but some groups also copy their messages to USENET. Because LISTSERV's utilize E-mail rather than USENET, anyone capable of receiving E-mail can join one of the hundreds of LISTSERV's.

Archives

While the USENET and LISTSERV aspects of the 'net are temporal insofar as postings may disappear in a few days, Internet access also opens windows to millions of permanent files. Many subscribers, particularly those from educational institutions are allocated storage space on the computer of their service provider. This space, in turn, is accessible to others on the 'net. The way that this space is used varies wildly, from scientific data on antelope migration in Finland to ramblings of Ku Klux Klan members. Although there are several different ways for users to get to and search through these archives, the large memory required to keep these files is usually found at educational institutions or larger Internet providers, like Panix and Netcom. Aside from restrictions on space, providers' administrations almost never interact with these files.

Users can employ any one of several methods to access these files. FTP, Gopher, Netscape, Mosaic and other programs are ways that any user with Internet access and the appropriate software can read and copy to her machine (called "downloading") millions of files, with both pictures and sound. It is in this aspect of the 'net, because users creating the archive upload material into the space, that the greatest number of copyright issues arise. There are still unresolved instances of uploading copyrighted material into these publicly accessible archives for general distribution. Also, new material uploaded to a site and later downloaded from that archive may raise other infringement questions.

Spambots, Killfiles and Flames

As mentioned earlier, the 'net is generally imbued with an anarchistic, anti-authoritarian ethos. For the most part, restrictions on content are abhorred. Generally, most users realize the wide range of dissemination that the Internet has given to the ordinary person. This voice has also been recently realized by marketers, who see the huge Internet audience as potential customers for products and services. Often, the interests of 'net users and marketeers clash, sometimes with explosive results. For the most part, 'net users strongly resent and resist advertising on the 'net.

Despite the general disdain for commercialization, advertisers' approaches, like those of 'net users, varies wildly. Some, respectful of the sensitivity regarding commercialization, post ads in limited numbers, or set up archives where interested parties can go and search through "electronic malls." On the other hand, other privateers have hired computer specialists to design programs that send millions of commercial messages to any and all mailboxes and newsgroups. This wide-cast messaging is called "spamming the 'net" and programs that spam are called "spambots." One of the early incidents in this regard involved two Florida attorneys, Martha Siegal and Lawrence Canter, who became infamous as the "Green Card lawyers." Last year, Canter and Siegal's spambot sent millions of messages advertising their immigration practice, to the point where sections of the 'net actually had to be temporarily shut down. The Internet community reacted with outrage bordering on hostility, and Canter and Siegal received millions of angry replies, called "flames," and also became the subject of millions of newsgroup postings which ranged from reasoned discourse to ad hominem attacks. Canter and Siegal, who were disbarred from Florida practice on other grounds and now practice in Arizona, counterattacked by spamming once again, this time threatening to sue for libel anyone who posted such attacks. Although no libel actions were brought, the episode has died down, partially due to many 'net users' employment of "killfiles," which are programs that automatically reject mail from a particular source. These killfiles, however, do not prevent postings from appearing on local boards or USENET newsgroups.

Charles Glasser is a second year student at New York University Law School and is an LDRC intern.

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Two Recent New York Misappropriation Decisions

1. *Merriwether v. Shorr*, N.Y.L.J., Mar. 6, 1995 at 28 (N.Y. Sup. Ct. Mar. 6, 1995)

The trial court dismissed claims for commercial misappropriation and emotional distress against a publisher of a photograph of a lesbian couple, dressed as bride and groom, on their way to a ceremony celebrating their relationship. The photograph appeared with an article on the photographer. The court refused to dismiss a claim and granted an injunction against the photographer on the commercial misappropriation claim, however, although dismissing the emotional distress claim against the photographer as well.

The photographer, doing a stint as a limousine driver, had taken this and other photographs with the consent of the plaintiffs, who had leased defendant-photographer's limo to drive them between the church ceremony and the subsequent party. The plaintiffs had failed, however, to sign a release form submitted by the photographer at a later point. The article with which the picture appeared was a feature piece in Popular Photography on the defendant-photographer and the pictures that she took in her limousine.

Plaintiffs brought claims against the photographer, Kathy Shorr, and the publication, Hachette Filipacchi Magazines, Inc. The claims were under New York Civil Rights Law Sections 50 and 51, which authorize injunctive as well as monetary damages for commercial use of an individual's name or likeness without their prior written consent. Plaintiffs also brought emotional distress claims against both defendants.

