

LDRC

Libel
Defense
Resource
Center

LIBELLETTER

Reporting Developments Through March 17, 2000

In This Issue . . .

LIBEL

Levan v. ABC Will Not Receive Further Review, p.3
TX Court Finds No Libel By Implication if Statements are True, p.8
CT Court Dismisses Mistaken Photograph Case, p.9
Van Horne v. Muller Settled for \$1.6 Million, p.9
HI Court Finds No Jurisdiction Over Larry Flynt, p.11
CA Corporate Defendant Defends SLAPP Class Action, p.12
10th. Cir. Affirms Summary Judgment in Mistaken ID Case, p.13
MI Court Throws Out Claims in Temptations Mini-Series Case, p. 19
Attorney General's Statements Absolutely Privileged, p.42

NEWSGATHERING

MI Court of Appeals Follows *Desnick* Reasoning on Trespass, p.5
California Publisher Serves 5-day Sentence, p.37

PRIVACY

Public Interest Defeats Privacy Claims In Judicial Custody Battle, p.16
NY Ct. of Appeals Affirms Limited Reach of Misappropriation, p.17
5th Cir.: Right of Publicity Not Preempted By Copyright Act, p.21
Models' Right of Publicity Allowed in California, p.23
NJ Court Allows Soundalike Claim to Proceed, p. 25
CO Court Recognizes False Light as a Claim, p.27

ACCESS

WI Sup. Ct. Finds No Right of Access to Discovery Materials, p.29
NJ Fed. Ct. Reaffirms Presumption of Access to Motion Papers, p.31
Right of Access to Judicial Records in 5th Circuit, p.33
CT Court Opens Skelton Murder Arraignment to Public, p.35
Judicial Conference Opens Access to Judge Finance Forms, p.32

NEWS AND UPDATES

Dept. of Commerce to Study Protection of Personal Names, p.15
CA Supreme Court Refuses Review in *Beardstown Ladies*, p.28
New FTC Regulations Change How Websites Do Business, p.43
GA Broadcasters Face Telemarketing Class Action Suit, p.39
MI Anti-Profanity Statute Upheld, p.32

INTERNATIONAL

English Court Finds Paper Protected By Qualified Privilege, p.45
Canadian Defamation Awards 1999, p.46

WATCH THIS TORT!
RIGHT OF PUBLICITY IN
5TH CIRCUIT, NEW
YORK, CALIFORNIA, NEW
JERSEY, MICHIGAN AND
DEPT. OF COMMERCE
PP. 15, 17, 19, 21, 23, 25

NEW FTC
REGULATIONS
CHANGE THE WAY
WEBSITES DO
BUSINESS
P.43

LDRC ANNUAL DINNER

Thursday, November 9, 2000

A conversation with Ben Bradlee, Diane Sawyer and Mike Wallace on the intersection of journalists, journalism, litigation and lawyers.

All in honor of LDRC's 20th birthday.

NBC Wins Reversal of *Veilleux* Verdict

By Susan Weiner and Daniel Kummer

The First Circuit has reversed a jury verdict against NBC for defamation, false light, misrepresentation, emotional distress and invasion of privacy arising from a Dateline report about the perils of tired long-distance truck drivers.

The 83-page decision, issued on March 6, 2000, held: (i) that Dateline's description of the plaintiffs' dangerous driving practices accurately reflected what the plaintiffs themselves said and did; (ii) that the journalists' alleged promise that the story would be "positive" could not support a claim for misrepresentation under Maine law, and would likely run afoul of the First Amendment as well; (iii) that the plaintiffs could not circumvent state law and constitutional limitations by relabeling their misrepresentation claims as claims for emotional distress; and (iv) that Dateline's disclosure of

(Continued on page 2)

PUBLISHED BY THE

LIBEL DEFENSE RESOURCE CENTER, INC.

404 Park Avenue South, NY, NY 10016
212.889.2306, www.ldrc.com

NBC Wins Reversal of *Veilleux* Verdict

(Continued from page 1)

a trucker's failed drug test was a matter of public concern and therefore could not support a claim for invasion of privacy.

The First Circuit remanded for retrial on a single claim remaining in the case: the allegation that Dateline journalists had misrepresented to the plaintiffs that a parents' group advocating stricter trucking regulations would not be included in the report. The court held that if plaintiff Ray Veilleux could convince a jury that the journalists made such an assertion (which was denied), that he relied upon their statement in agreeing to participate in the story, and that he suffered pecuniary loss proximately caused by the inclusion of the group in the broadcast — not just from the report itself — he could recover damages for misrepresentation.

The Lawsuit and Trial

In April 1995, Dateline aired a report on the long-distance trucking industry that focused on the pressures confronting truckers, the dangers posed by trucker fatigue and the widespread disregard of federal regulations governing truckers' driving practices. The report prominently featured Peter Kennedy, a trucker, and Ray Veilleux, his employer, who allowed a Dateline crew to accompany and film Kennedy on a coast-to-coast run from Maine to California. The report included interviews with members of Parents Against Tired Truckers ("PATT"), an advocacy group comprised of parents whose children had been killed in truck accidents, as well as interviews with industry experts and government officials.

The report showed Kennedy violating federal limits on truckers' driving hours, staying on the road with little or no sleep, and falsifying the log book in which he recorded his driving hours. Dateline also reported that Kennedy failed a drug test.

Kennedy, Veilleux and Veilleux's wife filed a lawsuit in federal court in Bangor, Maine alleging defamation, false light, misrepresentation, infliction of emotional distress, invasion of privacy and loss of consortium. NBC moved for summary judgment

relying on its outtakes to establish the truth of each and every challenged statement. NBC also argued that Dateline's alleged promise that the story would be positive and that PATT would not be included in the story failed to state a misrepresentation claim under both state law and the federal constitution. NBC's motion challenged the emotional distress claim, and argued that Kennedy's failed drug test was a matter of public interest that could not support an invasion of privacy claim.

The district court judge declined to grant summary judgment, but did dismiss plaintiffs' punitive damages claim. The case was tried before a Bangor judge in July 1998. NBC showed the jury selected portions of the outtakes — culled from many hours of tape — that showed Kennedy repeatedly admitting that he violated the law and drove more hours than he should, and showed Veilleux acknowledging his awareness of these practices. At trial, like on NBC's summary judgment motion, the factual accuracy of each of the 18 challenged statements was vividly demonstrated by admissions contained in the outtakes. The journalists also testified that they never told plaintiffs that the story would be positive or would exclude PATT, and explained how the story was investigated and reported.

Following a two week trial, the jury ruled against NBC on every count, except for excluding five of the challenged statements from the defamation verdict. The jury awarded the three plaintiffs a total of \$525,000. The district court denied NBC's post-trial motion, which again argued that the outtakes established the truth of the report and that the other claims were legally deficient under state and federal constitutional law. NBC appealed, and the plaintiffs cross-appealed from the district court's dismissal of the punitive damages claims.

The First Circuit Decision

The First Circuit agreed with NBC that a broad standard of independent review governed the appeal on all the claims implicating First Amendment concerns, not just the defamation claims. The court's careful review of the record developed at trial illus-

(Continued on page 3)

NBC Wins Reversal of *Veilleux* Verdict

(Continued from page 2)

trated the importance of this standard of review.

In reversing the libel verdict as to each and every one of the challenged statements in the Dateline report, the court delved into the trial evidence, reviewing and quoting substantially from the interviews with the plaintiffs captured in the outtakes, and pursuing factual inferences from that proof on numerous points. Based on this exhaustive review of the evidence, the court repeatedly held that NBC was justified in relying, both as a matter of truth and of due care, on the plaintiffs' own admissions in their interviews as support for the challenged statements. The court further held that several of the statements constituted protected opinion or hyperbole.

UPDATE

***Levan v. ABC* Will Not Receive Further Review**

In late February, the U.S. Supreme Court denied certiorari in *Levan v. Capital Cities/ABC, Inc.*, financier Alan Levan's libel action based on a 1991 "20/20" report. 68 U.S.L.W. 3547. The story portrayed certain transactions engaged in by Levan and his company, BFC Financial Corp., as unfair to investors; according to Levan's claim, it accused him of deliberately defrauding limited partners in real estate schemes. At trial, a jury awarded Levan \$8.75 million in compensatory damages and BFC \$1.25 million. On appeal last September, the Eleventh Circuit held that the trial court erred in refusing to grant ABC's motion for judgment as a matter of law, as ABC's comprehensive investigation of the story foreclosed a finding of actual malice. The court determined that the "gist" of the report was not as damning as Levan had claimed, and overturned the verdict. See *LDRC LibelLetter*, October 1999 at 11. Subsequently Levan petitioned the Supreme Court for review, arguing that the Eleventh Circuit erred in interpreting the gist of the report as a matter of law, once a jury had already found it false and defamatory.

Turning to the misrepresentation claims, the First Circuit's ruling distinguished between the two alleged misrepresentations: (i) that the Dateline report would be a "positive" portrayal of plaintiffs, and (ii) that the report would not include the PATT advocacy group. The court held that the alleged promise of a "positive" story was too vague and non-factual to support a misrepresentation claim under Maine law, and concluded that Maine's courts would likely construe the claim narrowly in order to avoid the constitutional problems inherent in applying such a nebulous standard. Without reaching a constitutional holding on this issue, the court strongly implied that a claim requiring a fact-finder to engage in a vague, subjective and ultimately standardless inquiry into whether a broadcast report was sufficiently "positive" would be unlikely to pass First Amendment muster.

With respect to the alleged representation about PATT's exclusion from the report, the court ruled that it was sufficiently specific, factual and objectively verifiable to support a claim under Maine law. The court further held that a fact-finder could conclude that *Veilleux* suffered damages as a proximate cause of such a misrepresentation, and distinguished a series of federal decisions in analogous factual settings holding that information uncovered by broadcast defendants constituted an "intervening cause" barring recovery for any misrepresentation that enabled such discovery.

Having surmounted these common law hurdles, the First Circuit went on to hold, under the analysis prescribed by the Supreme Court's decision in *Cohen v. Cowles Media*, that a misrepresentation claim based on the alleged promise about PATT did not raise constitutional concerns. The court undertook a comparative analysis of the *Cohen* and *Hustler v. Falwell* decisions and distilled a series of First Amendment principles applicable to newsgathering claims such as these. Because, like the plaintiff in *Cohen* and unlike *Falwell*, *Veilleux* was a private figure seeking recovery only of "pecuniary" loss, not reputational or emotional damages, the court concluded that a tort claim of "general applicability"

(Continued on page 4)

NBC Wins Reversal of *Veilleux* Verdict

(Continued from page 3)

such as that based on the alleged PATT misrepresentation could proceed unfettered by the First Amendment.

However, in vacating and remanding for a new trial on this portion of the misrepresentation claims, the court held that *Veilleux* was precluded from recovery based upon the “general tone of the broadcast” and would instead be required to prove that he suffered pecuniary loss “specifically resulting from the inclusion of PATT in the program.” Accordingly, although it permitted *Veilleux*’s “PATT” claim to proceed, the First Circuit’s decision applied a strict gloss to the *Cohen* analysis that, as a practical matter, should make it very difficult for *Veilleux* and similarly-situated future plaintiffs to prevail on such a claim.

With the exception of Kelly *Veilleux*’s derivative claim for loss of consortium based on this remaining portion of the misrepresentation claims, the court reversed the judgment against defendants on all of the remaining claims in the case. Most significantly, the court reversed the verdict on plaintiff Kennedy’s invasion of privacy claim based on *Date-line*’s publication of his drug-test failure, on the ground that this information was of “legitimate concern to the public.” Indeed, the court noted that this standard, which Maine has adopted from Restatement (Second) of Torts § 652D, permits more disclosure than the standard applied in some of the prominent federal decisions in this area.

The verdict on false light was reversed on the same grounds as the defamation claims, as well as on the ground that proof of “actual malice” is a substantive element of the claim under Maine law and had not been proved. The judgment on the claim for negligent infliction of emotional distress was reversed because it constituted an end-run around the pecuniary damages restriction on misrepresentation claims under Maine law. Finally, the court rejected plaintiffs’ cross-appeal from the dismissal of their claims for punitive damages.

Susan Weiner and Daniel Kummer of the NBC Law Department represented the defendants. Bernard Kubetz of Eaton, Peabody, Bradford & Veague in Bangor, Maine was lead trial counsel. Kenneth Cohen and John Englander of Goodwin, Procter & Hoar in Boston also represented NBC on the appeal.

*Editor’s Note: The First Circuit decision in *Veilleux* is truly a wonderful victory for NBC. Susan and her colleagues and counsel are to be congratulated. The decision will make it difficult to win, and difficult to justify bringing, misrepresentation claims. But the decision undoubtedly leaves media lawyers less than fully satisfied because of the crack in the door it leaves open for misrepresentation claims and publication based damages.*

For in the end, the decision does allow the plaintiff to carry forward with a misrepresentation claim — an invitation to others to engage in what in most instances will be a “he said/he said” kind of dispute — laying out what could be characterized as the roadmap for the next such claim. And it asks the jury (or judge, as the case may be) to make an almost impossible distinction between damages caused by the report’s content arising from the specific misrepresentation and that caused by the entirety of the rest of the report.

Hidden Camera Consumer Reporting Gets a Boost From the Michigan Court of Appeals *Follows Desnick Reasoning on Trespass*

By James E. Stewart and David M. Giles

In *American Transmissions, Inc., and American Transmissions of Troy v. Channel 7 of Detroit, Inc., and Joe Ducey*, (Michigan Court of Appeals Docket No. 210925), the Michigan Court of Appeals ruled that a television news report on a hidden camera visit to a transmission shop was not actionable. Key issues in the case were trespass and libel by implication.

A Clunky Car

In late 1997, the Consumer Reporter at one of Detroit's local television stations (WXYZ-TV) had been receiving generalized complaints about transmission repair shops. In response, he procured a ten-year-old Buick LaSabre and took it to a local service station where the mechanic demonstrated that disconnecting the vacuum hose would cause the transmission to "clunk" and have difficulty shifting. He also told the reporter that the vacuum hose would be one of the first things that should be checked. The reporter then arranged for a volunteer from a consumer group to take the car to randomly selected transmission shops to ascertain what diagnosis she would be given. The volunteer carried a hidden camera and microphone in her purse to record her experiences.

Four of the transmission shops found the disconnected vacuum hose and sent her on her way. Four others, including plaintiffs' shop, did not find it and recommended expensive transmission tear downs. At the end of the report of this investigation, the news anchor, in unscripted cross-talk, expressed his relief that there are "some honest guys still out there."

American Transmissions of Troy, one of the stores that failed to find the disconnected vacuum hose, sued along with its franchiser American Transmissions, Inc. They claimed defamation, interference with business relations, fraud, and trespass. The trial court granted summary judgment for WXYZ and plaintiffs appealed to the Michigan Court of Appeals. On February 22, 2000, the Court of Appeals affirmed summary judgment.

Trespass Claim

Plaintiffs made the obvious claim that by sending the

undercover consumer into their transmission shop, Channel 7 had committed trespass. The court affirmed summary judgment based upon the decision in *Desnick v. American Broadcasting Co, Inc.*, 44 F.3d 1345 (CA 7, 1995), which had found no trespass when representatives from ABC's *Primetime Live*, posing as patients, went with concealed cameras into an ophthalmology office.

Applying *Desnick*, the Michigan Court of Appeals found that

although [the consumer volunteer] misrepresented her purpose, plaintiff's consent was still valid because she did not invade any of the specific interests related to the peaceable possession of land that the tort of trespass seeks to protect . . . [She] entered only those areas of plaintiff's shop that were open to anyone seeking transmission repair services and videotaped plaintiff's employees engaging in professional discussion. [She] did not disrupt the shop or invade anyone's private space and the videotape she made did not reveal the intimate details of anybody's life.

During the lower court proceedings, plaintiffs had vigorously argued from the district court opinion in *Food Lion, Inc.*, while defendants argued that this opinion had been based on facts different than were presented in this case. Nevertheless, between the time of oral argument and the Court of Appeals' decision, the Fourth Circuit issued its decision in *Food Lion*. We advised the Court of Appeals of this decision and the panel relied on it to observe that "a finding of trespass cannot be sustained on grounds of misrepresentation."

Defamation

Since the plaintiffs had not contested the literal accuracy of the statements in the broadcast, they relied in large part on the anchor's statement, "Some honest guys still out there" as creating a defamatory implication that they were not honest. The Court of Appeals, relying on its previous decision in *Hawkins v. Mercy Health Services, Inc.*, 230 Mich App 607; 584 NW2d 632 (1998), held that a cause of action for defamation by implication

(Continued on page 6)

Hidden Camera Reporting Gets a Boost

(Continued from page 5)

exists in Michigan but requires the plaintiff to prove that the defamatory implications are materially false. The court ruled that plaintiffs had failed to present any evidence,

. . . such as testimony from the employee who examined the vehicle and recommended taking apart the transmission, that would raise a genuine issue of material fact regarding the falsity of the implication that American Transmissions of Troy had been dishonest.

(The court notes that an alternative implication was that plaintiffs were incompetent — _____ a point not argued by plaintiffs.)

Michigan Court is Tough, But is it Consistent, on Implication?

No modern plaintiff has prevailed in Michigan on a claim of defamation by implication. However, the contours of this claim remain unclear.

See, for example, *Loccrichio v. Evening News Assoc.*, 438 Mich 84; 476 NW2d 112 (1991), in which plaintiffs conceded that a newspaper report of their business activities contained no false statements of fact but had a defamatory implication that they were associated with organized crime. In upholding the trial court's directed verdict for defendants, the Michigan Supreme Court discussed the general theory of libel by implication. The court began with the observation that,

It has been said that 'there is a great deal of the law of defamation which makes no sense.' One might say the same of the case law regarding defamation by implication. (*Id.* at 132).

The court concluded that at the very least

an action for defamation for implication must still conform to the three guiding constitutional principals discussed above: speech on public matters initiates heightened First Amendment protection, true speech on public affairs cannot accrue liability, and a plaintiff bears the burden of proving fal-

sity. (*Id.* at 132-133).

In its conclusion, however, the court stated that

to the extent this media defendant can be liable for defamation by implication arising from underlying published statements of fact not proven to be false and where no omission of material facts exists, such defamation by implication would at least have to pass the same standards of falsity, fault and burden of proof as would establish liability for defamation by statements of fact. (*Id.* at 133-134)

The Supreme Court concluded that the implications alleged were not false, not requiring it to actually reach or apply other issues and standards.

At the end of the report of this investigation, the news anchor, in unscripted cross-talk, expressed his relief that there are "some honest guys still out there."

Nevertheless, the overall language of *Loccrichio* seems to suggest that the Michigan Supreme Court would require a finding of a false statement of fact or an omission of a

material fact before permitting a claim of libel by implication to succeed. This is buttressed by footnote 41 of the Court's Opinion observing that it had been able to find no case where plaintiff prevailed on defamation by implication without showing either a direct or underlying material falsity or a material omission of true facts.

In *Hawkins v. Mercy Health Services*, 230 Mich App 315; 584 NW2d 632 (1998), a patient died after being given an improper medication. Hawkins, who was one of the nurses taking care of the patient, and two other nurses were overheard by the family members criticizing the care given by the doctor on the case. When confronted with this by hospital administrators, Hawkins initially denied the statements, but the other two nurses confirmed them. Hawkins was then discharged for lying.

Subsequently, the hospital issued a press release about the patient's death stating that the hospital's medical staff credential's committee was reviewing the woman's death and that "one employee is no longer with the hospital." Hawkins claimed that she was defamed by the implication in the press release that she had been

(Continued on page 7)

Hidden Camera Reporting Gets a Boost

(Continued from page 6)

discharged as a result of her involvement with the patient's treatment and death.

The *Hawkins* court began by concluding from *Loccrichio* that "Michigan common law recognized defamation by implications albeit in a somewhat circumscribed fashion." *Id.* at 329. The Court of Appeals then concluded that the decision in *Loccrichio* permitted a cause of action for defamation by implication, but only if the plaintiff proves that the defamatory implications are materially false. The court seemed to be saying that such a claim might succeed even if the plaintiff could not prove

In sum, after three decisions on defamation by implication in the last ten years in Michigan, the exact contours of the theory remain unclear.

that any of the actual statements in the material were false.

Ironically, the Court of Appeals repeats the Supreme Court's observation in *Loccrichio* that there had been no case where a plaintiff prevailed on defamation by implication without a showing of either direct or underlying material falsity or a material omission of true facts, and noted that it had likewise found no such decision in Michigan after *Loccrichio*. The *Hawkins* court also observed that "it remains true however that claims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face severe constitutional hurdles. (*Id.* at 331).

