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MEDIALAWLETTER

Reporting Developments Through March 25, 2005

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MLRC

REPORTERS' PRIVILEGE

LIBEL & PRIVACY

In Remembrance: Ralph Elliot

Ralph Elliot, of Tyler Cooper & Alcorn in Hartford, Connecticut, passed away this month at age 68. Ralph Elliot was a longstanding member and contributor to MLRC and was best known for his vigorous advocacy on access issues and for his wide ranging expertise on legal ethics issues.

He was the dean of the First Amendment bar in Connecticut and represented *The Hartford Courant* for more than 40 years. He was recently involved in the newspaper's successful challenge to a longstanding practice in the state of maintaining a secret docket of cases. He also taught at Yale School of Law and endowed the Ralph Gregory Elliot lectures on the First Amendment.

Elliot also gained a national reputation on legal ethics, codifying ethics opinions in Connecticut and for the ABA.

U.S. District Judge Mark Kravitz (a former MLRC member himself) said about Ralph: "He really exemplifies all those things we all go to law school thinking we may turn out to be. He was a scholar, a counselor extraordinaire."

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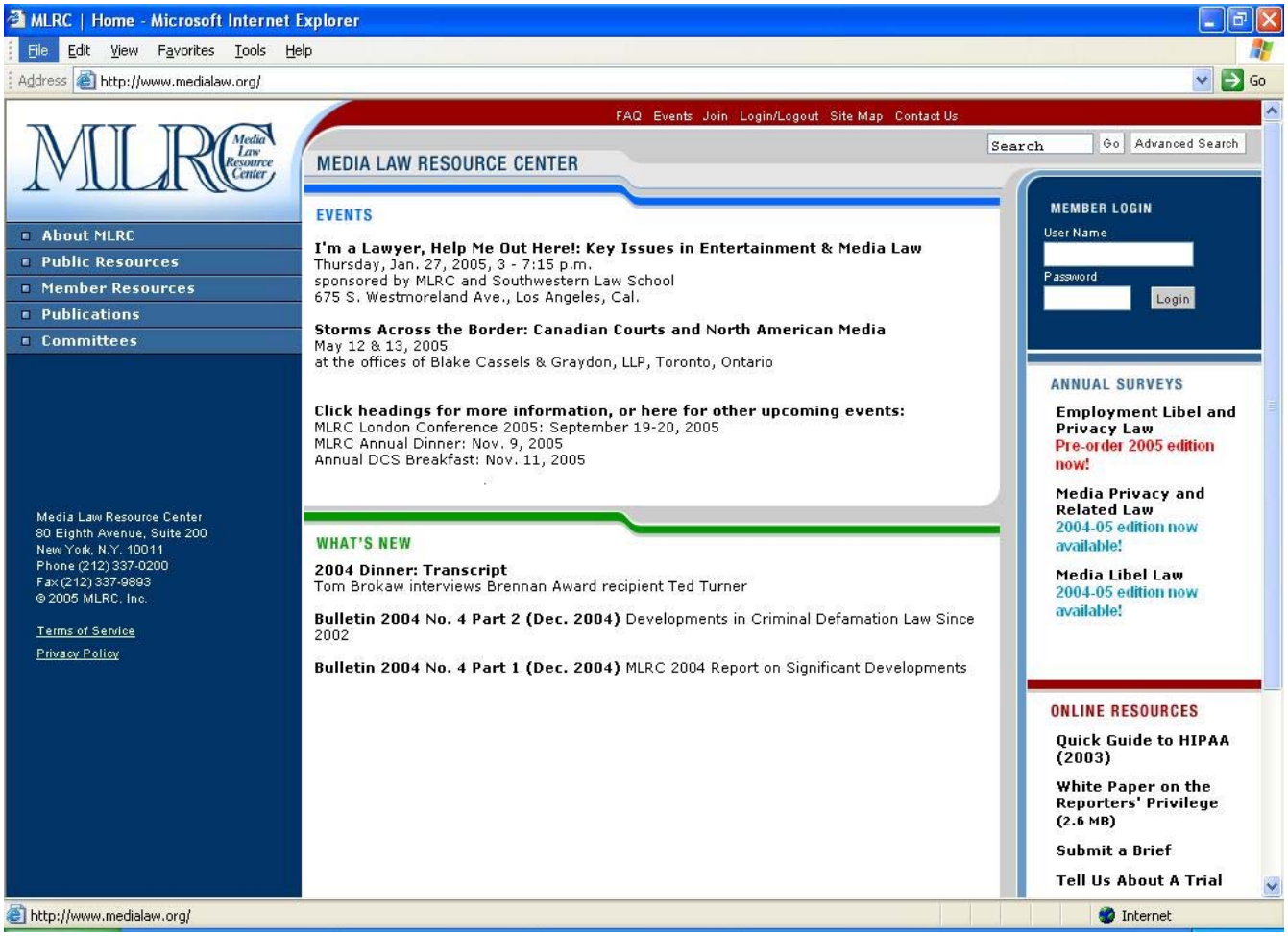

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Contact Debby Seiden, dseiden@medialaw.org, for details.

U.S. Supreme Court Hears Argument in *Cochran v. Tory* Libel Case

On March 22, the U.S. Supreme Court heard oral argument in *Cochran v. Tory*, 2003 WL 22451378 (Cal. App. Oct. 29, 2003) (unpublished), *cert. granted*, 125 S. Ct. 26 (Sept. 28, 2004) (No. 03-1488), a case centering on post-trial injunctions in libel cases.

This is the first libel case the Court has heard since *Masson v. New Yorker* was decided in 1991. It is a libel action brought by high-profile lawyer Johnnie Cochran against a disgruntled former client.

The defendants picketed outside Cochran's office with signs stating among other things: "Johnnie is a crook, a liar and a Thief." The trial court found the statements to be deliberately false and issued a broad permanent injunction against the defendants, barring them from making *any* public comments at all about Cochran and his firm. A California appellate court affirmed, finding that "although a prior restraint can be presumptively unconstitutional, that rule has no application where, as here, an injunction against a private person operates to redress alleged private wrongs."

Defendants' petition for certiorari presented the question: Does a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violate the First Amendment?

Supreme Court Hearing

Professor Erwin Chemerinsky, Duke University School of Law, argued for the defendant; Jonathan B. Cole, of Nemecek & Cole in Sherman Oaks, California, argued for plaintiff.

Cole sought to defend the injunction as a remedy for what he characterized as essentially extortionate threats. According to news reports, the argument did not play well with the Court with several Justices appearing to side squarely with the defense position that the injunction constituted an impermissible prior restraint.