New York privacy law is hedged by the limited provisions of Section 50 and 51, which do not provide for a cause of action in New York for revelation of private facts. New York courts do not permit a commercialization claim against a publisher for dissemination of information of public interest. And the courts interpret the public interest standard very broadly. The photograph at issue here was related to the article. The court found that the article and the issue of the photograph, a ritual that could symbolize social progress of the modern gay community, were of public interest. The publisher was not liable for commercialization.

The photographer, however, may be liable, the New York courts having found that the sale of photographs by a photographer is a commercial transaction. Accordingly, the plaintiffs were entitled to preliminarily enjoin the defendant-photographer from future sales and to proceed with their damage claims against her.

While the plaintiffs contended that the publication of their lesbian relationship caused enormous emotional harm to them -- their fellow employees, among others, did not know of it -- the court had little difficulty determining that the conduct of both defendants did not rise to the level of extreme or outrageous, necessary to support such claims. The photograph was taken with plaintiff's permission, it was a respectful picture, displayed with a modest and accurate caption.

2. *Vinales v. Community Service Society of New York*, N.Y.L.J., Jan. 24, 1995, at 27 (N.Y. Sup. Ct. Jan 24, 1995)

A not-for-profit corporation failed to obtain dismissal of a claim arising under Sections 50 and 51, based upon defendant's inclusion of a picture of the plaintiff in its newsletter which was used to solicit funds for needy New Yorkers. Plaintiff, who allegedly is neither a client of the defendant nor has ever received funds from the defendant, sued claiming the defendant violated the statutes by commercially exploiting her likeness. The defendant, Community Service Society, argued in support of its motion to dismiss that since it is a not-for-profit organization which does not engage in commerce it could not have commercially exploited the plaintiff's likeness. Further, defendant asserted that the newsletter was a publication of newsworthy events or a matter of public interest exempting it from Sections 50 and 51. Finally, defendant claimed the First Amendment protected the newsletter as a form of non-commercial speech.

In denying the motion, Justice Silver pointed out that under *Smith v. Long Island Youth Guidance*, 581 NYS 2d 401 (2nd Dept. 1992), the written solicitations of not-for-profit corporations may constitute a form of advertising. The court then found that the newsletter was an advertisement on its face. The court also noted that the newsworthy exception did not apply since the plaintiff was not a public figure nor did her photo have any reasonable relationship to the mailing. In addition, the defendant did not offer enough proof that the newsletter was newsworthy, especially in light of the fact that the corporation is not a media enterprise or a media defendant. Finally, Justice Silver disposed of the defendant's Constitutional arguments stating simply that the unauthorized use of the plaintiff's picture is not protected under the First Amendment as a matter of law.

LDRC wishes to thank all of our spring interns, Suzanne Brackley, John Maltbie and Robert Sommer, all Brooklyn Law School attendees; Charles Glasser, a student at New York University Law School; and Gary Wong, who attends Hofstra University Law School, for their great work and tremendous contributions to this month's *LibelLetter*.

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The Libel-Proof Doctrine At Issue Before Texas

The Texas Supreme Court has been asked to reject certain limitations placed upon the libel proof doctrine by a mid-level Texas court. In *New Braunfels Herald-Zeitung v. McBride* 1994 WL 663633 (Tex. Ct. App. 1994) the plaintiff, a man with a criminal record, asserts a libel claim against New Braunfels Herald-Zeitung, a newspaper, for a report done on the plaintiff's arrest on a 1989 robbery charge which was eventually dropped. The article reported a sheriff's quote that the plaintiff had gotten away with $1,700 in cash and cigarettes. The Herald-Zeitung filed a motion for summary judgment on the ground that the plaintiff, a man with a criminal history, is libel-proof. This motion was granted by the state district court but reversed by the court of appeals.

In their briefs to the Texas Supreme Court, both the petitioner and the *amicus curiae* assert that the court of appeals' holding that the libel-proof doctrine is only applicable when the plaintiff's prior criminal activities are notorious and meet a minimum number of required convictions is unsupported by the common law and violates the scope of the libel-proof doctrine established in prior Texas cases.

It is also argued by the petitioner that the presumption of good character used by the court of appeals, regardless of the plaintiff's past criminal record, is a misinterpretation of established Texas precedent. Above all else, the petitioner states that the libel-proof doctrine is based on common sense. When a plaintiff lacks a good reputation that could be damaged, the plaintiff is deemed libel-proof.

The *amicus curiae* brief asserts that the state constitution of Texas mandates the use of the libel-proof doctrine where an article is of public concern, the defendant is a member of the media, and the impeaching reputational facts are uncontested convictions in the public record.