After analyzing the record, the court overturned the summary judgment that had been entered for the hospital apparently on the grounds that the press release had omitted a material fact, i.e., that *Hawkins* had been discharged for lying and not for anything to do with the patient's care.

In sum, after three decisions on defamation by implication in the last ten years in Michigan, the exact contours of the theory remain unclear. *Hawkins* is the only plaintiff that prevailed on this theory (if surviving summary judgment can be called prevailing), and the Court of Appeals ruled for her only because it found a material fact had been omitted from the complained of publica-

tion.

Fraud and Interference With Business Relations

While plaintiffs had advanced these theories with some vigor in the lower court, they did not preserve these arguments for appeal and the court simply ruled that those claims had been waived on appeal and did not address them in any substantive manner.

Conclusion

The portion of the appellate decision on trespass may have the most use for media attorneys outside Michigan. While the decision is a welcomed victory for reporting involving hidden camera entry into a place of business, this sort of reporting should still be approached very carefully and ideally with consultation of counsel beforehand.

Jim Stewart with Butzel Long, Ann Arbor, Michigan and Dave Giles with Baker & Hostetler, Washington D.C. office represented WXYZ-TV.

*As might have been anticipated, the opinion written by Judge Posner of the 7th Circuit Court of Appeals in *Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345 (1995), and most specifically his analysis of the trespass claim, has been influential beyond the borders of the 7th Circuit. The Fourth Circuit in *Food Lion* followed *Desnick*, as did *Willis/Kids on Broadway v. Griffin Television, L.L.C.*, Case No. 91,812 (Okla. Ct. Civ. App. 3/5/99), and now *American Transmissions, Inc., v. Channel 7 of Detroit*, reported here. Rejecting the *Desnick* perspective on trespass was the federal district court in *Medical Laboratory Management Consultants v. ABC, Inc.*, 30 F. Supp. 2d 1182 (D. Ariz. 1998).*

Texas Court of Appeals Finds No Libel by Implication When Actual Statements Made are True

By Robert Latham

In a case that will be of some assistance in defending libel plaintiffs from attempts to expand the actual language used in a publication or defined liability, a Texas court of appeals refused to find that there could be libel by implication when the actual statements made in a television broadcast were true. *Dolcefino v. Randolph*, Slip Op. No. 14-99-00026-CV (Tex. App.—Houston [14th Dist.] February 10, 2000).

The *Randolph* case involved a suit by the former City Controller of Houston, Lloyd Kelley and a member of executive staff, Cynthia Randolph against television reporter Wayne Dolcefino, KTRK Television, and other KTRK employees. The broadcast had focused on the work habits of Lloyd Kelley and one broadcast in the series showed Kelley and Randolph at a water park called Splash Town on a work day afternoon. One of the allegations that plaintiffs made was that the broadcast gave the impression that Randolph and Kelley were involved in an extramarital affair. In attempting to defeat the summary judgment filed the reporter and television station, the plaintiffs offered an affidavit from a private citizen who stated that the broadcast gave the impression that Randolph and Kelley were involved in an extramarital affair.

The plaintiffs claim that the following statement in the broadcast insinuated a personal relationship between Kelley and Randolph:

[A]nd while Cynthia Randolph doesn't tell us what she was doing at Splash Town that day she says 'I have never babysat Lloyd Kelley's children.' Apparently, she chose to spend her personal time with the city official who hired her and his children."

The defendants availed themselves of the Texas statute allowing an interlocutory appeal for the denial of a motion for summary judgment in a libel case against media defendants.

In reversing the trial court's denial of the motion for summary judgment and rendering judgment for the

defendants, the court of appeals analyzed the specific language made in the broadcast. The court found that Randolph admitted that she made the quoted statement. There was further no dispute that she and Kelley and his children were all at Splash Town that day as shown on the surveillance tape and that she ultimately took vacation time for that afternoon. The court included "given the truth of the underlying facts, a mere implication of a personal relationship between Kelley and Randolph cannot be the basis for a defamation claim."

The court cited authority from the Texas Supreme Court that "truth is a complete defense to defamation." *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). The Texas libel statute also makes truth a defense to a defamation action. Thus, both the Texas common law and the statute allowing a defendant to prove the actual and literal truth of the statements made in a broadcast would be undermined by a court allowing liability to be based on implications that arise from true statements.

Robert Latham is a partner at Jackson Walker L.L.P., which represented the defendants in this matter.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

Libel Defense Resource Center, Inc.
404 Park Avenue South, 16th Floor
New York, NY 10016

Ph: 212.889.2306
Fx: 212.689.3315
ldrc@ldrc.com

RIGHT NAME, WRONG PICTURE

Connecticut Court Dismisses Claims Former Local Political Player is Public Figure/Official

By Mark R. Kravitz and Daniel J. Klau

In an amusing and erudite decision, the Connecticut Superior Court (Blue, J.) recently granted summary judgment to the defendants in a defamation case arising out of a newspaper's mistaken publication of a photograph of the plaintiff, William Jones, in connection with an otherwise accurate article describing the arrest of another person with the same name. *William B. Jones v. New Haven Register, et al.*, 2000 WL 157704 (Conn. Super. Jan. 27, 2000).

The Wrong Mr. Jones

The lawsuit arose from a front-page article published by the *New Haven Register*, accurately describing the arrest of William Jones, the former treasurer of the New Haven Chapter of the NAACP. Jones had previously pled guilty to theft of the organization's funds but had failed to repay those funds as ordered. The article's author submitted the story for publication the next morning and then left the newspaper for the day.

Unbeknownst to the author, his editor decided that evening to run a photograph with the article and asked a colleague to search the newspaper's archives for a picture of William Jones. The colleague found a file marked "William Jones" and brought the photograph in the folder to the editor, who believed that this was a photograph of the William Jones described in the article.

Unfortunately, the editor was mistaken. The photograph that ran with the article was of a different individual named William Jones, one who had once been prominent in local politics but who had never been treasurer of the local NAACP and had never been arrested. It turned out that a photograph of the correct William Jones was in another folder in the archives, located immediately adjacent to the folder containing the picture of the plaintiff William Jones.

An Obvious Error

When the article and photograph hit the newsstands, the mistake was immediately obvious. Indeed, the error was the subject of a morning radio talk show with a lis-

tener audience of over 25,000. On its own initiative, the *Register* published a retraction the following morning. The retraction included a photograph of the correct William Jones. Unmoved by the retraction — or by personal apologies from the newspaper's editor-in-chief and the author of the article — the plaintiff sued the newspaper, the author, and three other employees of the paper, none of whom were involved in the article.

After discovery, the defendants moved for summary judgment on numerous grounds. As is relevant to the court's decision, the defendants argued that the plaintiff was required to prove actual malice and that he could not do so. The defendants argued that the plaintiff should be considered a general purpose public figure in the paper's distribution area for two reasons.

(Continued on page 10)

Shock Jock Libel Suit Settled for \$1.6 Million

Just days before the March 15 trial date in *Van Horne v. Muller*, Evergreen Media Corp. d/b/a WRCX agreed to settle a libel action brought by former Chicago Bear Keith Van Horne for \$1.6 million. The libel suit was based on a 1994 broadcast during which WRCX disc jockey "Mancow" Muller and his sidekick Irma Blanco alleged that Van Horne assaulted Muller and threatened his life. See *LDRC LibelLetter* February 1998 at 8, July 1998 at 15, December 1998 at 9, and October 1999 at 40.

Earlier in the case, WRCX also faced claims of negligent and reckless hiring, supervision and retention. Following a trial court dismissal of these claims, the Illinois Appellate Court reinstated them. The Illinois Supreme Court subsequently dismissed the claims finding that the plaintiff failed to allege a nexus between Muller's former antics and the alleged defamation at issue. The U.S. Supreme Court denied Van Horne's petition for certiorari. In so doing, it acknowledged that the First Amendment required it to construe such a cause of action narrowly.

RIGHT NAME, WRONG PICTURE

(Continued from page 9)

First, he had a long history of involvement in local politics, including several successful campaigns for local offices and an unsuccessful campaign for Mayor. Second, the plaintiff's own allegations in the damage portions of his complaint recited that he was "well known" and "favorably known" in New Haven and throughout Connecticut. The defendants argued that these allegations were binding judicial admissions that conclusively established the plaintiff's public figure status.

The defendants also argued that the plaintiff was a public official because of his current position at a local governmental agency.

The trial court agreed with each of these arguments, and therefore, did not reach the defendants' other arguments.

Once A Public Figure, Always A Public Figure

The most interesting aspect of the court's opinion arose from the plaintiff's counsel's concession, during oral argument, that his client was, in fact, a public figure as of the late 1970's and early 1980's, when he was active in local politics and held several local elected offices. The court asked the parties to submit supplemental briefs addressing the question whether a person, having once attained public figure status, could relinquish that status with the passage of time by purposefully retreating from the limelight, as plaintiff claimed to have done.

After a lengthy discussion of relevant precedents — including the famous "Red Kimono" case, *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931), and *Sidis v. F-R. Pub. Corp.*, 113 F.2d 806 (2d Cir), *cert. denied*, 311 U.S. 711 (1940) — the court concluded that the plaintiff had not shed his public figure status by the time of the October 1996 article. The court also held that the plaintiff was a general purpose public figure in New Haven and elsewhere in Connecticut because he had sought the limelight for many years and was, by his own admission, well known throughout the state.

Negligence, Perhaps, But Malice, Emphatically Not

Having determined that the plaintiff was a general purpose public figure and that an actual malice standard

therefore governed his claims, the court turned to the plaintiff's evidence of actual malice. The plaintiff had submitted his deposition testimony, in which he asserted that the author of the article told him, several days after its publication, that he had warned an unnamed editor that there were, in fact, two individuals named William Jones.

Both the author of the article and his editor vigorously denied this claim. Moreover, on cross-examination, the plaintiff conceded that his recollection of this supposed conversation was weak and that he was, in his own words, only "speculating" about its substance.

The plaintiff also submitted the deposition testimony of another individual, who also claimed vaguely to recall that the author "might" have told her that he had told "someone" at the newspaper to be sure to publish the correct picture. This witness also acknowledged that she was not positive about her recollection of this purported conversation.

The court held that this testimony did not rise to the level of "clear and convincing" evidence of actual malice. According to the court, this was "at best, a case of negligence built on the sand of surmise." It was "emphatically not a case of malice established on the rock of clear and convincing evidence." The court, therefore, entered judgment for all the defendants on the plaintiff's defamation claim, as well as on his derivative claims for intentional and negligent infliction of emotional distress, invasion of privacy, and unfair trade practices. The plaintiff has recently filed an appeal.

Mark Kravitz is a partner with Wiggin & Dana in New Haven, CT. Kravitz and Dan Klau, a senior associate with the firm, represented the defendants in the litigation.

Hawaii Federal Court Finds No Personal Jurisdiction Over Publisher Larry Flynt

By Paul Alston

Recognizing that Larry Flynt, the individual, was different from Larry Flynt Publishing, now known as L.F.P., Inc., a federal district court in Hawai'i refused to find it has jurisdiction over him in a libel case based on an article in an L.F.P. magazine. *Ferris v. Larry Flynt Publishing, Inc., et al.* United States District Court, District of Hawai'i, Civil No. CV99-00662 HG-LEK.

Big Brother is a magazine focused on the sport and recreation of skateboarding. It is published by L.F.P., Inc., fka Larry Flynt Publishing ("LFP"). The October 1998 edition of *Big Brother* contained an article addressing skateboarding in Maui. The article discussed "the politics that surround the skate scene" in Maui and the difficulties that had been involved in getting public skateboarding parks built. The article also stated that "quite a few skaters" seemed to hold Martha Ferris responsible and questioned her use (or alleged misuse) of public funds. At the time, Ferris was employed by the County of Maui Department of Parks and Recreation.

On September 28, 1999, Ferris ("Plaintiff") filed a defamation action in the United States District Court for the District of Hawai'i against LFP, Carnie and Larry Flynt ("Flynt"), individually. Plaintiff alleged the statements about her in the article were reckless and untrue. Plaintiff did not make any specific allegations regarding Flynt; she simply alleged that "[o]ne or more of the Defendants published, distributed and/or sold" *Big Brother* in Hawai'i.

On December 10, 1999, Flynt, a California resident, moved to dismiss for lack of personal jurisdiction. Flynt argued that jurisdiction was not authorized by Hawai'i's long arm statute (Haw. Revised Statutes § 634-35) because he had never personally conducted business in the State of Hawai'i, nor did he own, use or possess any real property in the State.

Flynt further argued that, under Hawai'i law and the First Amendment, he could not be held liable in defamation because he did not personally participate in the publication. See, e.g., *Rodriguez v. Nishiki*, 65 Haw. 430, 653 P.2d 1145 (1982); *Tavoulareas v. Piro*,

93 F.R.D. 11, 15 (D.D.C. 1981); *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985), *vacated in part on other grounds*, 763 F.2d 1472 (D.C. Cir. 1985); *Lewis v. Time, Inc.*, 83 F.R.D. 455, 463-64 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983). Flynt's declaration in support of the motion stated, *inter alia*, that he did not review, edit, discuss or contribute to the article before it was published, and he did not personally own, publish or participate in the production of *Big Brother* magazine.

Plaintiff's opposition argued that Flynt conducted business in Hawai'i because (1) he was the publisher of *Big Brother*, (2) he owned *Big Brother*, (3) *Big Brother* is sold in Hawai'i and (4) Flynt solicited business in Hawai'i by soliciting subscriptions for *Big Brother* on an internet webpage. Plaintiff also argued that Flynt was responsible for the article because he was listed as "publisher" on the editor's page of the October 1998 edition. The same edition of the magazine, however, expressly stated that *Big Brother* is "[p]ublished monthly by L.F.P., Inc."

The court granted Flynt's motion and dismissed the complaint with prejudice as to him. The court held that, because Flynt had come forward with specific evidence disputing personal jurisdiction, the burden shifted to Plaintiff to make a *prima facie* showing that personal jurisdiction existed. According to the court, Plaintiff had not come forward with any admissible evidence to contradict Flynt's showing that he did not own or publish *Big Brother*, or personally participate in publication of the article. The court further held that Plaintiff "failed to set forth any evidence, in the form of exhibits, declarations, or otherwise," to support her allegation that Flynt personally transacted business in Hawai'i through the sale of *Big Brother*.

Paul Alston is a partner in Alston Hunt Floyd & Ing, Honolulu, HI which represented the defendants in this matter.

Corporate Defendant Defends Against SLAPP Class Action

New Use of California Anti-SLAPP Law

In an unusual application of an anti-SLAPP statute to protect a defendant corporation, the Court of Appeal of the State of California held that, unless the plaintiffs in a class action based on defendant's protected speech can establish a probability they will prevail, their complaint should be stricken. *DuPont Merck Pharmaceutical Company v. The Superior Court of California, County of Orange*. 00 C.D.O.S. 1422 (Feb. 23, 2000).

The complaint alleged that the defendant, the manufacturer of Coumadin, a prescription drug used to thin blood, artificially inflated the drug's price by spreading false information about the generic equivalent of Coumadin. The claims in the complaint were largely based on an alleged lobbying effort defendant undertook to delay or prevent FDA approval of the generic drug as well as the marketing campaign defendant allegedly directed at the medical community. The defendant moved to have the complaint dismissed under the anti-SLAPP statute, but the trial court denied the motion after finding that the defendant was not furthering rights of petition or free speech in connection with a public issue.

The defendant petitioned the Court of Appeal for a writ of mandate compelling the trial court to grant the motion. Because California requires parties to file anti-SLAPP motions within 60 days of the service of the complaint, and such was not the case here, the petition was summarily denied. However, the California Supreme Court directed the Court of Appeal to vacate the order, issue an alternative writ and consider the matter on the merits. Consequently, the Court of Appeal turned its attention to the anti-SLAPP standard.

The relevant statute, 425.16(b)(1), provides for a motion to strike "[a] cause of action arising against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue . . . unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." A related statute, 425.16 (e)(1), defines an "act in furtherance of a person's right of petition" as "any written or oral statement or writing made before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law."

The court first held that all of the defendant's lobbying efforts fall within the definition promulgated in 425.16(e)(1).

Relying on *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106 (1999), it held that "when an issue is under consideration or review by a legislative [or similar] body," in this case the FDA, no independent inquiry by the court into its public interest value is necessary.

Such an inquiry is, however, necessary when considering statements made in advertising, marketing and public relations efforts. Because the plaintiffs themselves alleged that 1.8 million Americans have purchased Coumadin, a drug that relates to life-threatening conditions, the court found the public interest in this issue is clearly established with respect to defendant's marketing campaign.

Having found that the first element of the statute is satisfied, the court shifted the burden of proof to the plaintiffs, who had to establish probable victory to salvage the complaint. At the trial level, the plaintiffs relied on the fact that the complaint was legally sufficient and that three other cases pending in other jurisdiction denied motions similar to this one. The court, however, disagreed with both the arguments.

The court said it rejected cases from other jurisdictions because the plaintiffs had not provided enough procedural context or an explanation of the facts. Since the plaintiffs did not request that the court take judicial notice, the court found the record lacking in evidence that would have made plaintiffs' cited cases persuasive.

Finally, the court, again relying on *Briggs*, held that the purpose of the anti-SLAPP statute would be undercut by allowing unsubstantiated but sufficient complaints to proceed to trial and that, once the defendant satisfied its burden, a legally sufficient claim is inadequate to defeat the motion to strike; rather, the claim has to be substantiated with sufficient evidence. Since, in this case, the trial court erroneously concluded that the defendant had not carried its burden, the Court of Appeal remanded the case, allocating the burden of saving the complaint to the plaintiffs.

Tenth Circuit Affirms Summary Judgment for Police and Media in Case of Mistaken Identity

By Lorinda G. Holloway

In a recent unpublished decision, *Walker v. City of Oklahoma City*, 2000 WL 135166 (10th Cir.), the Tenth Circuit affirmed summary judgment for a media defendant which had reported the arrest of a Navy Seaman, as well as erroneous information about the Seaman, only to have the police announce later that they had arrested the wrong person. The Tenth Circuit questioned the lower court's finding that the fair report privilege applied under the circumstances but still affirmed summary judgment for the media on the grounds that there was no evidence in the record of negligent newsgathering or reporting.

Case of Mistaken Identity

Early one April morning in 1997, based on information from a hospitalized victim, an Oklahoma City police officer arrested a Navy Seaman stationed at Tinker Air Force base, for kidnaping, maiming, and assault with a deadly weapon. KFOR-TV reported the arrest on its 4:30 p.m., 5:00 p.m., and 6:00 p.m. newscasts. KFOR-TV also included information that the reporter learned from the police public information officer — the suspect, Tenisha Walker, had also been arrested recently along with the victim on prostitution charges. At about 4:45 p.m., a public affairs officer for the Navy spoke to the reporter and told him that the Navy's research, using Walker's social security number, indicated that Walker had no prior arrests.

On the 5:00 p.m. and 6:00 p.m. newscasts, KFOR-TV repeated the news about both arrests but also added that Navy officials had advised that they did not believe that Seaman Walker was the same Walker who had been arrested for prostitution. That evening, Oklahoma City officials concluded they had arrested the wrong person. Another woman with a similar name was the proper suspect. The police released Walker at 10:00 p.m. that night. On the following day, KFOR-TV reported that Walker had been released from jail, explaining that Walker was

not the real suspect and her arrest was "nothing more than a case of mistaken identity."

The Claims Against the Police and KFOR-TV

Walker sued the City of Oklahoma City and the arresting officer for violating her Fourth Amendment rights as well as state law claims for false imprisonment and malicious prosecution. She also sued KFOR-TV for defamation, negligence, and negligent infliction of emotional distress. The district court dismissed the negligence claims and all the defamation claims *except* the one that concerned the report that Walker had been previously arrested on charges of prostitution. Subsequently, the court granted summary judgment to the defendants on all of the remaining claims. With regard to KFOR-TV, the district court concluded that the reports of Walker's arrest were protected under Oklahoma law by the privilege governing reports of official proceedings (in Oklahoma the fair report privilege is a creation of both statutory and common law). The court reasoned that the common law privilege applied because the reporter had obtained the information about Walker from the police department's public information officer. In the alternative, the court held that even if the information was not privileged, negligence had not been established because the undisputed facts (supported by an affidavit from the reporter) showed that KFOR-TV exercised due care in its gathering and reporting.

Does the Fair Report Privilege Protect Information Obtained from a PIO?

