

Reporting Developments Through March 22, 2002

This month we rechristen the *LibelLetter* as the *MediaLawLetter*. This is one of several changes that LDRC's Board is planning to implement in the coming months to better reflect the growing scope of media law issues we report on and that you are interested in hearing about.

#### IN THIS ISSUE **NEWS & UPDATES PAGE** Mass. Court Rules That Proposed Son of Sam Law Would Violate the First Amendment 3 Massachusetts high court finds bill is a content-based regulation of speech Wisc./N.C. **Injunctions Barring Publication Issued in State Courts** 5 Possibly defamatory publications, harassing flyers enjoined D.Colo. Movie and Video Game Companies Win Dismissal in Columbine Related Suit Court: Generally no person has responsibility to foresee intentional violent acts by others Second "Hit Man" Suit Settled Ore. First lawsuit was settled in May 1999 for an undisclosed multi-million-dollar amount Cal. Settlement Reached for Beardstown Ladies Book 12 Walt Disney agreed to give buyers a credit toward another purchase N.Y./Fla. Media on Trial in Criminal Court 29 Porn publisher convicted, shock jock acquitted in criminal trials N.Y./Pa./Fla. **Troubles for Reporters** 31 Allegations of trespass a recent problem for journalists D.D.C. Court Grants Media Intervenors' Motion for Access to Transcripts and Videotapes 33 Judge: Microsoft failed to make necessary showing to prevent access by the press **Most Regan Papers Released President** 36 Release comes more than 14 months after initially due California Congressman Quietly Rebuffs Ashcroft's FOIA Stance Congress 37 Action has no legal effect, but is a symbolic bipartisan slap Tex. WorldPeace Has No Right to Debate, Court Rules 39 Candidate excluded because he was not deemed a newsworthy candidate War Update on Reporters in the War Zone 41 Pentagon allows press pools to accompany ground troops LIBEL & PRIVACY 4th Cir. **Court of Appeals Orders Liddy Retrial** Court says the jury should decide whether evidence showed negligence (Continued on page 2)

Page 2 March 2002

(Continued from page 1) 11 Ga. "Rogue Lawyers" Article Did Not Libel Atlanta Attorney Paper's use of 'disassociating language' proved critical in court's analysis Cal. Super. Ct. **Teacher Wins Harassment Suit Stemming From Underground Paper** 13 School district likely to appeal decision that could have negative impact on student journalists Cal. Ct. App. **Court Finds Comments on Olympic Production to be Opinion** 14 Defendant claimed plaintiff had "no responsibility whatsoever" for conception of ceremonies 2nd Cir. Court Affirms Dismissal of Defamation Claim Based on Use of "Militant" 15 Considering the context of the entire article, the term could not be considered defamatory 9th Cir. Court Affirms Most of *Tailwind* Dismissal 15 Claim stemming from retraction is reversed and remanded? E.D.Cal. Second Curious Counsel in Condit Case 16 Condit's wife adds attorney from first "Hit Man" case Tex. Dist. Ct. "Girls Gone Wild" Producer Seeks to Vacate \$5 Million Default 32 College students sued over bare-breasted video Mary. Privacy of Bookstore Records Becomes Focal Point for ABFFE 38 ABFFE expresses its support of legislation limiting chances for subpoena of bookstore records **NEWSGATHERING** Ga. Judge Modifies Gag Corder in Georgia Crematory Case 17 Changes relate to who is gagged and which information may not be disseminated Fla. Ct. App. Appellate Court Lifts Order Prohibiting Interviews in Courthouse During Trial 21 Original order was found to be overbroad INTERNET Senate Press Gallery Denies Credential Request from Online News Site Media 22 Credentials denied because, among other things, web site doesn't have enough original content 9th Cir. Ninth Circuit Develops New Public Display Right Analysis 23 Court holds that making thumbnail copies of images was a fair use Minn. Ct. App. Minnesota Court Holds Alabama Injunction May Survive First Amendment Challenge 26 Minnesota Supreme Court hears jurisdiction arguments, asked to review merits of injunction 2nd Cir. Amicus Brief Filed in Universal Studios v. Corley Case 28 The amici are concerned with district court's 'subjective test to determine linking liability' INTERNATIONAL Can. Canadian Supreme Court Decisions Ease Court Publication Bans 19 Latest decisions have already been relied upon by judges willing to refuse bans UK **UK Court of Appeals Reverses Controversial Privacy Ruling** 42 Prior Decision Enjoined Publication of "Kiss and Tell" Articles

# Court Rules That Proposed Son of Sam Law Would Violate the First Amendment

#### Massachusetts High Court Finds Bill is a Content-Based Regulation of Speech

#### By Joseph D. Steinfield and Zick Rubin

For the second time in two months the highest court of a state has held a "Son of Sam" law unconstitutional. On February 21, 2002, the California Supreme Court held that that state's "Son of Sam" statute "facially violates constitutional protections of speech by appropriating, as compensation for crime victims, all monies due to a convicted felon from expressive materials that include the story of the crime." *Keenan v. Superior Court*, 27 Cal.4th 413, 40 P.3d 718 (2002). Now, a proposed Massachusetts version of such a law has bit the dust under the unusual Massachusetts advisory opinion procedure.

The Massachusetts Constitution (Part 2, c. 3, Art. 2) authorizes the legislature, as well as the governor, to require the justices of the Supreme Judicial Court (SJC) to render advisory opinions "upon important questions or

#### **Correction**

In an article in last month's LibelLetter on past cases in which courts had entered default judgments after defendants refused to identify sources ("Is Ayash Unique?," p. 9), we misstated the sequence of decisions in the one case in which such a default was upheld on appeal. The trial court's entry of such a default was upheld in Georgia Communications Corp. v. Horne, 164 Ga. App. 227, 294 S.E.2d 725, 8 Media L. Rep. 2375 (Ga. Ct. App. 1982), reh'g denied (Nov. 1, 1982). The case then went to trial on damages, which apparently resulted in an award of \$120,000. The Georgia Court of Appeals rejected an appeal of this award based on the argument that it was improper to impose damages based on a default judgment. Georgia Communications Corp. v. Horne, 174 Ga. App. 69, 329 S.E.2d 192 (Ga. Ct. App. 1985).

The other decisions cited in the article, *Williamson v. Lucas*, 166 Ga. App. 403, 304 S.E.2d 402 (Ga. Ct. App. 1983) and *Williamson v. Lucas*, 171 Ga. App. 695, 320 S.E.2d 800 (Ga. Ct. App. 1984), were made in a separate case involving the same defendants.

law." In September 2001, the state senate asked the SJC to review Senate Bill 1939, entitled "An Act Relative to Profits From Crime" – legislation which, if enacted, would have obligated a "contracting party" to pay over to the Commonwealth, for the benefit of "victims," any "proceeds related to a crime."

The court solicited amicus briefs from interested parties. A group of media organizations – the Association of American Publishers, the Authors Guild, Magazine Publishers of America, the Motion Picture Association of America, and the Newspaper Association of America – submitted a brief in opposition to the bill. Among the organizations supporting the bill was the Matty Eappen Foundation, named for the victim of Louise Woodward, the Massachusetts nanny convicted of involuntary manslaughter in 1997. In an opinion sensitive to the interests of authors and publishers, the SJC has advised that the proposed law would violate the First Amendment and the Massachusetts Constitution. *Opinion of the Justices to the Senate*, SJC-08634 (March 14, 2002).

This was not the first "Son of Sam" effort in Massachusetts. The Commonwealth's earlier Son of Sam law was repealed in the wake of *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991), which struck down the New York Son of Sam law. The Massachusetts bill, filed and reported favorably out of committee following reports that Louise Woodward intended to sell her story, was cast in ways that attempted to circumvent the constitutional problems identified in *Simon & Schuster*. Among its key provisions were the following:

• The bill applied to any "defendant," defined as "a person who is the subject of pending criminal charges or has been convicted of a crime or has voluntarily admitted the commission of a crime." A "contracting party" was a person or entity that agrees to pay a defendant consideration which constitute "proceeds related to a crime." Such "proceeds" are defined as any assets "obtained through the use of unique knowledge or notoriety acquired by means and in consequence of the commission of a crime." (The drafters of the Massachumission of a crime."

(Continued on page 4)

#### Court Rules That Proposed Son of Sam Law Would Violate the First Amendment

(Continued from page 3)

- setts bill hoped that this broad definition, avoiding words like "movie," "book," or "expression," would insulate the bill from First Amendment attack.)
- Any "contracting party" would have been required to submit a copy of the contract to the Attorney General's "division of victim compensation" if the consideration to be paid, presumably including advances and royalties on a book or movie contract, would constitute "proceeds related to a crime."
- The Attorney General would then determine whether the proceeds under the contract were "substantially related to a crime." If so, the contracting party would be required to turn the money over to the state, to be held in escrow for the benefit of the victims, or post a bond. (The drafters hoped that this "substantially related" test would address the overbreadth attack that was successfully made against the original New York law.) Even if no one made a claim to the escrowed money, only half would be returned; the other half would be kept in the victim compensation fund.

The absence of words like "speech" or "expression" did not deter the SJC, which recognized that the bill was a content-based regulation of speech, burdening "works that describe, reenact, or otherwise are related to the commission of a crime." Because the bill calls for the escrowing of author advances, the author might not be able to support him or herself while preparing the work. And "the prospect of having all proceeds held in escrow ... with at best uncertain prospects as to how much of it (if any) will ever be paid, makes it very unlikely that a defendant-author would ever agree to undertake such a project," the court ruled.

The statutory burden would fall not only on authors and publishers but on society as a whole, the court said. "Although it is impossible to measure the cost of works that would never come to fruition because of the multiple deterrent effects of the bill, 'we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne." (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 470 (1995)).

The First Amendment would not be implicated by regulation of nonexpressive activity such as the sale of "memorabilia" related to crime – an amicus brief in support of the bill cited "voodoo dolls woven by Charles Manson" as an example. The court concluded, however, that the proposed regulation of expression could not be severed from the statute without undermining the bill's integrity. "The proposed bill, sweeping broadly across the publishing and entertainment industries and interfering with an entire category of speech, is not narrowly tailored," the court wrote. "There are other less cumbersome and more precise methods of compensating victims and preventing notorious criminals from obtaining a financial windfall from their notoriety."

The court did not limit its decision to the problem of overbreadth. It also held that "in its practical effect, [the bill] would operate as a prior restraint on speech, while lacking the procedural protections required" under *Freedman v. Maryland*, 380 U.S. 51 (1965). On this alternative ground the court cited with approval the decision of the Maryland Court of Appeals in *Curran v. Price*, 334 Md. 149, 167-70 (1994).

In a final footnote, quoting the California Supreme Court's recent opinion in *Keenan v. Superior Court*, the court left open the possibility of dealing with this subject in some other way. "We do not suggest that legislation on this subject is automatically violative of the First Amendment." This may encourage Massachusetts legislators to try yet again, but such legislation would probably have to target convicted felons, rather than "contracting parties" such as media and film companies. Legislation regarding restitution orders and conditions of probation in criminal cases, procedures already upheld in Massachusetts, would likely be much less objectionable to authors, publishers, and filmmakers.

Joseph D. Steinfield and Zick Rubin are members of the Media and Entertainment Group at Hill & Barlow in Boston. Together with their colleagues John Taylor Williams, Kristen Carpenter, and Rebecca Hulse, they authored the amicus brief on behalf of the Association of American Publishers, et al.

# **Injunctions Barring Publication Issued In State Cases**

## Possibly Defamatory Publications, Harassing Flyers Enjoined

In recent weeks, a Wisconsin appeals court upheld and a North Carolina court issued injunctions barring individuals from distributing publications which they had used to air their grievances against other people.

#### Guitar Theft Allegations Lead to Injunction

In Wisconsin, the state Court of Appeals has affirmed an injunction preventing a Wisconsin man from publishing any information about a man he accused of stealing his guitar.

After his guitar was stolen, Tom Wakely began distributing flyers and posters accusing Terrance Massey – who he believed had stolen the instrument -- of tax evasion, lying and theft. In November 2000, Massey petitioned for a harassment injunction against Wakely. Oneida County Circuit Court Judge Mark Mangerson issued the injunction, but did not rule on whether Wakely's allegations were true.

Wakely appealed, arguing that the injunction violated his freedom of speech.

The court of appeals, in a per curiam, unpublished decision, said that the issue was not whether the allegations were true, but

(1) whether Wakely's conduct constituted harassment and served no legitimate purpose; and (2) whether the injunction was properly tailored to the present facts.

Wakely did not dispute that his intent was to pressure Massey, and the court of appeals held that the trial court "rationally applied the appropriate law to the facts fo record when granting and fashioning the injunction." *Massey v. Wakely*, 2002 WL 378371 (Wisc. Ct. App. March 12, 2002).

Wakely was represented by Richard W. Voss of Rhinelander, Wisc. Timothy B. Melms of Hogan & Melms LLP in Rhinelander, Wisc. represented Massey.

#### Judge Named As Witch

In North Carolina, Superior Court Judge F. Fetzer Mills issued an injunction on March 11 against Robert A. Williams for publishing *Citizens for Good Government*, a publication mailed and faxed to various parties in November 2001 which associated District Court Judge Dina Foster

with the North Carolina Piedmont Church of Wicca.

The injunction prohibits Williams from printing anything that relates Judge Foster to Wicca, witchcraft or satanism until a trail for defamation can be held.

In issuing the order, Judge Mills found that the allegations made in *Citizens for Good Government* were false and were known to be false at the time they were published. He also concluded that the actions were "malicious, willful, wanton, and show a reckless disregard for Judge Foster's rights."

In addition to the injunction, Judge Mills ordered that Williams answer 21 interrogatories, including "Is it your contention that Anna F. (Dina) Foster is involved with the Church of Wicca?" and "Identify each member of *Citizens for Good Government*." Williams was given 10 days to answer the questions.

Judge Mills rejected any argument for a reporter's privilege, holding that Williams is not a journalist, that Williams does not disseminate news through any "new medium," and that even if Williams could otherwise qualify for a reporter's privilege, Judge Foster had proven the information sought through the interrogatories was relevant, cannot be obtained through other sources, and is essential to her claim.

Williams is apparently representing himself pro se; Judge Foster is represented by William K. Diehl, Jr. of James, McElroy & Diehl, P.A. in Charlotte.

# Save the Date!

LDRC Annual Dinner November 13, 2002

In honor of war reporting...moderated by Ted Koppel, ABC News

## Movie and Video Game Companies Win Dismissal in Columbine-Related Suit

Court: Generally No Person Has Responsibility to Foresee Intentional Violent Acts by Others

Chief Judge Babcock reasoned that

plaintiffs essentially sought to

obligate all speakers to anticipate and

prevent the idiosyncratic, violent

reactions of unidentified, vulnerable

individuals to their creative works.

#### By Deanne E. Maynard

On March 4, 2002, the federal district court in Colorado dismissed Sanders v. Acclaim Entertainment, Inc., NO. CIV.01-B-728, — F. Supp. 2d —, 2002 WL 338294 (D. Colo. Mar 04, 2002), an action alleging that movie and video game manufacturers and distributors caused the shootings at Columbine High School. The family of William David Sanders, a teacher killed by Columbine students Eric Harris and Dylan Klebold, brought the putative class action.

In a thorough 30-page opinion, Chief Judge Lewis T. Babcock rejected the plaintiffs' negligence and strict liability claims on both state law and First Amendment grounds. On the negligence claims, the court held that

the movie and video game defendants did not owe a duty to the plaintiffs and that, in any event, Harris and Klebold's actions were a superseding cause of Sanders' death. On the strict liability claims, the court held that the expression in the movies and video games was not a

"product" subject to strict liability and that, again, the shooters' actions were a superseding cause. In addition, the court held that the First Amendment barred all of plaintiffs' claims.

In their amended complaint, plaintiffs sued movie, video game, and Internet companies. Plaintiffs based their claims against the movie companies on the movie "The Basketball Diaries," in which the protagonist guns down his classmates during a drug-induced dream sequence. They sued a number of video game companies based on the allegedly "violent" content of their games, and several Internet companies based on their allegedly violently pornographic and obscene content. In essence, plaintiffs alleged that exposure to the content of the various media caused Harris and Klebold to shoot their classmates and teachers.

#### The Negligence Claims

The district court first addressed plaintiffs' negligence claims. In considering whether the defendants owed a legal duty to the plaintiffs under Colorado law, the court considered (1) the foreseeability of the injury that occurred; (2) the social utility of the defendants' conduct; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on the defendants. Analyzing each of these factors, the district court held that each weighed heavily against imposing a duty on the defendants.

As to foreseeability, the district court noted that generally no person has responsibility to foresee intentional violent acts by others. Under the particular circumstances alleged in this case, the court concluded that the video

> game and movie defendants probable consequence of expo-

> "had no reason to suppose that Harris and Klebold would decide to murder or injure their fellow classmates and teachers." Nor did the defendants "have any reason to believe that a shooting spree was a likely or

sure to their movie or video games." The court concluded that, at most, there was a speculative possibility that the movie or games might have "the potential to stimulate an idiosyncratic reaction in the mind of some disturbed individuals." But the court held that this is not enough to create a legal duty. The court found its conclusion consistent with other cases from around the country brought against media defendants, discussing, among others, James v. Meow Media, Inc., 90 F. Supp.2d 798 (W.D. Ky. 2000), which asserted nearly identical claims as the Columbine suit; Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990), which involved the game Dungeons and Dragons; and Zamora v. Columbia Broadcasting System, 480 F. Supp. 199 (S.D. Fla. 1979), which involved a claim based on television violence.