Justice Sandra Day O'Connor cited *Near v. Minnesota*, stating "You can't square it with the *Near* case at all.... It's clearly overbroad." Chief Justice Rehnquist and Justices Kennedy and Souter appeared to agree. Rehnquist noted that the libel was "a far cry" from a true extortion threat. Kennedy observed that even a more narrowly defined injunction would be impermissible. And Souter observed that the injunction could be read so broadly to even bar Chemerinsky from speaking about the case to the Court.

Justice Sandra Day O'Connor cited* Near v. Minnesota, *stating "You can't square it with the* Near *case at all.... It's clearly overbroad."

Several Justices questioned Chemerinsky about what remedy libel plaintiffs would have against judgment-proof defendants. Chermerinsky stressed that such a broad injunction was flatly unconstitutional and went beyond any alleged defamatory speech by defendant. He also stressed that the statements at issue were not defamatory – an argument that was not taken up by the Court but one which the Court could take up in its decision.

Supreme Court Briefs in Cochran v. Tory and in next week's argument in MGM Studios v. Grokster are available online at:

www.abanet.org/publiced/preview/briefs/march05.html

Second Circuit Holds Ban on Publication of Juror Names Unconstitutional

The Second Circuit ruled this month that the district court that presided over last year's high-profile criminal obstruction trial of Frank Quattrone, a former Credit Suisse First Boston investment banker, violated the First Amendment by entering an order forbidding the press from publishing the names of jurors that had been read out in open court. *United States v. Quattrone*, No. 04-2432-cr (2d Cir. Mar. 22, 2205) (Sotomayor, J.).

Background

Shortly before the *Quattrone* trial, former Tyco executive Dennis Kozlowski was on trial in a New York state court in Manhattan for allegedly looting over $600 million from his company. That lengthy trial received great media attention and ultimately ended in a mistrial after several media outlets published the name of a juror who appeared to make an "ok" hand sign to the defendant.

The judge in the *Kozlowski* case eventually declared a mistrial, citing the "pressure" brought to bear on the juror after she received an anonymous phone call and frightening letter after her name was published in two separate newspapers.

U.S. District Court Judge Richard Owen, seeking to avoid a similar result in the *Quattrone* trial, entered an order forbidding the publication of the jurors' names until the conclusion of the trial. (Quattrone was already being retried after the jury in the first trial deadlocked. He was convicted in May 2004 on all charges.)

After the order was entered, counsel for several media organizations objected to the order in Judge Owen's robing room. The prosecution also took the position that the order might be unconstitutional as a prior restraint. After Judge Own refused to rescind the order, the media entities appealed.

Order Held Unconstitutional

Recognizing that an order forbidding disclosure of information gathered from public judicial proceedings constitutes a prior restraint as well as an infringement on the right to report freely on events in open court, the Second Circuit concluded that Judge Owner's order violated the First Amendment.

The Second Circuit found that before enacting the prior restraint – "the most serious and the least tolerable infringement" on a free press – the district court failed to grant the media prior notice of the restraint, and to satisfy a three-part test that looks to: whether the news coverage would impair the defendant's right to a fair trial; whether any measure other than a prior restraint could mitigate the possible effects of unrestricted publicity; and the likely efficacy of a prior restraint to prevent the threatened harm.

The Second Circuit further ruled that an "independent constitutional harm" was rendered to the media by the trial court's order forbidding them from publishing information disclosed in open court. The Court based its decision on extensive Supreme Court precedent holding that those who view what happens in open court may "report it with impunity," and that the press will not face liability for publishing information disclosed in public court. (citations omitted).

The Media appellants were represented by Floyd Abrams of Cahill Gordon & Reindel with Joel Kurtzberg of Cahill Gordon & Reindel and David A. Schulz and Alia L. Smith of Levine Sullivan Koch & Schulz LLP on the brief.

Florida Broadcaster Seeks Supreme Court Stay of Trial Court's Prior Restraint Order

By George D. Gabel, Jr., Charles D. Tobin, and Jennifer A. Mansfield

On Tuesday, March 8, 2005, Multimedia Holdings Corporation d/b/a First Coast News, a Gannet television station in Jacksonville, Florida, asked a Supreme Court justice to stay a prior restraint entered by a state judge in a St. Augustine murder case. The application seeks to stay the trial court's orders pending a petition for certiorari review before the Court. The application was filed with the chambers of Justice Anthony M. Kennedy, Circuit Justice for the Eleventh Circuit. *Multimedia Holdings, Inc. d/b/a First Coast News v. Circuit Court of the Seventh Judicial Circuit, State of Florida*, No. 04A773 (filed March 8, 2005, United States Supreme Court).

Judge Robert K. Mathis, without notice or a hearing, entered an order enjoining* First Coast News *and others from further publishing information from the grand jury transcript.

Background

The controversy began in July, 2004 when a state prosecutor responded to a pubic records request and gave a *First Coast News* reporter the transcript of a murder defendant's grand jury testimony. Florida's public records law provides that documents given or required to be given to a criminal defendant are public record. The State Attorney's Office provided the transcript to the *First Coast News* reporter at the same time as it released the transcript to the defendant. The station broadcast a story with details of the testimony.

When Florida Circuit Judge Robert K. Mathis, who presided in the criminal case, learned of the broadcast, he *sua sponte* and without notice or a hearing entered an order enjoining *First Coast News* and others from further publishing information from the grand jury transcript. The order also threatened criminal prosecution and criminal contempt of court against anyone who further published the transcript. The judge also ordered the transcript removed from the public record and placed in an evidence locker. Finally, he ordered all recipients to maintain a copy of the transcript to be used as evidence in a future prosecution under Florida's grand jury secrecy statute. After entering his July 30 order, the trial judge immediately left for a one week trip to Europe. *First Coast News'* counsel, immediately after learning of the order, moved in the trial court to intervene to vacate the order. When counsel learned the judge was away for a week, he contacted the Chief Judge of the Florida Seventh Judicial Circuit. The chief judge, however, refused to hear the motion herself or to assign another judge.

Immediately after being denied a hearing, *First Coast News* moved for a petition for writ of certiorari with the Fifth District Court of Appeal, pursuant to Florida's expedited review procedure for orders denying the press access to courts. Initially, the Fifth District Court of Appeal responded quickly and ordered expedited briefing on the merits. But, during the briefing period, the trial judge returned from Europe and issued another order, on August 9, 2004.

In it, the trial judge said that he did not enjoin *First Coast News* from publishing matters in the public record. Rather, in the trial court's view, "*First Coast News* was placed on notice, along with all other persons who might have obtained copies of the transcript of the grand jury proceedings, that publication or broadcast, or disclosure of such information, is a crime and may be punished as contempt of court."