On appeal, the Tenth Circuit affirmed the judgment for the City and the officer, concluding that at the relevant time there was probable cause to arrest Walker. With respect to KFOR-TV, the Court stated that it had "some doubt about the district court's application of the fair report privilege" because it was not clear that the fair report privilege protects all

(Continued on page 14)

10th Cir. Affirms Summary Judgment for Police and Media

(Continued from page 13)

communications made by police public information officers. The court reasoned based on Oklahoma cases and the Restatement § 611 that the privilege is triggered by specific kinds of “occasions” that are open to the public and not from private conversations between reporters, victims or police officers. The court then noted that the statutory privilege did not appear to apply either because the PIO’s providing the erroneous information was not a “judicial proceeding” or given under “the proper discharge of an official duty.”

No Evidence of Negligence

The court, however, affirmed summary judgment for KFOR-TV based upon the district court’s alternative ruling that the reporter had not been negligent in gathering or reporting the erroneous information about Walker. The court noted that to begin with, the reporter included the conflicting information about Walker in the 5:00 and 6:00 p.m. newscasts; additionally, the court noted that Walker failed to offer any evidence in her summary judgment papers indicating that KFOR-TV’s reliance on the public information officers’ statements in these circumstances constituted negligence. In support of this finding, the court cited *Malson v. Palmer Broadcasting Group*, 936 P.2d 940, 942 (Okla. 1997), providing that in private figure defamation cases, evidence of customs and practices within the news profession, which may be relevant in determining ordinary care was practiced, will normally come from an expert.

In its conclusion, the court expressed regret for Walker that the entire incident had taken place, and also commented that the question of whether journalistic ethics compelled more evaluation of the Navy’s position before the station broadcast information that could injure an innocent party was not before the court, and instead must be left to the company’s policymakers.

Conclusion

If there is a lesson for journalists in this case, it is that they should not take great comfort that the fair report privilege will protect them simply because a public information officer is providing the information. For the privilege to apply, at least in Oklahoma, the information may have to be provided in a forum open to the public. And if there is a lesson for media lawyers in this case, it is that it is not impossible to get summary judgment in a private figure defamation case, at least in jurisdictions like Oklahoma which employ a professional negligence standard. If the plaintiff’s lawyer has not yet designated an expert, be sure to mention *Malson*. You may just get lucky.

Lorinda G. Holloway is an associate in the Oklahoma City office of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. and assisted Robert D. Nelon and Jon Epstein in successfully defending KFOR-TV. Mr. Nelon presented oral argument to the Tenth Circuit.

LDRC would like to thank Spring Intern Serge Mezburhd — New York University School of Law, Class of 2002 — for his contributions to this month’s *LDRC LibelLetter*.

A Federal Right of Publicity? Department of Commerce to Study Protection of Personal Names From Unauthorized Use in Internet Domain Names

Enacted in November, 1999, the federal Anticybersquatting Consumer Protection Act, Public Law 106-113, amends the Trademark Act of 1946 to expressly prohibit the bad faith registration as a domain name of another's trademark or of a confusingly similar term. The Act is designed to protect trademark holders from such registration by "cybersquatters" who have no intention of using the domain names for purposes other than extortion; that is, with the intention of selling the name to the trademark holder.

A separate provision in the Act, section 3002(b), provides similar protection to personal names. It creates a private right of action against "any person who

Comments are due March 30, 2000.

registers a domain name that consists of the name of another living person, or a name substantially and confusingly similar thereto, without that person's consent, with the specific intent to profit from such name by selling the domain name for financial gain to that person or any third party."

These provisions do not curtail Internet speech; they only aim to put a stop to a type of extortion scheme that sprang up with the increased use of the Internet as an advertising medium. As it now stands, the Anticybersquatting Act would presumably not provide a right of action based on an actual web site registered under a celebrity's name, because the specific intent of the site's creator would not be the sale of the domain name. However, by its own terms, the Act forebodes a possible expansion of the protection of personal names in this context akin to a partial right of publicity.

Section 3006 of the Act, "Study on Abusive Domain Name Registrations Involving Personal Names," directs the Department of Commerce, in conjunction with the Patent and Trademark Office and the Federal Election Committee, to conduct a study regarding possible protections against "abuses" of several different types. One of these is the classic type of extortion

through domain name registration now covered by the statute.

However, the call for recommendations also mentions possible protections against registration of a personal name with the intent to harm the person's reputation, or to confuse consumers as to the person's "affiliation, connection, or association [with] the domain name registrant, or a site accessible under the domain name ... or as to the origin, sponsorship, or approval of the goods, services, or commercial activities of the domain name registrant." The provision also directs DOC to consider means of protecting the names of public officials or political candidates from unauthorized registration as domain names or as parts of domain names.

Apparently the study has been called for with an eye toward future legislation in this realm. Depending on the shape such laws might take, they could have unpleasant ramifications for Internet publishers if individuals choose to use them as a means of controlling use of their names on the Internet. Thus, though the cause of action created by the Anticybersquatting Act is fairly innocuous, it might signal the first step on a path toward restriction of Internet content by individual persons.

Pursuant to its task, the DOC has issued a notice for comments in the Federal Register at 65 FR 10763 (February 29, 2000). Currently a number of media trade associations, including the Center for Democracy and Technology, the Newspaper Association of America, Magazine Publishers of America, and the Motion Picture Association of America, are considering submitting their comments to the Department, as are some individual film companies. Those concerned about the potential for further legislation presented by section 3006 might use the comment period as an opportunity to assert their views. Be advised that the deadline for written comments is March 30, 2000.

Legitimate Public Interest in Judicial Custody Battle Defeats Privacy Claim *Disclosure of Intimate Sexual Facts Protected*

In an unblinking application of the legitimate public interest defense, a Massachusetts Superior Court Judge has dismissed invasion of privacy and emotional distress claims brought against the Community Newspaper Company (“CNC”) over a report detailing the protracted battle between the Dineens and their daughter, Tiffani Dineen, for the custody of Tiffani’s three children. *Dineen v. Department of Social Services, et al.*, 2000 Mass. Super. LEXIS 18 (Mass. Super. Ct. January 31, 2000).

The September 6, 1998 article, written by Elizabeth Dinan, was based upon interviews with Mrs. Dineen and Michael Hamilton, the father of Tiffani Dineen’s three children. The article included a photograph of Hamilton displaying pictures of the children and included, among other things, the following personal information: “1) Hamilton allegedly urinated on one of the children; 2) one of the children attempted to sodomize the other; 3) one of the children exhibited behavior that suggests that he witnessed or fell victim to sexual abuse; 4) Mr. Dineen dropped out of school in the eighth grade; 5) Mrs. Dineen was married four times to three different men; 6) Mrs. Dineen was raped at the age of twelve by her mother’s brother and another man; and 7) one of the children claimed that Hamilton cut his hand.” *Id.* at *5-6.

Despite the intimate nature of the disclosures, the court found that the article was protected stating, “[t]he subject of a judicial proceeding is a subject of inherent interest and concern to the public.” *Id.* at *8, citing *Peckham v. Boston Herald, Inc.*, 48 Mass. App. Ct. 282, 719 N.E.2d 888 (1999). According to the court:

The article published by CNC and Dinan concerned an ongoing custody battle taking place in the Essex County Probate Court. The focus of the article concerned the details of the judicial proceedings as it has affected the lives of the parties involved. Accordingly, the Court finds that the subject of CNC and Dinan’s article was a subject of legitimate public concern.

Id. at *8.

The court continued, rejecting the plaintiffs’ claims that the article contained facts that were not closely related to the custody battle, but rather were “lurid and extraneous.” Addressing these statements — the alleged sexual and physical abuse of the children, Mr. Dineen’s educational background, Mrs. Dineen’s marital history and the allegations that she raped — the court found that “[t]hese details are the same facts that a court would consider in a custody battle,” and as such were also a matter of legitimate public concern.

Additionally, the court dismissed the plaintiffs’ intentional infliction of emotional distress claim finding that because it addressed a matter of legitimate public concern, CNC was privileged to publish the article.

LDRC *LibelLetter* Committee

Adam Liptak (Chair)
Mike Giudicessi (Vice Chair)
Robert Balin
Jim Borelli
Jay Ward Brown
Peter Canfield
Thomas Clyde
Robert Dreps
Jon Epstein
Charles Glasser, Jr.
Richard M. Goehler
Karlene Goller
Steven D. Hardin
Rex S. Heinke
Beth Johnson
Nory Miller
William Robinson
Madeleine Schachter
Charles D. Tobin
Paul Watler

New York Highest Court Affirms Limited Reach of Misappropriation

By Robert G. Sugarman and Jessica Sclar

In *Messenger v. Gruner + Jahr*, 2000 WL 190553, 2000 N.Y. Slip. Op. 01705 (N.Y. Ct. App. Feb. 17, 2000) the New York Court of Appeals recently reaffirmed the long-standing rule that there is no claim under Sections 50 and 51 of the New York Civil Rights law based on the use of a photograph that illustrates a newsworthy article so long as the photograph bears a real relationship to the subject matter of the article and the article is not an advertisement in disguise, “even where a plaintiff’s photograph, when juxtaposed with an article, could reasonably have been viewed as falsifying or fictionalizing plaintiff’s relation to the article.”

New York does not recognize a common law right of privacy. Sections 50 and 51 are New York’s statutory misappropriation provisions. They prohibit the use of a living person’s name, likeness or voice for trade or advertising purposes without written consent.

Teen Model Shots for Advice Column

Jamie Messenger, a professional teenage model, brought an action against Gruner + Jahr, the publisher of *YM Magazine*, for commercial misappropriation pursuant to Sections 50 and 51 based on the use of her photographs to illustrate an advice column. In March 1995 Ms. Messenger posed for *YM*. Three pictures of her appeared to illustrate the “Love Crisis” column, a regularly featured column presented in question and answer format. The column at issue featured a letter, signed “Mortified,” from an anonymous teenager, recounting her experiences of getting drunk and having sex with her boyfriend and two of his friends. There was no dispute as to the newsworthiness of the column or the existence of a “real relationship” between the photographs and the text. Indeed, the photos had been shot specifically to illustrate the text. Nor was there a claim that the column was an advertisement in disguise.

District Court Allowed Trial

The district court denied Gruner + Jahr’s motion for summary judgment, holding that the use of Ms. Messenger’s photographs was actionable under Sections 50 and 51 if a jury found that the juxtaposition of her photographs with the text created the false impression in the minds of reasonable readers that Ms. Messenger was the teenager

who wrote the letter seeking the advice, and that the magazine editors acted with gross irresponsibility in failing to recognize that reasonable readers would have that impression. (Gross irresponsibility is the standard applied by New York in claims by private figures against a media defendant about statements on a matter of public concern.)

The jury so found and awarded Ms. Messenger \$100,000 in damages for emotional distress. Gruner + Jahr appealed the district court’s denial of summary judgment on the grounds that there is no “falsity” exception under Sections 50 and 51. The Second Circuit certified the question to the New York Court of Appeals.

Second Circuit Asks State Ruling

The issue raised in the *Messenger* case — whether a plaintiff can recover under Sections 50 and 51 for the unwanted and unauthorized use of a photograph in connection with a newsworthy publication based on the creation of a false impression — is an issue the New York Court of Appeals has considered on a number of occasions. Between 1971 and 1990 it considered and rejected similar claims in three cases. *Finger v. Omni Publications*, 77 N.Y.2d 138, 566 N.E.2d 141, 564 N.Y.S.2d 349 (1990) (no violation of Sections 50 and 51 for use of photograph of plaintiffs, a large family, to illustrate article on caffeine enhanced fertilization techniques even though plaintiffs did not use the techniques described in article to conceive their children); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982) (no violation of Sections 50 and 51 for use of photograph of well-dressed black man to illustrate cover story in *New York Times Magazine* about black middle-class even though plaintiff was opposed to views expressed in the article); *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 267 N.E.2d 256, 318 N.Y.S.2d 474 (1971) (no violation of Sections 50 and 51 for use of photograph of plaintiff dressed in traditional Irish garb to illustrate a story on Irish immigrants even though plaintiff was not Irish).

In each case the plaintiff claimed that the juxtaposition of their picture to illustrate the argument was false as to them. Nonetheless, the Court of Appeals rejected a Sections 50 and 51 claim because the photograph was

(Continued on page 18)

NY Ct. Affirms Limited Reach of Misappropriation

(Continued from page 17)

used to illustrate a newsworthy article, there was a real relationship between the photograph and the article, and it was not an advertisement in disguise.

Ms. Messenger, principally relying on *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y. S.2d 832 (1967); *Binns v. Vitograph Co. of America*, 210 N.Y. 51 (1913), argued that New York courts recognize yet another exception to the newsworthiness privilege where the publication is substantially fictionalized or falsified. In *Spahn*, defendants published a biography of Warren Spahn, a famous baseball player, which contained imaginary incident, invented dialogue and dramatized portrayals. In *Binns*, defendant produced a film about John Binn's role in rescuing passengers from a sinking boat. Many of the details were manufactured and the story was "mainly a product of the imagination." (210 N. Y. at 56)

Follows Recent Cases

The Court of Appeals followed the *Finger-Arrington-Murray* line, unequivocally reaffirmed its holding in those cases, stating that "where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is an advertisement in disguise." The Court went on to note that "if the newsworthiness exception is forfeited solely because the juxtaposition of a plaintiff's photograph to a newsworthy article creates a false impression about the plaintiff, liability under Civil Rights Law § 51 becomes indistinguishable from the common law tort of false light invasion of privacy" and "New York does not recognize such a common law tort."

The Court distinguished *Spahn* and *Binns* on the basis that neither case "concerns the use of a photograph to illustrate a newsworthy article" and that the publications at issue were "substantially fictional works" which attempted "to trade on the persona of Warren Spahn and John Binns." In other words, the fictionalization of the story of a famous person was an attempt to trade on the commercial value of that person and was not newsworthy.

Gruner + Jahr had also appealed the jury's verdict that reasonable readers could have believed that the person

pictured was the person who had the experiences described in the anonymous letter. In this regard, it argued that a teenager who wrote an anonymous letter signed "Mortified," would not have posed for pictures of her experience and sent them to the magazine. At trial, Gruner + Jahr introduced a survey that which found that 92% of those surveyed that were 19 years or younger (the age of *YM*'s target audience) did not believe that Ms. Messenger was the person who wrote the letter and had the experiences described therein.

The Court of Appeals did not reach this issue, but observed in a footnote:

We have not been asked to, and do not, pass on the question whether a reasonable reader could conclude that plaintiff was the person identified as "Mortified," given that the pictures were obviously contrived and she was not identified as the author of the letter (*see, University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 AD2d 452, 455 [reasonable viewers would know that "they are not seeing or reading about real Notre Dame happenings or actual Notre Dame characters"], *aff'd* 15 NY2d 940).

The Court's opinion is also extremely useful in that it restates "several basic principles concerning the statutory right of privacy" — that the statute is to be narrowly construed; that the statute does not apply to newsworthy events; that "newsworthiness" is to be broadly construed; and that the fact that a person's name or likeness is solely or primarily to increase circulation, does not mean that they have been used for trade purposes.

Robert G. Sugarman is a partner and Jennifer Sclar is an associate with Weil Gotshal & Manges, New York, NY and represented Gruner + Jahr in this matter.

Michigan Federal Court Throws Out Right of Publicity, False Light and Libel Claims Based on NBC 'Temptations' Mini-series

By Herschel P. Fink

A U.S. District Court in Detroit has dismissed three of four lawsuits arising from the November, 1998, NBC broadcast of a two-part, four-hour mini-series depicting the story of the legendary Motown act, The Temptations.

The case, *Ruffin-Steinback v. dePasse Entertainment, et al.*, ___ F. Supp. 2d ___, 2000 WL 133440 (E.D. Mich., Feb. 3, 2000), involves claims of appropriation of the right of publicity, false light, public disclosure of embarrassing private facts, defamation, unjust enrichment and intentional infliction of emotional distress. A request for an injunction against the broadcast was rejected as a constitutionally impermissible prior restraint in a prior related action reported at 17 F. Supp. 2d 699, 27 Media L. Rep. 1474 (E. D. Mich., 1998).

The mini-series relates the story of the Temptations from their beginnings as a singing group until the present. It is based upon a book by Otis Williams, the last surviving original member of the group, and is told from his point of view. It portrays portions of the lives of the original members, and also contains details of the life of the late David Ruffin, the group's lead singer from 1964 to 1968.

It also depicts many of the people who were involved in either family or business relationships with The Temptations, including deceased member Melvin Franklin's mother, Rose Franklin, Otis Williams' first wife, Josephine Miles, and Johnnie Mae Mathews, the group's first agent. None of these persons consented to use of their likenesses — through actor portrayals — in the mini-series.

Plaintiffs in the four related lawsuits, all filed in Michigan state court and removed to federal court where they were consolidated, are Rose Franklin, Miles, Mathews, and several children of Ruffin (who

were not depicted), along with Ruffin's stepmother, Earline Ruffin, to whom reference is also made in the broadcast.

U.S. District Judge John Feikens granted the joint dismissal motion of defendants dePasse Entertainment, NBC and Hallmark Entertainment as to three of the four cases. He denied dismissal of the fourth case as to the defamation and false light claims of the former agent, Mathews, in light of an amended complaint that she filed, providing previously lacking specific allegations. The defendants intend to make the amended Mathews claim the subject of another dismissal motion.

“Simply put, plaintiffs seek compensation for the use of their names and life-events in the mini-series.”

As described by the court, the principal issue in the case was plaintiffs' claims “that defendants unlawfully misappropriated their life-stories, names, and likenesses in airing the Temptations mini-series. Simply put, plaintiffs seek compensation for the use of their names and life-events in the mini-series.”

After first noting that no Michigan case law treated the “right of publicity” branch of invasion of privacy, Judge Feikens adopted the test in Section 47 of the Restatement (Third) of Unfair Competition:

[U]se “for the purposes of trade” does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.

The court took further note of Comment c to Section 47 that “the right of publicity is not infringed by the dissemination of an unauthorized print or broadcast biography.”

Dismissing the plaintiffs' claim of fictionalization of portions of the portrayals, the court concluded that, if actionable at all, they would have to constitute defa-

(Continued on page 20)

Michigan Fed. Ct. Throws Out Claims Based on Mini-series

(Continued from page 19)

mation or false light, “not as an action for violation of the right of publicity.”

The court also refused to allow a right of publicity action based upon promotion of the mini-series, and particularly the use of scenes from the mini-series: “Use of plaintiffs’ names or likenesses in promoting a story about the plaintiffs does not implicate the right of publicity.”

No Defamation

Judge Feikens also dismissed the defamation claim by Otis Williams’ first wife, Josephine Miles, who claimed, in essence, that she was defamed because the program’s portrayal of Otis Williams was too favorable. This portrayal of her then-husband as more attentive than he was, among other things, diminished her role as mother of their child. The court held:

As defendants correctly argue, this component of Miles’ defamation claim can be quickly dismissed; any inaccuracies that may have existed concerning Otis Williams’ behavior as a father are not “false and defamatory statement[s] concerning” Miles.

No Private Facts Disclosed

Judge Feikens also dismissed Miles’ claim for public disclosure of embarrassing private facts arising from the depiction of her high school relationship with Otis Williams and particularly her premarital pregnancy. Noting that these facts were disclosed in Williams’ 1989 book, the court held that “there is no liability [for public disclosure of private embarrassing facts] when the defendant merely gives further publicity to information about the plaintiff that is already public.” The court went on to note that “neither birth records nor marriage records are private documents; it cannot seriously be contended that Miles’ premarital pregnancy, while

perhaps embarrassing, is a private fact.”

Choice of Law Decides “Momma” Libel

In one of the case’s more bizarre turns, the court dismissed a defamation claim by David Ruffin’s stepmother over a line in the mini-series spoken by the Ruffin character: “My momma owed some pimp some money. Instead of paying him she gave me to him.”

The court avoided deciding whether the phrase “my momma” sufficiently identified his stepmother, Earline Ruffin, by adopting defendants’ argument that under Mississippi law, where she was domiciled, Earline Ruffin’s action did not survive her death at age 98 subsequent to the filing of the action. Judge Feikens found that “in the case of multistate publication of defamatory material, plaintiffs’ domicile will ordinarily be the state with the greatest interest in having its law applied,” which he found to be Mississippi. The court noted that “under Mississippi law, where Earline Ruffin was domiciled, a cause of action for defamation does not survive the death of the plaintiff, *see Cathings v. Hartman*, 174 So 553, 554 (1937), even where the case was filed prior to the death of the plaintiff.”

On February 29, 2000, the plaintiffs in the three dismissed actions filed claims of appeal to the Sixth Circuit U. S. Court of Appeals.