In *New Braunfels Herald-Zeitung v. McBride*, Fulbright & Jaworski filed the brief on behalf of the petitioner and the *amicus curiae* brief was submitted by Ogden, Gibson, White & Broocks, L.L.P. The amici included Texas Daily Newspapers Association, Texas Press Association, Reporters' Committee for Freedom of the Press, and Texas Association of Broadcasters. No decision has yet been handed down by the Supreme Court of Texas.

California Court of Appeal Considers Neutral Reportage

By Walter Allan

Pending before the California Court of Appeal for the Second District (in Los Angeles) is a case that may finally result in a definitive state court ruling on the neutral reportage privilege. The case of *Khawar v. Robert Morrow, et al.*, (Appeal No. B084899) arose from a best-selling book on the assassination of Robert Kennedy, entitled *The Senator Must Die: The Murder of Robert Kennedy*, and a subsequent news report regarding the book that appeared in the nationally distributed newspaper, the *Globe*. The theme of the book was that Robert Kennedy was not assassinated by Sirhan Sirhan but rather by a man identified as "Ali Ahmand." Photographs in the book identified as being those of Ali Ahmand depicted the plaintiff, Khalid Khawar.

The jury was instructed on the issue of neutral reportage, and specifically found the *Globe*'s report of the book to be a neutral one. However, the trial judge disagreed with that finding, holding that the *Globe* could not invoke the neutral reportage privilege because the *Globe*'s reproduction of a photograph from the book made the plaintiff, according to the judge, identifiable for the first time. A total verdict of $1,175,000 was entered against the *Globe*.

The *Globe* has appealed, arguing in part that the jury's finding was binding on the trial court and provided the *Globe* with a complete defense. The American Civil Liberties Union of Northern California and several media organizations, including Chronicle Publishing Company, Lesher Communications, Inc., The San Jose Mercury News, Inc., The Recorder, and the San Francisco Bay Guardian, will request permission to file an amicus brief in support of the *Globe*. Amici will urge express adoption of the neutral reportage privilege in California.

The neutral reportage privilege has been favorably cited by the California courts (*see*, *Grillo v. Smith*, 144 Cal. App. 3d 868, 162 Cal. Rptr.701 (1980); *Weingarten v. Block*, 102 Cal. App. 3d 129,162 Cal. Rptr. 701 (1980), *cert. denied*, 449 U.S. 99 (1980); and *see Stockton Newspapers v. Superior Court*, 206 Cal. App. 3d 966, 254 Cal. Rptr. 389 (1989), *disapproved on other grounds*; *Brown V. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406 (1989)), and has been applied by federal district courts sitting in diversity in California (*see*, *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984); *Ward v. News Group Intern.*, 733 F. Supp. 83 (C.D. Cal. 1990). However, to date, no California appellate court has expressly adopted the neutral reportage privilege. Because the jury in the *Khawar* case found that the *Globe*'s report was a neutral one, the case provides the opportunity for the court to address the issue definitively.

Walter Allan is a partner in the appellate group at Pillsbury Madison & Sutro in San Francisco. He along with Edward P. Davis, Jr., a partner, and James M. Chadwick, an associate, are preparing an amicus brief in this case.

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Sweeney v. Prisoner's Legal Service

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case, the appellate division concluded that 1) the prisoner's complaint was not credible; 2) defendants had "failed to fully investigate the complaint before publishing it"; and 3) "defendant's underlying motive was to prove a pattern of abusive conduct by correction officer." These factors, the court reasoned, were sufficient indicators that defendant had purposefully avoided the truth by failing to investigate the prisoner's allegations, and therefore, plaintiff had proven actual malice.

The Court of Appeals disagreed. It found that without direct evidence that defendants were aware that the prisoner's report was probably false, a failure to investigate as to a statement's truth is not sufficient to prove actual malice, regardless of whether a "prudent person would have investigated before publishing the statement." The Court of Appeals decided that here the plaintiff had not provided the courts below with any direct evidence. Relying heavily on the Supreme Court decision in *Harte Hanks, Inc. v. Connaughton*, 491 US 657 (1989), the Court of Appeals argued that failure to investigate must be the "product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity" of a published statement."