He also denied *First Coast News* the opportunity to intervene in the trial court proceedings. Judge Mathis that same day also took the remarkable step of writing Florida Governor Jeb Bush, requesting appointment of a special prosecutor to prosecute the Assistant State Attorney for releasing the grand jury testimony, and *First Coast News* for what he deemed a violation of Florida's grand jury secrecy statute.

Also highly unusual, the State of Florida sided with the station in the appeal. The State Attorney filed a brief with *First Coast News'* petition in the appellate court, agreeing that the trial judge's orders were a prior restraint and unconstitutional infringement of speech and

(Continued on page 8)

Florida Broadcaster Seeks Supreme Court Stay of Trial Court's Prior Restraint Order

(Continued from page 7)

the press. The State Attorney also argued, and asked the appellate court to decide, that the prosecutor was correct in turning over the grand jury transcript, since it became a public record under Florida's sunshine laws.

Although the Fifth District Court of Appeal ordered expedited briefing on the merits, the court took no further action. Immediately after briefing concluded, three hurricanes hit Volusia County, Florida, where the District Court sits. Nonetheless, six months after briefing concluded, the appellate court still had not ruled on *First Coast News'* petition. During that time the murder case was set for trial this June.

With no word from the appeals court and still operating under the restrictions imposed by the trial court's orders, *First Coast News*, on February 22, 2005, filed a Petition for Writ of Mandamus with the Florida Supreme Court. A week later, prior to the Florida Supreme Court acting on the Mandamus petition, the Fifth District Court of Appeal issued an order on March 2, 2005, summarily denying all review of the trial court's orders. The appeal court's decision contained no grounds or analysis, which, under Florida's court rules, deprives the Florida Supreme Court of jurisdiction to review the matter.

Stay Application to Justice Kennedy

In applying to Justice Kennedy for a stay, *First Coast News* points out that throughout the protracted procedural history in the lower courts, it has never been granted a hearing. The application argues to Justice Kennedy that the trial court's orders "come to this court bearing a heavy presumption against their constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). It points out that the Supreme Court has never permitted punishment of the press for publishing information that has lawfully come into its hands, relying upon the cases *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); and *Florida Star v. B.J. F.*, 491 U.S. 524 (1989).

First Coast News argues that, by first restraining applicant from further broadcasting material lawfully in its possession, and threatening prosecution based on past and future broadcasts, the trial court's orders constitute a classic example of a prior restraint. *First Coast News* also argues that the specter of criminal punishment for speech on matters of public concern is just as much a threat to First Amendment rights as an outright injunction.

Eleven news organizations and journalism nonprofits filed an *amici curiae* brief in support of *First Coast News'* application for a stay. The *amici* focus on the historical underpinning of First Amendment protections. They also argue that the trial court "appears to have framed its judicial orders for the obvious purpose of restraining speech while seeking to evade the immediate appellate review that this Court has declared to be an essential procedural safeguard for the imposition of prior restraints," and the appellate court endorsed the trial court's actions when it denied review. The *amici* warn that this case could serve as a model for future censorship if the Supreme Court does not grant the requested stay.

George D. Gabel, Jr., and Jennifer A. Mansfield of Holland & Knight LLP's Jacksonville, Florida office and Charles D. Tobin, of the firm's Washington, D.C. office represent First Coast News. Nathan E. Siegel, Ashley I. Kissinger, and Chad R. Bowman of Levine, Sullivan, Koch & Schulz, LLP, Washington, D.C. are counsel for the Amici Curiae. Lucy A. Dalglish, Gregg P. Leslie, and James A. McLaughlin, of the Reporters' Committee for Freedom of the Press, Arlington, Virginia, and Robert Rivas, of Sachs, Sax & Klein, P.A., Tallahassee, Florida, were counsel for the amici in the Florida proceedings. Counsel for the State of Florida has not appeared in the Supreme Court proceedings. Jonathan D. Kaney, Jr., of Daytona Beach, Florida, represented the State in the proceedings below.

Any developments you think other MLRC members should know about?

Call us, or send us a note.

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California Court Allows Apple to Seek Confidential Source of Leaked Trade Secrets

Court declines to determine whether "bloggers" qualify as journalists

A California trial court has ruled that Apple Computer, Inc. ("Apple") is entitled to subpoena an e-mail provider to try and identify the source(s) of leaked information published on several websites. In a closely watched case, the court declined to determine whether the website publishers – who sought to quash the subpoena – qualified as journalists under the California shield law. *Apple Computer, Inc. v. Doe*, No. 1-04-CV-032178 (Cal. Super. Mar. 11, 2005) (Kleinberg, J.).

Background

In December 2004, Apple filed suit against numerous unknown entities in connection with the leak of confidential information prior to the release of an Apple product codenamed "Asteroid." The information, which Apple claims are trade secrets, was posted on a number of websites, including AppleInsider (www.appleinsider.com) and PowerPage (www.powerpage.org)

In the course of discovery, Apple subpoenaed Nfox, the e-mail service provider for PowerPage, seeking e-mail messages that could identify the source(s) of the leaked information.

Although Nfox did not object to the subpoena, movants, loosely referred to as "bloggers," intervened to quash the subpoena, arguing that their confidential source(s) were protected from disclosure under the California shield law.

Apple disagreed, arguing that neither the California shield law or any federal reporters' privilege could be invoked to bar the discovery of information pertaining to the acquisition and dissemination of trade secrets, an alleged violation of the California civil code and penal law. *Citing* Uniform Trade Secrets Act, Civil Code Sec. 3426 et seq., Penal Code Sec. 499c.

Apple Entitled to Information

In holding that Apple was entitled to the information sought through the subpoena, the court found that Apple made a *prima facie* case that the drawings and technical specifications posted on the websites – reproduced from a set of company slides before the release of the product – constituted trade secrets, and that Apple had conducted an adequate internal investigations before issuing the subpoena.

Citing to both the California Supreme Court's opinion in *Mitchell v. Superior Court*, 37 Cal. 3d 268 (1984) – which addressed the extent of the reporters' privilege in discovery disputes – and the text of the California shield law, the court found that neither would prevent discovery of the information at issue.

The court held that the leaked trade secret information was in effect "stolen property," and that movants had failed to allege any significant public interest in the information that would justify the publication of "private, proprietary information that was ostensibly stolen and turned over to those with no business reason for getting it."

Trade Secrets and Reporters Privilege

The court went on to find it unnecessary to determine whether the bloggers at issue qualified as journalists under the shield law, concluding that even if it were to accept movants' characterization of their journalistic activities, there is no exception to California's trade secret laws for "journalists, bloggers or anyone else," and that "reporters and their sources do not have a license to violate criminal laws such as Penal Code Sec. 499c," thus making it irrelevant whether movants were in fact journalists.