Herschel Fink is a partner with Honigman Miller Schwartz and Cohn, Detroit, Michigan. He was lead counsel for the defendants and was assisted by his partner Cynthia Thomas.

Fifth Circuit Finds Right of Publicity Not Preempted by Copyright Act

By Robert P. Latham

In a decision that may have far-reaching and unintended consequences, the Fifth Circuit upheld an award of damages for misappropriation of name and likeness against a record producer and an oldies record label for using the names, and in some cases the likenesses, of musical artists in connection with the sale of CDs featuring those artists' performances. *Brown v. Ames*, 98-20736 (8th Cir. Feb. 7, 2000). The court held that such claims were not preempted by the Copyright Act.

The Musician's Allegations

The *Brown* case involved a suit by fifteen blues musicians from the Houston, Texas area who claimed copyright infringement against Roy Ames, a music producer in Houston, Texas specializing in Texas blues, and the record label "Collectibles" based on 146 songs that had been released on Collectibles' CDs. Pursuant to license agreements entered into in the early 1990's, Ames licensed to Collectibles master recordings featuring the blues artists, most of which had never previously been released on any label. The licenses granted from Ames to Collectibles included the rights to use the names and likenesses of the artists and warranted that Ames had the rights to enter into the licenses.

The musicians claim that they owned the copyrights to the musical performances that Ames licensed to Collectibles, and further claimed that they had not authorized Ames to distribute the recordings or, if they had, that such licenses were invalid. In addition to claims for copyright infringement, the musicians brought claims for violations of the Lanham Act and added state law claims for misappropriation of name and likeness, conversion and negligence.

The Trial of the Musicians' Claims

Of the copyright claims on the 146 songs at issue, 137 were either dismissed by the court or resulted in a jury verdict for the defendants. The musicians elected statutory damages on the remaining nine songs and Collectibles infringement on the nine songs was found to be innocent. Consequently, the court awarded \$1,800 total damages against Collectibles for innocent copyright in-

fringement. The musicians recovered \$22,500 for copyright infringement from Ames.

The musicians recovered nothing on their Lanham Act claims, and the conversion and negligence claims were held by the court to be preempted by the Copyright Act. However, the musicians were allowed to proceed to verdict on their misappropriation of name and likeness claims and ended up recovering \$27,000 from Collectibles and \$100,000 from Ames on those claims. Collectibles and Ames each filed an appeal claiming that the misappropriation claims should have been preempted by the Copyright Act. Collectibles in its appeal also urged that there was legally insufficient evidence to support an award of damages for misappropriation since the only claim against Collectibles in this regard was that it had used the names and likenesses of the musicians on the CDs that it sold featuring those musicians' performances and in Collectibles' catalog.

The Arguments Before the Fifth Circuit

Collectibles acknowledged on appeal that not every claim for misappropriation of name and likeness is preempted by the Copyright Act and that the common law cause of action for misappropriation and the right of publicity protect rights that are not necessarily protected under the Copyright Act. The theory behind awarding damages for misappropriation of name and/or likeness is that certain individuals have a value to their name and likeness such that the use of that name or likeness in endorsing a product adds value. An unauthorized use of a person's name or likeness to endorse a product to with
(Continued on page 22)

Editor's Note: I want to point out that we are publishing three decisions today in which the courts fail to find that right of publicity claims are preempted by the Copyright Act. The facts in each are different, although I note specifically that only one involves traditional commercial speech. These cases, found on pages 21-26, come out of the Fifth Circuit, the California Court of Appeals and a federal district court in New Jersey. The Fifth Circuit and the California state court cases, I would suggest, evidence a dangerous lean toward the application of right of publicity to non-commercial speech.

5th Cir. Finds Right of Publicity Not Preempted by Copyright Act

(Continued from page 21)

which they are not affiliated dilutes the commercial value of a celebrity's name or likeness. However, Collectibles' argument focused on the fact that in this case the only conduct of Collectibles of which the musicians complained was the copying and distribution of CDs featuring musical performances of the musicians — a right that is protected under the Copyright Act. Collectibles argued that identifying a performer with his music does not dilute the commercial value of that person's name or likeness. Therefore, the fact that the names and likenesses of the musicians were included on their CDs should not give rise to an additional cause of action or additional damages; otherwise, every single claim for the unauthorized copying and distribution of a musical recording or any other work fixed in a tangible medium, as

The court drew an analogy to Midler and Waits.

long as it includes the name or likeness of the artist on it, could be recast as a misappropriation claim and brought in state court.

Collectibles further argued that the misappropriation cause of action should be preempted because it would disrupt the uniform system of damages promulgated by the Copyright Act. For instance, in this case where Collectibles had been granted a license by a musical producer, had no grounds to question that license, and was found to have innocently infringed on only nine of 146 songs at issue, the court deemed appropriate an award of \$1,800 for copyright infringement. Nevertheless, the jury was allowed to award an additional \$27,000 for the exact same conduct.

The Fifth Circuit's Opinion and its Possible Effect

The Fifth Circuit rejected Collectibles' arguments. In so doing, the court drew an analogy to the cases of *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993) to support the proposition that a cause of action for misappropriation protects a distinct right, not equivalent to rights protected by the Copyright Act. The court also rejected

Collectibles' argument that the purpose and objectives of the Copyright Act would be frustrated by allowing a misappropriation claim in this context, stating that most modern day recording contracts and licenses include an assignment of the rights to use the artist's name and likeness.

There are several aspects of the Fifth Circuit opinion that are particularly troubling to record companies as well as to other publishers. In the first instance, the Fifth Circuit has now found a right of publicity in a context unlike *Midler* and *Waits*, each of which involved an allegation of an implied endorsement of a product, that *Midler* and *Waits*, respectively, did not endorse, as a result of the use of a soundalike in an advertisement. In the *Brown* case, there is no question that the musical performances on the CDs at issue were those of the plaintiffs, and their names and likenesses were not used to imply an endorsement of, or to advertise, a product but rather to identify the source of their own music.

Second, unlike the *Midler* and *Waits* cases, the musicians in *Brown* were not well known. Instead, they were local musicians who were unable to offer any evidence of any previous endorsement opportunities. Thus, the right of publicity as found by the Fifth Circuit can now extend to persons who have never demonstrated commercial value of their names and/or likenesses.

Finally, while the court suggests that if the copying and distribution of musical performances is authorized, its decision will not grant an additional claim for misappropriation of name and likeness (citing a common law right to use the artist's name and likeness as well as the standard industry practice that has evolved of the artist assigning a right to use his name and likeness), the court does not address the fact that most such claims will arise where there is a claim of *unauthorized* copying. In such a case, the Fifth Circuit appears to pave the way for plaintiffs to recover damages above and beyond those set forth in the Copyright Act if the name and likeness of the artist or author appears on the unauthorized copy. The *Brown* opinion also increases the ability of plaintiffs to recast their copyright claims

(Continued on page 23)

5th Cir. Finds Right of Publicity Not Preempted by Copyright Act

(Continued from page 22)

as claims for misappropriation of name and likeness and bring them in state court.

The decision appears to conflict with the holding of the Seventh Circuit in *Baltimore Orioles, Inc. v. Major League Baseball Player's Ass'n*, 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987). And, although distinguishable because of a broad release signed by James Brown, the Fifth Circuit opinion may also clash with the D.C.'s Circuit's opinion in *Brown v. Twentieth Century Fox Film Corp.*, 799 F. Supp. 166 (D.D.C. 1992), *aff'd*, 15 F.3d 1159 (D.C. 1994).

Collectibles has filed a petition for rehearing.

Bob Latham is a partner in the Houston and Dallas offices of Jackson Walker L.L.P. who represented Collectibles in the trial court and before the Fifth Circuit.

Appeals Court Find's Models' Right of Publicity Claims Not Preempted By Copyright Law

Distinguishing between the non-copyrightable likenesses of models and the copyrightable nature of the photographs in which they appear, the California Court of Appeal found that right of publicity claims alleged under California Civil Code § 3344 are not preempted by federal copyright law. *KNB Enterprises v. Matthews*, 2000 Cal. App. LEXIS 101 (Cal. Ct. App. Feb. 17, 2000). The decision allows an owner of copyrighted photographs to assert the contractually assigned rights of publicity of the models in the photo-

graphs against a web site operator who was copying the photos from Usenet news groups and posting them on its own commercial web site. Why he chose not to bring copyright infringement claims is not discussed in the decision.

Chooses to File State Claims

Plaintiff, KNB Enterprises ("KNB") operates a web site known as webvirgins.com which provides erotic images for a fee. As part of KNB's promotional efforts, it uploads sample images to the Usenet, which allows Usenet participants to access and download the images for free.

Claiming that he is providing a service to Internet users who do not have access to the Usenet, the defendant utilizes a software program to identify and copy sexually explicit photographs posted and freely available on the Usenet. Defendant then makes these images available on his own monthly membership web site, justpics.com.

Over time, the defendant allegedly copied and displayed without authorization 417 of the plaintiff's photographs. The photos depict 452 models, all of whom have assigned their § 3344 rights to the plaintiff. Plaintiff also owns the copyright to all the photographs. Rather, than bring a copyright infringement action against the defendant, however, the plaintiff filed suit in California state court asserting the § 3344 rights of each of the models pictured. The California statute provides for minimum damages of \$750, even if no actual damages are proven. Thus, if the plaintiff were to successfully assert the rights of each of the models it stands to gain at a minimum \$339,000.

Following a Superior Court of Los Angeles County grant of summary judgment holding that the plaintiff's § 3344 claims were preempted by federal copyright law, the plaintiff appealed to the California Court of Appeal.

No Preemption

On appeal, the California Court of Appeal noted that for preemption to occur under the Copyright Act,

(Continued on page 24)

Models' Likenesses Not Copyrightable

(Continued from page 23)

two conditions must be met: “first, the subject matter of the claim must be a work fixed in a tangible medium of expression and come within the subject matter or scope of copyright protection as described in sections 102 and 103 of 17 United States Code, and second, the right asserted under state law must be equivalent to the exclusive rights contained in section 106.” 2000 Cal. App. LEXIS at *13, quoting *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911 (1996).

While recognizing that it was “undisputed that the unauthorized commercial display of the copyrighted photographs on defendant’s website constituted an infringement of plaintiff’s exclusive 17 United States Code 106 rights,” the court stated that “the question that remains . . . is whether plaintiff’s statutory appropriation claim based on the violation of the model’s section 3344 rights is the equivalent of a copyright infringement claim.” 2000 Cal. App. LEXIS at *14-15.

Distinguishing the Claims

The defendant contended that “the models’ statutory right of publicity claims are indistinguishable from the plaintiff’s copyright infringement claim because the only wrong alleged was the unauthorized publication of the of the copyrighted photographs, or an infringing use.” *Id.* at *23. Pointing to *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999), in which the district court found that Dustin Hoffman’s § 3344 claim over a photograph which was digitally altered to combine Hoffman’s face with a designer gown was not preempted by federal copyright law, the defendant argued that the intent to use the photographs for endorsement purposes is required to distinguish § 3344 claims from copyright infringement claims.

While acknowledging that *Hoffman, Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911 (1996) (holding that actors’ § 3344 claims were preempted by copyright law where actors were attempting to stop distribution of film in which they appeared), and *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) (§ 3344 claims not preempted where plaintiffs’ names and likenesses were appropriated for advertise-

ment purposes), “arguably lend support to defendant’s position that something more than a mere infringing use is required to avoid preemption of section 3344 claim,” the appellate court ultimately relied on *Nimmer on Copyright* to find that likenesses are distinguishable from the copyrighted work in which they appear.

According to *Nimmer*:

Invasion of privacy may sometimes occur by acts of reproduction, distribution, performance, or display, but inasmuch as the essence of the tort does not lie in such acts, pre-emption should not apply. The same may be said of the right of publicity. . . . A persona can hardly be said to constitute a ‘writing’ of an ‘author’ within the meaning of the Copyright Clause of the Constitution. A fortiori, it is not a ‘work of authorship’ under the Act. Such name and likeness do not become a work of authorship simply because they are embodied in a copyrightable work such as a photograph.

1 *Nimmer on Copyright* (May 1996), § 1.01 [B][1][c], pp. 1-22 - 1-23, fns. omitted.

Thus the court concluded that neither condition of the two-part test for determining preemption was met in the case. The court stated, “[f]irst, the subjects of the claims are the models’ likenesses, which are not copyrightable even though ‘embodied in a copyrightable work such as a photograph,’” and, “[s]econd, the right asserted under the state statute, the right of publicity, does not fall within the subject matter of copyright.” 2000 Cal. App. LEXIS at *28, quoting *Nimmer on Copyright, supra*, § 1.01 [B][1][c], pp. 1-22 - 1-23, fns. omitted.

New Jersey District Court Allows Sound-Alike Claim to Proceed

Relying on *Midler v. Ford Motor Co.* and *Waits v. Frito-Lay, Inc.*, two Ninth Circuit decisions, a New Jersey District Court Judge has concluded that the state's courts would rule that imitating a celebrity's voice can give rise to a cause of action for the right of publicity. *Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337, 2000 U.S. Dist. LEXIS 248 (D.N.J. 2000).

At center is a commercial prepared by the defendant Grey Advertising for the defendant Darden Restaurants' Olive Garden chain of Italian restaurants. The commercial, entitled "Aunt Marie," depicts a family enjoying a meal at the restaurant while a narrator fondly recalls how his Aunt Marie enjoyed the food so much that she asked for the restaurant's chicken parmesan recipe. The song, "Oh Marie," plays in the background throughout the commercial.

The plaintiff, Gia M. Prima, the widow of musician Louis Prima, who popularized "Oh Marie" and at one time held a copyright in an arrangement of the song, brought suit after seeing the commercial. Ms. Prima alleged claims under Nevada's statutory right of publicity, New Jersey's common law right of publicity, § 43 (a) of the Lanham Act, tortious interference with prospective economic advantage, common law unfair competition and unjust enrichment.

Choice of Law

After setting out the applicable standards for motion to dismiss and for summary judgment, the court turned to the choice of law issue. Noting that New Jersey applies a "flexible governmental interest analysis requiring application of the law of the state with the greatest interest in resolving the particular issue," the court stated that the parties argue for the application of the laws of three different fora. *Id.* at *20.

First, the plaintiff contended that the court should apply either New Jersey law or Nevada law because the plaintiff lives in New Jersey and because Louis Prima spent much of his career in Nevada, the state in which his will was probated. Both New Jersey, through common law, and Nevada, by statute, recognize the right of publicity as a property right that survives the death of the person holding the right.

Defendants, on the other hand, argued that the law of Louisiana — where Louis Prima was born and where he died — should apply. While Louisiana courts have recognized claims for misappropriation, they have not expressly provided for a right of publicity. Rather, the court noted, "[b]ecause Louisiana couches this right in terms of the right of privacy, it appears that the right is a personal right and, as such, does not survive the death of the individual." *Id.* at *26.

Turning to the issue of which state has the greatest interest in the descendability of the right of publicity, the court found that "Louisiana's contacts to this litigation and the parties are minuscule." *Id.* at *28. Stating that the question of "whether Louis Prima ever had any significant contact with Louisiana after his childhood in the 1930's is a disputed question of fact that must be resolved in favor of the [plaintiff]," and that because neither of the defendants are citizens of Louisiana, the court concluded that "Louisiana has no contact with, or interest in, any issues or parties relevant to this litigation." *Id.* at *30.

Faced with choosing between New Jersey and Nevada law, the court recognized that because both states allow a decedent's estate to inherit his right of publicity there was no conflict of law and consequently, the law of the forum state, New Jersey, should apply.

Adoption of Sound-Alike Claims Predicted

Noting that "New Jersey courts have not expressly addressed whether the right of publicity protects a singer's voice from unauthorized commercial exploitation," the court, citing *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) and *Waits v. Frito-Lay Inc.*, 978 F.2d 1093 (9th Cir. 1992), stated that "the trend among courts addressing the issue is that imitation of another's voice can give rise to a cause of action for infringing the right of publicity." *Id.* at *36. "[P]ersuaded by those cases holding that imitating a celebrity's voice can give rise to a cause of action for violation of the right of publicity," the court concluded that "New Jersey courts would adopt such a rule." *Id.* at *38.

Fleshing out the rule, the court continued to state, "the plaintiff must be able to prove that she 'owns an
(Continued on page 26)

NJ Court Allows Sound-Alike Claim

(Continued from page 25)

enforceable right in the identity or persona of [Louis Prima],’ and that the defendants ‘without permission, . . . used some aspect of identity or persona in such a way that [Louis Prima] is identifiable from defendant[s]’ use,’ and that the ‘defendant[s]’ use is likely to cause damage to the commercial value of that persona.’” *Id.*, quoting McCarthy, *The Rights of Publicity and Privacy* § 3.1 [B].

Given that the defendants, for purposes of their motion, admitted that the voice singing “Oh Marie” on the commercial sounds like Louis Prima and that the song has become associated with him, the court found that “there is no dispute at this point in the litigation that the defendants imitated Prima’s voice on the commercial, that the defendants used the sound-alike voice for commercial purposes, and that the defendants did not have the plaintiff’s consent or permission.” Thus, the court concluded, “the plaintiff has made out a prima facie case for infringement of the plaintiff’s right of publicity.” *Id.* at *39.

Defendants’ Arguments Rejected

In opposition, the defendants argued, among other things, that 1) the use of Prima’s voice in the commercial was *de minimis*; 2) the plaintiff’s alleged right of publicity is preempted by federal copyright law; and 3) plaintiff failed to properly plead her claims for tortious interference with contract, unfair competition, and unjust enrichment. With the exception of the arguments against the unjust enrichment claim, the court rejected each of the defendants’ contentions.

First the court found that because the song played “almost continuously throughout the entire commercial,” and because “the song and more importantly the voice of Prima imitator are clearly audible above the din of restaurant noise and the voice of the narrator, and the refrain ‘Oh Marie’ is sung at key moments in the commercial,” the use of Prima’s voice cannot be considered *de minimis* “under any meaning of the term.” *Id.* at *43. Additionally, the court found “disingenuous” the defendants’ argument that the song was selected “for its thematic relevance and typicality as background music in an Italian restaurant.” *Id.* at *42-43.

No Copyright Preemption

With respect to preemption, the court distinguished between a copyright infringement claim over the rights to the song and the plaintiff’s claim “that the defendants violated Prima’s right of publicity when they hired a professional singer to imitate Prima’s voice in the commercial.” *Id.* at *45. Further, the court relied on Midler and Waits to support its determination that the plaintiff’s claim for “infringement of voice” is qualitatively different from a claim arising under federal copyright law.

The court also found that plaintiff’s tortious interference with prospective economic relations could survive summary judgment. The court rejected defendants’ arguments that the plaintiff’s complaint failed to allege “a single instance of [the plaintiff] marketing Prima’s voice, ‘singing style,’ or ‘manner of representation.’” Rather, the court found that the complaint’s allegation that the plaintiff “has actively utilized her right to commercially market proprietary interest in Louis Prima’s voice, singing style, and manner of presentation,” was sufficient to satisfy the pleading requirements for the cause of action. *Id.* at *54-55.

The court did, however, grant the defendants’ motion for summary judgment with respect to the plaintiff’s common law unjust enrichment claim. Under New Jersey law, “[t]o assert a claim of unjust enrichment a plaintiff must show that “it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights.”” *Id.* at *56, quoting *Eli Lilly and Co. v. Roussel Corp.*, 23 F. Supp. 2d 460 (D.N.J. 1998), and *VRG Corp. v. GKN Realty*, 135 N.J. 539, 641 A.2d 519 (1994). Finding no contractual or quasi-contractual relationship between the parties, the court dismissed the claim.

Colorado Court of Appeals Recognizes False Light as Claim *Affirms \$100,000+ Jury Award*

Holding that false light invasion of privacy is a viable claim in Colorado, the Colorado Court of Appeal has affirmed a \$106,508 jury verdict entered against Denver Publishing for a 1994 *Rocky Mountain News* report focusing on the plaintiff's criminally-active family. *Bueno v. Denver Publishing Co.*, 2000 Colo. App. LEXIS 268 (Colo. Ct. App. March 2, 2000).

Criminal Family Tree

The article, "Denver's Biggest Crime Family," which ran on Saturday, August 27, and Sunday, August 28, 1994, described the criminal activities of several of the 18 Bueno siblings, and included a "family tree" drawing with photographs of all of them. Plaintiff Eddie Bueno's photograph appeared just below the headline with the caption: "Eddie, 55, the oldest of the Bueno children." The family tree also included a photograph of Freddie Bueno, the youngest brother, captioned: "Freddie, 28, the only Bueno brother who stayed out of trouble. Living in the Midwest." The caption was deleted from the Sunday edition.