The court disagreed with the appellate court's inference that the prisoner's statement was incredible because he was a convicted felon who had been disciplined, and had not suffered serious injuries. Furthermore, the Court of Appeals reasoned that even were such an inference valid, there was no support for the "further inference that defendants were likely aware that [the prisoner's] allegations were probably false." In any case, as the court explained, the prisoner's statement was false only in the sense that he had misidentified his assailant, not because the incident had not occurred. As to defendant's desire to prove a pattern of officer abuse, the court stated that according to *Harte-Hanks* "even if a defendant's state of mind or motivation in publishing a statement is viewed as circumstantial support for a finding of actual malice, such factors should not be given undue weight." In light of these factors, the court concluded that defendant's failure to investigate the allegation was "at most, negligent," and therefore did not even meet the minimum standard of recklessness required to prove actual malice.

Involuntary Public Figure

(Continued from page 1)
The case involved a plaintiff, Lynette Harris, who with her twin sister, Leigh Ann Conley, were the subjects of nationwide publicity from their criminal convictions (later reversed) for failing to report as income more than $1 million they received from a rich widower. The defamation case arose, following the reversal of both convictions, from the magazine's February, 1992 report about an author's experiences writing a book about Ms. Harris and the tax case. *See, Involuntary Public Figure Decision in Wisconsin Federal Court* LDRC LibelLetter , July 1994, at 1.

The Seventh Circuit's decision in *Harris* advances the "involuntary public figure" doctrine by recognizing that states may provide more protection for free speech than the First Amendment requires. The decision on state law grounds takes no position on the division in some federal courts over the recognition of involuntary public figures. *Compare Littlefield v. Ft. Dodge Messenger*, 614 F.2d 581 (8th Cir. 1980) *with Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1985).

The Seventh Circuit acknowledged in *Harris* that whether a defamation plaintiff is a "public figure" is a question of federal constitutional law. Because the Supreme Court has not yet defined the "precise contours" of the "public figure doctrine," the court applied Wisconsin law, which clearly and unambiguously embraces the involuntary public figure doctrine.

> Whether a plaintiff is a "public figure" or simply a private person is a question of federal constitutional law and Supreme Court rulings are controlling. Nevertheless, because the Supreme Court has not defined the precise contours of who constitutes a "public figure" and because states are entitled to provide a broader, though no more constricted, meaning to "public figures," resort to Wisconsin case law is appropriate in this diversity action.

This reasoning provides independent grounds for defense of defamation suits even if the Supreme Court someday finds that First Amendment protections do not extend to speech about involuntary public figures. The court affirmed the principle that defamation is a common law tort where, as with the opinion defense, states can and should interpret their own constitutions and common law traditions to protect speech on public issues.

Robert J. Dreps is a partner in the firm of La Follette & Sinykin in Madison, Wisconsin which represented Milwaukee Magazine in this case.

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D.C. Court Clarifies Law

(Continued from page 1)
direct quote opposing Posner's premise and above the photographs was the headline: "GUILTY OF MISLEADING THE AMERICAN PUBLIC."

Lane's objections to the advertisement boiled down to two: (a) the unauthorized use of his name, fame and likeness to sell *Case Closed* and (b) the suggestion that he had been intellectually dishonest with the American people.

On January 30, 1995,Judge Lamberth granted Random House's and Posner's motion for summary judgment filed prior to discovery as a motion to dismiss with affidavits and exhibits.

The opinion is remarkable in a number of respects:

o It clarifies the murky law of misappropriation, ruling that since "Lane's picture and quotation are newsworthy and incidentally-related to a protected speech product, they cannot form the basis for a successful misappropriation claim."

o It rejects Lane's view that promotional material for editorial products is entitled to less than full First Amendment protection, ruling that "the court finds no justification for categorizing the Random House advertisement as commercial speech, nor for diminishing the constitutional safeguards to which it is properly entitled."

o It represents the first application in Washington of the new "supportable interpretation" standard crafted by D.C. Circuit Chief Judge Harry Edwards in *Moldea II (Moldea v. The New York Times Co.*, 22 F.3d 310). Judge Lamberth invokes *Moldea II* to protect a written work other than a book review. He finds the language "GUILTY OF MISLEADING THE AMERICAN PUBLIC" to be protected opinion, because it "reflects differing interpretations of the murky facts surrounding the Kennedy assassination." The decision should therefore be persuasive in extending Moldea II's analysis to libel cases involving not just commentary but also factual disputes over events that have happened in the past.

The breadth of Judge Lamberth's decision sets it apart from a narrower but also favorable ruling by a New York court in another case over the Random House advertisement (*Groden v. Random House*, No. 94 Civ. 1074 (S.D.N.Y. Aug. 22, 1194)). The Groden claim focused on commercial appropriation under New York law and false advertising under the Lanham Act.

Beyond the important legal issues, *Lane v. Random House* also offers an uncommon human interest twist and an object lesson on the capability of the bench for dispassionate objectivity.