Turning to the social utility of the defendants' conduct, the court concluded that creating and distributing

(Continued on page 7)

# Movie and Video Game Companies Win Dismissal in Columbine-Related Suit

(Continued from page 6)

works of the imagination is "an integral component of a society dedicated to the principle of free expression." The plaintiffs' characterization of the creative works as violent did not alter this conclusion. Relying on a recent decision in the Seventh Circuit by Judge Posner, *American Amusement Machine Association v. Kendrick*, 24 F.3d 572 (7th Cir. 2001), the court noted that violence is an age-old theme of culture, including classic literature and art.

With respect to the burden that would be imposed by plaintiffs' claims, the court concluded that the magnitude of the burden was "daunting." The court noted that Colorado courts repeatedly had rejected imposing impractical obligations on defendants to identify potential dangers. In particular, when First Amendment values were at stake, Colorado courts had refused to impose a tort duty based on

the contents of an authors' ideas. Moreover, the practical consequences of such a burden would be to compel defendants to refrain from expressing the ideas contained in their works. Chief Judge Babcock reasoned that plaintiffs essentially sought to obli-

gate all speakers to anticipate and prevent the idiosyncratic, violent reactions of unidentified, vulnerable individuals to their creative works. Creating such a burden, he concluded, would chill the rights of free expression, creating dire consequences for a free and open society. Having found that all of the factors weighed heavily against the defendants, the district court held as a matter of law that the movie and video game defendants owed no duty to the plaintiffs.

Alternatively, the district court concluded that the movie and video game defendants were not the proximate cause of the plaintiffs' injuries. Although causation is generally a jury question in Colorado, the court can decide as a matter of law that the alleged chain of causation is too attenuated to impose liability. Judge Babcock concluded that Harris and Klebold's intentional violent acts were not foreseeable to the defendants and therefore were not within

the scope of any risk purportedly created by them. Accordingly, the court held that no reasonable jury could find that defendants' conduct resulted in Sanders' death in "the natural and probable sequence of events."

The court then dismissed plaintiffs' strict liability claims. Plaintiffs alleged harm from the intangible thoughts, ideas, and messages purportedly contained in the movie and video games. Because Colorado courts had not yet addressed the question of whether such intangibles could be "products" within the meaning of the strict liability doctrine, the court looked to other jurisdictions and the *Restatement (Third) of Torts*. The court concluded that these authorities have recognized "the critical distinction" between imposing strict liability only for harm caused by the medium itself, and not for harm

allegedly caused by the information or message contained therein. Accordingly, the court held that strict liability could not be imposed. Alternatively, it held that plaintiffs' strict liability claims – like the negligence ones – failed for lack of causation.

Because Colorado courts had not yet addressed the question of whether such intangibles could be "products" within the meaning of the strict liability doctrine, the court looked to other jurisdictions and the Restatement (Third) of Torts.

#### First Amendment Protections

Finally, the district court held all of plaintiffs' claims barred by the First Amendment. As an initial matter, the court held that video games are entitled to full First Amendment protection. The court next held that, under the "exacting" test set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the speech at issue in this case could not be the basis of liability. Under *Brandenburg*, even speech that expressly advocates criminal activity cannot be the basis for liability, unless the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The court refused the plaintiffs' invitation to dilute the *Brandenburg* test, holding that (1) protection is not limited to "marginalized political speakers;" (2) the immi-

# Movie and Video Game Companies Win Dismissal in Columbine-Related Suit

(Continued from page 7)

nence requirement is not met by advocating illegal action at some future time; and (3) speech is protected if it is not directed at any particular person or group of persons. The court also rejected plaintiffs' reliance on the "Hit Man" case, *Rice v. Paladin, Inc.*, 128 F.3d 233 (4th Cir. 1997), distinguishing it on the grounds that the defendant in that case had stipulated to actually intending to assist murderers. [Another case stemming from Hit Man recently settled. See adjacent article]

Chief Judge Babcock relied on the Fourth Circuit's qualification in *Rice* that, with respect to other political, informational, educational, or entertainment publications, "an inference of impermissible intent on the part of the producer . . . would be unwarranted as a matter of law." In addition, the district court held that plaintiffs, as a matter of law, could not meet *Brandenburg*'s second prong because "the video games and movie were not 'likely' to cause any harm, let alone imminent lawless action."

The district court also rejected the plaintiffs' argument that defendants were not entitled to First Amendment protection because the case involved children. Chief Judge Babcock held that *Brandenburg* is the applicable test, even if the individual allegedly incited to violence was a minor. Moreover, the court recognized that plaintiffs' liability theories were not limited to the protection of minors and that the broad tort liability plaintiffs sought was not narrowly tailored.

The district court's dismissal applied to the movie and video game defendants that had moved to dismiss. As of the time of the decision, other movie and video game defendants had not yet been served and the internet defendants had not yet filed a motion to dismiss.

Deanne E. Maynard (dmaynard@jenner.com) and Paul M. Smith, partners in Jenner & Block's Washington, DC office, along with Thomas B. Kelley, Steven D. Zansberg, and Adam White Scoville in Faegre & Benson's Denver, Colorado office, represented Acclaim Entertainment, Inc., Activision, Inc., Capcom Entertainment, Inc., Eidos Interactive, Inc., Infogrames, Inc., Interplay Entertainment Corp., Nintendo of America Inc., Sony Computer Entertainment America Inc., and Square Soft, Inc.

# UPDATE: Second "Hit Man" Suit Settled

Palladin Press has settled a second lawsuit alleging that a crime was enabled by its book, *Hit Man: A Technical Manual for Independent Contractors. Wilson v. Paladin Press*, No. 00-06273 (D.Ore. orders vacated pending dismissal Feb. 5, 2002).

The suit had been brought in September 2000 by Bobby Jo Wilson, who survived an attempted murder by Robert Vaughn Jones and Vincent Wayne Padgett. Wilson's estranged husband, Robert Leslie Goggin, hired Jones to kill his wife; Jones induced Padgett to help him. Goggin hoped to collect on a \$100,000 life insurance policy on his wife. Goggin, Jones, and Padgett are now serving prison sentences of 17-and-a-half to 20 years.

Wilson's lawsuit claimed that Jones bought "Hit Man," and he and Padgett used 25 of the book's specific instructions in their attempt to kill Wilson. These included directions to wear latex gloves, buy new shoes and wear disguises.

In May 1999, Paladin Press – at the insistence of its general liability insurer – settled a similar suit by agreeing to pay the families of three murder victims in Maryland an undisclosed, multi-million-dollar amount. As part of the settlement, Paladin Press also agreed to stop selling the book and destroy all copies in inventory. *See LDRC LibelLetter*, June 1999, at 5. That case was settled three days before trial, and after the U.S. Supreme Court declined to review a decision by the U.S. Court of Appeals for the 4th Circuit allowing the suit to proceed. *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied sub. nom. Paladin Enterprises, Inc. v. Rice*, 523 U.S. 1074 (1998). Law professor Ronald Smolla argued the case before the 4th Circuit. (See related article, p. 16.)

In the latest suit, the plaintiff was represented by Don Corson of Johnson, Clifton, Larson & Corson, P.C. in Eugene, Ore.; Ronald E. Bailey of Bullivant Houser Bailey in Portland represented Paladin.

## Fourth Circuit Orders Liddy Retrial

#### Court Says Jury Should Decided Whether Evidence Showed Negligence

A libel suit brought by a former secretary for the Democratic National Committee against talk show host and former White House official G. Gordon Liddy will proceed to retrial after the Fourth Circuit ruled in an unpublished decision that the trial judge improperly granted judgment as a matter of law after the jury that heard the case declared that it was deadlocked. *Wells v. Liddy*, No. 01-1266 (4th Cir. March 1, 2002) (unpublished). The appeals court also ruled on a number of evidentiary and other issues which are likely to reemerge in the second trial.

This is the second time that the Fourth Circuit has reinstated the case. In 1999, the Fourth Circuit reversed a grant of summary judgment to Liddy, holding that Wells was a private figure, not an involuntary public figure as the district court had ruled. *Wells v. Liddy*, 186 F.3d 505, 28 Media L. Rep. 2131 (1999) (reversing 1 F.Supp. 2d 532, 26 Media L. Rep. 1779 (D. Md. 1998)), *cert. denied*, 528 U.S. 1118 (2000).

The case is based on statements made by Liddy during personal appearances at a Virginia college in 1996 and on a cruise ship in the Mediterranean during 1997. The original complaint also cited other statements made by Liddy as a guest on various radio and television programs, but these claims were either dismissed or dropped as the case proceeded.

In the statements that remained at issue in the case, Liddy propounded his theory that the break-in at the DNC office, which led to the Watergate scandal, was an effort to retrieve photos of prostitutes in Wells' desk. Wells also claimed that Liddy said that Wells coordinated the prostitute's liaisons, but Liddy denied making such statements.

Liddy said that his theory is based on information from the book *Silent Coop: The Removal of a President*, and on a conversation with Phillip Mackin Bailly, an attorney connected to the DNC at the time of Watergate who had a history of mental illness and was later convicted and disbarred for prostitution-related activities.

#### Second Dismissal

After the federal district court rejected at attempt to transfer the case there, 115 F.Supp. 2d 1 (2000), the case finally went to trial before Motz in January 2001. At trial, Wells

argued that Liddy's main source for the allegations, disbarred attorney Phillip Macklin Bailly, was not reliable and that Liddy should have further investigated his claims.

After a three-week trial and seven hours of deliberations, the nine-member jury said that it was hopelessly deadlocked. Motz dismissed the jury, and once again dismissed the case. "Having carefully considered all of the evidence, I do not believe a reasonable jury could find Mr. Liddy was negligent in making the statements at issue," Motz said in his ruling from the bench.

Motz later justified his decision in a written opinion, in which he held that Wells had failed to show "sufficient evidence from which a reasonable jury could find that Liddy failed to take reasonable steps in accessing the truth of his allegedly false statements." 135 F.Supp. 2d 668, 670 (D. Md. 2001). He also wrote that Wells' claims "raise serious First Amendment concerns" because they seek to limit discussion of Liddy's Watergate theories. *Id.* at 674-675.

"I recognize that my granting of Liddy's motion for judgment as a matter of law might be seen to be at odds with the Fourth Circuit's ruling since I am finding that Wells's evidence fails to meet the lower standard of negligence the parties agree (in light of the Fourth Circuit's ... holding that Wells is not an involuntary public figure) applies to her compensatory damage claim," Motz wrote. "However, I am now ruling after the establishment of a trial record that is fuller and more clarifying than was the record on summary judgment." *Id.* at 670.

#### 4th Circuit Reverses Again

The U.S. Court of Appeals for the Circuit disagreed, and again reversed the result. Noting that the eight pieces of corroborating evidence cited by Motz in his second dismissal "are very similar" to the seven pieces that he cited when dismissing the case the first time, the court concluded that "the evidence enumerated by the district court does not support judgment as a matter of law because it fails to prove, as a matter of law, that Liddy's actions were prudent." Based on this finding, the court remanded the

(Continued on page 10)

#### **Fourth Circuit Orders Liddy Retrial**

(Continued from page 9)

case to the district court for a new trial.

Given "the likelihood that many of the same issues will be revisited on remand," the appeals court went on to decide Wells' other grounds for appeal.

#### Evidentiary and Other Issues

While dismissing most of Wells' evidentiary arguments, the appellate court did agree with two of her points.

The court held that the lower court improperly excluded deposition testimony from St. Martin's Press officials stating that the book publisher did not have an obligation to fact check books, since Liddy cited a St. Martin's book – *Silent Coop* – as among his sources. The court ruled that Wells should have been able to use this evidence to show that Liddy's reliance on the book was unreasonable, and that the district court abused its discretion by excluding it.

The appeals court also said that the lower court should not have permitted Bailley's sister, who served as his secretary at the time of Watergate, to testify that a woman who identified herself as Wells called Bailley's office in early 1972. Allowing this testimony, the court said, was an abuse of discretion because it violated Fed. R. Evid. 901(a), which requires evidence to be authenticated before it is admitted; there was no proof offered, the court said, that Wells actually placed the call.

The appeals court also held that the district court was incorrect in finding that Liddy had not waived his attorney-client and work-product privileges. Wells alleged that Liddy had waived these privileges, and attempted to discover evidence of the extent to which Liddy relied on his attorney's advice regarding his comments. The appeals court held that Liddy waived his attorney-client and work-product privileges when he cited conversations with his attorney and privileged documents in motions and testimony during the course of litigation, and thus could not assert these privileges to stop the discovery.

Finally, the 4th Circuit held that Motz had not abused his discretion by denying Wells' motion to

amend her complaint to add a claim that Liddy fraudulently transferred assets to his wife in order to protect them from a potential judgment. While Motz did not cite a reason in his denial of the motion, the appeals court ruled that the reasons need not be specifically stated when they are apparent, such as in this case, where the denial was based on Liddy's single argument against allowing the amendment.

Liddy was represented at the 4th Circuit by John B. Williams and Kerrie Hook of Collier, Shannon, Rill & Scott in Washington, D.C. and Douglas Nazarian of Hogan & Hartson in Baltimore. David M. Dorsen of Wallace, King, Mawaro & Branson in Washington, D.C. represented Wells.

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## "Rogue Lawyers" Article Did Not Libel Atlanta Attorney

#### Paper's Use of "Disassociating Language" Proved Critical in Court's Analysis

#### By Michael Kovaka

In a ruling handed down in late February, the Georgia Supreme Court has struck down a libel suit by an Atlanta attorney who claimed he was defamed by two *Atlanta Journal-Constitution* articles on Georgia's attorney discipline process. *Cox Enterprises, Inc. v. Nix*, No. S01G0743, 2002 Ga. LEXIS 87 (Ga. Feb. 25, 2002) (Benham, J.). The decision reverses a Georgia Court of Appeals decision holding that the articles accused the plaintiff, Franklin Nix, of criminal misconduct by mentioning him in news reports that also discussed the criminal acts of other lawyers.

The case arose from two articles published by *The Journal-Constitution* in 1997. The first article, entitled "Policing lawyers: 'System needs fixing,'" reported on the work of a commission focused on improving the system to discipline Georgia attorneys. That article mentioned several attorneys who had been involved in criminal misconduct, but did not name, mention, or refer to Mr. Nix.

The second article was entitled "Rogue Lawyers: Who polices them?" and reported on the then-ongoing exploration of better mechanisms for handling complaints against attorneys. This article was devoted largely to a discussion of the process for disciplining attorneys, but cited to examples of misconduct by a number of lawyers, including two who had been charged with criminal wrongdoing. The article also mentioned civil proceedings in which a judge had enjoined Mr. Nix from soliciting another attorney's clients.

The reference to the civil proceedings against Nix appeared in the following passage discussing how the "public confidence in lawyers has been eroded by bitter disputes between attorneys and their clients":

Another attorney, Franklin R. Nix, was scolded publicly by Fulton County Superior Court Judge Wendy L. Shoob when Nix solicited business by sending letters to disgruntled Olympic vendors urging them to drop their current attorney and bring their business to him.

Nix invoked the name of defense attorney Bobby Lee

Cook in the letter to convince the potential clients to jump ship, and the attorney whose clients received the letters, Louis Levenson, has sued Nix, alleging tortious interference with his contracts and defamation.

The Journal-Constitution initially moved to dismiss the suit. The newspaper submitted records from the proceedings against Nix showing that its description of those proceedings was accurate. The newspaper also argued that the remainder of the challenged articles could not reasonably be read to suggest any other wrongdoing by Nix, criminal or otherwise. The trial court converted the motion to one for summary judgment and then quickly ruled in favor of *The Journal-Constitution*.

Nix then took his case to the Georgia Court of Appeals, where he twice obtained a reversal of the trial court's decision. The court of appeals initially reversed on procedural grounds, 529 S.E.2d 426 (Ga. Ct. App. 2000), but, on a writ of certiorari, the Georgia Supreme Court rejected that finding of error and instructed the court of appeals to address the merits of the case. 538 S. E.2d 449 (Ga. 2000). On remand, the court of appeals accepted the invitation in earnest. 545 S.E.2d 319 (Ga. Ct. App. Jan. 25, 2001). As a threshold matter, the court of appeals agreed that The Journal-Constitution's account of the proceedings against Nix was accurate. However, the court adopted an extremely broad reading of the articles and found that the two articles, taken together could reasonably be read to suggest both that Nix was one of the "Rogue Lawyers" referred to in the headline of the second article and that he had engaged in criminal misconduct. Based on this conclusion, the court of appeals reversed summary judgment and remanded the case to the trial court. The Journal-Constitution then filed a second petition for certiorari, arguing that the courts of appeals had applied an improper and unconstitutional approach to construing the meaning of allegedly defamatory publications. The high court granted certiorari, but posed a much narrower question for review: whether The Journal-Constitution was entitled to summary judgment. 2001 Ga. LEXIS

(Continued on page 12)

# "Rogue Lawyers" Article Did Not Libel Atlanta Attorney

(Continued from page 11)

The Georgia Supreme Court's eventual decision was equally limited in scope. Reversing the court of appeals and reinstating the trial court's ruling, the court issued a unanimous opinion holding that the construction of the articles urged by Nix and adopted by the court of appeals was simply not reasonable. For example, the court discounted the suggestion that Nix could have been libeled by references to criminal misconduct in the first article, as it did not mention Nix in any way. The court also emphasized that the description of the civil proceedings against Nix had been set apart from the references to other lawyers' criminal misconduct. It thus would be unreasonable for readers to infer that the newspaper had presented Nix's conduct as equivalent to that of those other attorneys. Perhaps most important from the Georgia Supreme Court's viewpoint was the fact that The Journal-Constitution had specifically distanced Mr. Nix from the criminal wrongdoers by the use of "disassociating language." Specifically, the court found that before mentioning Nix the writers had provided a segue indicating that the article's discussion was moving to a discussion of civil suits involving lawyers, rather than criminal misconduct. Finally, turning to the portion of the article that actually did reference Nix, the court agreed with the conclusion of the trial court and the court of appeals that the account of the civil proceedings against Nix was substantially accurate and therefore not defamatory. Because Nix was unable to show that the statements concerning him were false, summary judgment was required.