The article included 25 statements which referred in critical terms to the "Bueno brothers," the "Bueno boys," the "older brothers," the "older boys," or the "Bueno family" as being criminals.

The article also stated that the plaintiff had "stayed out of trouble." Despite that statement, Eddie Bueno filed suit for negligence, defamation, private facts, and false light.

Eddie Bueno, in fact, had left home at age 13, later served in the U.S. Army for six years, married and raised three children, and was never arrested for a crime, nor charged with a crime.

Prior to trial, the trial court granted summary judgment for the defendant on the plaintiff's private facts and negligence claims. Following the presentation of evidence, the trial court granted the defendant's motion for directed verdict on the defamation claim because the article contained no statement of fact, but permitted the false light claim to proceed to the jury. The jury subsequently awarded Bueno \$47,973.90 for

noneconomic losses, \$5,280 for economic losses arising out of loss of earnings and medical treatment, and \$53,253.90 in exemplary damages.

Court Recognizes False Light

Noting the various branches of invasion of privacy that have been recognized by the state's courts in recent years — private facts in *Robert C. Ozer, P.C. v. Borquez* (1997), intrusion in *Doe v. High-Tech Institute, Inc.* (1998), and misappropriation in *Dittmar v. Joe Dickerson & Associates, LLC* (1999) — the court rejected the defendant's argument that false light should not be recognized in Colorado.

Specifically, the court rejected Denver Publishing's contention that false light claims were "duplicative and superfluous" of defamation claims. Rather, the court held that because false light claims are measured by offensiveness and exist to compensate for mental distress caused by being exposed to public view, the tort is distinct from defamation which is measured by and seeks to compensate harm to reputation.

Turning to the elements of the false light claim, which the court adopted from the *Restatement (Second) of Torts* § 652E (1977), the court chose not to decide whether special damages must be proven in order to state a claim for false light. The court did find, however, that Bueno allegations of lost income and medical expenses were sufficient evidence of special damages.

Court Finds Actual Malice

The court also found that Bueno proved that Denver Publishing acted with actual malice in publishing the article. First, the court noted that while the article, which took six months to prepare, made repeated reference to the criminal activities of the "older Bueno brothers," each of the newspaper employees testified that the information they had about the plaintiff could not justify a portrayal of him as being involved in any

(Continued on page 28)

Colorado Court Affirms \$100,000 Verdict

(Continued from page 27)

criminal activities.

Further, the court found that Denver Publishing's reliance on Bueno's sister, who told the reporter that she hated the plaintiff, that she wished she had killed the plaintiff, that she wanted to use the story to "get back" at her older brothers, and who had participated in many crimes with her brothers, as a "chief source" for the story could provide an inference of actual malice. Finally, the court noted that the removal of the caption from the photograph of the plaintiff's brother Freddie, "could have been viewed by the jury as a recognition that its initial use of that caption in its first printing was substantially false."

Additionally, the court found that the newspaper could not escape liability by pointing to the statement in the article that specifically refuted the negative implication raised by the article. Rather, the court stated that the interpretation of the article and the determination of whether it invaded plaintiff's privacy were questions of fact for the jury. Likewise, the court refused to disturb the punitive damage award stating that, "a jury's determination of damages must be given considerable deference and should not be overturned unless the award is grossly and manifestly excessive."

Finally, the appellate court affirmed the trial court's exclusion of the plaintiff's juvenile arrest card for petty theft, despite the fact that Denver Publishing had the card in its possession while preparing the article. According to the court, "[t]he minor nature of the alleged offense, the fact that it was, at most, a delinquent act (and therefore, not a crime by definition), and that it occurred 40 years before trial, render it of no consequence to the issues in the case."

UPDATE

California Supreme Court Refuses Review in *Beardstown Ladies*

The California Supreme Court has refused to review a California Court of Appeal determination that information on book covers, even when quoted from the text of the book, constitutes commercial speech subject to California's Unfair Trade Practices Act. *See Keimer v. Buena Vista Books, Inc., et al.*, 89 Cal. Rptr. 2d 781 (Ct. App. 1999). *See LDRC LibelLetter* November 1999 at 7.

The Supreme Court's refusal leaves unsettled the discrepancy between California and New York regarding the protection that should be afforded book covers and other materials promoting constitutionally protected speech. In a case factually identical to *Keimer* filed in New York, *Lacoff v. Buena Vista Publishing, et al.*, No. 98-606005 (New York County), the New York Supreme Court dismissed the same claims on the theory that materials promoting protected speech must be afforded the same level of protection. *See LDRC LibelLetter* February 2000 at 5.

The complaints were filed after a press release in which the *Beardstown Ladies*, an investment club of retired women from Beardstown, Illinois, acknowledged that the investment returns they claimed in their investment guide book — claims that the publisher reprinted on the cover — were the result of a clerical error. The publisher was sued by the purchasers of the book under theories involving false advertising and deceptive trade practices. In New York, the complaints were dismissed on First Amendment grounds. In California, the trial court dismissed the complaints but the Court of Appeals reinstated, holding that, since the purpose of the book covers was to sell books, statements on book covers constituted commercial speech.

Wisconsin Supreme Court Holds No Right of Access to Unfiled Pretrial Discovery Materials *Ruling Reverses Trial Court Access Grant*

Holding that “neither the public nor the press have either a common law or First Amendment right of access to unfiled pretrial discovery materials which remain in the custody and control of the parties to the litigation,” the Supreme Court of Wisconsin reversed an order granting the *Milwaukee Journal Sentinel* a right of access to discovery materials in a negligence action against Mitsubishi Heavy Industries America. *State ex rel. Mitsubishi Heavy Indus. Am., Inc. v. Circuit Court*, 2000 Wis. 16, 2000 Wisc. LEXIS 18 (2000).

As Chief Justice Shirley S. Abrahamson emphasized in her concurrence however, the holding is limited to unfiled materials; once the material is filed with the court, the party seeking to prevent access must show good cause to be granted a protective order. Additionally, according to Abrahamson, the press does have the right, pursuant to Wisc. Stat. §§ 804.01(3) and 804.01(6), to move to intervene in order to request that the court compel the filing of unfiled discovery materials.

Accident Leads to Lawsuit

The negligence action arose when three ironworkers were killed by a collapsed construction crane while lifting a section of the retractable roof for a stadium. The widows of the deceased sued, among others, Mitsubishi, the subcontractor for the public works project.

Wary of the possibility of criminal prosecution, Mitsubishi filed for a motion to stay the depositions of five of its employees until OSHA and the Milwaukee County D.A.’s office completed their investigations. Rather than grant the stay, the circuit court imposed gag order, directing that the five depositions proceed but that the documents be sealed for 30 days. The court specifically pointed out that the order only applied to the depositions of the five employees of Mitsubishi.

When a representative from the *Milwaukee Jour-*

nal Sentinel appeared at a deposition of an employee of another defendant and requested copies of the transcript, his request was denied. The *Milwaukee Journal Sentinel* filed a motion to intervene, arguing that public interest would best be served if the newspaper were given access to the information. *Journal Sentinel* also asked for a clarification of the gag order, review of the sealed documents, release of depositions not covered by the gag order, and the right to attend or view depositions if invited by any of the parties.

Trial Court Grants Access

Granting the *Journal Sentinel* access to all papers not covered by the gag order, the circuit court invoked the First Amendment protections, calling itself a “public forum” and classifying discovery documents as “public records” and the lawyers holding these depositions and materials “custodians of public records.” The court also allowed the *Journal Sentinel* to attend or view any deposition upon the invitation of the host of a deposition. On appeal, the order was affirmed. The court of appeals found no showing that the circuit court violated a clear legal duty or went against clear controlling authority.

But The Supreme Court Reverses

The Supreme Court of Wisconsin disagreed. Instead, it held that unfiled and filed documents should be treated differently. As discussed in the concurrence, Wisconsin amended its rules of procedure in 1986 to provide that, absent a court order, pretrial discovery material be retained by the parties instead of being filed in the court.

Looking to common law, the court noted that “the access rights of news media and the general public are identical in scope,” and those rights consist of inspecting and copying judicial records and public documents. The presumption in favor of inspecting judi-

(Continued on page 30)

WI Sup. Ct. Reverses Trial Court Access Grant

(Continued from page 29)

cial records, the court said, generally “extends only to documents which have been filed with the court, such as pleadings and settlement agreements.” The court noted, however, that courts in some jurisdictions have limited the scope of the right of access. In some cases, the presumption in favor of inspection was limited to materials “used in determining the litigant’s substantive rights.” *In Re Reporters Comm. for Freedom of the Press*, 249 U.S. App. D.C. 119, 773 F.2d 1325 (D.C. Circuit 1985). In other cases, the right of access was limited to materials considered by the court when ruling on dispositive pretrial motions. *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). In the shadow of these narrow interpretations, the court rejected any common law right to examine discovery materials which have not yet been filed nor used in any motions.

No First Amendment Right of Access

The court then turned to the First Amendment analysis. Since the underlying negligence action was “a civil dispute between private litigants,” the court held, “public issues and concerns are not in dispute,” notwithstanding the fact that the lawsuit involved “a large public works project funded by public tax monies.” Thus, the court found, the documents should not be “imbued with ‘public record’ status.

Relying heavily on *Seattle Times v. Rhinehart*, the court noted the policy behind denying the press a right of access to discovery materials: because the liberal discovery rules allow “extensive intrusion into the private affairs of both litigants and third parties,” there is an interest in protecting the private nature of the process. With this in mind the U.S. Supreme Court in *Seattle Times* held that a protective order, entered on a showing of good cause, which places restraints on not yet admitted discovery documents does not offend the First Amendment. While acknowledging the difference between the issue in *Seattle Times* (the right to disseminate), and the issue here (the right of access), the court found that, due to

the private nature of unfiled, unadmitted discovery documents, the media does not have the right of access to such documents, and the court may not compel the parties to provide the documents. The court expressly reserved opinion, however, as to what happens when a party voluntarily releases any discovery materials.

In its First Amendment analysis, the court emphasized the admission into evidence as the starting point of the right of access. It referred to *Reporters Comm. For Freedom of the Press* and the two-prong test used in that case to determine whether there exists a constitutional right of access to judicial proceedings: (1) whether the proceeding has historically been open, and (2) whether the right of access plays an essential role in the proper functioning of the judicial process and the government as a whole. In *Reporters Committee*, then-D.C. Circuit Court Judge Scalia held that “there is no right of public access to discovery materials until such materials are actually admitted at trial.” Moreover, Judge Scalia held that the district court would be acting within its constitutional bounds if it refused access until final judgment. While the court in *Mitsubishi* noted such restrictive standards, it limited its own holding to deny the public right of access to unfiled documents only.

A Roadmap for the Future

In her concurrence, Chief Justice Shirley Abrahamson accepted the distinction between filed and unfiled documents, though she noted that such a holding “elevates form over substance.” She explained that, according to legislative history, the only reason the statute was rewritten to provide that pretrial discovery be retained by the parties and not filed with the court was to ease the filing burden on the circuit courts. Thus, the appropriate course of action would be for the media organization to ask the court to order the pretrial discovery material to be filed and to authorize media access to the material. Once the material is filed, the party seeking to prevent the media organization from obtaining the documents may, under court’s discretion, receive a protective order upon a showing of good cause.

WI Sup. Ct. Reverses Trial Court Access Grant

the civil case for a preliminary injunction to appoint a court monitor to supervise the IBF's affairs. Citing third-party privacy concerns, the Government filed all of its supporting evidence — including audio and video surveillance tapes, transcripts, and affidavits — under seal with the Court's approval.

The *Los Angeles Times* moved to intervene and unseal these evidentiary materials, arguing that the strong common law presumption of public access established by the Third Circuit's decision in *Leucadia Inc. v. Applied Extrusion Technologies*, 998 F.2d 157 (3d Cir. 1993), applied to the tapes and documents. The defendants strongly opposed public access to the materials on the ground that further publicity regarding the Government's evidence would pollute the jury pool and threaten their Sixth amendment rights to a fair trial.

Strangely, the U.S. Attorney's Office — which had originally moved to file its evidence under seal — chose to take no position on the access motion.

The court granted the *Los Angeles Times*' motion in its entirety, holding that the defendants' various objections to access could not defeat the presumption of openness in court proceedings. The court stated that “a risk of contaminating a potential jury pool is not enough to counteract the presumption of public access to the documents.” Instead, the court could rely on other devices such as voir dire to protect defendants from the adverse effects of publicity.

The court also rejected the defendants' argument that the tapes and documents should not be unsealed until the court determines that they are admissible at trial, finding no such requirement under Third Circuit law.

The Los Angeles Times was represented by Bob LoBue and Doug Widemann of Patterson, Belknap, Webb & Tyler LLP, New York, N.Y..

District of New Jersey Unseals Court Record in Racketeering Case *Strong Presumption of Access to Filed Motion Papers*

By Bob Lobue and Doug Widemann

The U.S. District Court for the District of New Jersey recently applied and reaffirmed the Third Circuit's strong presumption of public access to filed motion papers, granting a motion by the *Los Angeles Times* to unseal the record in *United States v. International Boxing Federation*, Civ. Action No. 99-5442 (D.N.J. Jan. 28, 2000), a racketeering case against the top officials of the nation's leading boxing ranking organization. The decision is significant because while public and press access to trials is well established, the courts have not always been as clear on the scope of public access to filed materials and pretrial proceedings, especially when they relate to ongoing criminal cases.

In parallel criminal and civil cases, the Government has accused the IBF's officials of taking hundreds of thousands of dollars in bribes from boxers and their promoters in exchange for higher rankings. In November 1999, the Government moved in

APBNews.com Victorious Without Litigation *Federal Judicial Conference Reverses Committee Vote*

In mid-March, the Judicial Conference of the United States voted to allow the release of federal judges' financial disclosure forms for publication on the Internet. This decision reverses a December ruling of the Judicial Conference's Financial Disclosure Committee, which had determined that such information would not be turned over to APBnews.com, a web site which reports criminal justice news. It also highlights the judiciary's recognition that it can not avoid the same avenues of public scrutiny available toward officials in the Executive and Legislative branches.

The annual filing of such disclosure forms is required of all federal employees under the Ethics in Government Act, 5 U.S.C. app. §101 et seq., and the Financial Disclosures Committee handles requests for their release. The original committee ruling against disclosure engendered a lawsuit, which APBNews.com filed in the Southern District of New York, alleging that the refusal constituted a First Amendment violation. See *LDRC LibelLetter* February 2000 at 31. The financial reports were provided to other requesters, while the committee voiced concerns over judges' safety should they be available on the Internet.

As it happened, the Executive Committee of the Judicial Conference unanimously disagreed with the Financial Disclosure Committee's decision, suggesting that instead sensitive information could be redacted. So did U.S. Supreme Court Chief Justice William Rehnquist, as articulated in a memorandum he distributed to members of the Judicial Conference in February. He noted that the Judicial Conference Committees "generally are not rulemaking or policymaking bodies within the Conference. That role is reserved for the Conference as a whole." Chief Justice Rehnquist also disagreed with the Financial Disclosure Committee's construction of the Ethics in Government Act to allow full withholding of information as opposed to redaction.

As a matter of policy, Chief Justice Rehnquist compared the disclosure requirements applied to the judiciary with those applied to other government officials, finding no reason for disparate treatment. Fur-

thermore, he noted, the continued reticence of the Committee would most likely result in the enactment of further statutory requirements making the Committee ruling moot, as "key members of both houses of Congress ... have indicated their intentions to require all of the reports to be disclosed and are willing to take additional legislative action to ensure this result."

On March 14, the full Judicial Conference followed this lead and voted to turn over all federal judges' financial reports to APB. The Chief Justice's memorandum can be accessed through the APBNews.com web site.

Anti-Profanity Statute Upheld

Timothy Boomer's conviction for violating Michigan's anti-profanity statute will stand, according to Arenac County Judge Ronald Bergeron. Last summer, a jury found that Boomer violated the 1897 statute when he launched into a tirade of profanity in the presence of two young children after falling out of his canoe. See *LDRC LibelLetter* February 1999 at 18, June 1999 at 16, and September 1999 at 6. Attorneys for the Michigan ACLU, who represent Boomer, alleged that the statute violates the First Amendment. Judge Bergeron disagreed and upheld the jury's verdict stating, "Every noise or utterance does not constitute protected free speech that falls within the . . . First Amendment." The judge also sent the case back to district court for a decision on whether to continue delaying Boomer's sentence – a \$75 fine and four days work in a child-care program. The ACLU has stated that it plans to appeal the ruling. In doing so, it acknowledged that the First Amendment required it to construe such as cause of action narrowly.

The Right of Access to Judicial Records: Confusion Spawns Hostility?

By Mary Ellen Roy and Sheryl Odems

Two recent federal district court cases in the Eastern and Middle Districts of Louisiana, *United States v. Edwards*, No. 98-165 (M.D. La), and *Lifemark Hospitals, Inc. v. Jones, Walker, et al.*, Civ. No. 94-1258 (E. D. La.), suggest that courts within the Fifth Circuit are becoming increasingly hostile to efforts to protect the media's First Amendment and common law rights of access to court proceedings and judicial records.

This trend seems particularly incongruous given that a number of other circuit courts of appeal have begun to recognize, notwithstanding the Supreme Court's decision in *Nixon v. Warner Communications*, that in addition to a common law right of access, there is also a First Amendment right of access to records filed in connection with judicial proceedings.

Governor Edwards Extortion Charges

Edwards, which is still pending in the Middle District, involves allegations that Louisiana's former governor, Edwin Edwards, extorted money in exchange for Edwards' assurances that he would use his influence to procure riverboat gaming licenses for certain applicants. Within days after a grand jury handed down the indictments in *Edwards*, the court entered a gag order prohibiting the parties from giving or authorizing "any extrajudicial statement or interview . . . relating to the trial, the parties or issues in this case which could interfere with a fair trial or prejudice any defendant, the government or the administration of justice."

Subsequently, the court issued a stream of orders that further limited the media's access. For example, the court denied a motion by the media to obtain copies of audiotape and videotape evidence at trial, and shortly before the trial commenced, issued a blanket sealing order requiring that all pleadings be filed under seal. The court also authorized an anonymous jury to be empaneled, but refused to unseal the government's memorandum in support of the court's order granting the motion.

In addition, the court threatened to hold a contempt

hearing for any reporter who published information from a sealed document shortly after two Louisiana newspapers published the names of proposed unindicted co-conspirators that had been contained in a sealed prosecution roster (the court later vacated this order and requested that the media brief whether such an order would be an unconstitutional prior restraint).

Civil Case Closed

Similarly, in *Lifemark*, the Eastern District took the virtually unprecedented step of closing an entire civil trial and sealing all court records in a high profile attorney malpractice case. After repeated unsuccessful efforts to gain access to the courtroom, the *New Orleans Times-Picayune* moved to open the proceedings and unseal the records.

The plaintiff opposed the motion on the ground that opening the proceedings would prejudice its fair trial rights in another lawsuit pending in federal court. Although the court acknowledged the press's strong First Amendment right of access to trial proceedings, it balanced this right against Lifemark's fair trial rights and denied the motion.

The court ultimately granted a motion by the *Times-Picayune* for reconsideration and ordered that the trial transcript and other records be unsealed, but the newspaper obtained this relief only after the trial had nearly concluded.

Did Fifth Circuit Encourage Less Access

The courts' decisions in these two cases to close significant portions of the record and/or proceedings is due in no small part to an extension of the Fifth Circuit's decision in *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981), which itself is a narrow reading of the Supreme Court's decision in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

In *Nixon*, the Court addressed whether the media had a First Amendment or common law right of ac-

(Continued on page 34)

The Right of Access to Judicial Records

(Continued from page 33)

cess to copy White House tapes that had been introduced as evidence at the Watergate trial. The Court held that the First Amendment did not guarantee the right to copy and publish the tapes because the “First Amendment generally grants the press no right to information about a trial superior to that of the general public.”

Thus, the Court reasoned that while the press was free to comment upon and publish information from the transcripts of the tapes that had been furnished to the media, the First Amendment did not require that the press be provided with physical access to the tapes themselves.

By contrast, the Court “assumed” that the common law right of access applied to the audiotapes at issue, but did not undertake to delineate the precise contours of the right because the Court ultimately decided that the Presidential Recordings Act provided a mechanism for the release of the tapes. Although the Court noted that the decision whether to permit access was “one best left to the sound discretion of the trial court . . . in light of the relevant facts and circumstances of the particular case,” the Court also recognized that there was a “presumption — however gauged — in favor of public access to judicial records.”