Apple is also pursuing a separate lawsuit in California against the 19-year-old operator of the Boston-based website "Think Secret" and various anonymous entities for allegedly publishing trade secrets on that website. Think Secret, www.thinksecret.com, bills itself as "the Internet's top source for news scoops about Apple and the Mac."

Apple is represented by George Riley and David Eberhart of O'Melveny & Myers.

Movants are represented by Thomas E. Moore III of Tomlinson & Zisko; Richard E. Wiebe and Terry Gross of Gross & Belski; and Kurt B. Opsahl of the Electronic Frontier Foundation.

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Plame Update: Media Coalition Changes Tack on Motion for Rehearing

On March, 23, media groups filed an amicus brief with the U.S. Court of Appeals for the District of Columbia Circuit on March 23 in support of the petition for rehearing by Judith Miller, Matthew Cooper and Time Inc.

In contrast to constitutional arguments made by the appellants, the 36 news organizations and reporters' groups assert that the appellate court should first determine whether the disclosure that Valerie Plame was a CIA agent constituted a crime before a court compels the journalists to disclose their confidential sources. The brief states that:

> In this case, there exists ample evidence on the public record to cast serious doubt as to whether a crime has even been committed under the Intelligence Identities Protection Act (the "Act") in the investigation underlying the attempts to secure testimony from Miller and Cooper. If in fact no crime under the Act has been committed, then any need to compel Miller and Cooper to reveal their confidential sources should evaporate.

The amicus brief, prepared by Bruce Sanford, Baker & Hostetler, argues that the Intelligence Identities Protection Act was narrowly drafted to cover "pernicious" efforts to reveal agents and crafted so as not to impede newsgathering by the press.

Connecticut and Texas Legislators Introduce Shield Law Bills

Bills have been introduced in the Connecticut and Texas legislatures that would create shield laws in each state. Representative James Spallone is the main co-sponsor of the Connecticut bill (No. 5385). It would protect journalists from being held in contempt for refusing to disclose confidential news or the sources of such news.

The bill would also provide journalists with a qualified privilege against disclosure of non-confidential news and sources. Such a privilege may be overcome if the information "(1) is highly material and relevant; (2) is critical or necessary to the maintenance of the party's claim or defense or proof of an issue material thereto; and (3) is not obtainable from any alternative source." (For a copy of the Connecticut bill, go to: http://www.cga.ct.gov/2005/tob/h/2005HB-05385-R01-HB.htm)

The Connecticut bill received some resistance from within the media in hearings before the state Judiciary Committee on March 7. Speaking on behalf of the Connecticut Council on Freedom of Information, Chris Powell, managing editor of the *Journal Inquirer*, argued the bill would create a "privileged class" and "… allow anyone employed in journalism to refuse to give evidence, even in the most important court proceeding, simply by claiming that he had obtained that evidence in confidence in pursuit of journalism."

Kevin Crosbie, publisher of the *Willimantic Chronicle*, spoke on behalf of the Connecticut Daily Newspaper Association in support of the bill. (To read a transcript of the hearing, go to: http://www.cga.ct.gov/2005/JUDdata/chr/2005JUD00307-R001400-CHR.htm)

In the Texas House of Representative and Texas Senate, identical bills were introduced by Representative Aaron Pena (H.B. No. 188) and Senator Rodney Ellis (S. B. No. 604). The bill would creates and absolute privilege for confidential sources and a qualified privilege for information and documents. The Texas bill also carves out from the privilege any eyewitness observations of criminal or tortious conduct by journalists. (For a copy of the Senate bill in Texas, go to: http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=79&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=00604&VERSION=1&TYPE=B)

A hearing before the Senate Jurisprudence Committee on S.B. No. 604 is scheduled for March 30.

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Texas Supreme Court Grants Summary Judgment for Newspaper In Public Official Libel Case

By Bill Ogden

The Texas Supreme Court has rendered a defense summary judgment in a public official libel case filed against a Texas newspaper, holding that the record conclusively negated actual malice as a matter of law. *The Hearst Corporation, d/b/a The Houston Chronicle Publishing Company and Evan Moore v. Jack Skeen, David Dobbs and Alicia Cashell*, Case No. 04-0414, 2005 WL 563100, 48 Tex. Sup. Ct. J. 484 (Mar. 11, 2005).

In a rare unanimous *per curiam* opinion, issued without granting oral argument, the Supreme Court reversed the trial court and the Fort Worth Court of Appeals, both of which had ruled that the plaintiffs raised viable fact issues regarding the article's truth, defamatory meaning, and publication with malice.

The Texas Supreme Court examined the plaintiffs' principal contentions on actual malice, explaining in turn why each was insufficient.

Background

On June 11, 2000, the *Houston Chronicle*, a division of The Hearst Corporation, published an article entitled "Justice Under Fire" researched and written by Chronicle reporter Evan Moore. Subtitled "Win at All Costs is Smith County's Rule, Critics Claim," the article cites critics who described Smith County's criminal justice system as "tainted and inequitable," and "driven by aggressive prosecutors who achieve some of the state's longest sentences."

Drawing on both attributed and anonymous sources, with references to over a dozen criminal cases, the article stated that Smith County prosecutors "have been accused of serious infractions: suppressing evidence, encouraging perjury and practicing selective prosecution, resulting in a notoriety that extends beyond state borders."

Three Smith County prosecutors sued the *Houston Chronicle* for libel: District Attorney Jack Skeen, and assistant district attorneys David Dobbs and Alicia Cashell. After extensive discovery, Hearst moved for summary judgment on multiple grounds, including (1) truth, (2) absence of malice and (3) statutory and constitutional privilege.

The trial court denied summary judgment. Utilizing Texas' interlocutory appeal statute, Hearst appealed the denial of summary judgment to the Fort Worth Court of Appeals, which affirmed the trial court's ruling and found that sufficient fact questions were raised for a jury. *Hearst Corporation v. Skeen,* 130 S.W.3d 910 (Tex. App.- Ft. Worth 2004, pet. granted).

Texas Supreme Court

In reversing and rendering summary judgment in favor of the newspaper, the Texas Supreme Court examined the plaintiffs' principal contentions on actual malice, explaining in turn why each was insufficient.

Plaintiffs first claimed that Moore had conducted an inadequate investigation in failing to survey a statistically relevant number of cases before writing that Smith County had a "pattern" or "rule" of aggressive prosecution, and in relying on biased sources, such as defendants and defense lawyers. The Court found that the journalist was not required to conduct a statistical sampling of all prosecutions before publishing criticisms on the problem cases he had researched.