The Atlanta Journal-Constitution and its editor Rochelle Bozman was represented by Peter Canfield, Michael Kovaka and Tom Clyde of Dow, Lohnes & Albertson in Atlanta. Franklin Nix was represented by Edward T.M. Garland and Nelson Otis Tyrone, III of Garland, Samuel & Loeb in Atlanta.

# Settlement Reached for Beardstown Ladies Book

The Walt Disney Co. and its publishing unit Hyperion have agreed to settle a lawsuit brought by consumers who accused the company of making fraudulent claims on the cover of its *Beardstown Ladies Common-Sense Investment Guide*.

The book detailed the investment strategies of 16 women from Beardstown, Ill. The cover included a claim that the strategies resulted in a 23.4 percent annual rate of return, but an audit revealed the actual rate or return was only 9.1 percent. As a result, two lawsuits were filed – one in New York and one in California. See *LaCoff v. Buena Vista Publ'g*, 2000 N.Y. Misc. LEXIS 25, 28 Media L. Rptr. 1307 (N.Y. Sup. Ct. 2000) and *Keimer v. Buena Vista Publ'g*, 1999 Cal. App. LEXIS 947, 28 Media L. Rptr. 1050 (Cal. Ct. App. 1999).

By January 2000, the two state courts came to opposite conclusions in the lawsuits, which filed over the cover's claim. In New York, Supreme Court Justice Herman Cahn granted the defendant's motion to dismiss, holding that the book cover was protected by the First Amendment despite the fact that the court found that the book cover was part commercial and part noncommercial. See *LDRC LibelLetter*, February 2000 at 5. In California, however, the Court of Appeal held that the statements on the book cover were commercial speech and thus actionable under the state's deceptive practices law. See *LDRC LibelLetter*, November 1999 at 7.

When the California Supreme Court refused to hear the case, the contradictory holdings were left standing. See *LDRC LibelLetter*, March 2000 at 28.

Last month, the Walt Disney Co. settled the California lawsuit by agreeing to give buyers of the Beardstown Ladies' book, videotape or audiotape a credit toward another Hyperion book. Buyers of the paperback edition will receive a \$15 credit, all others will receive a \$25 credit.

According to a press release, the settlement was reached without any admission of wrongdoing by the Beardstown Ladies.

# **Teacher Wins Harassment Suit Stemming From Underground Paper**

#### School District Likely to Appeal Decision That Could Have Negative Impact on Student Journalists

#### By Conor Fortune

Allowing student free speech may have come at a high price for the Los Angeles Unified School District, after a superior court jury handed down a decision that — if left unchallenged — could set a dangerous precedent for cases involving student journalists. *Adams v. Los Angeles Unified School Dist.*, No. BC 235667 (Cal. Super. Ct. jury verdict March 8, 2002).

A jury unanimously awarded Palisades High School teacher Janis Adams \$4.35 million in damages when she took the school district to court over an underground newspaper that she claims the school did little to stop after it defamed her. Over the course of three months and 10 issues of the paper in 2000, student publishers of the newspaper, *Occasional Blow Job*, attacked Adams, making her the butt of jokes and calling her a porn star, as well as superimposing her head on a picture of a nude model.

The students said the *O.B.J.*, which offended teachers and administrators because of its crude subject matter and profanity, began as a prank and was meant to be pure satire.

Adams took the insults to heart and sued the school district despite its banning of the *O.B.J.* and punishment of the students who published and distributed it.

Adams's complaints about the *O.B.J.* led the administration to ban its distribution in Palisades and to suspend and transfer five of its publishers to other schools in March 2000. Six other students were also suspended.

In June 2000 a federal judge ruled that one of the students, Jeremy Meyer, could not be suspended or transferred for his role in the *O.B.J.*, which amounted to an email he sent to the editors without expecting it to be published. *See Meyer v. Los Angeles Unified School Dist.*, No. 00-CV-4360 (C.D. Cal. dismissed Nov. 27, 2000). Meyer's letter, which questioned student suspensions, appeared in the same edition as an article that criticized Adams, but did not mention the names of any teacher or administrator at the school.

Meyer went to the high school administration and asked to drop one of Adams' classes after she threatened in class to bring legal action against the author of the article. Meyer inferred that Adams believed that he was the author.

About 300 of Palisades' 2,500 students staged a rally protesting the suspensions and parents criticized the administration for coming down on the student journalists with "an iron fist."

Despite the punishments, Adams sued the school district for harassment. Her husband Mark Adams said the district sided with "spoiled, rich kids who raped their teacher with their words."

After 3 1/2 hours of deliberation, on Mar. 8 the jury awarded Adams \$3.25 million for emotional distress and \$1.1 million for lost earnings while on leave-of-absence after the incidents in 2000.

"We feel we did everything possible to protect Mrs. Adams, and we took action against the students," said Hal Kwalwasser, legal counsel for the school district.

"Mrs. Adams now takes the attitude we did nothing," he said, "when, in fact, we did several things that were opposed by countervailing forces, including students and the American Civil Liberties Union."

Kwalwasser said the district would decide within a month if it will appeal the superior court's decision.

"It is very questionable whether an appellate court will uphold this judgement," said Mark Goodman, executive director of the Student Press Law Center. "The First Amendment limits school officials' ability to censor underground newspapers and the appeals court will likely recognize that."

The decision in the appeal would likely set a legal precedent in that it would establish what course of action should be taken when student free speech and teacher non-harassment interests seem to be in conflict, Kwalwasser said.

"In California it's a fairly absolute standard about keeping the workplace hostility-free," he said. "Having said that, students have First Amendment rights, so where's the balance?"

The school district was represented by Kwalwasser, its general counsel. The plaintiff was represented by Nathan Goldberg and Gloria Allred of Allred, Maroko & Goldberg in Los Angeles.

Conor Fortune is a Scripps Howard Foundation Journalism Intern at the Student Press Law Center.

# **Court Finds Comments on Olympic Production to be Opinion**

A California Court of Appeals has held that comments about someone's level of involvement in organizing the 1984 Olympic opening and closing ceremonies were not factual assertions, and thus not actionable. *See Birch v. Wald*, 2002 Cal. App. LEXIS 1982 (Cal. Ct. App., 2nd App. Dist. Feb. 26, 2002).

Plaintiffs Ric Birch and Spectak Productions alleged that defendant Jeff Wald made defamatory comments about their creative role in producing the opening and closing ceremonies of the 1984 Olympic Games in Los Angeles. Wald, an Australian visiting Los Angeles, made the alleged statements during a

telephone interview on a Sydney radio program. Wald's comments downplayed the role of Birch and Spectak Productions in the production of the 1984 Olympics, and claimed that Birch had "no responsibility whatsoever" for the conception or execution of the opening and closing ceremonies.

[T]he controversy over Birch's competence to produce the ceremonies for the Sydney games was established in the Australian media well before Wald's appearance on Sydney television and radio.

The court held that Wald's remarks were not sufficient to satisfy a claim for defamation.

In distinguishing between fact and opinion, this court noted that California courts apply the totality of the circumstances test to determine whether an allegedly defamatory statement is actionable. Quoting from *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401-1402 (1999), the court said that in "applying the totality of the circumstances test, editorial context is regarded by the courts as a powerful element in construing as opinion what might otherwise be deemed fact." The court also pointed out that in deciding whether language is defamatory, courts generally look to the effect on the average reader rather than the effect of someone trained in the law.

The court therefore rejected plaintiff's contention that Wald's statements would be construed by the average listener or reader as factual assertions. From all indications, the court noted, the controversy over Birch's competence to produce the ceremonies for the Sydney games was established in the Australian media well before Wald's appearance on Sydney television and radio. Furthermore, Birch's claim would require the court to confront the question of what constitutes being the creator of, the creative force behind, or playing a creative role in the production of Olympic ceremonies, something the court was not prepared to do.

Because of this conclusion, the court noted that it was irrelevant to discuss Birch's contentions that he was not a public figure and that he had adequately pleaded actual malice.

Wald's comments that Birch was a "player" and did not otherwise hold a creative role were seen by the court as "hyperbolic expressions" of opinion rather than statements of fact. Likewise, the court found Wald's statement that Birch, as director of produc-

tion, would have no responsibility for the "conception" of the ceremonies not concrete enough to be provable as fact. Also, the court found that Wald's statement that Birch would have no responsibility for the "execution" of the ceremonies but would have responsibility for the "physical execution" simply does not contain provable factual matter.

Therefore the court affirmed the judgment of the Superior Court finding that Wald's comments regarding Birch's role as a production supervisor could not possibly have defamed Birch.

Neil Papiano and Adam F. Burke of Iverson, Yoakum, Papiano & Hatch, represented Birch. Bradford H. Miller and Aaron M. Peck of Murtaugh Miller Myer & Nelson, represented Wald. The opinion was written by Associate Justice Robert M. Mallano, with Presiding Justice Vaino Spencer and Associate Justice Miriam A. Vogel concurring.

#### UPDATE: Court Affirms Dismissal of Defamation Claim Based on Use of "Militant"

Looking beyond the headline of the article and to the context of the entire article, the Second Circuit Court of Appeals has affirmed the dismissal of a defamation action brought by the operator of a former anti-terrorism training facility. See *Idema, et. al. v. Wager, et. al.*, 2002 U.S. App. LEXIS 2637 (2d Cir. Feb. 15, 2002).

In 1999, J. Keith Idema filed a defamation claim against the *Poughkeepsie Journal* after it ran an article under the headline "Militant sues Red Hook." Idema, who had requested a retraction from the newspaper, claimed the word "militant" "means many things to many people; all of them bad." In November 2000, however, the district court dismissed Idema's defamation action after the court found that the word "militant" was not capable of defamatory meaning. 120 F. Supp. 2d 361 (S.D.N.Y. 2000); see *LDRC Libel-Letter*, November 2000 at 13.

Though the original claim included other causes of action, Idema limited the appeal to the defamation claim and a civil rights claim. The court of appeals rejected both in an unpublished summary order.

As to the defamation claim, the Second Circuit considered the context of the entire article and concluded that the term "militant" "could not be understood by the average reader as defamatory." The court pointed to passages in the article, including quotes from a CBS's "favorable assessment" of Counterr, the anti-terrorism training facility, to underscore the point that the article, as a whole, was not defamatory.

The court concluded that "neither the article nor the headline suggests in any fashion that Counterr or Idema are themselves communists or terrorists." Thus, the court of appeals affirmed the trial court's dismissal of the defamation claim.

As to the civil rights claim, Idema contended that the district court had erred by finding a lack of state action, claiming the newspaper had conspired with Red Hook officials — the original story was about Idema's lawsuit against the town of Red Hook. The court of appeals, however, affirmed the dismissal of the civil rights action. The court said, that "even assuming that plaintiffs adequately pleaded defendants' status as state actors, they did not describe a constitutional wrong."

James E. Nelson, of Van DeWater & Van DeWater in

Poughkeepsie, N.Y., represented the newspaper defendants. George Pappas, of Hawthorne, N.Y., represented Counterr Group, Inc., while Idema appeared pro se.

# 9th Circuit Affirms Most of Tailwind Dismissal

#### Reverses and Remands Claim Stemming From Retraction

On March 20, as this issue of the *Media Law Letter* went to press, the 9th Circuit affirmed the dismissal of most of the causes of action in one of several consolidated lawsuits stemming from reports on CNN "Newstand" and in *Time* magazine alleging that the U.S. military used sarin nerve gas to target American defectors in Laos during the Vietnam War, a mission known as Operation Tailwind. *Buskirk v. CNN*, No. 00-16616, 2002 U.S. App. LEXIS 4389 (6th Cir. March 20, 2002). The network and magazine later retracted the claims made in the story. *See LDRC LibelLetter*, March 1999 at 19, and June 1999 at 9.

Among the sources for the Tailwind story was Robert Van Buskirk, who said that he participated in the operation. But in its retraction, CNN said that Van Buskirk's statements were inconsistent, and that "had been taking drugs for a nervous order for ten years, though he finally stopped."

While the appeals court affirmed the dismissal of most of Van Buskirk's claims, it reversed and remanded the trial court's dismissal of the claim based on the statement regarding the drugs in the retraction. Van Buskirk's claim was based on CNN's failure to disclose that he had not taken the medication in ten years, and that the medication he took was not mind-altering.

"The district court failed to appreciate the full nature of Van Buskirk's claim," the unanimous court ruled in a decision by Circuit Judge Myron H. Bright. "It would appear that CNN, in its zeal to shift all blame for its own failure to adequately investigate the Tailwind story, sought to portray Van Buskirk as unreliable by any means available."

"Statements, although perhaps 'true' when viewed in isolation, may create an overall false impression when considered in context," the court added.

A full report on the 9th Circuit decision will appear in the next issue of the *Media Law Letter*.

# **UPDATE: Second Curious Counsel In Condit Case**

Last month, we reported that gadfly attorney Neville L. Johnson was representing Carolyn Condit, the wife of Congressman Gary Conduit, in her lawsuit against the *National Enquirer* over reports that she "flew into a rage" when Washington intern Chandra Levy answered her call to the congressman's Washington condominium. *See LDRC LibelLetter*, February 2001 at 12; *Condit v. National Enquirer*, Civ. No. 02-5198 (E.D. Cal. filed Feb. 21, 2002).

It turns out that Johnson has been joined by Rodney Smolla, a professor at the University of Richmond School of Law. Although Smolla has written several books on the First Amendment and has generally been considered a strong advocate of the press, he represented relatives of murder victims who sought to have the publisher of a book titled *Hit Man* liable for the crimes. The case was settled on the eve of trial for a reported \$5 million. *Rice v. Paladin Enterprises, Inc.*, No. 95-CV-03811 (D. Md. dismissed July 6, 1999). *See LDRC LibelLetter*, June 1999, at 5; *see also LDRC LibelLetter*, August 1999 at 33. After the settlement, Smolla wrote a book on the case (*Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book*, Crown Pub., July 1999), which became a made-for-TV movie shown on the FX cable channel.

A separate suit brought by the family of another murder victim was settled in early February. *Wilson v. Paladin Press*, No. 00-06273 (D.Ore. orders vacated Feb. 5, 2002); *see* article, p. \_\_\_\_. Smolla was not involved in that case.

Smolla became involved in the first *Hit Man* case when he was contacted by the plaintiffs' counsel. "My instant reaction was, 'No way. You can't sue a book publisher,'" he told an audience at Northwestern University's Medill School of Journalism in Oct. 1999.

What changed his mind, he said, was the "nihilistic, feel-nothing" philosophy of the book. "Freedom of speech is not freedom to kill," Smolla said in a Court TV on-line chat. "If you participate in murder, and that includes training others in how to engage in killing, you are, in my view, infringing on another's rights. You are going outside of the social contract. We can have a very free and open society without reverting to the jungle, where there is no law, no sense of community." *See* "CourtTV Online Transcripts:

Ron Smolla," *available at* www.courttv.com/talk/chat\_transcripts/hitman.html (visited Mar. 21, 2001).

Smolla told the Northwestern audience that "this case has done a disservice to other media by opening them up" to liability, but added that "this will be a rare, one-of-a-kind case based on this very bizarre material."

He expounded upon this in the Court TV chat: "We took the position that to hold the publishers of a Murder Manual liable for aiding and abetting murder did not mean one could hold movie-makers or novelists or journalists liable when they put material into the market for entertainment, or political, or journalistic purposes. The key is the intent. The NRA [National Rifle Association, referred to by the questioner] does what it does out of political conviction. Paladin was simply trying to make a buck by selling people stuff on how to kill."

"We had powerful evidence," he told the Medill students. "The proof is, they settled."

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## Judge Modifies Gag Order in Georgia Crematory Case

#### Changes Relate to Who is Gagged and Which Information May Not Be Disseminated

Upon learning of the initial gag order

#### By Deanna K. Shullman

The trial judge in the prosecution of a Georgia crematory operator accused of mishandling corpses sharply curtailed a gag order after hearing objections from several groups of news media. *Georgia v. Marsh*, Criminal Warrants for Theft by Deception (Ga. Super. Ct. March 7, 2002) (order modifying original gag order). Judge Wm. Ralph Hill, Jr. of the Lookout Mountain Judicial Circuit had entered the expansive gag order *sua sponte*, without notice to the public or the media.