Similarly, *Belo* involved a motion by the media to copy audiotapes introduced as evidence in connection with the Brilab trial of public officials. As in *Nixon*, the trial was open to the press and the public, the audiotapes were played in open court, and the press was provided with transcripts of the audiotapes. In reliance on *Nixon*, the Fifth Circuit not only held that the media did not have a First Amendment right of access to copy the audiotapes, but further held that the district court had not abused its discretion in denying the media’s request to copy the tapes.

In doing so, the Fifth Circuit interpreted *Nixon* as vesting within the sound discretion of the court the decision to allow access and thus concluded that the district court’s decision should be reviewed only for an abuse of discretion. The Fifth Circuit rejected a more stringent standard which would recognize a strong presumption in favor of access, holding that any presumption in favor of access is merely one of the interests to be weighed.

Supreme Court Post-Nixon

The question arises whether *Nixon* can be reconciled in any principled manner with the Supreme Court’s more recent decisions in *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984) and *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986).

In *Press-Enterprise I*, the Supreme Court held that there was a First Amendment right of access to jury *voir dire*, and thus reversed the trial court’s closure of *voir dire* and its refusal to release transcripts of these closed proceedings. Although the Court said in *dicta* that closure is not absolutely barred, the Justices observed that such closures must be “rare.”

Subsequently, in *Press-Enterprise II*, the Supreme Court broadened the First Amendment access rights of the public and the press to encompass preliminary hearings in criminal cases. Restating the standard adopted in *Press-Enterprise I*, the Court held that such pre-trial hearings cannot be closed unless “specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest,’” and thus held that the lower court had improperly withheld the release of the transcript of the proceedings that had been closed.

These cases, taken to their logical conclusion, argue in favor of a First Amendment right of access not only to judicial proceedings themselves, but to

(Continued on page 35)

The question arises whether Nixon can be reconciled in any principled manner with the Supreme Court’s more recent decisions . . .

The Right of Access to Judicial Records

(Continued from page 34)

the records filed in connection with or introduced as evidence in these proceedings.

Although the Supreme Court has not yet squarely addressed whether there is a First Amendment right of access to records filed in connection with proceedings to which a presumption of openness attaches, several circuit courts in the wake of *Press-Enterprise I* and *Press-Enterprise II* have held that there is a First Amendment right of access to such records. See *In re New York Times*, 828 F.2d 110, 114 (2nd Cir. 1987); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *United State v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985); *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983); *United States v. Smith*, 776 F.2d 1104, 1111-12 (3rd Cir. 1985).

It is unclear how *Nixon* and its progeny can be reconciled in a principled manner with *Press-Enterprise I* and *II* and their progeny. Will the impending collision between these two lines of cases ultimately be derailed by limiting *Nixon* to its precise factual context — access to inspect and copy audiotapes that were played in open court — on the ground that there is something inherently prejudicial about audio- and videotape evidence that justifies a lessened right of access to such evidence?

Alternatively, will some courts, as in *Belo*, continue to adhere staunchly to *Nixon* and decline to recognize a First Amendment right of access to judicial records on the ground that there is something inherently prejudicial in providing access to such documents as compared to providing access to the proceedings themselves?

Until the Supreme Court provides guidance, the confusion in the lower courts, with some extending *Nixon* to restrict access to judicial records and others extending the *Press-Enterprise* cases to expand such access, likely will intensify.

Mary Ellen Roy is a partner and Sheryl Odems is an associate at Phelps Dunbar, L.L.P., New Orleans. They and associate David Patron represented the

Times-Picayune in the Lifemark case and represent four New Orleans television stations, WDSU-TV, WVUE-TV, WGNO-TV and WWL-TV, regarding access issues in the Edwards case.

Connecticut Court Opens “Juvenile” Arraignment of Michael Skakel in 25-Year-Old Moxley Murder Case

By David B. Fein and Kenneth D. Heath

In a First Amendment case of first impression in Connecticut, a Connecticut Juvenile Court (Dennis, J.) held that the public had a right to attend the juvenile proceedings against Michael Skakel for the 1975 murder of Martha Moxley in Greenwich. *In re Michael S.*, No. DL00-01028 (Conn. Juv. Ct. March 10, 2000).

The publishers of five newspapers—*The Advocate* of Stamford, the *Greenwich Time*, *The Hartford Courant*, *The New York Times*, and *Newsday*—and the Associated Press had sought access to the juvenile arraignment and subsequent proceedings, following a firestorm of public interest that arose when the State of Connecticut announced an arrest in the twenty-five-year-old murder case. The Moxley murder has long been a matter of great national concern, having inspired at least three books, one mini-

(Continued on page 36)

CT Court Opens Arraignment in Moxley Case

(Continued from page 35)

series and a web site. Though the State did not name Skakel as the subject of the January 2000 juvenile charge, Skakel's attorney, Michael Sherman, announced publicly that Skakel had been arrested for the murder.

Because Skakel was only fifteen years old at the time of the crime, Connecticut law requires him to be tried in Juvenile Court, which traditionally has closed its proceedings to the public in order to safeguard young offenders from publicity that could interfere with the system's rehabilitative goals. In their Motion for Access, the Movants argued that this concern did not apply to the Skakel proceeding since Skakel, now thirty-nine years old, was no longer a child.

Movants further argued that Connecticut law authorized — and the First Amendment required — the Juvenile Court to allow them to attend the proceedings. Under Connecticut law, Juvenile Court judges are required to exclude from the courtroom all persons who, “in the court's opinion, [are] not necessary.” While no Connecticut court had interpreted the meaning of this provision, Movants argued that courts in other contexts had interpreted the meaning of “necessary” to vary with the circumstances. Drawing on United States Supreme Court's jurisprudence on access to judicial proceedings, including *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986), Movants argued that press attendance at the arraignment and further proceedings was “necessary” to vindicate the First Amendment values at stake and the public's intense interest in the case, especially since Skakel himself had already availed himself of press coverage.

In its decision, the Juvenile Court noted that while “public proceedings in the juvenile context generally would be inconsistent with and undermine the rehabilitative purpose” of the juvenile

system, Skakel's age and his consent to an open proceeding rendered those concerns inapplicable. Significantly, the Court stressed the “positive role of public access to juvenile proceedings,” and cited with approval a recent federal appellate decision holding that the public interests in open criminal proceedings are “present and equally cogent” in juvenile proceedings. *United States v. A.D.*, 28 F.3d 1353,1358 (3d Cir. 1994). Interpreting the Connecticut statute to call for a balancing of the need to protect juveniles with the need for public awareness of juvenile proceedings, the Court held that, on the facts of the instant case, “Movants . . . appear to be necessary parties or persons so that they may assist in the goal of informing the public.”

A subordinate issue raised at the oral argument on Movant's Access Motion and later briefed by Movants was whether the Court could, consistent with First Amendment jurisprudence, open the proceedings to the press but not the public. Movants argued that the case law suggested no distinction between the press and the public from a First Amendment standpoint, but that the leading decisions did acknowledge that practical realities — such as size of the courtroom — could lead the Court to give priority to the media or to admit only members of the media as surrogates of the public. The Court held that, in light of these practical considerations, members of the media will have priority access to the proceedings, with the general public “allowed to attend as space is available.”

David B. Fein is a partner in the Stamford office of Wiggin & Dana. Fein and Kenneth D. Heath, an associate with the firm, represented the media in the motion for access.

California Publisher Serves Five Day Sentence For Refusing to Reveal Confidential Sources

By Thomas R. Burke

After seeking relief through the entire California state court system and having his emergency request for stay denied by the emergency motions panel of the Ninth Circuit Court of Appeals, on February 26, Tim Crews, the publisher of *The Sacramento Valley Mirror* newspaper reported to the Tehama County jail to serve a five-day sentence for contempt rather than disclose his confidential law enforcement sources. His incarceration is believed to be the first time a California journalist has been jailed for contempt since 1996.

Crews, who serves as publisher, editor, and chief reporter and photographer for his semi-weekly newspaper in Altois, California (circulation 2,600) began his shield law odyssey last summer when *The Valley Mirror* reported that Dewey Anderson, the former Undersheriff of Glenn County, and at the time an officer with the California Highway Patrol, was under investigation in connection with a gun that turned up at a local high school. Relying on unnamed law enforcement officers who had been promised confidentiality, *The Valley Mirror* reported that Anderson had kept the gun — a .380 Cobray Mac 12 semi-automatic — ever since he was assigned to the Tehama County Interdisciplinary Task Force (“TIDE”), a local drug enforcement task force. The law enforcement sources told the newspaper that authorities were aware that the gun had been missing since 1995 and that a “missing gun” report concerning the weapon had been prepared in 1994.

Sources Wanted For Limitations Defense

When Anderson was later charged with felony grand theft of the gun, Anderson’s lawyer subpoenaed Crews to testify at the preliminary hearing to disclose the identities of *The Valley Mirror’s* confidential sources. Defendant’s counsel hoped to show that law enforcement officials were aware the gun had been missing for several years, to support his client’s statute of limitations defense. Crews appeared and testified at the January 14 preliminary hearing, without counsel.

At the preliminary hearing, Crews authenticated cer-

tain published information but refused to identify the confidential sources who had told me about the “missing gun” report, asserting the California shield law and the First Amendment. Tehama County Superior Court Judge Noel Watkins felt strongly that Anderson needed to know the newspaper’s confidential sources — and even explained to Crews that Anderson was “only” asking him to reveal their identities. Despite the fact that the newspaper was continuing to investigate allegations of improprieties by the TIDE task force, without hearing any evidence, Judge Watkins pronounced that:

The name of the supervisor, or superior who gave you that information is neither confidential nor sensitive. I can’t conceive how they would be endangered in any way by divulging this information. There are no ongoing investigations that I can conceive of that would be compromised in any way.

When Crews again refused to disclose his sources, Judge Watkins found him in “open contempt” and sentenced him to five days in the county jail. Judge Watkins then gave Crews 72 “judicial hours” in which to obtain a stay in the Court of Appeal.

Lacking a transcript of the preliminary hearing, Crews retained counsel and secured a brief stay of the contempt order by the California Court of Appeal, Third Appellate District. After the Court of Appeal issued its stay, Judge Watkins, on his own issued a further stay of his contempt order and ordered that the entire transcript of the preliminary hearing be prepared and made available to counsel for Crews. Despite this order, the preliminary hearing transcript arrived less than two days before the trial court’s stay order was set to expire, when Crews filed a petition for writ of mandate, habeas corpus or review in the Court of Appeal.

In his writ petition, Crews argued that Judge Watkins improperly applied the balancing test established by the California Supreme Court in *Delaney v. Super-*

(Continued on page 38)

California Publisher Serves Five Day Sentence

(Continued from page 37)

rior Court, 50 Cal. 3d 785 (1990). Specifically, Crews argued that the trial court failed to require Anderson to show that the disclosure of his confidential sources would “materially assist” the defense; failed to consider the sensitivity of Crews’s sources to him; ignored *Delaney*’s alternative source requirement; and discounted, entirely, the shield law’s historic purposes of protecting confidential sources and preserving press autonomy, contrary to the California Supreme Court’s recent decision in *Miller v. Superior Court*, 21 Cal. 4th 883 (1999) and *Delaney*.

Crews’s writ petition highlighted evidence in the public record which confirmed that Anderson first came into possession of the gun when it was first seized by the TIDE task force — and assigned a “case” number in early 1994. Even though Anderson left the TIDE task force in December of 1994, the gun remained in his possession (in one of his trucks and later in his garage) for more than five years, until its discovery in early 1999, when Anderson’s son loaned the gun to a friend who took it to a local high school. In other words, Crews argued that Tehama County officials needed only to look in the TIDE evidence room as early as the Spring of 1994 to learn that the gun was “missing” from its inventory of seized weapons. Relying on this evidence — and emphasizing that various other knowledgeable law enforcement were never called to testify at the preliminary hearing, Crews argued there were a variety of alternative ways for Anderson to establish his statute of limitations defense without compelling him to reveal his confidential law enforcement sources.

A day after Crews filed his writ petition, it was summarily denied – without opinion – by the Court of Appeal, leaving Crews only a weekend in which to obtain a further stay. Crews then filed a petition for review and request for stay in the California Supreme Court. In addition, letters of support were filed by the

Reporter’s Committee for Freedom of the Press, and by the Copley Press, Inc., the Hearst Corporation, Knight Ridder, Inc., the *Los Angeles Times*, the McClatchy Company, Pulitzer Community Newspapers, the California Newspaper Publisher’s Association, the California First Amendment Coalition, and the Society of Professional Journalists (Northern California Chapter).

After these filings, Judge Watkins again continued the enforcement of his contempt order to allow the Supreme Court to consider the petition. On February 23, the California Supreme Court summarily denied the petition for review and request for stay, although Justice Stanley Mosk voted for review.

In his writ petition, Crews argued that Judge Watkins improperly applied the balancing test established by the California Supreme Court.

A few hours later, Crews filed a verified emergency petition for habeas corpus and a request for stay in the U.S. District Court, Eastern District in Sacramento, California. In his habeas petition, Crews alleged that Judge Watkins’s judgment

of contempt infringed his rights under the First and Fourteenth Amendments to the U.S. Constitution. The following morning, U.S. District Court Judge Garland E. Burrell, Jr. issued an 7 page order denying the request for stay of Crews’s incarceration concluding that the habeas petition did not demonstrate “sufficiently serious questions going to the merits.” That same morning, Crews obtained yet another brief stay from Judge Watkins and, later that day, filed a notice of appeal (of the District Court’s order denying the request for stay) and an emergency request for a certificate of appealability in the District Court, pursuant to 28 U.S.C. § 2253(c).

The following morning, Crews filed an emergency request for stay of enforcement of the contempt order in the Ninth Circuit Court of Appeal in San Francisco. An amicus brief was also filed by the same group of newspapers who had supported Crews in the California Supreme Court. Interestingly, later that same morning, acting on the request Crews made the day before, District Court Judge Burrell issued a certificate of appealability, finding that Crews “has made a substantial

(Continued on page 39)

California Publisher Serves Five Day Sentence

(Continued from page 38)

showing of the denial of a constitutional right” — which was promptly brought to the attention of the Ninth Circuit.

Late that afternoon, an emergency motions panel of the Ninth Circuit — consisting of Senior Circuit Judge Robert Boochever, and Judges Edward Leavy and A. Wallace Tashima considered the motion for stay but in a brief order issued around 5:00 that evening, denied Crews any temporary relief. Instead, the court announced a relatively expedited briefing schedule for consideration of his habeas petition (Crews’s opening brief is due April 6).

Crews opted not to seek emergency relief in the United States Supreme Court. Seemingly unfazed by his pending incarceration, after learning that the Ninth Circuit had denied his request for a stay, Crews published yet another controversial article that appeared on the front page of *The Sacramento Valley Mirror*. The article, which prominently featured Tehama County Superior Court Judge Watkins, was headlined: “Tehama judges defy concealed weapons law.”

Crews was released from jail on March 1. He and his lawyers are currently considering whether to further pursue his pending habeas petition or to simply prepare to start anew in the trial court in the likely event that he is served with a trial subpoena. No trial date has been set, though it is likely that Anderson’s trial will take place this summer. In the meantime, in response to this situation and to two other shield law matters currently pending in the California state court system, California Assemblywoman Carole Migden (D-San Francisco) announced that she is exploring ways to provide for procedural safeguards to protect California journalists who assert the state’s shield law.

The Crews situation painfully demonstrates the serious problems that can come to a journalist who testifies — without representation — in response to a subpoena. Then again, having been deprived of any meaningful opportunity to have his shield law and First Amendment privilege considered on the merits, Crews’s decision to be jailed rather than breach the trust of his confidential sources also confirms that there remain individuals firmly dedicated to fundamental

principles.

Tim Crews is represented by Thomas R. Burke of Davis Wright Tremaine LLP, San Francisco, Charity Kenyon of Riegels Campos & Kenyon LLP in Sacramento, and Ronald D. McIver, Esq. of Red Bluff, CA. Roger Myers, Joshua Koltun, Rachel E. Boehm and Lisa Sitkin of Steinhart & Falconer LLP in San Francisco represent the Amici Curiae.

Georgia Broadcasters Named in Telemarketing Class Action Suits

By Sean R. Smith and Scott Dailard

A popular practice among broadcasters has become fuel for two putative class action lawsuits in Georgia alleging violations of federal and state telemarketing laws. In recent years, radio stations have engaged tele-services firms to transmit pre-recorded voice messages to potential listeners by means of automatic telephone dialing equipment. These pre-recorded messages typically feature celebrity voice talent or the station’s own on-air personalities and generally do no more than identify the station’s dial or channel position and invite called parties to tune-in and listen to the station’s programming. The messages are deposited in voicemail boxes or answering machines by automatic telephone dialing systems capable of connecting with thousands of residential telephone lines without the use of live operators. The same technology has been widely employed by political campaigns this Presidential primary season to deliver fundraising pleas and personal messages from the candidates.

(Continued on page 40)

GA Broadcasters Named in Class Action Suits

(Continued from page 39)

Two suits filed in February and March of this year against Cox Radio, Inc. and Susquehanna Radio Corporation appear to be the first to allege that pre-recorded telephone messages inviting people to listen to a free over-the-air radio broadcast are unlawful telephone solicitations under the federal Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(b)(1)(b). The suits also allege violations of related Georgia telemarketing laws governing the use of automatic telephone dialing equipment. See *Hershovitz v. Cox Radio, Inc.*, No. 00-C-1512-4 (Gwinnet County) and *Garver v. Susquehanna Radio Corporation*, No. 00-vs-002168F (Fulton County).

The TCPA makes it unlawful to “initiate any telephone call to any residential telephone line using an artificial or pre-recorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications] Commission.” 47 U.S.C. § 227(b)(1)(B). The Act creates a private right action for consumers to recover \$500 in compulsory statutory damages for each unsolicited pre-recorded voice message transmitted in violation of the TCPA — but only if such suits are “otherwise permitted by the laws or rules of a court of a State” 47 U.S.C. § 227(b)(3). The Act states that courts may treble this award of statutory damages upon finding that a defendant has knowingly or willfully violated the statute. According to the Eleventh Circuit, the TCPA, although a federal statute, vests subject matter jurisdiction over private actions exclusively in the state courts. *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir.), modified, 140 F.3d 898 (11th Cir. 1998) (remanding class action suit involving “junk fax” prohibitions of TCPA to state court).

The named plaintiffs in the Cox and Susquehanna lawsuits (three persons in all) allege that they each received one or more unsolicited telephone calls transmitting “advertisements” from the defendants’ Atlanta radio stations in violation of the TCPA. They seek an award of \$1,500 in statutory damages for each call re-

ceived, plus punitive damages and attorneys’ fees. They also seek to represent a putative class of similarly-situated plaintiffs composed of “all persons . . . throughout the State of Georgia” who received an unsolicited pre-recorded telephone message delivering an “advertisement” from any Cox or Susquehanna radio station. The plaintiffs also allege violations of the Georgia statute governing the use of automatic dialing and recorded message equipment, O.C.G.A. § 46-5-23. Although responsibility for civil enforcement of Georgia’s “auto-dialer” statute is vested exclusively in the Public Service Commission and the Attorney General, the plaintiffs have nonetheless asserted a “tort” claim under this Act for the so-called “abusive use” of automatic dialing equipment.

Aside from issues surrounding class certification, the legal battle over these TCPA claims will likely focus on three questions: (1) whether the Georgia courts have subject matter jurisdiction to entertain private actions under the TCPA in the absence of enabling legislation authorizing such suits; (2) whether the calls allegedly placed on behalf of Cox and Susquehanna constituted “telephone solicitations” or “advertisements” within the meaning of the rules and regulations implementing the TCPA; and (3) whether the TCPA and its attendant regulatory regime impose unconstitutional restrictions on commercial speech.