As to the allegedly inadequate investigation, the Court reiterated the rule in *Bentley v. Bunton,* 94 S.W.3d 561 (Tex. 2002): "a failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is."

The Court then analyzed why Skeen failed to state a purposeful avoidance claim, emphasizing four factors.

1. ***Extensive research.*** The Court noted that Moore spent 5 months researching his article, interviewing parties on both sides of the issues, and reviewing voluminous court records in over a dozen cases profiled in the article, some of which extended back 20 years. The Court's opinion repeatedly cites *Huckabee v. Time Warner,* 19 S.W.3d 413 (Tex. 2000), another public official libel case dealing with an HBO documentary profiling custody rulings in domestic relations cases. Both *Huck-*

(Continued on page 14)

Texas Supreme Court Grants Summary Judgment for Newspaper In Public Official Libel Case

(Continued from page 13)

abee and *Skeen* highlight the significance of building a summary judgment record with detailed and comprehensive affidavits to demonstrate the reporter's thoroughness in newsgathering.

2. *Claims not readily disproved.* Again quoting *Huckabee*, the Court held that the purposeful avoidance theory did not apply because "no source could have easily proved or disproved the documentary's allegations." Implicitly, this factor seems akin to traditional opinion analysis: claims that the D.A. has a "win at all costs policy" or engages in a "pattern of overzealous prosecution" which results in "a notoriety that extends beyond state borders" are not readily verifiable (capable of being proved or disproved); therefore, republication of these criticisms does not make a purposeful avoidance case.

3. *Quality and quantity of sources.* In discussing the reporter's extensive research, the Court gave special credence to the quality and quantity of sources that Moore interviewed. The Court noted that Moore interviewed over twenty attorneys, and emphasized that several attorneys, "including perhaps most significantly a former Smith County D.A.," spoke on the record and for attribution. The Court contrasted this record with the facts in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), in which the newspaper relied upon a single dubious source concerning claims of a tape recording raising bribery allegations, without listening to the tape recording and despite the fact that the source's uncorroborated claims were disputed by every other witness. By contrast, the breadth and depth of Moore's research persuaded the Court that there had been no purposeful avoidance.

4. *Not inherently improbable.* The Court finally concludes there was no evidence of purposeful avoidance because the reporter's criticisms were not inherently improbable. This analysis comes very close to stating that the criticisms were in fact true, or were at least privileged because they were accurate accounts of public trial records. For example, the opinion cites one criticism of an assistant district attorney that was corroborated by a finding of prosecutorial misconduct in an opinion published by the Texas Court of Criminal Appeals.

Other criticisms regarding the suppression of exculpatory evidence were documented in the public record by statements in a petition for a writ of habeas corpus. The claim that assistant district attorney Alicia Cashell had coached a prosecution witness to lie was corroborated by references to three affidavits filed as public records in that case. Since the published criticisms were accurately recounted in public records, the claims were not inherently improbable, and there could be no purposeful avoidance. But of course, it could also be said that criticisms accurately documented in the public record are either true or privileged.

With the new opinion in Hearst v. Skeen, the Court appears back on track in applying more rigorous constitutional analysis in public official libel claims.

Conclusion

The *Skeen* opinion is a welcome move in the right direction. In 2002, the Texas Supreme Court issued its first opinion affirming a jury finding of actual malice in a public official libel case in *Bentley v. Bunton,* 94 S.W.3d 561 (Tex. 2002). Two years earlier, the Court had embraced the overly elastic theory of libel "based on the publication as a whole," holding that a public official plaintiff could still prove falsity, even if every statement in an article was literally true, where the article created a substantially false impression by "omission or juxtaposition" of true facts. *Turner v. KTRK Television*, 38 S.W.2d 103 (Tex. 2000).

Both *Turner* and *Bentley* gave public official plaintiffs considerably stronger ammunition in filing libel complaints, or at least in avoiding summary judgment. With its favorable opinion last year in *New Times, Inc. v. Isaacks,* 146 S.W.3d 144 (Tex. 2004), and now with the new opinion in *Hearst v. Skeen*, the Court appears back on track in applying more rigorous constitutional analysis in public official libel claims.

Bill Ogden and Joel White, Ogden, Gibson, White, Broocks & Longoria, L.L.P., Houston, Texas, represented the Hearst Corporation together with Gregory Coleman, Weil, Gotshal & Manges, L.L.P., Austin, Texas. The plaintiffs were represented by Gary Richardson of Tulsa, Oklahoma, and by Bruce L. Mulkey of Rogers, Arkansas.

California Supreme Court Tosses Verdict Over Net Speech

By Karl Olson

In a case which disproved the adage that hard cases make bad law, the California Supreme Court this month threw out a $775,000 jury verdict against two former Varian Medical Systems employees who continually "flamed" the company with Internet postings because the case went to trial before an appeal of an anti-SLAPP ruling was heard. *Varian Medical Systems, Inc. v. Delfino*, No. S121400, 2005 WL 486787 (Cal. March 3, 2005) (Brown, J.).

The Supreme Court's ruling on a key procedural issue had been urged by major California newspapers which filed an amici curiae brief supporting the defendants. The Court's ruling continues an unbroken string of victories for California newspapers when they have filed amicus briefs on the merits in the court on anti-SLAPP issues.

Background

This case involved an unusual set of facts. Varian sued its former employees, Michelangelo Delfino and Mary Day, who between them published thousands of message board postings about the company. Undaunted by the lawsuit, they continued to post messages even during the trial, including messages sharply critical of the trial judge and Varian's counsel.

None of that colorful history, however, was before the California Supreme Court. The Court granted review only on a narrow procedural issue: does an appeal from the denial of an anti-SLAPP motion automatically stay proceedings in the trial court?

California Supreme Court Decision

The court, resolving a split between Courts of Appeal, answered "yes." Its unanimous opinion on that issue – authored by Justice Janice Rogers Brown, who has been nominated to the District of Columbia Court of Appeals – held that the Legislature, in allowing appeals from orders denying anti-SLAPP motions, "clearly intended that the perfecting of an appeal from the denial of an anti-SLAPP motion stay further trial court proceedings on the merits."

A trial, the court ruled, "is inherently inconsistent with the appeal because the appeal seeks to avoid that very proceeding. Indeed, '[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights," the Court held unanimously.

Six of the seven justices held that the verdict for Varian had to be tossed out because the trial had proceeded while the appeal from the anti-SLAPP ruling was pending. Chief Justice Ronald M. George would have retained the verdict, arguing that the error was harmless.