The defendant in the matter, Tommy Ray-Brent Marsh, was arrested on charges of theft by deception after the discovery of un-cremated remains at the Tri-State Crematory in Noble, Georgia. An anonymous tip

led investigators to the crematory, where the remains of bodies sent for cremation were found decomposing throughout the property. pose of Opposing the Gag Order. Cox's *Atlanta Journal-Constitution* and WSB-TV and radio, Meredith Broadcasting's WGCL-TV in Atlanta, and the *Chattanooga Times Free Press*, also filed motions. Additionally, the court received letters from the Georgia Attorney General and a Georgia State Representative complaining that the gag order hampered communications with family members concerned about their relatives' remains.

#### The Modifications

Judge Hill granted all intervention motions, and on March 1 held a hearing on the gag order. In a three-hour hearing, lawyers for the news media argued that the order — which applied to the more than 40 state agencies involved in the investigation — was unconstitutionally

overbroad and unduly restricted the public's access to information about a matter involving significant issues of public safety and interest. The discoveries at the crematory

involving significant issues of public safety and interest. The discoveries at the crematory had sparked a local concern about environmental safety in the area and a national debate concerning regulation

had sparked a local concern about environmental safety in the area and a national debate concerning regulation of crematories, and state officials actively were soliciting information and samples of ashes from relatives of decedents whose remains had been sent to the crematory.

In his March 7th Temporary Order Modifying Court's Order Restricting Extra Judicial Statements, Judge Hill detailed the extent of the media coverage of the events transpiring at the crematory and found there was a "clear and present danger that continued pretrial publicity as to certain prejudicial matters" would impinge on Marsh's ability to obtain a fair trial anywhere in Georgia. The court considered alternative measures to a gag order, including changes of venue, jury sequestration, and jury admonition, finding that these measures, while they may become necessary later in the course of the prosecution, were insufficient at this stage of the proceedings to safeguard Marsh's rights.

shortly after it was issued, the Georgia
Bureau of Investigation immediately
shut down a press conference.

### The Original Order

Without notice or a hearing, on Feb. 21 the judge *sua sponte* issued an order that prevented all attorneys and people affiliated with them, court staff, agencies involved in the investigation, witnesses, and anyone else involved in the investigation from making extra-judicial statements regarding nine broad categories of information. Some of the information prohibited by the gag order included the performance and results of any tests and the identity and testimony of potential witnesses. Upon learning of the initial gag order shortly after it was issued, the Georgia Bureau of Investigation immediately shut down a press conference. Investigators with a number of other agencies also declined all comment about the case.

CNN, Time Inc., Fox's WAGA-TV in Atlanta, Media General's WDEF-TV in Chattanooga, The New York Times Co., Tribune Co., The Reporters Committee for Freedom of the Press, and the Georgia Press Association filed a Motion to Intervene for the Limited Pur-

(Continued on page 18)

### Judge Modifies Gag Order in Georgia Crematory Case

(Continued from page 17)

However, acknowledging the sheer breadth of the original gag order, the judge held that modifications were warranted "to accommodate the concerns of the Court for family members to maximize the flow of information to them and to the public regarding any public health, safety and environmental risks" and to allow for "public debate and controversy surrounding the law making and legislative needs."

As modified, the gag order narrows the scope of the original order, with respect to both who is gagged and the topics on which information may not be disseminated. Witnesses and potential witnesses are not gagged

under the modified order. The list of state agencies prohibited from speaking is now limited to the Walker County Sheriff and his deputies, agents and employees of the Georgia Bureau of Investigation, and the Walker County Coroner.

The order also limits

the scope of the information that the people governed by the order cannot disseminate. The new categories – which include Marsh's prior criminal record, his refusal to submit to any examination or test, and confessions or admissions made by him in the case – primarily are directed to specific information about Marsh, rather than information concerning the investigation taking place at the crematory. The order also reminds counsel of their obligation to follow the Georgia Rules of Professional Conduct, a device that often has been used by courts, as an alternative to a broader gag order, to ameliorate concerns about pre-trial publicity.

The judge specifically left open the opportunity to revisit the issues raised in the hearing and in the order should circumstances warrant.

Shortly after issuing the modified gag order, Judge Hill recused himself from further hearings and the trial. Judge Hill's son, attorney Larry Hill, has filed a class action lawsuit on behalf of a group of clients against Marsh and Tri-State Crematory. Judge Hill, in his recusal order, said he was stepping aside "to prevent even an appearance of an impropriety and to protect the integrity of the criminal justice system and the public's confidence in the impartiality of its judiciary."

Deanna K. Shullman is an associate in the Tampa office of Holland & Knight LLP. Along with partner Gregg D. Thomas and associate Rachel E. Fugate in Tampa, and partner Charles D. Tobin in Washington D. C., she represented CNN, Time Inc., Fox's WAGA-TV in Atlanta, Media General's WDEF-TV in Chattanooga,

The New York Times Co., Tribune Co., The Reporters Committee for Freedom of the Press, and the Georgia Press Association. Peter C. Canfield, Thomas M. Clyde, and Christopher L. Meazell of Dow, Lohnes & Albertson PLLC in Atlanta, represented The Atlanta Jour-

nal-Constitution, WSB-TV, and WSB Radio. Robert L. Rothman and Roger A. Chalmers, of Arnall Golden Gregory LLP represented Meredith Corporation's WGCL-TV.

[T]he judge held that modifications were warranted "to accommodate the concerns of the Court for family members to maximize the flow of information to them and to the public regarding any public health, safety and environmental risks" and to allow for "public debate and controversy surrounding the law making and legislative needs."

Any developments you think other LDRC members should know about?

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## **Canadian Supreme Court Decisions Ease Court Publication Bans**

#### Latest Decisions Have Already Been Relied Upon By Judges Willing to Refuse Bans

#### By Paul B. Schabas

The law in Canada continues to move slowly towards more openness in court proceedings and away from common law restrictions that have historically led to publication bans where there was any risk to fair trial rights. Until recently, Canadian law routinely favored the interest in preventing any risk to fair trial caused by pre-trial publicity over freedom of the press and the right of the public to know and scrutinize court proceedings.

Now, 20 years after the passing of the Canadian Charter of Rights and Freedoms, which entrenched freedom of expression and the press as constitutional rights, the courts have departed from the position that a risk to fair trial trumps freedom of the press, and recognized that the two rights are at least of equal importance and must be balanced.

While publication bans are still commonplace for evidence presented at bail hearings and preliminary inquiries (often-lengthy pretrial hearings to determine if there

is enough evidence to go to trial), as they are authorized by statute and those provisions have not (yet) been challenged, they are becoming rare indeed at trials. Two recent Supreme Court of Canada decisions — *R. v. Mentuck* [2001] S.C.C. 76 and *R. v. O.N.E.* [2001] S.C.C. 77 — confirm this trend. For American media covering cases across the border, and for Internet news services, these cases reduce, but do not eliminate, the perils of publishing details of Canadian criminal cases.

R. v. Mentuck and R. v. O.N.E. arose from applications by the Crown to ban publication of a certain type of police investigative technique (the "crime boss scenario") on the grounds that the reporting of it could have a detrimental impact on the ability of the police to use it, and would endanger undercover officers. (The "crime boss scenario" is a technique well-known to many defence lawyers, in which undercover police officers pose as leaders of crime rings that can offer protection to members of the ring, but usually requires the members [i.e. suspects], to confess their crimes to the boss in or-

der to get protection.) The argument succeeded in British Columbia, but failed in Manitoba. Both cases went to the Supreme Court together.

The Supreme Court confirmed the approach to be taken in considering whether to impose publication bans set out in *Dagenais v. C.B.C* (1994), 120 D.L.R. (4<sup>th</sup>) 12 (S.C.C.), and reframed it more broadly to allow consideration of the interests involved in *Mentuck* and *O.N.E.*, and other interests associated with the administration of justice. The general rule set out in *Dagenais* is that publication bans should only be imposed where there is a serious risk to a fair trial such that a publication ban is necessary, having regard to the fact that there are no other alternatives, and that imposing a ban itself is not desirable.

In Mentuck, Justice Iacobucci refined this stating:

A publication ban should only be ordered when: (a) such an order is necessary in order to prevent a serious risk to the proper administration of jus-

(Continued on page 20)

The general rule set out in

Dagenais is that publication bans
should only be imposed where
there is a serious risk to a fair trial

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#### Canadian Supreme Court Decisions Ease Court Publication Bans

(Continued from page 19)

tice because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Mentuck [2001] S.C.C. 76 at para. 32.

The case clarifies and expands the *Dagenais* test in other ways. Iacobucci also emphasized that any "real and substantial risk" must be a "serious one which is well grounded in the evidence" and must "be a risk that poses a serious threat to the administration of justice."

Indeed, he stated explicitly that "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained." *Id.* at para. 34.

The Court went on to emphasize many of the advantages of publicity, referring to the importance of public scrutiny of the administration of justice

On the facts of these cases, the

Court found that the Crown did not adduce sufficient evidence to satisfy the Court that there was a serious risk to the administration of justice. As Iacobucci J. stated in *R. v. Mentuck*:

I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run. Criminals who are able to extrapolate from a newspaper story about one suspect that their own criminal involvement might well be a police operation are likely able to suspect police involvement based on their common sense perceptions or on similar situations depicted in popular films and books. . . . I do not believe that media publication will seriously increase the rate of compromise.

Mentuck, at para. 43

The Court went on to emphasize many of the advantages of publicity, referring to the importance of public scrutiny of the administration of justice, which in addition to ensuring fair procedures can also be critical to exonerating an accused, not only in the eyes of the court but in the minds of the public. As Iacobucci stated:

Second, it [public scrutiny] can vindicate an accused person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public. In many cases it is not clear to the public, without the advantage of a full explanation, why an accused person is acquitted despite what a reasonable person might consider compelling evidence. Where a publication ban is

in place, the accused has little public answer. . . On this basis the publication ban sought would have a deleterious effect on the accused's right to a public trial.

Id. at para. 54

The implications of *Mentuck* and *O.N.E.* are significant. The Court states, remarkably, that "Our country is not a police state." It makes clear that publication bans are not going to readily be granted and that there is a heavy evidentiary burden on police and the Crown to justify any ban at all.

Already, these decisions have been relied on by many judges to refuse bans that would have been readily granted previously such as bans on naming witness, accused persons in sensitive cases which might identify victims, and where it was alleged that police powers would be affected. This signals a new trend toward more openness in criminal justice proceedings.

Paul B. Schabas is a partner at Blake, Cassels & Graydon LLP, Toronto, Canada.

# **Appellate Court Lifts Order Prohibiting Interviews in Courthouse During Trial**

[T]he order contained no evidentiary support

and lacked the requisite findings that it was

necessary to prevent an imminent threat to

the administration of justice; that it was

narrowly tailored; and that the judge

considered less restrictive alternatives.

#### By Gregg D. Thomas and Rachel E. Fugate

A trial judge's order prohibiting all media interviews inside a courthouse, which was entered without an evidentiary basis or notice and opportunity to be heard to the media, was overbroad and must immediately be lifted, Florida's Second District Court of Appeal has ruled.

The Honorable Nancy K. Donnellan, Circuit Court Judge for the Twelfth Judicial Circuit, is currently presiding over the criminal trial of *State v. Ralf Jurgen Panitz*, No. 00-10578 CF (Fla. 12<sup>th</sup> Cir. Ct.), more commonly known as the "Jerry Springer trial." The case received notoriety because the defendant, Ralf Panitz, appeared on *The Jerry Springer Show* with his current wife, Eleanor Pantiz, and ex-wife, Nancy Campbell. The day the program aired, law enforcement officials found Nancy Camp

bell dead inside her house. Ralf Panitz was arrested shortly thereafter.

In the midst of the *Panitz* proceedings, Judge Donnellan barred the media from conducting any interviews in the courthouse. Specifically, Judge Donnel-

lan entered the following order:

The media is hereby prohibited from conducting interviews inside the courthouse during the trial in the above styled cause. This order is necessary for security reasons and to protect the rights of the parties.

The order was not precipitated by a motion from either party and it was entered without notice or an opportunity to be heard by the media or the parties directly affected by the order.

On March 7, 2002, *The Sarasota Herald-Tribune* filed an Emergency Petition for Certiorari in the Second District Court of Appeal. The *Herald-Tribune* first argued that the media should have been provided notice and an opportunity to be heard before the judge entered such an expansive order. More importantly, however, the *Herald-Tribune* argued that the order directly infringed its First Amendment right to gather news and was constitutionally infirm.

Indeed, the order contained no evidentiary support and lacked the requisite findings that it was necessary to prevent an imminent threat to the administration of justice; that it was narrowly tailored; and that the judge considered less restrictive alternatives.

That same day, the Second District Court of Appeal ordered the parties to respond to the *Herald-Tribune*'s petition by 1 p.m. on the following day, March 8, 2002. The Attorney General's Office responded that the order was facially deficient in that it did not contain the necessary findings and asked that the appellate court remand the matter to the trial court. Judge Donnellan, however, responded that the order was constitutionally sound because it was entered at the request of law enforcement to prevent a serious and imminent threat to the administration of justice and was no broader than necessary.

By 5 p.m. on March 8, 2002, the Second District Court of Appeal lifted Judge Donnellan's order. The court found that the findings in the order had no evidentiary basis and that the actual scope of the order was broader than that explained

in Judge Donnellan's response. The court then stayed Judge Donnellan's order and allowed her the opportunity to conduct an evidentiary hearing, after proper notice to the media, to determine the necessity for and scope of any limitations on media coverage of the trial. At that time, Judge Donnellan could enter an amended order and transmit it to the district court, which only then would consider lifting the stay. *Sarasota Herald-Tribune v. State of Florida and Ralf Panitz*, No. 2D01-877 (Fla. 2d DCA March 8, 2002).

The trial in the *Panitz* case began on March 11, 2002. To date, Judge Donnellan has not conducted an evidentiary hearing regarding her order prohibiting media interviews in the courthouse and the Second District Court of Appeal's stay remains in effect.

Gregg D. Thomas is a partner at Holland & Knight LLP in Tampa. Rachel E. Fugate is an associate at Holland & Knight LLP in Tampa. Mr. Thomas and Ms. Fugate represented the Herald-Tribune in the matter.

# Senate Press Gallery Denies Credential Request from Online News Site

In February, the Senate Press Gallery denied a request for permanent press credentials for WorldNetDaily ("WND"), an online newssite. The denial of credentials came exactly one year after WND had applied for credentials. WND has appealed the decision.

The Senate Press Gallery is a non-government organization organized by the media to issue credentials to cover the U.S. House and Senate, as well as presidential debates. Journalists accredited by the Gallery are permitted to use its facilities in the Capitol to report and file stories on Congressional activity. Since 1879, the Gallery has been overseen by the Standing Committee of Correspondents, a committee of five working journalists.

The Senate Press Gallery actually consists of four smaller organizations, or galleries, organized by type of media: one for daily newspapers, one for periodicals, one for press photographers, and one for radio and television.

In February 2001, WND, which can be found at www. worldnetdaily.com, applied for credentials through the Standing Committee of Correspondents.

According to stories posted on its website, WND was denied credentials for two main reasons.

First, WND's credential request was denied because WND "originated from a non-profit organization, the Western Journalism Center, which today owns a minority of stock in WorldNetDaily – implying that WND is somehow engaged in lobbying or promotion work on behalf of 'tax-free special interest or issue advocacy groups.'"

Second, WND's credential request was denied because WND does not have enough "significant original reporting content."

The LDRC examined credentialing issues in our 2001 LDRC Bulletin No. 4, issued in December.

As explained in that Bulletin, the leading case on credentials is *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n., et. al.*, 365 F.Supp. 18, 1 Media L. Rptr. 2534 (D.D.C. 1973), *rev'd*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

In that case, the District Court held that the Periodical Correspondents' Association (the Senate press gallery overseeing magazines, newsletters and non\_daily newspaper reporters), was a quasi-public body because it had been assigned official control of access to the galleries by Congress. As such, the court found that it was subject to the First

Amendment limitations on speech restrictions, and was required to satisfy due process and equal protection requirements. The court concluded that the refusal to admit a representative of *Consumer Reports* magazine as a member, violated these provisions.

The D.C. Circuit reversed, holding that the controversy was nonjusticiable. 515 F.2d 1341 (D.C. Cir. 1975). Although "mindful" of the First Amendment issues raised, the court found that the defendants were "acting by virtue of an express delegation of authority as aides or assistants of Congress. If their actions would have been immune from inquiry under the Speech or Debate Clause had they been performed by Members of Congress, the same immunity would attach to appellants." *Id.* at 1350. The U.S. Supreme Court then denied certorari. 423 U.S. 1051 (1976).

More recently, credentialing issues have arisen for websites, and over whether writers for websites are not "journalists." On a preliminary motion in the highly publicized libel suit against Matt Drudge, for example, the D.C. district court held that "Drudge is not a reporter, a journalist or a newsgatherer." *Blumenthal v. Drudge*, 992 F.Supp. 44 n.18 (D.D.C. 1998). However, the same court later allowed Drudge to assert the reporter's privilege to protect the identity of his sources. 1999 WL 304039, at \*7-8 (D.D.C. April 22, 1999).

WND's appeal before the Standing Committee of Correspondents will be heard on April 15, and the group has promised court action if the credentials are not issued.