Subject Matter Jurisdiction

Several courts have held that there is no private of action under the TCPA unless the forum state has either enacted legislation affirmatively enabling such suits to be adjudicated in its courts, or has created a private right of action under its own, analogous telemarketing laws. See *e.g.*, *Kaplan v. Democrat & Chronicle*, 69 N.Y.S.2d 881 (N.Y. City Ct. 1998) (dismissing state court action brought under TCPA); *Condon v. Freedom Ford, Inc.*, No. 99-6701-SC (County Court, 13th Jud. Cir., July 1999) (same); *Nicholson v. Hooters of Augusta, Inc.*, No. CV-195-101 (S.D. Ga. 1996), vacated on other grounds, 136 F.3d 1287 (11th Cir.), modified, 140 F.3d 898 (11th Cir. 1998). Unlike several states, Georgia has not enacted enabling legislation for TCPA

(Continued on page 41)

GA Broadcasters Named in Class Action Suits

(Continued from page 40)

claims, and notwithstanding plaintiffs' novel "tort" theory, the Georgia auto-dialer statute does not create a private right of action. Nonetheless, following a remand from the Eleventh Circuit, the Georgia Superior Court judge presiding over the *Hooters* case ruled that private TCPA claims may be heard in Georgia because nothing in Georgia law expressly prohibits such actions. This threshold issue of subject matter jurisdiction was certified for interlocutory review and has been briefed and argued to the Georgia Court of Appeals. *Nicholson v. Hooters of Augusta, Inc.*, No. A00A0429 (Ga. App. 1999). A decision is expected in the Spring.

TCPA Exemptions

If the plaintiffs surmount the subject matter jurisdiction hurdle, they will have to prove that the messages transmitted on behalf of the radio stations do not fall within one of the many exemptions to TCPA liability. Although sweeping on its face, the statutory prohibition on unsolicited pre-recorded "telephone calls" is a veritable "Swiss cheese" shot-full of exceptions created by the FCC in its implementing regulations and orders. Among other things, the FCC defines a "telephone call" in this context to exclude "a call or message by, or on behalf of, a caller that is not made for a commercial purpose" or that "is made for a commercial purpose but does not include the transmission of any unsolicited advertisement." 47 C.F.R. § 64.1200(c) (emphasis added). The term "unsolicited advertisement" means "any material advertising the commercial availability or quality of any property, goods or services." 47 U.S.C. § 227(a)(4). Although the term "commercial purpose" is not defined by statute or regulation, the FCC has held that the "exemption for non-commercial calls" includes calls which do not involve a telephone solicitation," defined as the "initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services" 47 C.F.R. § 1200(f)(3) (emphasis added).

The plaintiffs should face an uphill battle trying to prove that calls that do no more than invite listeners to listen to a free over-the-air radio program fall within the FCC's commercial calling prohibition or are in the nature of unsolicited "advertisements." Such calls do not propose any transaction for property, goods or services and do not advertise the "commercial availability" or "commercial quality" of any property, goods or services.

Constitutional Issues

Finally, the TCPA's pre-recorded message prohibitions appear vulnerable to attack as an unconstitutional restriction on commercial speech under the rationale of *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999). Regardless of what privacy interests the statute is intended to serve, it is difficult to understand how the selective restrictions enacted by the TCPA and its implementing regulations directly and materially further these interests. Automated calls made for commercial purposes and for non-commercial purposes are equally intrusive on residential privacy. Moreover, the TCPA's implementing regulations categorically exempt all pre-recorded messages — irrespective of their commercial or non-commercial character — transmitted on behalf of tax exempt non-profit organizations. Thus, while a message from a commercial radio station encouraging the purchase of station logo T-shirts would almost certainly be unlawful, an identical message soliciting the purchase of T-shirts from a non-commercial radio station would be perfectly legal. As the Supreme Court observed in *Greater New Orleans*, "[e]ven under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." 527 U.S. at 181. Like the FCC's unconstitutional selective ban on broadcast advertisements for casino gambling activities, the operation of the TCPA's pre-recorded message prohibition and its attendant regulatory regime appears to be so pierced with ex-

(Continued on page 42)

GA Broadcasters Named in Class Action Suits

(Continued from page 41)

emptions and inconsistencies as to be unsupported under contemporary commercial speech doctrine.

Answers on behalf of Cox and Susquehanna will be filed in late March and early April of this year.

Sean R. Smith, a member in the Atlanta office of Dow, Lohnes & Albertson PLLC and Scott Dailard, a litigator in DLA's Washington office, represent Cox Radio, Inc. and Susquehanna Radio Corporation in these lawsuits.

Attorney General's Press Statements Absolutely Privileged

An Indiana Court of Appeals held that the State and its agents are absolutely immune from defamation liability for statements to the press when the agents can reasonably be understood as fulfilling their duty of informing the public. *American Dry Cleaning and Laundry v. State of Indiana*, 2000 Ind. App. Lexis 260 (March 8, 2000).

The case arose out of allegedly defamatory comments made by a state environmental agency and Attorney General during television interviews and news conferences regarding an environmental action pending against the plaintiff's dry cleaning service. During one television appearance, the service was allegedly described as a "public enemy."

The trial court dismissed the complaint based upon the State claim of absolute immunity. The Court of Appeals affirmed relying on *Foster v. Percy*, 270 Ind. 533, 387 N.E.2d 446 (1979), cert. denied, 445 U.S. 960, 64 L. Ed. 2d 235, 100 S. Ct. 1646 (1980), where a prosecutor was held to be "duty-bound to inform the public about his or her investigative, administrative, and prosecutorial activities."

SAVE THE DATES

LDRC LONDON CONFERENCE 2000

September 25-26, 2000

LDRC EIGHTEENTH ANNUAL DINNER

November 9, 2000

A conversation with Ben Bradlee, Diane Sawyer and Mike Wallace on the intersection of journalists, journalism, litigation and lawyers.

ANNUAL DCS BREAKFAST

November 10, 2000

New FTC Regulations Change the Way Websites Do Business

By David J. Wittenstein and Prabha R. Rollins

New Federal Trade Commission rules that will take effect on April 21 will affect every general interest news website that collects any information from visitors. These FTC rules, promulgated pursuant to the recently-enacted Children's Online Privacy Protection Act ("COPPA" or the "Act"), are designed primarily to address privacy concerns in connection with the online disclosure of personal information by kids. The new regulations are so broad, however, that they will affect even sites that are neither directed to kids nor collect information from kids.

Many websites and online services routinely collect information from users to enhance services and sell products. Some sites also offer forums, such as chat rooms and bulletin boards, where users volunteer personal information. Other sites conduct sweepstakes or other promotional contests that require entrants to identify themselves.

Under the new regulations, sites that continue to conduct business as usual do so at their peril. Briefly, COPPA prohibits operators of websites and online services from gathering personal information from children under the age of thirteen without first obtaining verifiable parental consent. COPPA also requires operators to provide parents with access to information collected from their children and an opportunity to remove the information from any database. We urge all operators of websites and online services to evaluate the way they do business and make necessary changes to comply with the new FTC regulations.

Coverage of the Act

COPPA applies to two types of sites. First, it applies to sites that are directed to children under the age of thirteen and that collect personal information from children. The FTC will consider several factors to determine whether a website is directed to children: subject matter; visual or audio content; the age of the models on the site; the language; whether advertising on the site is directed to children, information regarding the age of the actual or intended audience; and

whether a site uses child-oriented features such as animation. Personal information includes name, address, e-mail address, telephone number or any other information that would allow someone to identify a child. COPPA may also apply to other information under some circumstances.

Second, COPPA applies to websites and online services that have actual knowledge that they collect personal information from children. Therefore, if a child uses even a general interest website that routinely requires users to supply their age, the site would (assuming that the child answers this question accurately or provides other information that suggests he or she is a child) have actual knowledge that it is collecting personal information from children. It is not enough, however, simply to refrain from asking for users' ages. Operators may have actual knowledge of information collected from children if, for example, users volunteer their age in a monitored chat room or message board offered by the website, or if the operator asks age-related questions, such as asking what type of school the user attends.

Steps to Take If a Website or Online Service Is Not Covered by COPPA

Even operators not covered by COPPA must change their information collection practices to protect against collection of personal information from children, if they want to avoid compliance with these complex new regulations. Operators should develop children's privacy statements that explain that the website or service (1) does not knowingly collect personal information from children under the age of thirteen, (2) screens users to prevent this collection, and (3) does not knowingly allow children to post or distribute personal information. The statement should also explain that the operator will delete any personal information it inadvertently receives from children and that if these practices change, the operator will take the steps required by law.

Operators should also require users to provide their age (or age range) before letting them participate

(Continued on page 44)

New FTC Regulations

(Continued from page 43)

in any chat rooms or online forums. By asking this question up front, operators can simply prevent children from using these features, which reduces the risk that the site will obtain unsolicited information volunteered by these children in chat rooms (as in, “Hi, I’m Rebecca, and I’m in the 6th grade in Bethesda, Maryland”). As noted above, if the operator determines that a child has volunteered personal information, it should promptly delete the information.

Sites claiming not to be covered by the regulations should also ensure that advertisers or partners have appropriate information collection practices. Operators may be held responsible for the information collection practices of third parties on their sites, such as advertisers, and for partners’ practices on shared or co-branded websites or pages. Therefore, before entering into these arrangements, operators should obtain contractual assurances that these parties will not collect information from children.

Finally, if the operator decides to provide content directed to children, we recommend that it segregate that content in a section of the site where no personal information is collected. The site should alert users that they are moving to a different portion of the website, and that different rules apply.

Steps to Take if a Website or Online Service Is Covered by COPPA

If an operator determines that its site is covered by COPPA, it must comply with the detailed FTC regulations. Broadly speaking, the regulations impose notice, parental consent, access and security requirements on website operators that collect personal information from children.

First, the regulations require that operators create, prominently display and comply with a children’s privacy statement. This statement should include name and contact information of the operator(s) collecting information through the site. It should describe the types of information collected, the method of collection, and the operator’s use of such information. If the operator discloses information to third parties, the statement must describe the businesses of these third

parties, whether they have agreed to maintain the confidentiality of the information, and clearly explain that parents have the option of permitting the collection of their child’s information without consenting to disclosure to third parties. The statement must also explain that the operator cannot condition website participation upon receiving more information than reasonably necessary from a child. Finally, the privacy notice must explain how a parent may review the information the site maintains on his or her child, how to refuse further use or collection of information, and how to delete information. Operators must update this statement to conform to any changes in their privacy practices.

Second, with certain limited exceptions, operators must obtain verifiable parental consent before collecting, using or disclosing children’s personal information. The regulations permit several forms of obtaining consent, including requiring a child to print a form to be signed and returned by a parent, setting up a toll-free phone number where trained staff can receive calls, and requiring a parent to use a credit card to verify identity. Operators must obtain new consent if its privacy practices have materially changed since the parent gave consent.

Third, parents must have access to the personal information collected by operators from children — both the general types of information the sites collect and the specific information collected from their child. At any time, parents may revoke their consent, refuse to allow further use or collection, and require the operator to delete personal information. Operators must take steps to verify that the person requesting information is actually the child’s parent or guardian before sharing personal information.

Finally, operators must implement safeguards, such as secure web servers and firewalls, to protect the confidentiality and security of any information collected from children.

These new requirements will impose significant burdens upon websites that are directed to children or that knowingly collect information from children. But they also impose new burdens on all website operators that collect any personal information from visitors. We urge all general interest sites to examine their informa-

(Continued on page 45)

New FTC Regulations

(Continued from page 44)

tion collection practices promptly, and to take the steps necessary to comply with these new regulations.

David J. Wittenstein is a member of, and Prabha R. Rollins is an associate at, the Washington, D.C. law firm of Dow, Lohnes & Albertson, PLLC.

recipients and whether they had an interest in receiving it — requires the court to take into account all the circumstances of publication including the nature, status, and source of the material.” See *LDRC Libel-Letter* November 1999 at 27, discussing *Reynolds*. In the instant case, after a lengthy review of the facts and the decision in *Reynolds*, the court held that the article was privileged because it was based on reliable evidence, written by a responsible reporter and honestly believed by the reporter.

Article Warned Against Unlicensed and Uninsured Karate Lessons

The complained of article was headlined “GIVE ‘EM THE CHOP,” with the subhead “Doorstep salesman flog dodgy karate lessons.” It passed on a warning from the English Karate Association that families not buy karate lessons from plaintiff’s door-to-door salesmen because of concerns about the standards and safety of the instruction they offered. The article quoted the general administrator of the English Karate Association (who was also named as a defendant but was not party to the instant motion) that plaintiff was “just ripping people off.”

Qualified Privilege Factors

For guidance on the application of the privilege, the court referred to a list of ten factors cited by the House of Lords in *Reynolds*. These are:

- “(1) The seriousness of the allegation. The more serious the charge the more the public is misinformed and the individual harmed if the allegation is not true;
- (2) The nature of information and the extent to which the subject matter is of public concern;
- (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind or are being paid for their stories;
- (4) The steps taken to verify the information;
- (5) The status of the information. The allegation may have already been the subject of an

(Continued on page 46)

English Court Finds Newspaper Protected by New Qualified Privilege

In the first application of the new qualified privilege defense under English libel law, a trial court held that the privilege applied to a newspaper and reporter sued for libel over an article alerting readers to a questionable local business. *GKR Karate (UK) Ltd v. Yorkshire Post Newspaper, et al.*, 1997 G No. 963 (High Court Jan. 17, 2000) (J. Popplewell). This decision gives some contours to the qualified privilege defense, although as noted in the decision, it remains to be applied on a case by case basis. The decision is decidedly open and receptive to the privilege and offers as well generous support for free speech principles.

The qualified privilege defense formulated by the House of Lords in *Reynolds v. Times*, (1998), 3 *W.L.R.* 862 and *H.L.* (1999) 3 *W.L.R.* 1010 holds that in certain circumstances the public interest in the free flow of information outweighs the interest in protecting reputation. “[T]he common law test — whether there had been a duty to publish the material for intended

English Court Finds Newspaper Protected

(Continued from page 45)

investigation which commands respect;

(6) The urgency of the matter. News is often a perishable commodity;

(7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary;

(8) Whether the article contained the gist of the plaintiff's side of the story;

(9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact;

(10) The circumstances of the publication, including the timing.”

This list is not exhaustive and the weight to be given to these or any other relevant factors will vary from case to case — essentially creating a balancing test. But significantly, in *Reynolds*, and quoted in the instant case, the House of Lords stated that in determining whether the privilege applied a court “should have particular regard to the importance of freedom of expression. . . . Any lingering doubts should be resolved in favour of the publication.”

Application to the Facts

In applying the privilege to the instant case, the court in a common-sensical fashion, looked in detail at how the story was put together, the sources for the story, the reporter's notes and records, and her professional background. The court found that some details weighed against the finding of privilege. For instance, the reporter made only one attempt to get a comment from the plaintiff. But the overall balance weighed in favor of the privilege. The court noted the reporter's experience and the reliability of her sources. According to the court, the reporter was “an honest, sensible and responsible person on whose evidence I could rely and who was naturally concerned by the dangers, particularly to children, resulting from this organisation. . . . She based her article on what she believed, honestly believed, was reliable evidence.”

A copy of the decision is available through
<http://wood.ccta.gov.uk/courtser/judgements.nsf/>

Canadian Defamation Awards 1999

By Roger McConchie

Note: All dollar figures in this article are Canadian currency.

Although Canadian trial judges pronounced a score of damage verdicts for defamation in 1999, only four involved media defendants. Curiously, not a single province or territory witnessed a jury verdict in a libel or slander case in 1999.

Estimating the probable magnitude of a libel damage award has always been a dicey proposition for legal counsel. The 1999 defamation verdicts will not make the task any easier.

Canada's Top Ten

When Canadians greeted the year 2000, their Top Ten Libel Awards List looked as follows:

1. *Hill v. Church of Scientology* (1995) \$1.6 million (jury)
2. *Hodgson v. Canadian Newspapers* (1998) \$880,000 (judge) *
3. *Baines v. Chelekis* (1998) \$875,000 (judge) (appeal since dismissed in March 2000)
4. *Amalgamated Transit Union v. Ind. Canadian Transit Union* (1997) \$705,000 (judge) *
5. *Eagleson v. The Globe and Mail* (1996) \$700,000 (jury) [settled for a substantially lesser amount on the eve of an appeal hearing.]

(Continued on page 47)

Canadian Defamation Awards 1999

(Continued from page 46)

6. *Botiuk v. Toronto Free Press Publications Ltd.* (1995) \$465,000 (judge)[a non-media case despite its name]
7. *Hiltz and Seamone Co. v. Nova Scotia* (1997) \$300,000 (judge) (appeal dismissed)
8. *Norman v. Westcomm International Sharing Corp.* (1997) \$265,600 (judge) (appeal settled for undisclosed amount in excess of \$200,000)
9. *Myers v. CBC* [1999] \$200,000 (judge)
10. *Barrière c. Filion* (1999) \$200,000 (judge) \$2 million award reversed

Gone from the top position on the Top Ten List was the \$2,000,000 award of a five-member Manitoba jury pronounced in 1998 in *Laufer v. Bucklaschuk*. On December 20, 1999, the Manitoba Court of Appeal unanimously set the jury's award aside and ordered a new trial in part because it found the damages awarded to be excessive. *Laufer v. Bucklaschuk*, [1999] M.J. No. 553. The appeal court attributed the jury's excess to an improper and "inflammatory invitation by plaintiff's counsel to teach all politicians and government a lesson even though the only defendant was one ex-cabinet minister." The appeal court reasoned that "restraint [should] be exercised when assessing damages for defamatory statements made in a political context" to preserve the "delicate balance" between legitimate protection of freedom of expression and the necessary protection of individual reputation.

Largest Corporate Loss Affirmed

Keeping its Top Ten ranking, however, the trial judge's verdict in *Hiltz and Seamone Co. v. Nova Scotia* was unanimously affirmed by the Nova Scotia Court of Appeal in early February, 1999. The verdict of \$200,000 general damages and \$100,000 punitive damages therefore remains the largest Canadian libel award in favour of a corporate plaintiff. *Hiltz and Seamone Co. v. Nova Scotia (Attorney General)* (1999), 172 D.L.R. (4th) 488.

Media's Largest 1999 Losses

The largest 1999 verdict against the media added a \$200,000 general damages judgment to the bottom of

the Top Ten List. On November 19, 1999, a judge of the Ontario Superior Court of Justice ordered state-owned Canadian Broadcasting Corporation to pay that sum to the plaintiff physician over an episode of a current affairs television program called "the fifth estate" entitled "The Heart of the Matter" which dealt with a heart medication called nifedipine.

The court held that certain statements selected from the physician's video-taped interview with the CBC were taken so grossly out of context that broadcast seriously mischaracterized the physician's position concerning the use of nifedipine. The judge found the CBC guilty of malice by excluding facts which would have contributed to a much more favourable and balanced portrayal of the plaintiff. The CBC's purpose, according to the judge, was to set the plaintiff up as a "bad guy" in the controversial public debate about the safety of nifedipine. *Myers v. Canadian Broadcasting Corp.* [1999] O.J. No. 4380.

Much lower, but certainly more risqué, was the \$75,000 award in early March by a judge of the Quebec Superior Court against "Frank" magazine, a non-glossy satirical weekly which has earned the hatred of many Canadian public figures. "Frank" was ordered to pay \$50,000 "moral" (i.e. general) damages and \$25,000 punitive damages to a provincially-appointed Quebec Court judge over an August, 1996 article entitled "The Judge and the Hooker" which substantially repeated certain false accusations of corruption and soliciting a prostitute.

"Frank" also published the article on the Internet, where it remained accessible until February, 1997. Co-defendant Filion, who originally made the allegations on Montreal radio station CKVL, was ordered to pay \$75,000 "moral damages" and \$25,000 punitive damages. CKVL was ordered to pay \$25,000 moral damages. The plaintiff therefore enjoyed an aggregate recovery of \$200,000 from all defendants. *Barrière c. Filion*, [1999] R.R.A. 712.

Two Low Awards

The two remaining media verdicts were rendered by the Supreme Court of British Columbia and ranked far below the bottom of the Top Ten List.

In *Taylor-Wright v. CHBC-TV, a division of WIC*
(Continued on page 48)

Canadian Defamation Awards 1999

(Continued from page 47)

Television Ltd. [1999] B.C.J. No. 334, two plaintiffs involved in the operations of a food bank were awarded damages aggregating \$60,000 in February, 1999. They had been sharply criticized in a series of broadcasts by the defendant, Kelowna television station CHBC. The plaintiff Taylor-Wright was awarded \$35,000 for an inference that she was part of an “administration that presided over a long list of dishonest deeds, including the taking of donated food and money.” The plaintiff Christensen was awarded \$25,000 for similar allegations.

In October, 1999, a British Columbia lawyer won \$25,000 general damages and \$5,000 punitive damages over an opinion column in a bi-weekly newspaper with a circulation of 25,000 copies, mostly in British Columbia. The column falsely accused the plaintiff of aiding and abetting “bogus” refugee claims, abusing his role as a lawyer, and working against the public interest, thereby enriching himself at the expense of the truly deserving and needy. *Rankin v Southeast Asia Post*, [1999] B.C.J. No. 2409.