The Court did, however, caution defendants not to use appeals simply to delay proceedings. "In light of our holding today, some anti-SLAPP appeals will undoubtedly delay litigation even though the appeal is frivolous or insubstantial. Such an assessment is, however, a question for the Legislature, and the Legislature has answered it." But Justice Brown urged courts to dismiss frivolous appeals as soon as possible and said trial courts "should not hesitate to award attorneys' fees and costs to prevailing plaintiffs" if a motion or appeal is solely intended to delay matters.

The Court's ruling, while it didn't involve media defendants, preserves the anti-SLAPP statute as a potent defense for California publishers and broadcasters, who have used the law with great success since it was passed in 1992. The brief filed for the California Newspaper Publishers Association and many of its largest members told the Court that the anti-SLAPP statute

> has enabled the state's newspapers, and those they cover, to breathe and speak a little freer, a little less fearful of the threat of lawsuits designed to stifle the open discourse which is the hallmark of our democracy. And as a result, it has enabled the state's newspapers to do what they've done since gold was discovered at Sutter's Mill: inform Californians about important events and contribute to the functioning of a health democracy.

What will happen to the defendants and Varian Medical Systems? Varian told the press, "We are reviewing our options." But the Court's decision to throw out the verdict in a defamation case filed in 1999 should send the same message the Legislature intended when it passed the anti-SLAPP statute: either counter-speech, or a "grin and bear it" attitude, is the best antidote to unwelcome criticism.

Karl Olson of Levy, Ram & Olson in San Francisco represented the media amici. Varian Medical Systems was represented by Lynne Hermle and Matthew Poppe of Orrick Herrington & Sutcliffe. Defendants were represented by Jon Eisenberg and Jeremy Rosen of Horvitz & Levy.

Washington Supreme Court Rules for Media in Defamation by Omission Action

The Washington Supreme Court has reinstated a trial court's grant of summary judgment for media defendants after finding that a private figure plaintiff failed to make a prima facie showing of falsity in a "defamation by omission" action. *Mohr v. Grant*, No. 74208-1 (Wash. Mar. 24, 2005) (Fairhurst, J.).

Background

In 1998, defendant KXLY-TV ran four reports on the prosecution of Glen Burson, a 40-year-old man with Down's Syndrome who had been arrested for criminal trespass and harassment. Burson was arrested for refusing to leave plaintiff Eliot B. Mohr's store and threatening Mohr and his wife.

In the first report, defendant reporter Tom Grant presented a sympathetic portrait of Burson, reporting Burson's claim that he was only trying to get candy and was grabbed and hit by Mohr. Burson's family described him as gentle and harmless. Mohr and prosecutors declined to be interviewed for this broadcast. Although the broadcast did not name Mohr, it identified his business and showed the storefront. And after the broadcast more than 30 viewers called the business to complain and threaten a boycott.

After complaining about the broadcast, Mohr appeared in a subsequent broadcast to say that Burson had prior arrests for threatening the couple, had been warned by police not to enter the store and that he did not want Mohr prosecuted but simply restrained from threatening him and his wife.

Mohr later sued KXLY-TV and Grant for libel, claiming that by initially omitting these facts the broadcasts created the false impression that he bullied and assaulted Burson.

Courts Below

The trial court granted summary judgment for defendants finding the broadcasts contained no false statements of fact. The appellate court reversed, ruling in a case of first impression under Washington law that plaintiff could have a claim for "defamation by omission." 68 P.3d 1159, 1162 (2003).

Supreme Court Reverses

On appeal to the Washington Supreme Court, a divided court reinstated summary judgment for the broadcaster and reporter. The Court applied a "defamation by implication" analysis, one that the court stated it had employed before and was appropriate when a defendant is alleged to have "juxtapose[ed] a series of facts so as to imply a defamatory connection between them, or creat[ed] a defamatory implication by omitting facts.'"

To establish that true statements conveyed a false impression through the omission of material facts, a plaintiff must show that the alleged false impression would have been contradicted by the inclusion of omitted facts.

To support his claim, plaintiff submitted a declaration by a viewer stating she had a negative impression of Mohr after the first broadcast, and a prosecutor's statement that the first broadcast was "one-sided."

The court found such evidence inadequate to substantiate plaintiff's claim. First, these submissions were based solely on the first broadcast, and the Court found that any defamatory implication was negated by Mohr's appearance in the later broadcast where he told his side of the story.

Second, the Court noted that the reporter did not have the additional facts about Burson's history of conduct at the time of the first broadcast. Although it did not say so expressly, the Court appeared to reason that the reporter could not, therefore, have intended a defamatory implication.

The Court concluded that plaintiff failed to show falsity, therefore the media defendants were entitled to summary judgment.

Writing separately Chief Justice Alexander agreed in the result but found no authority under Washington law to recognize a claim of libel based on omitted facts. Writing in dissent for three justices, Justice Chambers would have held that plaintiff made a sufficient showing of falsity to support a claim for libel by omission.

The media defendants were represented by Laurel Siddoway of Spokane, Wa. Plaintiffs were represented by Ryan Beaudoin of Spokane, Wa. A media amicus brief was submitted by Michele Earl-Hubbard, Alison Howard, Bruce Johnson, and Eric Martin of Davis Wright Tremaine LLP, of Seattle, Wa.

Fifth Circuit Affirms Dismissal of "Jackpot Justice" Lawsuit Brought Against *60 Minutes* in Mississippi

By Tom Curley

In a *per curiam* opinion adopting the reasoning of the trial court, the Fifth Circuit Court of Appeals affirmed the dismissal of a lawsuit brought against *60 Minutes* concerning a news report on large damage awards in tort suits in Mississippi state courts. *Gales v. CBS Broadcasting Inc.*, No. 04-60710, 2005 WL 488764 (5th Cir. Mar. 3, 2005).

The Fifth Circuit agreed with the district court below that, taken as a whole and in context, the *60 Minutes* report was not "of and concerning" the plaintiffs, former jurors in state tort suits.

Notably, in dismissing the lawsuit, the district court had emphasized that the "of and concerning" element is strictly applied under Mississippi law. The Fifth Circuit opinion reiterated this principle, holding that "general references to a comparatively large group do not constitute actionable defamation."

Background

The *Gales* case arose out of a 2002 broadcast by *60 Minutes* concerning multi-million dollar jury awards in and comparable settlements of personal injury cases in rural Mississippi. The broadcast, entitled "Jackpot Justice," observed that "[t]here are more lawsuits filed [in Jefferson County] than there are inhabitants of Jefferson County" and that the southern Mississippi jurisdiction is one in which "plaintiffs' lawyers have found that juries . . . can be mighty sympathetic when one of their own goes up against a big, rich multinational corporation."