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# Ninth Circuit Develops New Public Display Right Analysis

#### The Court Also Held That Thumbnails Were a Fair Use

The panel found that Ditto's use of

Kelly's images as thumbnails in a

search engine was transformative

because it served a different, non-

superseding function.

#### By Kurt B. Opsahl and Oscar S. Cisneros

The Ninth Circuit Court of Appeals has affirmed that the fair use doctrine provides immunity to image search engines for gathering and making thumbnail copies of online images. In *Kelly v. Arriba Soft Corp.*, 2002 U.S. App. LEXIS 1786 (Feb. 6, 2002), a three judge panel found that the fair use doctrine of copyright law allowed Ditto.com (formerly known as Arriba Soft) to temporarily copy images and create smaller thumbnail versions for its index. In the first appellate decision on deep-linking, however, the panel also found that Ditto's practice of linking directly to the original images on the plaintiff's server violated plaintiff's public display right. A petition for reheaving on this second issue.

for rehearing on this second issue is pending.

#### **Background**

#### THE PARTIES

Ditto offers Internet users the latest in search technology: the

image search engine. Ditto allows users to search the Internet by viewing web-based images rather than text, based on the idea that a picture often provides a more succinct representation of information available online.

Les Kelly is a professional photographer who publishes his photographs of the American West on the web and in books. While Kelly does not sell images directly on the web, he uses his site to promote his services. In early 1999, Ditto crawled Kelly's site and included thumbnail images of Kelly's photographs in its search engine database so that users searching for information relating to Kelly's photographs would be referred to his web site. Kelly complained about this use and Ditto promptly removed the images.

Kelly filed suit shortly thereafter. In December 1999, the District Court held that Ditto's creation and use of reduced-size thumbnails of Kelly's images and any subsequent link to the original images on his Web site was fair use under the Copyright Act. 77 F. Supp. 2d 1116 (C.D. Cal., Dec. 15, 1999). Kelly appealed.

#### THE TECHNOLOGY

Ditto's "thumbnail" image index is generated by a "crawler," a computer program that traverses the web looking for new images. Generally, the crawler automatically travels the web in a random fashion, following links to other web pages. Ditto can also target the crawler to specific online locations and, like most search engines, users can submit web sites for indexing. When the crawler finds images, it downloads temporary copies of the files and generates smaller, lower-resolution "thumbnails" of the images. Once the thumbnails are created, the program deletes the original images from the server.

After users search for the subject of their interest,

Ditto displays the search results as a list of thumbnails. In the first half of 1999, clicking on a thumbnail produced an "Images Attributes" page, containing the original image (directly from the web site, such as Kelly's), along with information about the image. The ap-

pellate panel called this "inline linking."

Starting in July 1999, the search results page contained thumbnail images accompanied by two links called "Source" and "Details." "Details" linked to a page similar to the Images Attributes page but with a thumbnail rather than the original image. The "Source" link opened two new windows: one contained the original image (directly from the source web site) and the other contained the originating web page. The panel called this "framing."

#### Thumbnails are Fair Use

After quickly finding a prima facie case of infringement, the panel applied the four-factor test for "fair use" under Section 107 of the Copyright Act.

#### PURPOSE AND CHARACTER OF THE USE

Although the opinion found that Ditto's use of Kelly's images was commercial, it also found that such a

(Continued on page 24)

**Public Display Right Analysis** 

# Ninth Circuit Develops New

The panel found that the display of

Kelly's images in their original size

superseded the function of Kelly's

works, and was more use of the

work than reasonable.

(Continued from page 23)

use was not highly exploitative. Ditto did not use Kelly's images to promote its own site, but as part of a larger database of images. The panel found that Ditto's use of Kelly's images as thumbnails in a search engine was transformative because it served a different, non-superseding function. Where Kelly's images portrayed the American West in an artistic, illustrative manner, Ditto's use of the same images in thumbnails was unrelated to any esthetic purpose. The panel noted that the thumbnails were of a much lower resolution than the originals and that any enlargement would result in a significant loss of clarity. Because of this, the panel found, Ditto's thumbnails did not supplant the need for Kelly's originals.

The panel brushed aside Kelly's arguments that Ditto

merely reproduced the exact photographs and added nothing to them. Ditto's use was transformative, the court said, because the thumbnails did not involve a mere change in medium, but served a different function — "use-improving access to information on the [I]nternet

verses artistic expression." Citing to an analogous comparative advertising case, the panel found Ditto's use provided a public benefit without loss to the integrity of the copyrighted works.

#### The Nature of the Work

The panel found that this factor weighed only slightly in favor of Kelly because – although the images were creative in nature – they had appeared on the Internet prior to Ditto's use.

#### AMOUNT AND SUBSTANTIALITY

This factor did not weigh in favor of either party. The panel held that Ditto's use was reasonable because it was necessary to copy the whole image to show the thumbnail to the users.

#### MARKET HARM

The panel held that Ditto's use of Kelly's images would not impact their value or any potential market for their sale or license because they did not replace the original images and because Ditto's site drove traffic to Kelly's site. On balance, the panel found that the above factors weighed in favor of fair use.

LDRC MediaLawLetter

#### Unique Public Display Analysis

Turning to Ditto's Image Attributes page and subsequent practice of opening a new browser window directly to the image file, the panel recognized that Ditto did not directly copy Kelly's images. Thus, Ditto did not infringe Kelly's right of reproduction. The panel's analysis did not end there, however.

Rather, the panel developed a new application of the public display right, finding that Ditto publicly displayed Kelly's images by "importing" the images into its web site. Focusing on the legislative history of the transmission

prong of the Copyright Act's definition of public display, the panel held that whether or not anyone actually viewed the images was "irrelevant" to liability analysis, though could be considered in determining damages

termining damages.

Accordingly, the panel found that Ditto was liable for direct infringement, stating that the company became more than a "passive conduit" when it searched the web for Kelly's images and made them available for display.

The panel then looked at the "public display" under the fair use factors, finding no fair use. The panel found that the display of Kelly's images in their original size superseded the function of Kelly's works, and was more use of the work than reasonable. Furthermore, the panel held that Ditto's use of the images harmed all of Kelly's markets, reasoning that it would reduce the number of visitors to Kelly's site, impede his ability to license the works, and result in substantial adverse effects to his potential markets.

#### Clouded Opinion on Deep Linking

The panel characterized the public display portion of its analysis as relating to "framing," which is traditionally thought of as incorporating or importing the contents of

(Continued on page 25)

# Ninth Circuit Develops New Public Display Right Analysis

(Continued from page 24)

another's site directly into one's own site. The process described by the panel is not what is traditionally thought of as "framing," however. Rather, the opinion describes opening a link in a new browser window, pointed towards an online location on a third-party's server. Explained from the user's perspective, a new browser window would pop up containing the standalone, full-sized image, and the corresponding Internet address for that image pointing to Kelly's web site as the source or location for the image. Thus, on its face, the opinion appears to implicitly hold that linking directly to an online location ("deep-linking") without the permission of the owner would violate the public display right.

Accordingly, without clarification from the panel or the Ninth Circuit sitting en banc, the opinion could be used to assert claims for deep-linking. If this is truly what the panel intended, it would be the first appellate decision on deep-linking, and mark a departure from current cases. Compare with *Ticketmaster v. Tickets. com*, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. 2000) ("hyperlinking does not itself involve a violation of the Copyright Act ... since no copying is involved.") and *Bernstein v. J.C. Penny*, 1998 U.S. Dist. Lexis 19048. 26 Media L. Rep. 2471 (C.D. Cal. 1998) (granting motion to dismiss claim for copyright liability for linking).

Ditto has petitioned for rehearing by the panel or before the Ninth Circuit sitting en banc, challenging the panel's decision on the public display right as contradictory with Ninth Circuit and Supreme Court precedent and contending that the panel misunderstood critical factual issues. The panel has ordered further briefing from Kelly, and the petition is currently pending.

Kurt B. Opsahl and Oscar S. Cisneros are associates with Perkins Coie LLP in San Francisco. Mr. Opsahl, along with Perkins Coie partners Judy Jennison and David Burman and associate David Saenz, represented Ditto in this appeal.

The first issue of the 2002 LDRC BULLETIN, a REPORT ON TRIALS AND DAMAGES is now available.

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# Minnesota Court Holds Alabama Injunction May Survive First Amendment Challenge

Minnesota Supreme Court Hears Jurisdiction Arguments, Asked to Review Merits of Injunction

#### By John Borger and Patricia Stembridge

An Alabama injunction that prohibited a Minnesota woman from making any statement, on the Internet or in any other medium, "asserting or implying" that an Alabama consultant was a "liar," was overly broad on its face and violated the First Amendment.

To that extent, a March 5, 2002, unpublished decision of the Minnesota Court of Appeals in *Griffis v. Luban*, No. CX-01-1350, 2002 WL 338139 (Minn. Ct. App. 2002), was unremarkable and fully consistent with established law.

However, the court also held that other aspects of the Alabama injunction might survive First Amendment scrutiny on remand, if these aspects were (1) based on a suffi-

cient record, (2) issued after a judicial determination that the speech is in an unprotected class, and (3) narrowly tailored to enjoin only the offending speech. Even a default judgment addressing non-commercial statements could suffice to establish these conditions, the court held.

Luban also suggested that any degree in Egyptology that Griffis might claim came "out of a Crackerjack box."

The March 5 decision is the latest development in a procedurally complicated case evolving from a dispute over credibility in an on-line discussion group.

The case began when Minnesota resident Marianne Luban challenged the ability and credentials of Alabama resident Katherine Griffis to speak with authority on matters related to Egyptology. Luban, who made her comments in December 1996 in an Internet newsgroup focused on archeology, noted that although Griffis had identified herself as "an instructor with the University of Alabama at Birmingham, Department of Special Studies," Griffis' e-mail address [<grifcon@mindspring.com> or <grifcon@usa.pipeline.com>] had nothing to do with the University of Alabama. Luban also suggested that any degree in Egyptology that Griffis might claim came "out of a Crackerjack box."

Griffis sued for defamation in Alabama. Luban did not appear, and the Alabama court entered default judgment for \$25,000 and an injunction prohibiting seven categories of "false statements," including any allegations that Griffis "is" a liar, con-artist, or phony.

Griffis filed the Alabama judgment in Minnesota in 1998, and Luban began a long challenge to personal jurisdiction and the validity of the injunction. In August 1998, a referee assigned to the case by the Ramsey County district court at first recommended that the judgment be vacated. Griffis then filed several motions, which were not heard by the court, challenging the finding. Several months later, the referee issued a new recommendation, that the Alabama order be affirmed, which became the basis of a judgment entered by the court administrator. On appeal, this result was vacated because the judgment was based entirely on referee's orders, and had not been counter-

signed, reviewed, or confirmed by the district court judge. *Griffis v. Luban*, 601 N.W.2d 712 (Minn. Ct. App. 1999).

The money judgment was discharged in bankruptcy in 2000, but the injunction was left in force. A

few weeks after the discharge, Griffis moved in Minnesota state district court to find Luban in contempt of the Alabama injunction, contending that Luban had called her a "liar" when Luban asserted that the Alabama judgment was of limited significance because it had been obtained by default. As a sanction, Griffis asked the Minnesota court to fine Luban \$1,000 for each of 99 perceived violations of the injunction and, if Luban did not pay, to confiscate Luban's computer and incarcerate her. The request for a \$99,000 sanction was based entirely upon allegedly violative statements occurring within the period covered by the bankruptcy discharge. (In May 2001, the bankruptcy court found Griffis in contempt of the discharge based upon the motion for sanctions in state court.)

In December 2000, the Minnesota district court ruled upon both Luban's jurisdictional challenge and upon Griffis' motion to confirm the Alabama injunction. It determined that Alabama had personal jurisdiction over Luban and, based solely upon deference to the Alabama court, re-

(Continued on page 27)

## Minnesota Court Holds Alabama Injunction May Survive First Amendment Challenge

(Continued from page 26)

entered the injunction against Luban's speech. The district court did not impose any sanctions for alleged past violations of the injunction.

Luban appealed from that judgment, while simultaneously asking the district court to examine the merits of the injunction for itself and to vacate the injunction pending appeal.

The Minnesota Supreme Court granted review of this decision, and heard arguments in the case on March 6, 2002. *Griffis v. Luban*, No. C3-01-296 (Minn. argued March 6, 2002.) The arguments related to both the juris-

dictional question and the validity of the original injunction.

While that jurisdictional appeal was pending before the court of appeals, the case proceeded in the Minnesota district court, which for the first time considered the merits of the injunction issued by the Alabama court. In June 2001, the district court vacated the injunction completely. It found that the injunction was an unconstitutional prior restraint; that Griffis had adequate legal remedies; and that Griffis was using the Alabama injunction to prohibit any negative speech by Luban, whether libelous or not, including but not limited to Luban's legitimate criticisms of Griffis (as shown by Griffis' motion to hold Luban in contempt for violating the Alabama injunction).

The appeal of this ruling led to the March 5, 2002 decision by the Court of Appeals. In its ruling, the appeals court did not address the district court's equitable reasons for vacating the injunction, holding instead that the district court should not have vacated the injunction while

the prior appeal was pending, even though the court of appeals had refused to rule on the validity of the injunction in the prior appeal and even though the court of appeals in an April 2001 special order had held that the district court had jurisdiction during the appeal to consider the motion to vacate.

On March 14, 2002, Luban formally requested the Minnesota Supreme Court to review the March 5 court of appeals decision in conjunction with the high court's review of the September 11, 2001 court of appeals decision.

Copies of Luban's appellate briefs are available through LDRC's Brief Bank. News coverage of the March 6 oral argument is available at <a href="http://www.startribune.com/stories/468/1913930">http://www.startribune.com/stories/468/1913930</a> (visited March 19, 2002).

As a sanction, Griffis asked the Minnesota court to fine Luban \$1,000 for each of 99 perceived violations of the injunction and, if Luban did not pay, to confiscate Luban's computer and incarcerate her.

John Borger, of DCS member firm Faegre & Benson LLP in Minneapolis, has been representing Marianne Luban on a pro bono basis since December 2000. Patricia Stembridge, an associate at Faegre & Benson,

also has represented Luban in the most recent proceedings.

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In honor of war reporting...moderated by Ted Koppel, ABC News

# Amicus Brief Filed in Universal City Studios v. Corley Case

A group of media associations, including the Reporter's Committee for Freedom of the Press and the Newspaper Association of America, have filed an amicus brief with the Second Circuit Court of Appeals supporting a request for a rehearing en banc in *Universal City Studios v. Corley*. In November, the Second Circuit affirmed the district court's ruling that enjoined a website from "offering to the public, providing, or otherwise trafficking in DeCSS." 2001 U.S. App. LEXIS 25330 (2d Cir. Nov. 28, 2001); see *LDRC LibelLetter*, December 2001 at 53.

In January 2000, eight major motion picture studios filed suit in the Southern District of New York, claiming that three hackers, including Eric Corley, were violating the Digital Millennium Copyright Act by providing – via websites – a software for decrypting motion pictures released on DVDs. After District Judge Lewis Kaplan granted a preliminary injunction, the website operators began providing hyperlinks to the decryption software, called DeCSS.

Six months later, Judge Kaplan issued a permanent injunction that expressly barred Corley from further distributing DeCSS by "knowingly linking any Internet website operated by them to any other website containing DeCSS or knowingly maintaining any such link for the purpose of disseminating DeCSS."

Most importantly, Judge Kaplan concluded that Corley ignored "the reality of the functional capacity of decryption computer code and hyperlinks to facilitate instantaneous unauthorized access to copyrighted materials by anyone anywhere in the world."

In its November 2001 ruling, the Second Circuit gave its approval to Judge Kaplan's holding, finding it to be content neutral.

The amici are especially concerned with the district court's "subjective test to determine 'linking liability." In their brief, the amici argue that Judge Kaplan's "creation of a special constitutional test whereby an online publisher may be subject to suit under a federal statute merely because it has included a link in an article will have a serious chilling effect on journalistic practice."

Comparing the district court's standard for linking liability (i.e., knowingly linking to a website that contained the DeCSS software) to liability for defamation, the amici state that the district court's standard would chill significantly more speech than the defamation standard. Most basically, the amici argue, *New York Times v. Sullivan* and its progeny require a clear and convincing showing of actual malice. In contrast, the district court requires only proof of "simple intent to disseminate certain information."

The amici are also concerned that under the district court's standard, publication could be enjoined without any showing that the links were used improperly by any reader or caused any harm, and argue that the district court's ruling is a classic prior restraint, and the DMCA itself forbids the use of the Act to grant a prior restraint.

The amici conclude that existing First Amendment tests for vicarious liability adequately address copyright concerns embodied in the DMCA.

A copy of the brief, which was prepared by David Greene of the First Amendment Project, Jane E. Kirtley and Erik F. Ugland of the Silha Center for the Study of Media Ethics and Law at the University of Minnesota, and Milton Thurm of Thurm & Heller, LLP in New York, is available at www.eff.org/IP/Video/MPAA\_DVD\_cases/20010126\_ny\_journpub\_amicus. html.