Several months ago, Judge Lamberth treated Mr. Lane quite differently when he awarded Lane approximately $500,000 in attorneys' fees against the law firm of Wilmer, Cutler & Pickering arising out of discovery issues in a discrimination lawsuit against Cap Cities/ABC. In that case, Judge Lamberth commended Lane for acting "in the highest tradition of the bar".

In the Random House litigation, however, all solicitude and admiration for Lane is gone. Instead, the Judge chides Lane in this closing passage from his opinion:

Mark Lane might well profit from Jefferson's sage advice: " laid it down as a law to myself, to take no notice of the thousand calumnies issued against me, but to trust my character to my own conduct, and the good sense and candor of my fellow citizens." If nonetheless Lane is affronted by such minor provocations as the court addresses today, he may elect to minimize his exposure by opting for a lower public profile. More likely, having acknowledged that publicity is the lifeblood of his career, Lane will have to overcome his brittleness -- or seek solace elsewhere than from this court.

Bruce W. Sanford, a partner and head of the Media & Communications Group at Baker & Hostetler, represented Random House, Inc. and author Gerald Posner in Lane v. Random House as well as the New York Times Co. in Moldea v. The New York Times Co.

THE PRO SE PLAINTIFF DISMISSED/A GOOD PRECEDENT

It is not uncommon, sadly, that media receive pro se complaints from those who believe that the defendant(s) is monitoring and publishing their activities, thoughts, private actions or is otherwise harassing them. It therefore may be of some value to know that Federal District Court Judge Sprizzo, in the Southern District of New York, has written an opinion dismissing such a complaint on the grounds, *inter alia*, that the plaintiff has failed to meet the pleading requirements of Federal Rule of Civil Procedure 8. *Queen Esther Jones v. Capital Cities/ABC Inc.*, et al., 93 Civ. 2915 (JES) (S.D.N.Y. Feb. 1, 1995)

Even though, as the court acknowledged, a pro se action was to be "interpreted liberally by the Court", plaintiff's complaint, which contained a "montage of unsupported, vague and conclusory allegations" was to be dismissed as plaintiff set forth no facts in support of any claim that would entitle her to relief. (Slip op. at 4)

ABA Conference In London

The ABA Section of Litigation is sponsoring a conference in London on April 30-May 5 on civil litigation in both England and the United States that will feature on May 3 a program titled "From Sir Thomas More to O.J. Simpson: American and British Responses to Issues of Fair Trial/Free Press and Privacy. For more information on the conference, which is called "New Directions in Civil Litigation in England and the United states: Making the Adversary System More Efficient and Fair", contact the American Bar Association.

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THE LDRC ANNUAL DINNER

Presenting LDRC's *William J. Brennan, Jr. Defense of Freedom Award* to

JUSTICE HARRY A. BLACKMUN

LDRC is truly honored to be able to invite all of you to spend this evening with Justice Blackmun as our esteemed guest.

PLEASE NOTE NEW DATE, TIME AND LOCATION:

NOVEMBER 9, 1995
THURSDAY EVENING
7:30 P.M.

THE ANNUAL DINNER HAS MOVED --

*** New Night: Thursday**

*** New Location: The Sky Club Atop the Metropolitan Life Building**

As in past years, however, the Annual Dinner will be preceded by a cocktail reception sponsored by Media/Professional Insurance.

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LDRC 50-STATE SURVEYS
SEND IN YOUR ORDER FORMS AND PAYMENT!

The order forms for the **1995-96 50-State Surveys** -- now in two volumes with new and expanded materials on non-libel claims -- have been mailed out. Thank you to those of you who have already sent in your order forms. We hope that all of you will order **EARLY** and often. Please send in payment with your order form and check the bottom line if you want a standing order.

We have already heard from a number of preparers who believe that the law that they are analyzing for the **new 50-State Survey: Media Privacy and Related Law** will be of great use to LDRC members and all media lawyers.

The **50-State Survey: Media Libel Law**, due out in October, will continue to offer extended and extensive material on libel in all 50 states, U.S. territories and the District of Columbia. It will also offer again this year, outlines of the law in the federal circuits, summary issue charts at the end -- all of the features that have made the **50-State Survey** so valuable in years past.

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LDRC would urge LDRC members to notify the LDRC Executive Director of any new cases, opinions, legislative and other developments in the libel, privacy and related claims fields. LDRC welcomes submissions from LDRC members for the *LDRC LibelLetter*.

LDRC members are encouraged to make copies of the *LDRC LibelLetter* for distribution to colleagues within their organization.