Following the broadcast, the *Gales* lawsuit and another lawsuit were filed on behalf of some 35 Mississippi citizens who alleged that they served on Jefferson County juries and were defamed by the broadcast because it allegedly suggested that they had awarded large sums to plaintiffs suing big corporations without a proper evidentiary basis for doing so.

The lawsuits named a variety of defendants, including CBS Broadcasting Inc., *60 Minutes* correspondent Morley Safer and the two producers of the "Jackpot Justice" broadcast. Also named as defendants were two Mississippi citizens interviewed in the broadcast, Wyatt Emmerich, a newspaper publisher and columnist, and Beau Strittman, a florist who was a plaintiff in a tort suit against a diet drug maker.

The lawsuits were initially filed in Jefferson County Circuit Court, the jurisdiction that had been the focus of the *60 Minutes* report. The defendants removed both cases to the Southern District of Mississippi, arguing that the two non-diverse defendants in the cases, Mississippians Emmerich and Strittman, had been "fraudulently joined" so as to defeat federal jurisdiction.

In June 2003, the district court held that the Mississippi defendants had indeed been fraudulently joined, and thus the cases should remain in federal court, because plaintiffs could not state claims for defamation (or any other cause of action) against the non-diverse defendants, since their own, specific statements on the broadcast were not "of and concerning" any particular Jefferson County juror. *See MediaLawLetter* July 2003 at 23.

The media defendants in both cases then moved for judgment on the pleadings on a variety of grounds, which motions were granted in July 2004. In granting those motions, the district court held that the broadcast, taken in its entirety, was not "of and concerning" the plaintiffs. *See MediaLawLetter* Aug. 2004 at 39.

The plaintiffs in *Gales* appealed both the trial court's decision to deny remand of the litigation to state court and the subsequent dismissal of the media defendants. The Fifth Circuit affirmed both decisions "for essentially the reasons as well-stated" by the lower court. The plaintiffs in the other lawsuit arising out of the "Jackpot Justice" broadcast did not appeal the district court's dismissal of their complaint.

Tom Curley, Lee Levine, and Jay Ward Brown of Levine Sullivan Koch & Schulz, LLP in Washington, D.C., represented the CBS appellees together with in-house counsel Susanna M. Lowy and Anthony M. Bongiorno. Gregg D. Thomas and James B. Lake of Holland & Knight, LLP in Tampa, Florida, represented Media General Operations, Inc.

Luther T. Munford and John P. Sneed of Phelps Dunbar, LLP in Jackson, Mississippi, represented appellee Wyatt Emmerich. W. Wayne Drinkwater, Jr. of Bradley Arant Rose & White, LLP in Jackson represented appellee Beau Strittman. Plaintiffs were represented by Harry M. McCumber, Esq. of Cofer & Associates, P.A., in Jackson.

Eleventh Circuit Strikes Down Florida Statute Prohibiting Disclosure of Police Complaint Information

The Eleventh Circuit this month held unconstitutional a Florida statute that made it a misdemeanor to disclose information about police misconduct investigations, finding the statute to be a content-based restriction on speech. *Cooper v. Dillon*, No. 04-11150, 2005 WL 653313 (11th Cir. Mar. 22, 2005) (Birch, Kravitch, Gibson, JJ.)

The Court reversed a Florida district court's decision that dismissed a newspaper editor's §1983 action against a former Key West police chief who arrested the editor for violating the statute.

Editor Was Arrested

In May 2001, Dennis Reeves Cooper, editor of the free weekly newspaper, *Key West The Newspaper,* filed a complaint with the Florida Department of Law Enforcement against a Key West internal affairs officer for failing to investigate whether a member of the Key West police force lied in a traffic court proceeding. Cooper then published two articles about the complaint and the fact that it was being investigated in his newspaper.

Police Chief Dillon obtained an arrest warrant for the editor for violating Fla. Stat. § 112.533(4), which provides that "[a]ny person who is a participant in an internal investigation, including the complainant, ... who willfully discloses any information obtained pursuant to the agency's investigation ... commits a misdemeanor of the first degree."

Cooper surrendered to police that evening and spent three hours in jail. The prosecution was subsequently dropped. Following his arrest, Cooper filed a § 1983 action against Dillon, seeking damages for the arrest and a declaration that the statute was unconstitutional.

District Court Decision

Although Magistrate Judge John J. O'Sullivan found that the statute was "an 'outright, direct ban on speech'" for which there was no compelling state interest, District Court Judge Lawrence J. King upheld the constitutionality of the statute and granted summary judgment to defendant.

Judge King stated that the statute only restricted disclosure of information "obtained pursuant to the agency's investigation" and not disclosure of information already within the complainant's knowledge or obtained independently, and that the statute served compelling government interests. *Cooper v. Dillon*, Civil No. 01-10119 (S.D. Fla. order Feb. 6, 2004); *see also MLRC MediaLawLetter* Feb. 2004 at 59.

Appeals Court Reverses

In a decision written by Judge Stanley Birch, the Eleventh Circuit reversed. The Court rejected the district court's finding that the statute was a content-neutral time, place and manner restriction on speech, and the lower court's rationale that the statute concerned only the means by which the information was obtained. Instead, the Court found that the statute to be a content-based restriction requiring a compelling state interest to pass constitutional muster.

Defendant argued that the statute maintained the integrity of the investigative process, protected the reputational interest of wrongly accused police officers and the privacy interest of complainants and witnesses.

But the Court found that none of these interests justified the restriction on speech, *citing, e.g., Landmark Communications v. Virginia*, 435 U.S. 829 (1978) and *Florida Star v. B.J.F.,* 491 U.S. 524 (1989).

Indeed, by criminalizing the editor's reports on the police investigation, the Florida statute "penalized the very kind of expression" the Supreme Court has declared "constitutionally essential." *Citing Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials").

Qualified Immunity

The court then considered plaintiff's § 1983 claims against the defendant individually and in his official capacity. It held that the defendant enjoyed qualified immunity in his individual capacity because he was exercising discretionary authority and the statute had not yet been deemed unconstitutional. But the court held that the defendant could be held liable in his official capacity – placing ultimate liability on the city of Key West – because defendant made a "policy" decision on behalf of the municipality to enforce a speech restricting statute.

Plaintiff Dennis Cooper was represented by Randall C. Marshall of the ACLU of Florida, based in Miami; M. David Gelfand, a professor at Tulane Law School in New Orleans, La.; and Thomas W. Milliner of New Orleans, La. Defendant Gordon Dillon was represented by Michael T. Burke of Johnson, Anselmo, Murdoch, Burke, Piper & McDuff in Fort Lauderdale.