# Any developments you think other LDRC members should know about?

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#### Media on Trial in Criminal Court

#### Porn Publisher Convicted, Shock Jock Acquitted in Criminal Trials

In separate criminal trials, a Florida radio host was acquitted of animal cruelty after he broadcast the killing of a boar, while in New York the publisher of a pornographic magazine was convicted on misdemeanor charges of harassment after he insulted his former secretary in his magazine, on his cable television access program, and in phone calls and mailings to her home.

#### Screw Publisher Faces Sentence

In the New York case, *Screw* magazine publisher Alvin Goldstein was convicted on six of 12 counts of second-degree harassment stemming from his treatment

of his former secretary, Jennifer Lozinski. Several of the harassment counts involved content of Goldstein's magazine and cable show. *People v. Goldstein*, No. 2001-KN-052112 (N.Y. Crim. Ct., Kings County jury verdict Feb. 27, 2002).

"New Yorkers are the most nasty, miserable SOBs in the world.
Based on this statute, all we can say is, 'Have a nice day."

Lozinski testified that Goldstein became upset with her after she reserved a rental car for him, but did not arrange for him to receive VIP treatment. Goldstein claimed that Lozinski stole petty cash and damaged computer files when she quit after 11 weeks at the job.

During the three-day trial, Goldstein presented character witnesses including comedian Gilbert Gottfried, porn star Ron Jeremy, and "Munsters" star and erstwhile political candidate "Grandpa" Al Lewis. He also testified in his own defense – reportedly against his lawyer's advice – and admitted making vulgar and threatening comments in phone calls to Lozinski. He also mailed to Lozinski's home a videotape of his public access cable program and a *Screw* editorial, both of which insulted her by name and gave her home address.

Lozinski was not the only target of Goldstein's vitriol; after he was indicted, *Screw* published an photograph of a naked women with the head of Brooklyn District Attorney Joe Hynes, along with an article urging terrorists to fly a plane into D.A.'s office. When asked whether he had written the article during trial, Goldstein shouted that the editorial was "protected speech."

"That's words, not actions!," he yelled. "This is speech! This is speech!" As the tirade continued, Supreme Court Judge Daniel Chin held Goldstein in contempt and ordered that he be handcuffed until he calmed down, after which the judge rescinded the contempt citation.

After two days of deliberation, the six-member jury announced that it was deadlocked and Judge Chin prepared to declare a mistrial. After the prosecutor objected, the jury was told to continue and then convicted Goldstein on charges stemming from the phone calls, the mailed editorial, and the cable show.

He could be face up to a year imprisonment when he is sentenced on April 16.

After the verdict, Goldstein said that he would appeal on the grounds that New York's harassment statute was unconstitutionally overbroad.

"If I called [Osama] bin Laden and said, 'You're low-life scum and

I wish you die from cancer,' I would be guilty under this statute," Goldstein said. "New Yorkers are the most nasty, miserable SOBs in the world. Based on this statute, all we can say is, 'Have a nice day."

The case was prosecuted by Assistant District Attorney David Cetron. Solo practitioners Charles C. DeStafano of Staten Island and Fredy H. Kaplan of Brooklyn represented Goldstein.

Goldstein is also reportedly facing a civil suit from another former secretary, Kelly Hogan. In her \$45 million suit alleging libel and intentional infliction of emotional distress, Hogan alleges that Goldstein ridiculed her and mocked her miscarriage in his magazine and on his cable show, and sent the magazine article to her parents.

Hogan's suit apparently claims that Goldstein became upset with her when she quit her job with Goldstein and took one with Goldstein's friend Lyle Stuart, publisher of Barricade Books. Barricade Books has had its own First Amendment battles; last year, the company won a reversal of a \$3.1 libel verdict in a suit brought by casino mogul Steven Wynn. *See Wynn v. Smith*, 16 P.3d 424, 29 Media L. Rep. 1361 (Nev. 2001), *reh'g denied* (Nev. Sept. 20,

(Continued on page 30)

#### **Media on Trial in Criminal Court**

(Continued from page 29)

2001). *See also LDRC LibelLetter*, Feb. 2001 at 3, Oct. 2001 at 31. A new trial has not yet been scheduled. *Wynn v. Smith*, No. 95-A-348109-C (hearing on plaintiff's motion to set trial held Feb. 10, 2002).

Alan Rich of Manhattan is representing the former secretary in the civil case.

#### Boar Killing No Crime, Jury Holds

The charges against radio host Todd A. Clem, who goes by the name "Bubba the Love Sponge," stemmed from a Feb. 27, 2001 broadcast on WXTB-FM in St. Petersburg, Fla. which featured a "Road Kill Barbeque," in which he invited listeners to bring animal carcasses. *State v. Brooks*, No 01-04900 (Fla. Cir. Ct., 13th Jud. Cir. jury verdict Feb. 28, 2002).

Listener Paul Lauterberg brought a wild boar in cage. After three hours, listener Daniel Brooks held down the boar as Lauterberg castrated and slit the throat of the animal in the parking lot, and as program producer Brent Hatley described the events via a cell phone to Clem in the station's studios. Clem broadcast Hatley's descriptions while playing recorded sounds of pigs squealing, implying that the broadcast was coming directly from the parking lot.

The broadcast led animal rights groups to call for an advertiser boycott of the station, and to demand Clem's firing. They also filed complaints with the Tampa police and the Federal Communications Commission.

In response, the station suspended Clem for 15 days without pay in mid-March 2001.

Local prosecutors charged Clem, Hatley, Lauterberg and Brooks with animal cruelty, a third degree felony with a maximum sentence of five years in prison and/or a fine of up to \$10,000. *See* Fla. Stat. § 828.12 (2001). Wild boars are considered a nuisance in many parts of Florida, and it is legal to kill them.

Clem turned himself in to authorities on March 29, 2001, and was released on \$10,000 bond. Hatley and Brooks turned themselves in the previous evening.

During discovery, prosecutors obtained a videotape of the killing, made by Clem's production company with the intention of offering it on a pay-per-view web site. The video showed Lauterberg saying that he hoped that Clem would reward him for bringing the boar, so that he could buy a nice birthday gift for his wife; it also showed him eating parts of the animal raw.

LDRC MediaLawLetter

The video also showed other antics, including a man drinking live goldfish and the crowd voting on whether to kill the boar, which they named Andy.

In response to media requests, and over defense objections, Hillsborough County Circuit Judge Herbert made the video public in June.

In January 2002, Circuit Judge Ronald Ficarrotta ruled that prosecutors could use the video. But on the eve of trial the following months, Judge Ficarrotta limited their use of an audiotape of the broadcast.

At trial, the prosecution's case consisted solely of playing the videotape and the authorized portions of the audiotape, and took less than an hour to present. The defense put Clem on the stand, who emphasized his charitable and community activities and said that the purpose behind the "Roadkill Barbeque" was "to display where we get our meat and how we get it." A veterinarian and a former state game official then both testified that the method used to kill the boar was routine. Video of the entire trial is available online at www.voyeurcourt.com.

The six-person jury acquitted Clem and the other defendants after an hour of deliberation. Jurors told reporters that they had not been given enough evidence to conclude that the killing was cruel or inflicted unnecessary pain.

After the verdict, Clem vowed to sponsor a voter registration drive to oust Thirteenth Judicial Circuit State Attorney Mark Ober.

Clem was represented by Norman Cannella Sr., of counsel to Rywant, Alvarez, Jones, Russo & Guyton, P.A. in Tampa; producer Hatley was represented by J. Kevin Hayslett of Carlson & Meissner in Clearwater, Fla. Prosecuting Attorney Darrell Dirks prosecuted the case.

The complaint to the Federal Communications Commission regarding the broadcast was denied. Letter to Peter Wood, People for the Ethical Treatment of Animals, Re: EB-01-1H-0089 (March 21, 2002). John Burgett of Wiley, Rein & Fielding LLP in Washington, D.C. handled the complaint for WXTB licensee Citicasters Company, a division of Clear Channel Communications, Inc.

# **UPDATE: Troubles for Reporters**

Allegations of trespass have been a recent problem for reporters and photographers in New York, Pennsylvania and Florida.

In February, a New York trial judge denied freelance photographer Stephen Ferry's request for the return 28 rolls of film confiscated when was arrested for, among other things, trespass and criminal impersonation when he went to the site of World Trade Center collapse dressed in a firefighter's gear. When he was arrested, Ferry was on assignment for *Time*. *People v. Ferry*, No. 06373-2001 (N.Y. Sup. Ct., N.Y. County).

According to reports, Ferry put on the firefighter's gear to protect himself from the fire and smoke. Ferry has also said that he was unaware at the time that so many firefighters had died on Sept. 11, and that he would not have worn the gear had he known that.

On Feb. 13, New York Supreme Court Judge Micki A. Scherer ruled that the film was seized as arrest evidence. Moreover, because the photographs were not the subject of the criminal charges, Judge Scherer felt the First Amendment was not implicated. Ferry had argued that retention of the film by the prosecutor's office constituted a prior restraint.

Though Ferry's camera was also confiscated, it has been returned.

In addition to trespass and criminal impersonation, Ferry was also arrested for possession of a forged instrument after he gave police an altered New York driver's licence as identification. Ferry has said he lost his license while on assignment in Colombia and had altered the expiration date on an old license so that he could use it as identification outside the country while waiting for a replacement license.

Ferry is represented by Jack Litman of Litman, Asche & Gioiella in New York.

In York, Pa., a reporter was charged with criminal trespass after he refused to leave a non-profit agency's building on March 5. Andrew Broman, a reporter for the *York Daily Record*, refused to leave the offices of the Housing Council of York County because workers would not answer his questions about the agency's spending habits with government money. Broman was arrested and later released on his own recognizance. A

hearing in scheduled for April 10.

Finally, in Florida, the *Naples Daily News* filed a police complaint on March 14 accusing a man of assault after a reporter and photographer claimed they were accosted and verbally threatened while covering a postelection party.

On March 12, reporter Ilene Stackel and photographer Erik Kellar were covering the post-election party for Marco Island City Council candidate Jean Merritt. According to reports, a party guest blamed the press and "unfair press coverage" for Merritt's defeat. Several guests began yelling at Stackel, and Joseph Christy, the party's host, yelled at her, "I hope you get run over by a truck." When Christy began to approach the reporter, Kellar stepped in. Christy then shoved the photographer.

Both Stackel and Kellar had received prior permission from Merritt and another city councilman to cover the party. They had been at the party for approximately 90 minutes before the incident. They left the party immediately thereafter. Christy later denied inviting Stackel and Kellar, accusing them of trespass.

The State Attorney's office will determine if assault charges need to be filed against Christy.

# **SAVE THE DATE**

# 2002 NAA/NAB/LDRC CONFERENCE

SEARCHING FOR THE FIRST AMENDMENT

#### "Girls Gone Wild" Producer Seeks to Vacate \$5 Million Default

#### College Student Sued Over Bare-Breasted Video

The producer of a video that was advertised with pictures of a Texas college student baring her breasts is seeking to have a \$5 million default judgment entered against it vacated. *Kulhanek v. Acro Media Group, Inc.*, No. 01-0505 (Tex. Dist. Ct., 22nd Dist. default verdict entered Feb. 27, 2002). The student also sued the E! cable network, which broadcast the advertisements for the video.

According to the plaintiff's attorney, the judgment appeared to be the first against a producer of a video featuring unclothed women filmed in public.

Amber Kulhanek, a student at Southwest Texas State University, traveled to South Padre Island on the Texas Gulf coast for Spring Break 2000. During her vacation she went to a bar in Matamoras, Mexico, where she participated in a wet T-shirt contest and took off her top. While this scene did not appear in any of the "Wild Party Girls" videos produced by Florida-based Accro-Media Group, Inc., a still picture did appear in the member's section of the "Wild Party Girls" web site, and a censored video version – with the words "Too hot for TV' superimposed on Kulhanek's chest – was used in an advertisement for the videotape that was broadcast by E!.

#### Alleged Conspiracy

In her suit, Kulhanek claimed that representatives of AccroMedia conspired with bartenders to get women drunk and convince them to participate in the contests. She sued for invasion of privacy and intentional infliction of emotional distress, saying that she withdrew from classes and suffered from insomnia after seeing the advertisement.

While E! made an appearance at the Hays County District Court, AccroMedia Group initially did not. The failure to appear led Judge Charles R. Ramsay to issue a default judgment awarding Kulhanek \$2.5 million on the privacy claim, \$2.5 million for the emotional distress claim, and \$10,000 in attorney's fees.

When seeking the default judgment, the plaintiff claimed that AccroMedia had been served through the Texas Secretary of State.

After AccroMedia appeared to challenge the default judgment, Kulhanek filed a motion for a "default judgment *nunc pro tunc*." This motion sought to correct the name of the defendant, and to have the court issue a new default judgment for a reduced amount: \$1 million in damages, plus \$100,000 in attorney fees.

AccroMedia's opposition to this motion says that the *nunc pro tunc* procedure is meant to correct minor clerical errors, and cannot be used the cure serious defects in the original default judgment. The opposition also says that the company was never served, and did not receive any notice of service on the Secretary of State's office.

The motion is pending.

Kulhanek's attorney is David Sergi, a solo practitioner in San Marcos, Texas. Dale Jefferson of Martin, Disiere, Jefferson & Wisdom, L.L.P. in Austin and Houston is representing E!, and AccroMedia is now being represented by Sean E. Breen of Herman, Howry & Breen, L.L.P., in Austin.

#### Similar Florida Suit Pending

A similar suit filed against a different company in September by Becky Lynn Gritzke, a Florida college student who was shown her baring her breasts at Mardi Gras celebrations in New Orleans, was removed from state to federal court in November. A motion to dismiss is now pending in the case. *See Gritzke v. MRA Holdings LLC*, No. 2001-CV-00495 (N.D. Fla. filed Nov. 21, 2001) (filed after removal of *Gritzke v. MRA Holdings LLC*, No. 37 2001 CA 002241 (Fla. Cir. Ct., 2nd Jud. Dist. removed Nov. 21, 2001)).

In the Florida case, Gritzke is represented by Matthew K. Foster of Brooks, LeBoeuf, Bennett & Foster, P.A., in Tallahassee; video producer MRA Holdings is represented by Michael W. Marcil and Bryan S. Miller of Gunster, Yoakley & Stewart, PA in West Palm Beach.

<sup>&</sup>lt;sup>1</sup> The company name is incorrect in the case caption.

# Court Grants Media Intervenors' Motion for Access to Deposition Transcripts, Videotapes in Microsoft Antitrust Case

#### By Audrey Billingsley and Jay Ward Brown

On Feb. 24, 2002, the United States District Court for the District of Columbia held that the press and public are entitled to redacted transcripts and videotape recordings of depositions of four former and current highlevel executives of Microsoft and its competitors, notwithstanding that the deposition materials have not been filed with the court. The ruling leaves open the possibility that more transcripts and recordings may be made available upon specific request.

#### **Background**

The context of this decision stretches back to May 1998, when the United States and 20 states sued Microsoft for alleged antitrust violations in two separate actions. After the federal and state cases were consolidated, The New York Times Company and several other news organizations moved for leave to intervene to enforce a right of access to depositions pursuant to the Publicity in Taking Evidence Act, 15 U.S.C. § 30. That statute requires that depositions taken for use in civil antitrust actions brought by the United States be open to the public to the same extent as trials in a courtroom. Judge Thomas Penfield Jackson, who was then the trial judge, granted the motion, and, after Microsoft's unsuccessful appeal of his order, established ground rules for public and press attendance at depositions. In addition, consistent with the appellate court's ruling, Judge Jackson ordered the release of transcripts and videotapes of depositions taken while the access order was on appeal.

Judge Jackson thereafter ruled that Microsoft had violated federal and state antitrust laws and ordered its division into two distinct companies. The Court of Appeals affirmed the finding of liability, but remanded the cases for additional proceedings regarding an appropriate remedy. On remand, the case was assigned to Judge Kollar-Kotelly, who set an expedited discovery period for a remedy hearing. The United States and Microsoft, however, reached a tentative settlement, in which several of the plaintiff states soon joined.

In light of the proposed settlement, proceedings in

the federal action were stayed, but the non-settling states and Microsoft were ordered to prepare for the remedy hearing on an expedited basis, which required the parties to schedule some 60 depositions in the states' case in late January and February. On Jan. 2, 2002, *The New York Times* and *Washington Post* notified the parties that their reporters planned to attend certain of the scheduled depositions. In response, Microsoft filed a motion to vacate the court's prior orders entered pursuant to 15 U. S.C. § 30 that required public and press access to depositions. Microsoft argued that, because the depositions to be taken were for use in the action brought by the states, and not an action brought by the United States, Section 30 did not apply.

#### Motion to Intervene

The Associated Press, Bloomberg News, CNN, Dow Jones & Company, Inc., the *Los Angeles Times*, The New York Times Company, the *Washington Post*, and *USA Today* intervened to oppose Microsoft's motion. They argued that Section 30 requires only that a deposition be one "for use" in a suit brought by the United States to fall within the terms of the statute. Because the two actions remained consolidated for all purposes, and because the court had not approved the settlement of the federal action, the media intervenors argued that the depositions could well be used in the federal action, if that action resumed.