Non-Media Awards Relatively High

The most astonishing damage assessment of 1999 is found in the August 11 ruling of the Ontario Superior Court of Justice in *McKerron v Marshall*, [1999] O.J. No. 4048. In that case, an elementary school teacher was awarded aggregate damages of \$405,000 (Cdn) for causes of action pleaded separately in defamation and intentional infliction of mental suffering.

The two libels which were subject of the plaintiff’s complaint consisted of a letter circulated at a meeting by the defendant (who was a parent of a child in the plaintiff’s class) which impeached the plaintiff’s competence. The second libel was a banner which the defendant mounted on his automobile outside the school which alleged the plaintiff was “unstable” and demanded “Remove her now.”

The plaintiff recovered \$100,000 general damages for libel. In addition, the plaintiff was awarded \$150,000 “aggravated” damages “globally for both defamation and intentional infliction of mental suffering plus “punitive” damages of \$5,000 “globally” for both defamation and intentional infliction of emotional suffering.

The trial judge explained his relatively modest award of \$5,000 punitive damages in the following terms: “Were [the defendant] a wealthy man I would unhesitatingly direct punitive damages in excess of \$100,000.” With respect to the plaintiff’s separate claim for intentional infliction of mental suffering, the plaintiff recovered \$130,000 special damages and \$20,000 general damages for intentional infliction of mental suffering.

In 1999, there were two other damage awards for defamation in excess of \$100,000, both by the Quebec Superior Court.

In February, in *Publisystème inc. c. Québec (Procureur général)*, [1999] R.R.A. 335, the plaintiff individual and his company were awarded non-pecuniary libel damages of \$125,000 (Cdn) over very serious defamatory publications by Quebec government officials which destroyed their reputation for honesty and professionalism in the publishing field. \$100,000 was allocated to the individual plaintiff and \$25,000 in respect of the corporation. The individual plaintiff was also awarded \$8,200 special damages for expenses relating to psychotherapy. (In addition to the \$133,200 aggregate damages for defamation, the Court awarded \$300,000 damages for pecuniary losses caused by the Quebec government’s breach of contract and by its damaging criticism of the plaintiffs.)

In September, in *Dufour c. Syndicat des employés (es) du centre d'accueil Pierre-Joseph Triest*, [1999] J. Q. no 4253, the Quebec Superior Court awarded an aggregate \$122,457.35 over defamatory allegations that the plaintiff had been expelled from the defendant union for causing serious damage to the union by virtue of conspiring with the employer. The plaintiff became a victim of systematic discrimination and hatred and the union refused to let him rejoin. The award including \$10,000 for attack on reputation, \$25,000 moral damages, \$25,000 exemplary damages, and \$62,457.35 pecuniary damages (for fees of lawyers, experts and litigation disbursements).

The remaining baker’s dozen 1999 Canadian trial verdicts for defamation involved awards of \$30,000 or less. More than half were handed down by the Quebec Superior Court.

Canadian Defamation Awards 1999

Third Circuit Denies Injunction and Expedited Appeal Sought By Newspapers in Philadelphia Transit System Distribution Case

Last month, LDRC LibelLetter published an article detailing the arguments of Philadelphia Newspapers, Inc, Gannett, and The New York Times, plaintiffs in a litigation against SEPTA, the local transit authority in Philadelphia — a litigation to which Transit Times Publishing Metro PA, publisher of a tabloid newspaper designed for free distribution in the SEPTA facilities, METRO, joined. The suit was filed in the Eastern District of Pennsylvania federal court. Today we are publishing an article by counsel for Transit Times Publishing Metro PA articulating their position and arguments in the case.

The company that publishes METRO has indicated that it hopes to publish transit distributed free tabloids in a number of U.S. cities. Because of that, and because the issues raised in the case are both serious and being put forth by worthy contenders, we thought our readership would be interested in the give and take in the litigation.

By Edward D. Rogers

A February 22 ruling by the United States Court of Appeals for the Third Circuit marks the third time in less than a month that a federal court has refused to grant an injunction to the publishers of *The Philadelphia Inquirer*, the *Philadelphia Daily News*, *The New York Times*, and

USA Today, in their challenge to a contractual arrangement between Philadelphia's transit authority and the publisher of Metro, a new, free daily newspaper distributed in the Philadelphia transit system. The arrangement between Southeastern Pennsylvania Transportation Authority ("SEPTA") and Transit Publications Inc. Metro PA ("TPI Metro") obligates TPI Metro to share revenues with SEPTA and allows TPI Metro wider access to distribute Metro in the transit system, specifically on buses, than is afforded publishers of paid newspapers.

In January, plaintiffs sued SEPTA in the United States District Court for the Eastern District of Pennsylvania and sought to enjoin this distribution plan on First Amendment grounds. The District Court denied the motion, finding that plaintiffs had failed to show either a reasonable likelihood of success or immediate and irreparable harm. Plaintiffs appealed this decision, and moved the District Court for an injunction pending their appeal, which was also denied. Plaintiffs then moved for an injunction pending appeal in the United States Court of Appeals for the Third Circuit. Apparently unpersuaded by plaintiffs' arguments, on February 22, a three-judge panel of the Third Circuit, without comment, denied plaintiffs' motion as well as their request for an expedited appeal.

Although the case appears at first glance to be a typical First Amendment newsrack suit in which a publisher challenges distribution restrictions imposed by a government agency, it is fundamentally different because plaintiffs seek not to expand their own distribution but to limit the distribution of another newspaper. Moreover, the case pits Philadelphia's two major daily newspapers, which are jointly owned and which enjoy a virtual monopoly over the city's newspaper readership, along with the publishers of *The New York Times* and *USA Today*, against a fledgling, free transit newspaper. Accordingly, as TPI Metro argued in the Third Circuit, this case is less about lofty First Amendment principles than economic bullying.

Factual Background

The lawsuit arises out of a Request for Proposals
(Continued on page 50)

3d Cir. Denies Injunction and Appeal in Transit Case

(Continued from page 49)

(“RFP”) issued by SEPTA in June 1999 soliciting contractors to produce, print, deliver and distribute a “Rider Publication.” The RFP explained that SEPTA was “seeking alternative, non-traditional sources of revenue through the publication and distribution of a revenue-generating rider newspaper . . . which would . . . promote[] SEPTA services and generate[] revenue through the sale of advertising.” None of the plaintiffs submitted proposals in response to the RFP, and PNI specifically advised SEPTA that it was not interested in doing so.

TPI Metro did respond and, on August 5, 1999, reached an agreement which requires TPI Metro (i) to distribute a minimum of 110,000 copies daily; (ii) to pay SEPTA a portion of its advertising revenue that is the greater of \$30,000 per month or 2% of Metro’s adjusted gross revenue from advertising; (iii) to pay SEPTA \$15,000 per month for recycling; (iv) to provide SEPTA with a daily “advertising and information” page for riders; (v) to devote 12% of its operating budget to the use of Disadvantaged Business Enterprises; and (vi) to refuse advertisements for alcohol and tobacco products.

PNI’s reaction to the SEPTA-Metro agreement has evolved over time. News stories published in October 1999 quoted a PNI spokesperson as saying that Metro would pose no threat to the *Daily News* or *The Inquirer*, that it would be “an uphill battle for a European company to penetrate this market,” and that Metro “may work in Europe, but we don’t believe it will work here.” Yet on January 5, 2000, PNI’s Senior Vice President for Sales and Marketing wrote a letter to an advertising agency discouraging the agency from purchasing ads in Metro. And on January 21, 2000, just one business day before Metro was to begin distribution, PNI filed this action.

Legal Arguments

The legal standards governing the action are straightforward and essentially not disputed. To obtain an injunction, plaintiffs must show a likelihood of success on the merits, immediate and irreparable harm, that the benefits of an injunction outweigh the

harm to other interested parties, and that an injunction promotes the public interest. In terms of the merits, because the contested areas of distribution — bus interiors — are nonpublic fora for First Amendment purposes, the wider distribution afforded to Metro must be both “reasonable” and “viewpoint neutral” to pass constitutional muster.

As set forth in their article in last month’s *LibelLetter*, plaintiffs have argued that the SEPTA-Metro distribution plan is unreasonable because the harm to their First Amendment rights caused by affording preferential distribution rights to Metro outweighs any justifications offered by SEPTA for this arrangement, such as its desire to raise revenue, and because SEPTA’s financial interest in Metro reflects a desire to choose “a single speaker of the news.” Plaintiffs contend that the arrangement is not “viewpoint neutral” based on language in the RFP stating that the publisher had to conform to SEPTA’s editorial standards, which in plaintiffs’ view represents an effort to drive certain viewpoints out of the marketplace.

The Reasonableness of the SEPTA-Metro Distribution Plan

In opposing plaintiffs’ motion for an injunction in the Third Circuit, TPI Metro argued that the SEPTA-Metro distribution plan is both reasonable and viewpoint neutral. TPI Metro emphasized the deferential nature of the reasonableness inquiry, noting that the Supreme Court routinely upholds such restrictions without requiring a factual showing by the government agency, *see, e.g., International Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992), and gives government particular leeway when functioning “as a proprietor, managing its internal operations, rather than . . . as lawmaker with the power to regulate or license,” *id.* at 678; *see Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (upholding ban on political advertisements on buses on the ground that, when it operates a transit authority, “the city is engaged in commerce, . . . must provide rapid, convenient, pleasant, and inexpensive service to . . . commuters, . . . [and] has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles”).

(Continued on page 51)

3d Cir. Denies Injunction and Appeal in Transit Case

(Continued from page 50)

TPI Metro also noted that courts have regularly upheld restrictions on newspaper distribution in transit stations and airports, especially when the public authority justified these restrictions as necessary to raise revenue or to ensure passenger safety, and when the newspapers had alternative means of distribution at these facilities. See, e.g., *Jacobsen v. City of Rapid City, South Dakota*, 128 F.3d 660, 663 (8th Cir. 1997) (upholding ban on newsracks at city airport because newsracks would deprive gift shop concessionaire of exclusive right to sell newspapers, which would “mak[e] its exclusive contract less valuable . . . [and] in turn . . . reduce the City’s leverage in bargaining” for lease terms, thereby endangering the City’s ability to raise revenues); *Gannett Satellite Information Network, Inc. v. Metropolitan Trans. Auth.*, 745 F.2d 767, 774 (2d Cir. 1984) (upholding license fees for newsracks at commuter rail station given authority’s interest in revenue raising and the fact that newspaper publisher had “ample alternative means to distribute its newspapers to MTA commuters,” for example, by “plac[ing] newsracks on streets or sidewalks near the stations . . . [or by using] news vendors or existing newsstands to sell its newspapers in MTA stations”).

In particular, TPI Metro pointed to a New York Court of Appeals decision upholding a New York City Transit Authority regulation that barred newspaper sales in subways but permitted “noncommercial expressive activity” such as the distribution of free literature, on the ground that “permitting sales would inescapably engender or encourage competitive participants and open an unmanageable overflow . . . [and such sales] might lead to a veritable bazaar of expressive merchandise being authorized to be churned for sales throughout the subway system.” *Rogers v. New York City Transit Auth.*, 89 N.Y.2d 692, 703 (1997).

TPI Metro also analogized the instant case to decisions upholding preferential distribution rights resulting from competitive bidding to publish civilian-operated newspapers on military bases because such distribution rights provide a “crucial economic incentive . . . to civil-

ian publishers.” *Swarnar v. United States*, 937 F.2d 1478, 1482 (9th Cir. 1991); *Shopco Distrib. Co., Inc. v. Commanding General of Marine Corps Base, Camp Lejeune, North Carolina*, 885 F.2d 167, 174 (4th Cir. 1989).

Under the above authorities, TPI Metro contended that the SEPTA-Metro distribution plan is clearly reasonable. Like the New York City Transit Authority in *Rogers*, it makes eminent sense for SEPTA to distinguish between sales and free distribution of newspapers, particularly given the logistical difficulties attendant to the sale of newspapers on buses. And as in the military base cases, SEPTA’s grant of preferential distribution provides a “crucial economic incentive” to TPI Metro especially in light of the strictures imposed by

SEPTA in its RFP — that the publisher share revenue with SEPTA and that the publication be advertiser-supported.

Furthermore, numerous alternative avenues exist for distribu-

tion of plaintiffs’ newspapers, which are sold not only in SEPTA stations, but in countless retail establishments, honor boxes, and via home delivery. See *Gannett*, 745 F.2d at 774 (“Gannett could also use peripatetic news vendors or existing newsstands to sell its newspapers in MTA stations. Although the alternative distribution method may be more costly, the First Amendment does not guarantee a right to the least expensive means of expression.”).

TPI Metro also urged the Third Circuit to reject as specious the plaintiffs’ claim that they are merely seeking a “level playing field,” because the playing field was “level” when SEPTA issued the RFP, and none of the plaintiffs submitted a proposal. In fact, PNI specifically advised SEPTA it was not interested in doing so. Cf. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1967) (noting that First Amendment rights are waivable). Further, were the Court either to allow plaintiffs to sell their newspapers on buses or to enjoin TPI Metro from distributing Metro on buses, this would tilt the playing field against Metro because, unlike plaintiffs, TPI Metro is paying SEPTA significant sums of money and must meet various other contractual obligations.

(Continued on page 52)

[C]ourts have regularly upheld restrictions on newspaper distribution in transit stations and airports.

3d Cir. Denies Injunction and Appeal in Transit Case

(Continued from page 51)

The Viewpoint-Neutrality of the SEPTA-Metro Distribution Plan

In addition to demonstrating the reasonableness of the SEPTA-Metro distribution plan, TPI Metro argued that the plan was viewpoint-neutral. Disputing the contention by plaintiffs' counsel that the RFP's reference to "SEPTA's editorial standards" led *The Inquirer* and the other plaintiffs not to respond to the RFP, TPI Metro noted the absence of any evidence supporting this assertion and demonstrated that the available evidence suggested that PNI's rationale for declining to submit a proposal was economic, not philosophical. As its spokesperson told the *Daily News* in October 1999 — a free transit publication "may work in Europe, but we don't believe it will work here."

TPI Metro also pointed to the absence of any evidence that SEPTA's award of the contract to Metro had anything whatsoever to do with viewpoint, which was fatal to plaintiffs' claim of viewpoint discrimination because, in this context, whether governmental conduct was in fact discriminatory is measured at the time the agency selects a bidder. See *M.N.C. of Hinesville, Inc. v. United States Dept. of Defense*, 791 F.2d 1466, 1476 (11th Cir. 1986) (noting that the facts surrounding award of contract for Civilian Enterprise Newspaper "provide no inference that the Army engaged in impermissible viewpoint discrimination when it selected [defendant] over [plaintiff] . . . [because] [n]o evidence suggests that [defendant] was selected . . . because of the views it would express in [its paper]").

TPI Metro further demonstrated that the un rebutted evidence in the record showed that SEPTA will not attempt to influence the content of Metro other than to supply the SEPTA advertising and information page included in Metro's daily editions. Thus, as SEPTA's Project Director told the *Daily News* on October 8, 1999, "SEPTA will have no say over the editorial content of the paper, except its own transit page." Similarly, on January 21, 2000, Dow Jones News Service reported Metro publisher Jack Roberts as saying that Metro "will be nonpartisan and editorially independent."

Plaintiffs' Failure to Show Irreparable Harm

Pointing out that plaintiffs were required to "show a chilling effect on free expression," *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989), TPI Metro contended that no such claim could plausibly be made because plaintiffs' newspapers remain available throughout the Philadelphia region through home delivery, at newsstands and convenience stores, on the Internet, and in honor boxes (many of which sit beside Metro honor boxes at SEPTA transit stations and bus stops).

Harm To Other Interested Parties

TPI Metro maintained that plaintiffs also could not satisfy the remaining criteria of injunctive relief — which require consideration of the harm to other interested parties and the public interest. In this respect, TPI Metro argued that it would suffer irreparable harm if enjoined from distributing Metro on buses pursuant to its agreement with SEPTA because this would cut off an essential source of Metro's distribution, thereby compromising Metro's advertising revenue and scuttling its efforts to gain a foothold on this market — all of which would benefit plaintiffs, Metro's direct competitors.

This harm would be especially acute given PNI's long-standing dominance of the Philadelphia newspaper market. As TPI Metro pointed out, dominant market players may not invoke a court's equitable powers — especially the power to issue emergency injunctive relief — to preemptively snuff out a new market entrant. See, e.g., *Storck USA v. Farley Candy Co.*, 14 F.3d 311, 315 (7th Cir. 1994) (affirming denial of preliminary injunction that might put new market entrant out of business).

TPI Metro further explained that this rule must be applied even more strictly when the harm to Metro is of a constitutional, and not just competitive, dimension. Although plaintiffs had made much of their First Amendment right to distribute their newspapers, TPI Metro reasoned, they had entirely ignored Metro's corresponding right. And, while Metro is distributed solely in the transit system, plaintiffs have numerous other well-established means of distribution.

(Continued on page 53)

3d Cir. Denies Injunction and Appeal in Transit Case

(Continued from page 52)

More problematic still was that the remedy requested has nothing to do with the distribution of plaintiffs' newspapers, but rather would have prevented TPI Metro from distributing its newspaper pursuant to the rights it purchased from SEPTA following open bidding on the RFP. Such an injunction would constitute a prior restraint, which is presumptively unconstitutional. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976) ("Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity") (internal quotations omitted).

Public Interest

Finally, TPI Metro noted that an injunction would harm the public interest, as reflected in the First Amendment, which lies in access to more, not fewer, news sources, especially a free source of news. Competition between Metro and plaintiffs' newspapers will insure that the marketplace of ideas remains vibrant and that access to it is not prohibitively expensive. Granting the injunction and impairing Metro's distribution, TPI Metro argued, would only mean less competition, a result inimical to the public interest. Even apart from the First Amendment interests at stake, TPI Metro concluded, the public has a compelling interest in vigorous competition, no matter what the industry.

• • •

For all of the above reasons, TPI Metro urged the Third Circuit to see this lawsuit for what it really is, an effort by established newspapers to stifle competition for advertising dollars that would actually do more harm than good to First Amendment principles. Now that the Third Circuit has upheld TPI Metro's position and declined to grant plaintiffs an injunction or an expedited appeal, SEPTA is free to implement the distribution plan while the appeal proceeds on the regular track.

Edward D. Rogers of Ballard Spahr Andrews & Ingersoll, LLP, in Philadelphia, PA, represents Transit Publications Inc. Metro PA in this litigation.

©2000

LIBEL DEFENSE RESOURCE CENTER, INC.
404 Park Avenue South, 16th Floor
New York, NY 10016
(212)889-2306
www.ldrc.com

BOARD OF DIRECTORS

Kenneth M. Vittor (Chair)
Robin Bierstedt
Dale Cohen
Anne Egerton
Harold W. Fuson, Jr.
Susanna Lowy
Mary Ann Werner
Thomas B. Kelley (ex officio)

STAFF:

Executive Director: Sandra Baron
Staff Attorney: David Heller
Staff Attorney: John Maltbie
LDRC Fellow: Elizabeth Read
Legal Assistant: Nila W. Williams
Staff Assistant: Michele Loporto

Place your order for the second edition of LDRC's newest 50-State Survey.

LDRC 50-STATE SURVEY 2000: EMPLOYMENT LIBEL AND PRIVACY LAW

An essential reference on these critical employment issues.

NOW AVAILABLE!

In 1999, the LDRC applied its expertise in libel and privacy law to the workplace. With the assistance of a national network of employment lawyers and libel/privacy specialists, LDRC added the LDRC 50-State Survey: Employment Libel and Privacy Law to its growing library.

Like LDRC's other Surveys, the Employment Survey is a "practitioner-friendly" resource. Each state's chapter is presented in a uniform outline format with coverage ranging from basic employment, libel and privacy law to the emerging issues of email monitoring and employee drug testing.

EACH CHAPTER INCLUDES:

LIBEL: Publication; Compelled Self-Publication; Fault Standards; Damages; Recurring Fact Patterns; Vicarious Liability of Employers for Statements Made by Employees; Privileges and Defenses; Procedural Issues

PRIVACY: Employer Testing of Employees; Searches; Monitoring of Employees; Activities Outside the Workplace; Records

ALTERNATIVE LIABILITY THEORIES, including: Negligent Hiring, Retention and Supervision; Intentional Infliction of Emotional Distress; Interference with Economic Advantage; Prima Facie Tort

To Order Contact :

LDRC
404 Park Avenue South, 16th Floor
New York, NY 10016
call 212.889.2306
or visit our website at www.ldrc.com.

The price per Survey is \$150.