The media intervenors also argued that, even if Section 30 technically did not apply, Microsoft was not entitled to an order excluding the public and the press from depositions except upon a showing of "good cause" pursuant to Fed. R. Civ. P. 26(c). In this case, they argued, the public policy of requiring openness in antitrust proceedings involving the United States, embodied in Section 30, weighed so heavily against a finding of good cause that Microsoft could not carry its burden of demonstrating that it was entitled to such an order. Moreover, intervenors noted, attendance of the public and press at depositions has been authorized in other news-

(Continued on page 34)

### Court Grants Media Intervenors' Motion for Access to Deposition Transcripts, Videotapes in Microsoft Antitrust Case

(Continued from page 33)

worthy cases such as these. See, e.g., Avirgan v. Hull, 118 F.R.D. 252, 253 (D.D.C. 1987); Estate of Rosenbaum v. New York City, 21 Media L. Rep. (BNA) 1987, 1989 (E.D.N.Y. 1993); In re Texaco Inc., 84 B.R. 14, 17-18 (S.D.N.Y. 1988); United States v. Didrichsons, 15 Media L. Rep. (BNA) 1869 (W.D. Wash. 1988); Tyson v. Cayton, 88 Civ. 8398 (S.D.N.Y. 1989).

On Jan. 28, 2002, the court granted Microsoft's motion, vacating the prior orders requiring access insofar as they applied to the action brought by the states. Although the court denied the media intervenors' motion to the extent it relied on a right of access under Section 30,

it expressly questioned whether Microsoft would be entitled to a blanket order excluding the public and the press from all depositions to be taken in the case pursuant to Rule 26.

Under Rule 26(c), "where an individual or entity from whom

discovery is sought wishes to exclude persons from a deposition, that individual or entity must obtain a protective order requiring such exclusion upon a finding of good cause." 01/28/02 Mem. Op. at 9. Microsoft, however, had not asked the court to exclude the public and the court declined to do so *sua sponte*, confirming instead that the existing protective order "provides for exclusion of the public . . . only when the answer to a question at deposition will result in the disclosure of 'Confidential Information' or 'Highly Confidential Information,'" as defined in the protective order. *Id.* at 9-10.

During a subsequent hearing, the court again emphasized that the parties "can't de facto exclude [reporters] by setting it up in such a way that the press can't be present without actually getting a court order to that effect." Transcript of 01/31/02 Hearing at 6:18-21.

On Feb. 11, 2002, in light of the court's recognition that the parties could not "de facto" exclude the press from depositions and after Microsoft had rejected all efforts at compromise, the media organizations filed an affirmative motion seeking an order requiring that a pool of three reporters be permitted to attend five specific depositions. To the extent that some or all of those depositions were completed prior to the court's ruling on their motion, the media organizations requested copies of the videotapes of the depositions. In addition, they sought access to transcripts of all post-remand depositions, redacted to remove confidential information covered by the protective order.

Microsoft responded that the motion for live access was moot because, in the interval, four of the five depo-

sitions had been completed, while the fifth had not been noticed. Even if the motion were not moot, Microsoft argued, allowing the press to attend the depositions would eviscerate the protections embodied in the protective order. Microsoft dis-

missed as impractical any model for access based on Judge Jackson's orders under 15 U.S.C. § 30, because that statute, unlike Rule 26(c), required depositions to "be open to the public as freely as are trials in open court." Microsoft's Opp. at 4 (quoting 15 U.S.C. § 30).

Microsoft argued, allowing the press to attend the depositions would eviscerate the protections embodied in the protective order.

Even if the motion were not moot,

#### **Motion Granted**

Judge Kollar-Kotelly granted the media intervenors' motion for access to transcripts and videotapes of the specific depositions to which they had sought live access, albeit in redacted form - notwithstanding that these discovery materials have not been filed with the court. Rule 26(c)'s good cause requirement "appears to balance the public's interest in open proceedings against an individual's private interest in avoiding 'annoyance, embarrassment, oppression, or undue burden or expense," 02/24/02 Mem. Op. at 6 (citation omitted), she noted.

Microsoft, however, had failed to "offer any expla-

(Continued on page 35)

Adhering to the balance established in

Rule 26(c)," she ruled that Microsoft

had failed to make the showing

necessary to exclude the press from

access to the specified deposition

transcripts and videotapes.

## **Court Grants Media Intervenors' Motion for** Access to Deposition Transcripts, Videotapes in **Microsoft Antitrust Case**

(Continued from page 34)

nation as to why provision of the transcripts and video recordings from these four depositions would be so troublesome or vexatious that the circumstances justify the denial of the Media's request," id. at 8, and, indeed, Microsoft had not even argued that their release "would in any way burden, oppress, or embarrass the parties to the litigation or third parties who were deposed," id. at 7-8. "Adhering to the balance established in Rule 26(c)," she ruled that Microsoft had failed to make the showing necessary to exclude the press from access to the specified deposition transcripts and videotapes.

By the same token, although the media intervenors' request to attend already-completed depositions was moot, as to the fifth, then-unnoticed deposition, Judge Kollar-Kotelly ruled "that such access would be annoying, oppressive, and unduly burdensome" because of the likelihood

that confidential information would be disclosed throughout. Id. at 6-7 n.4. "[S]eparating confidential information from public information is not a simple task," she observed, "and consequently, information may be revealed inadvertently that should properly remain secret." Id. (citation omitted). The existing protective order did not provide a workable solution, she added, because

the procedure of requiring press representatives to leave when a particular question or line of questioning is likely to elicit confidential information comes 'at great cost to the continuity of questioning that counsel is entitled to maintain for effectiveness.'

Id. (citation omitted).

Finally, the court held that the media intervenors "are not entitled to access transcripts of all the depositions taken in this case," 02/24/02 Mem. Op. at 2 (emphasis added), at least where they "d[id] not attempt

to differentiate among the deponents, nor to identify the particular need for the transcripts of each and every deposition taken in this case," id. at 9. Concluding that, "[b]eyond an assertion of general public interest in the litigation, the Media have not provided any argument to explain why access to the transcripts of dozens of depositions is appropriate," id. at 9, the court "decline[d] to create new law by granting the Media's extensive request for transcripts of all of the depositions taken in this case," id. at 10. This portion of the decision, however, does not appear to preclude news organizations from

> filing a renewed motion for access to additional deposition transcripts and videotapes if they can show such a "particular

fessed not to be making new law, Judge Kollar-Kotelly

need" for the testimony of specific witnesses. At bottom, although she pro-

joined a rather small group of federal judges who have ordered that the public be given access to unfiled deposition transcripts. And, while she rejected the argument that members of the press have a right of live access to depositions in particularly newsworthy cases where those depositions involve substantial testimony on matters properly subject to a Rule 26(c) protective order - in this case, because of the possible disclosure of trade secrets -- her ruling that there is, in effect, a qualified right of access to unfiled deposition transcripts at least in certain circumstances should prove helpful in the future. The parties have indicated that they do not intend to appeal the decision.

Lead counsel for the media intervenors were Lee Levine and Jay Ward Brown of Levine Sullivan & Koch, LLP. Microsoft's lead counsel is John Warden of Sullivan & Cromwell. The non-settling states are represented by Brendan Sullivan & Steven Kuney of Williams & Connolly. Audrey Billingsley is an associate at Levine Sullivan & Koch.

# **UPDATE: Most Reagan Papers Released**

More than 14 months after they were initially due to be released, on March 15 the Ronald Reagan Presidential Library and Museum in Simi Valley, Cal., released 58,850 pages of internal documents from the Reagan Administration after their release was approved by the current Bush Administration.

The latest release came 10 weeks after 8,000 pages were released on Jan. 3, *see LDRC LibelLetter*, January 2002, at 36, and left 150 pages of material which has not been disclosed.

All of the material – which consists of confidential communications between Reagan and his advisors – were originally due to become public on Jan. 20, 2001, as provided for by the Presidential Records Act of 1978, Pub. L. No. 95-961, 92 Stat. 2523-27, codified as amended at 44 U.S.C. §§ 2201-7.

Reagan, whose records were the first subject to the Act, issued an executive order two days before he left office giving a sitting president 30 days to either request a delay in the release of the records, or order that the records be withheld indefinitely under a claim of executive privilege. *See* Exec. Order 12667, 54 Fed. Reg. 3403 (1989). President George W. Bush requested such delays three times, before he issued his own executive order which gave both current and former presidents 90 days to review the material, and to block disclosure of the documents for indeterminate periods. *See* Exec. Order 13233, 66 Fed. Reg. 56025 (2001).

The released Reagan documents were all reviewed by Bush Administration officials and approved for disclosure under this process. The remaining 150 pages involve "deliberations about potential appointees to public office" and are still under review because of the "sensitive constitutional, legal and privacy ramifications" if disclosed, according to a letter from White House Counsel Alberto Gonzales to the library.

Besides the 150 remaining pages of Reagan documents, the White House is also reviewing tens of thousands of pages from the office of Vice President George H.W. Bush, the current president's father.

Meanwhile, a bill has been proposed in Congress to reverse Bush's order, and a lawsuit filed by coalition of historical associations and public interest groups challenging the order continues.

The bill, which has not yet been introduced, would still

allow either the sitting or former president to claim executive privilege as the basis for withholding documents of a past administration. But it would require that such claims be in writing and that they cite specific grounds. A request by a former president would have to be approved by a court within 20 days, or the papers would be released; a claim by the sitting president would prevent the records from being disclosed until the president or a court orders their release. Rep. Stephen Horn (R-Cal.), Chairman of the House Subcommittee on Government Efficiency and Financial Management, is currently seeking co-sponsors before introducing the bill.

In the civil suit, on March 12 Judge Colleen Kollar\_Kotelly accepted an amicus brief filed on behalf of groups including the American Society of Newspapers, the Society of Professional Journalists, and the Authors Guild. See American Historical Ass'n v. Nat'l Archives and Records Admin., No. 01-CV-02447 (D.D.C. filed Nov. 28, 2001). The plaintiffs are represented by Scott L. Nelson of the Public Citizen Litigation Group. The amicus brief was prepared by Adam P. Strochak of Weil, Gotshal & Manges, L.L.P. in Washington.

#### Now Available:

## Compendium of Judicial References to First Amendment Interests in Newsgathering

The Newsgathering Committee, chaired by Dean Ringel, Cahill Gordon & Reindel, and Kelli Sager, Davis Wright Tremaine, with author (and DCS President) David Schulz, and his colleagues at Clifford Chance Rogers & Wells, have created a Compendium of Judicial References to First Amendment Interests in Newsgathering.

This 46-page report is a collection of statements by the courts, cataloged on a court-by-court basis, on the relationship of the First Amendment in newsgathering claims, access cases, and reporter privilege matters.

To obtain a copy of this very useful reference tool, send an e-mail to kchew@ldrc.com, or contact LDRC by telephone – 212.337.0200 – or by facsimile – 212.337.9893. Unless you indicate otherwise, it will be sent to you electronically.

Particular thanks for this reference report goes to David Schulz, Clifford Chance Rogers & Wells, and Nick Leitzes at the firm who assisted him in putting together the report.

## California Congressman Quietly Rebuffs Ashcroft's FOIA Stance

Congressman Henry Waxman (D-Los Angeles) sought and got a rebuke to Attorney General John Ashcroft's Freedom of Information Act policy.

The action may have no legal effect, but represents a symbolic (and bipartisan) Congressional slap at Ashcroft's directive last fall encouraging federal agencies' FOIA officers to, in effect, search for and use any legal authority for denying access to records under the federal law.

Every few years the House Government Reform Committee, with oversight on FOIA issues, publishes an update of its popular "A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records" (current 1999 edition found at bottom of page at http://www.access.gpo.gov/congress/house/house07cr106.html).

On February 7, the committee marked up its draft for the next edition, which in the introduction currently states, "Above all, the statute requires Federal agencies to provide the fullest possible disclosure of information to the public."

Congressman Waxman offered, and Committee Chair Dan Burton (R-Indiana) approved, the addition of the following paragraphs immediately following that statement:

The history of the act reflects that it is a disclosure law. It presumes that requested records will be disclosed, and the agency must make its case for withholding in terms of the act's exemptions to the rule of disclosure. The application of the act's exemptions is generally permissive — to be done if information in the requested records requires protection — not mandatory. Thus, when determining whether a document or set of documents should be withheld under one of the FOIA exemptions, an agency should withhold those documents only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Similarly, when a requestor asks for a set of documents, the agency should release all documents, not a subset or selection of those documents. Contrary to the instructions issued by the Department of Justice on October 12, 2001, the standard should not be to allow the withholding of information whenever there is merely a 'sound legal basis' for doing so.

Meanwhile in the other house, Senator Patrick Leahy (D-Vermont) has asked the General Accounting Office to look into a question several journalists and others have been wondering about: Just what if any real-world effect has the Ashcroft memorandum had?

According to a report from the Reporters Committee for Freedom of the Press, on February 28 Leahy asked the GAO to "assess the impact of the new policy on agency responses to FOI requests, agency backlogs of requests, litigation involving federal agencies for withholding records and fee waivers for requests from news media," and also "to ascertain whether agencies were accepting electronically filed FOI requests, particularly since the anthrax threat has compromised delivery of mail."

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## **Privacy of Bookstore Records Becomes Focal Point for ABFFE**

Concerned with a growing number of subpoenas and search warrants issued to bookstores, the American Booksellers Foundation for Free Expression (ABFFE) last month expressed its support of legislation in Maryland that would protect privacy of bookstore records.

The privacy of bookstore records began receiving national attention in March 1998, when Independent Counsel Kenneth Starr issued a subpoena to a Washington, D.C. bookstore requesting "all documents and things referring or relating to any purchase by Monica Lewinsky," dating back to November 1995. A second subpoena was issued shortly thereafter to a second Washington, D.C. bookstore. See *LDRC LibelLetter*, April 1998 at 25.

More recently, the federal government agreed not to pursue the production of customer records relating to the purchases of U.S. Sen. Robert G. Torricelli and seven other people. See *LDRC LibelLetter*, October 2001 at 46. The Torricelli case was just one of four cases over the last two years where bookstores have been subpoenaed for records, including a case involving the Tattered Cover Book Store in Denver, which is fighting a judge's order to surrender information. See *LDRC LibelLetter*, November 2000 at 25. The Colorado Supreme Court heard oral arguments in the case in December.

ABFFE President Chris Finan spoke before a committee of the Maryland House of Delegates expressing the ABFFE's support of Maryland legislation that limits the circumstances in which police can request customer records from a bookstore. Maryland H.B. 897 provides a four-part test for granting a subpoena for bookstore records, including a requirement that "the purposes of the investigation cannot be achieved by alternative investigative methods or sources that do not require disclosure of the information sought."

Finan told the committee that "the growing number of subpoenas and search warrants issued to bookstores for the purpose of discovering what people are reading makes it imperative that we increase the protections for book purchase records. If bookstore customers fear that the police can easily discover what they are reading, they will not feel free to buy the books they want and need."

#### PATRIOT Act Raises Concerns

ABFEE's concern grew after President Bush signed the USA PATRIOT Act, which amended the Foreign Intelligence Surveillance Act ("FISA") and expanded the federal government's ability to search business records, including records of the book titles purchased by customers.

The law allows the FBI to seek an order "for tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities." The ABFFE was especially concerned with a provision that allowed a judge to make a ex parte decision on an FBI request, and a gag order provision that prevented bookstores from disclosing "to any other person" the fact that it had received the order to produce the documents.

After President Bush signed the law,, ABFFE sent a letter to all its members instructing them on how to properly respond when served with a court order for records under FISA. A copy of the letter is available at http://www.abffe.com/fisa\_letter.html

The letter informed the bookstores that if they receive a subpoena for records, the gag order does not prevent contacting legal counsel. The letter says that booksellers may contact ABFFE for legal counsel, but "because of the gag order ... you should not tell ABFFE that you have received a court order under FISA. You can simply tell us that you need to contact ABFFE's legal counsel."

The ABFFE's website is http://www.abffe.com

LDRC is distributing the

PRACTICE GUIDE: HOW TO
DEFEAT PLAINTIFF'S CLAIMS
OF ACTUAL MALICE

by e-mail, to allow you not only to read it, but to cut and paste easily from it. To obtain a copy, send an email request to ldrc@ldrc.com.

## WorldPeace Has No Right To Debate, Court Rules

#### Candidate Excluded Because He Was Not Deemed a Newsworthy Candidate

#### By John C. Wander

On March 1, 2002, North Texas Public Broadcasting and a consortium of Texas media companies presented a historic first. That evening, Tony Sanchez and Dan Morales, the leading candidates for the Democratic nomination for Texas Governor, engaged in two debates – one in English, the other in Spanish. The debates were carried statewide by television and radio outlets in every major Texas market. Days before the debates took place, however, there were still doubts about whether they would happen.

At the center of these doubts was a lawsuit by John WorldPeace, a fringe Democratic candidate seeking to stop or to participate in the debates. Styled *John World-Peace v. Telemundo Communications Group, Inc., et al.* 

No. H-02-0659 in the United States District Court for the Southern District of Texas, Houston Division (Hughes, J.), the lawsuit sought to restrain the debate organizers from broadcasting any debate (a) without WorldPeace's participation, or (b) in Spanish.

The debates were meant to provide Texas voters an opportunity to witness a one-on-one discussion of the issues between the leading Democratic candidates for governor. WorldPeace was far from a leading candidate.

The suit alleged that a "Hispanic only" debate or a debate conducted in Spanish would discriminate against WorldPeace and violate his First Amendment rights. At the conclusion of a three-hour injunction hearing, United States District Judge Lynn Hughes denied WorldPeace's request for emergency relief, holding that the debate organizers were not state actors, and thus that they had the discretion to invite any candidates they desired and conduct the debate in any format they chose.

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Decisions regarding debate participation were made the week of Feb. 11, using North Texas Public Broadcasting's pre-existing selection guidelines. Although North Texas Public Broadcasting is a private non-profit corporation, these guidelines were nonetheless crafted to meet the criteria for sponsorship of political debates by government-owned media outlets, as outlined by the Supreme Court in *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 683 (1998) (government-owned public television station is not precluded by the First Amendment from denying a third-party candidate access to its televised political debate if the exclusion is not due to candidate's viewpoint or platform, but rather because the candidate has generated no appreciable public interest and support).

Using the *Forbes* standards, North Texas Public Broadcasting made the editorial judgment that World-Peace was not a newsworthy candidate. As of Feb. 10, 2002, the Texas Poll, conducted by *The Dallas Morning* 

News, indicated that World-Peace and candidate Bill Lyon were collectively supported by just 3 percent of registered voters. Similar polls conducted for the *Houston Chronicle* and the independent Texas Politics Survey put WorldPeace at 0.7 percent to 1.9 percent support among De-

mocratic voters. Furthermore, WorldPeace had made minimal expenditures. He had done little fundraising. He had made very few meaningful public appearances. His campaign had received little press coverage, and he had not participated in the newspaper editorial board process around the state. Thus, the news producers at North Texas Public Broadcasting determined that WorldPeace was not conducting a significant statewide campaign.

Accordingly, the producers invited only Mr. Sanchez and Mr. Morales to participate in the March 1, 2002 debate. By limiting the participation to these two candidates, without regard to their respective platforms, the voters of the State of Texas would be presented with their best opportunity to understand the positions of all serious candidates. And because there are an estimated seven million Spanish-speaking voters in Texas, the can-

(Continued on page 40)

#### WorldPeace Has No Right To Debate, Court Rules

(Continued from page 39)

didates and organizers agreed that the second debate session of the evening would be conducted in Spanish.

At the injunction hearing, WorldPeace argued this decision discriminated against him and violated his First Amendment rights. The defendants responded that the Constitution is a restraint on the state, not on private entities such as these debate organizers, citing Public Utils. Comm'n v. Pollack, 343 U.S. 451, 461 (1952) and Belluso v. Turner Communications Corp., 633 F.2d 393, 398 (5th Cir. 1980). The mere fact that a broadcast entity is regulated by the federal government does not serve to cloak its actions with federal or state authority: "most lower courts which have considered the question whether broadcasters are instrumentalities of the Government for First Amendment purposes have concluded they are not." Belluso, 633 F.2d at 398; see also Blouin v. Loyola Univ., 506 F.2d 20, 21-22 (5th Cir. 1975) (licensing under the Federal Communications Act does not require a finding of state action by licensee). Nor do government grants to private entities thrust Constitutional responsibility upon those entities. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542-46 (1987).

Citing these principles, Judge Hughes agreed there was no state action and never reached the issue of whether North Texas Public Broadcasting and the other organizers had made a viewpoint neutral, non-discriminatory decision to exclude WorldPeace from the debates:

I'm going to assume that there was a conscious decision to broadcast a debate between Hispanic candidates for governor. The Constitution does not require participants in a political process to operate under the restrictions the Constitution requires of the government. The government cannot discriminate, it must act by due process of law, participants in political campaigns do not have to do that. . . . [I]n this instance, assuming that the editorial decision was to feature Hispanic Texans in the debate for the governorship, I think it's constitutionally permissible. If the candidates for — the leading democratic candidate for Governor were a Belgian immigrant and an Australian immigrant, and the wanted to feature a debate between them through Hispanic spokesmen, I don't think anybody could

complain about it....That leaves no room for me to compel these people to include you and I am not going to prohibit them from speaking.

2/26/02 Transcript at 54-56.

Accordingly, Judge Hughes denied the request for injunctive relief.

Thus, the first ever Spanish-speaking debate in a major U.S. political race went forward three days later.

As a postscript, the Democratic Primary was held on March 12, 2002. John WorldPeace received 2 percent of the vote. His suit against the debate organizers is still pending

WorldPeace, a Houston attorney, is representing himself *pro se* in the debate lawsuit.

John C. Wander is an associate at Vinson & Elkins L.L. P. in Dallas, Texas. He represents the debate producers and sponsors, along with Thomas S. Leatherbury, Charles W. Schwartz, J. Stevenson Wiemer, and Ara A. Hardig, also of Vinson & Elkins L.L.P. in Dallas and Houston.

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## **UPDATE: Reporters in the War Zone**

In recent weeks, the Pentagon has organized press pools to accompany American ground troops as they fought with suspected al Queda and Taliban fighters holed up in the vicinity of Gardez in eastern Afghanistan, and to cover the detention of captured fighters at the naval base at Guantanamo Bay, Cuba. This policy stands in contrast to those earlier in the anti-terrorism campaign in Afghanistan and surrounding countries, when reporters were prevented from joining American combat troops.

#### Press With Troops, But Danger Lurks

The first reports from the Afghanistan pool became available March 5, four days after the beginning of the operation – dubbed "Operation Anaconda" by the Pentagon. Military officials apparently prevented the pool members from reporting from the battlefield earlier, in accordance with the ground rules for the pool.

Defense Secretary Donald Rumsfeld defended these restrictions at a March 4 press conference. "This is a most unusual conflict," he said. "It is not a set of battle lines, where Bill Malden and Ernie Pyle can be with troops for week after week after week as they move across Europe or even across islands in the Pacific. This is a notably different activity. It's terribly untidy. We have bent over backwards to see that every opportunity that we could imagine that press people could be connected to that they were connected to. And they have been."

Rumsfeld added that "anyone who wants to in the press can get into Afghanistan and go anywhere they want. It's a free country. It's dangerous, and people are being killed, but it's a free country."

The danger to journalists in Afghanistan was reinforced on March 15, when the commanders of the multinational peacekeeping force in the country announced that they had credible intelligence that al Queda and Taliban operatives were planning to kidnap a foreign journalist in retaliation for the U.S. military operation.

Ten days earlier, a *Toronto Star* reporter was badly injured by a hand grenade thrown at car she was sharing with her husband, a photographer, and an Afghan driver. The car was in a convoy of reporters who left the town of Zurmat after they were threatened by gunmen loyal to a local warlord who had been detained by the American

military. The reporter is recovering at an American military hospital in Germany.

Eight journalists have been killed covering fighting in Afghanistan, in addition to the kidnapping and brutal murder of *Wall Street Journal* reporter Daniel Pearl in neighboring Pakistan.

#### Suit Seeks Open Hearings

Back in the U.S., there are several cases challenging the closure of deportation hearings after Sept. 11.

After the attacks, Chief Immigration Judge Michael Creppy instructed immigration judges to close immigration hearings connected to terrorism investigations. A copy of Creppy's memo is available at www.aclu.org/court/creppy\_memo.pdf (visited March 14, 2002).

In March, the ACLU filed a suit on behalf of the *New Jersey Law Journal* and the North Jersey Media Group challenging the closures. The court set an April 5 hearing date on plaintiffs' request for a preliminary injunction opening the hearings. *See North Jersey Media Group v. Ashcroft*, No. 02-CV-967 (D. N.J. filed March 6, 2002). The complaint is available online at www.aclu.org/court/creppy.pdf (visited March 14, 2002). The lead attorney for the media plaintiffs is Lawrence S. Lustberg of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. in Newark. The North Jersey Media Group publishes the *Herald News* in West Patterson, N.J., and the Hackensack, N.J. *Record*.

Separately, a Syrian man who was being detained pending deportation for overstaying his visa had filed his own lawsuit challenging the closed hearing policy. *See Zeidan v. Ashcroft*, No. 02-CV-843 (D. N.J. filed Feb. 28, 2002). The government released Maliek Zeidan on \$10,000 bail on March 13, and said that they would seek to have his lawsuit dismissed as moot. Zeidan

was represented by Ennet Dann Zurofsky of Reitman Parsonnet in Newark.

The remaining New Jersey lawsuit joins two lawsuits filed in Michigan over the issue of closed immigration hearings. *See Detroit Free Press, Inc v. Ashcroft*, No. 02-CV-70339 (E.D. Mich. filed Jan. 28, 2002), and *Detroit News, Inc. v. Ashcroft*, No. 02-CV-70340 (E.D. Mich. filed Jan. 29, 2002).

# UK Court of Appeals Reverses Controversial Privacy Ruling That Enjoined Publication of "Kiss and Tell" Articles

In a significant decision that may rein in privacy claims against the British press, the UK Court of Appeal this month reversed an order enjoining a newspaper from publishing true articles reporting on the adulterous affairs of a professional soccer player A v. B. & C., [2002] EWCA Civ 337 (Mar. 11, 2002) (LCJ Woolf, LJ Laws, LJ Dyson); see also LDRC LibelLetter, Nov. 2001 at 39. The lower court enjoined the newspaper on the ground that publication would be a breach of confidence and violate the player's right of privacy. Reversing, the Court of Appeal held that the injunction improperly restricted the freedom of the press and was based on an expansive notion of privacy not recognized in UK law. A law report on the decision is available in the archive of www.thetimes.co.uk; the full decision should be posted shortly on the official Court Service site www.courtservice.gov.uk/.

In the proceedings below the parties and even their solicitors were not identified to protect the plaintiff's privacy. After the Court of Appeal decision the newspaper defendant was identified as the *Sunday People*, published by Trinity Mirror. The paper's editor, Neil Wallis, hailed the decision as a "historic victory." Publication of the articles, though, was stayed for three weeks pending the plaintiff's application to the House of Lords for a discretionary appeal.

# Articles About Soccer Player's Extramarital Affairs

At issue in the case was a so-called "kiss and tell" series. Two women — a lap dancer and a teacher — who had affairs with the still-unnamed, married Premier League soccer player, sold their stories to the *Sunday People* tabloid. On learning of the forthcoming articles, the plaintiff obtained an injunction on publication in April 2001. In a written decision released in September 2001, High Court Justice Jack found that publication would be breach of confidence and invasive of the player's privacy. Most notably, he found that the law of confidence could apply to protect any disclosure of plaintiff's extramarital affairs — the law of confidence had previously only applied to intimate marital information — and that there was no public interest in the publication of the articles.

# Court of Appeals Rejects Privacy and Confidence Findings

The Court of Appeal squarely rejected both grounds for the injunction. First, it held that the law of confidence did not apply to plaintiff's extramarital affairs, finding that "relationships of the sort which [plaintiff] had with C and D are not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential." Id. at ¶ 45. Second, the Court of Appeal found that the plaintiff's behavior was a matter of public interest since "footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example."

Significantly, the Court of Appeal also faulted the standard under which the lower court issued the injunction. The Court held it was wrong to assume, as the lower court did, that once a privacy interest was recognized an injunction should issue unless the press could prove that publication served the public interest. The Court emphasizes that an injunction on the press constitutes a serious interference with free expression and the burden must be on the plaintiff to "justify" it. Indeed, the Court found that once it is determined that the free press interests outweigh a plaintiff's privacy concern, "then the form of reporting in the press is not a matter for the courts but for the Press Commission and the customers of the newspaper concerned." Id. at  $\P$  48. The Court of Appeal admonished courts not to engage in ad hoc decision making on the public interest of newspaper reports, recognizing that the existence of the press in and of itself serves the public interest.

#### Court Issues Guidelines for Future Cases

The Court of Appeal's decision also sets forth legal guidelines for courts and lawyers facing similar claims. The Court offered the guidelines to avoid excessive and costly litigation, as it thought had occurred in the present case. However, the guidelines seem as much intended to clarify the law surrounding privacy. The guidelines address a number of important substantive issues on the balance between press and privacy interests and might provide significant authority for future cases.

(Continued on page 43)

# UK Court of Appeals Reverses Controversial Privacy Ruling That Enjoined Publication of "Kiss and Tell" Articles

(Continued from page 42)

First, the court noted that prepublication injunctions interfere with a free press "irrespective of whether a particular publication is desirable in the public interest" and that "the existence of a free press is in itself desirable and so any interference with it has to be justified," quoting with approval Lord Justice Hoffman that "freedom which is restricted to what Judges think to be responsible or in the public interest is no freedom." *Id.* at Para. 11 (iv), citing *R v Central Independent Television PLC* [1994] Fam 192 at p.201-204.

#### Judges Need Not Determine if New Privacy Tort Exists

As to the existence of a new tort of privacy following the incorporation into UK law of the European Convention on Human Rights, the court observed that:

It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy. In the great majority of situations, if not all situations, where the protection of privacy is justified, relating to events after the Human Rights Act came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection. This means that at first instance it can be readily accepted that it is not necessary to tackle the vexed question of whether there is a separate cause of action based upon a new tort involving the infringement of privacy.

#### Id. at ¶11 (vi).

Directing courts to look to the law of confidence rather than developing any new law on privacy, the Court of Appeal addressed the proper balance between free press and privacy interests within this extant body of law. Among the significant guidelines:

1) The determination of whether a privacy interest exists "should not be the subject of detailed argument" because "usually the answer to the question whether there exists a private interest worthy of protection will be obvious. In those cases in which the answer is not obvious, an answer will often be unnecessary. *Id.* at ¶11 (vii).

- 2) The existence of a public interest in publication strengthens the case for not granting an injunction though even absent a public interest the interference with freedom of expression has to be justified. *Id.* at ¶11 (viii).
- 3) In most instances whether a publication is a matter of public interest will be obvious. "In the grey area cases the public interest, if it exists, is unlikely to be decisive. Judges should therefore be reluctant in the difficult borderline cases to become involved in detailed argument as to whether the public interest is involved." *Id*.
- 4) An intrusion into a situation where a person can reasonably expect his privacy to be respected will be capable of giving rise to liability in an action for breach of confidence unless the intrusion can be justified. For example:

The bugging of someone's home or the use of other surveillance techniques are obvious examples of such an intrusion. But the fact that the information is obtained as a result of unlawful activities does not mean that its publication should necessarily be restrained by injunction on the grounds of breach of confidence. Dependent on the nature of the unlawful activity there may be other remedies. On the other hand, the fact that unlawful means have been used to obtain the information could well be a compelling factor when it comes to exercising discretion.

*Id.* at ¶11 (x).

5) A more difficult question is presented where one party to an allegedly private sexual relationship speaks to the press. In this situation, the "conflict between one party's right to privacy and the other party's right of freedom of expression is especially acute." The law of confidence applies to legal marriages but courts also "have to recognize and give appropriate weight to the extensive range of relationships which now exist. Obviously, the more stable the relationship the greater will be the significance which is attached to it." The fact

(Continued on page 44)

# UK Court of Appeals Reverses Controversial Privacy Ruling That Enjoined Publication of "Kiss and Tell" Articles

(Continued from page 43)

that one of the parties to the relationship wants to disclose information does not extinguish the other party's right to have the confidence respected, but it does undermine that right. Id. at ¶11 (xi).

6) A public figure is entitled to a private life, but a public figure:

should recognize that because of his public position he must expect and accept that his actions will be more closely scrutinized by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position.

Id. at ¶11 (xii).

- 7) Whether a person has courted publicity or not, he or she may be a legitimate subject of public attention. If they have courted public attention they have less ground to object to the media coverage. *Id*.
- 8) In many of these situations "the public have an understandable and so a legitimate interest in being told the information. . . . The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media." *Id*.
- 9) In balancing free press and privacy interests "courts should not act as censors or arbiters of taste. This is the task of others. If there is not a sufficient case for restraining publication the fact that a more lurid approach will be adopted by the publication than the court would regard as acceptable is not relevant. If the contents of the publication are untrue the law of defamation provides prohibi-

- tion. Whether the publication will be attractive or unattractive should not affect the result of an application if the information is otherwise not the proper subject of restraint. Id. at ¶11 (xiii).
- 10) Courts may take into account, as one factor, the Press Complaints Commission Code of Practice,
- 11) "however, the court should discourage advocates seeking to rely on individual decisions of the Press Commission which at best are no more than illustrative of how the Press Commission performs its different responsibilities." *Id.* at ¶11 (xiv).
- 12) Summing up the Court of Appeal noted that "frequently what is required is not a technical approach to the law but a balancing of the facts. . . . In many situations the balance may not point clearly in either direction. If this is the position, interim relief should be refused. Id. at ¶12 (emphasis added).

#### Conclusion

The significance of the decision and the guidelines remain to be determined in future cases, but in the near term at least the decision should put some brakes on what had been a haphazard development of privacy rights at the expense of the press.

Sunday People was represented on appeal by Richard Spearman QC and Solicitor Marcus Partington; the plaintiff, by barristers Alastair Wilson QC, Stephen Bate, Jeremy Reed and George Davis Solicitors.

The Code provides in relevant portion that: "The use of long lens photography to take pictures of people in private places without their consent is unacceptable. Note – Private places are public or private property where there is a reasonable expectation of privacy. Harassment – They must not photograph individuals in private places (as defined by the note to clause 3) without their consent; must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist; must not remain on their property after having been asked to leave and must not follow them. The public interest – 1. The public interest includes: (i) Detecting or exposing crime or a serious misdemeanor. (ii) Protecting public health and safety. (iii) Preventing the public from being misled by some statement or action of an individual or organization."