Seventh Circuit Rejects False Light Invasion of Privacy Suit Based on Photo in Mob Book

By Jeffrey O. Grossman

A woman who alleged that the use of her photograph in a book written by a former mob figure placed her in a false and offensive light was recently rebuffed by the United States Court of Appeals for the Seventh Circuit. *Raveling v. HarperCollins Publishers Inc.*, No. 04-2963 (7th Cir. Mar. 4, 2005).

In an unpublished order, the Court affirmed the lower court's grant of the book publisher's motion to dismiss the complaint. Both the Seventh Circuit's and the federal district court's opinions are instructive as to the limits of the false light tort under Illinois law.

Background

Gayle Raveling sued HarperCollins Publishers Inc. over the appearance of a photograph of her in the non-fiction book "Double Deal." In that book, author Michael Corbitt, a former Willow Springs, Illinois policeman, described his life and involvement with organized crime, an account billed on the book's cover as "The Inside Story of Murder, Unbridled Corruption, and the Cop Who Was A Mobster." The book was co-authored by Sam Giancana, the godson and namesake of Sam "Momo" Giancana, a notorious Chicago Mob boss.

The photograph at issue appeared on the thirteenth page of the 16-page photograph section that made up the center of the book. The photograph depicted the plaintiff, Raveling, holding a baby, and standing next to another man. The photo's caption stated:

> My son Joey's christening in 1983 was one of the proudest moments of my life. Here, my sister-in-law, Gail Barone, cradles him in her arms while Joey's godfather, Sal Bastone, beams into the camera.

According to the book, Sal Bastone was the man "who ran the Chicago mob's North Side crew."

Raveling admitted that she was, in fact, Michael Corbitt's sister-in law at the time of the photo, that she was, in fact, the baby's godmother, and that there was nothing inaccurate about the photo or caption. However, she claimed that the mere use of the photo in the context of a book about Corbitt's life in organized crime falsely associated her with criminal elements in the eyes of the public.

District Court Decision

The United States District Court for the Northern District of Illinois (Der-Yeghiayan, J.) dismissed the complaint with prejudice for failure to state a claim. *Raveling v. HarperCollins Publishers Inc.*, No. 03 C 7333, 2004 WL 422538 (N.D. Ill. Feb. 10, 2004).

Under Illinois law, the elements of a false light claim are: 1) the plaintiff was placed in a false light before the public; 2) the false light would be highly offensive to a reasonable person; and 3) the defendant acted with actual malice, meaning with knowledge of, or reckless disregard for, the falsity of the statements. *Kolegas v. Heftel Broadcasting Corp., Inc.*, 607 N.E.2d 201, 209-10 (Ill. 1992).

The District Court observed that Raveling's objections were "merely based upon her own displeasure and embarrassment resulting from the inclusion of a photograph which *accurately* depicts her at the christening," and held that the "mere placement of a photograph of her in a book about organized crime" did not portray her in a false light – the first element. District Court Opinion at 3 (emphasis added). The District Court also held that Raveling had failed to allege actual malice with respect to any alleged false statement – the third element.

On appeal, Raveling pressed her argument that the context in which her photograph was used placed her in a false light, and emphasized that her photograph appeared on the same page as another photograph illustrating a murder crime scene described elsewhere in the book.

In particular, the other photo on the page showed a Cadillac being pulled from a Chicago sanitary canal. The caption of that other photo stated that the car's trunk concealed the decomposed body of a woman who was the wife of one of Corbitt's co-defendants in the trial that landed Corbitt in federal prison.

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Seventh Circuit Rejects False Light Invasion of Privacy Suit Based On Photo In Mob Book

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Seventh Circuit Decision

In a ten-page order, the Court of Appeals rejected the Plaintiff-Appellant's argument and affirmed the lower court's decision, holding that Raveling had failed to allege any of the three required elements of the false light tort.

First, the Court stated that Raveling had failed to allege any false light, since it was undisputed that the statements at issue were true. Citing *Pope v. Chronicle Publ'g Co.*, 95 F.3d 607, 616 (7th Cir. 1996). The Court of Appeals held that in light of this fact, any claimed "innuendo" arising from the other photo appearing on the same page, or the context of the book as a whole, was "not sufficient to constitute a false light." Seventh Circuit Order ("Order") at 5.

Next, the court found that Raveling had failed to allege the second element of the tort, offensiveness. The Court of Appeals stated that "a plain statement of one's family relationship to another person simply is not highly offensive to the reasonable person." Order at 6. The Court also commented that the second element required a highly offensive *false* light, and that "in this case, Ms. Raveling was not placed in a false light, let alone a false light which would be highly offensive to a reasonable person." *Id.*

Lastly, the Court held that Raveling's allegations that she did not consent to the publication of her photograph, and that she did not think the photograph had a logical connection to the subject of the book, were not relevant to whether the photograph was published with "actual malice."

The Court explained that actual malice "concerns a defendant's knowledge of the *truth* of the statements made or the state of mind with which the defendant acted with regard to the truth of those statements." *Citing Kolegas*, 607 N.E.2d at 209-10. The Court of Appeals held that Raveling had failed to allege that HarperCollins acted with the requisite state of mind, even assuming there had been something false about the photograph or its caption. Order at 6.

Slade R. Metcalf and Jeffrey O. Grossman of Hogan & Hartson L.L.P. in New York City, and David P. Sanders of Jenner & Block, LLP in Chicago, represented the defendant-appellee HarperCollins Publishers Inc. Justin J. Tedrowe, Esq. of Downers Grove, Illinois, represented the plaintiff-appellant Gayle Raveling.

Federal Court Grants TRO on Misappropriation Claims Over Advocacy Ad

A federal court this month granted a temporary restraining order barring a political advocacy group from using a couple's photograph in an advocacy ad. *Raymen v. United Senior Association, Inc.*, No. Civ. A. 05-486(RBW), 2005 WL 607916 (D.D.C. Mar. 16, 2005) (Walton, J.).

In a short opinion without citation to caselaw, the court simply treated the advocacy ad as a commercial advertisement and concluded that plaintiffs were likely to succeed on their misappropriation claim.

Background

Plaintiffs, a same-sex couple married in Oregon, were photographed before their ceremony by a photographer from the Portland, Oregon *Tribune* newspaper. The photograph later appeared in the newspaper, as well as on the *Tribune*'s website.

The court simply treated the advocacy ad as a commercial advertisement and concluded that plaintiffs were likely to succeed on their misappropriation claim.

The United Senior Association, Inc. ("USA Next") allegedly copied the photograph from the newspaper's website without permission to use in an advocacy ad criticizing the American Association of Retired Persons ("AARP").

USA Next's ad captioned "The Real AARP Agenda" displayed the couple's photograph with a superimposed green check mark. Next to the couple's photograph was a picture of a U.S. soldier with a superimposed red "X," suggesting the AARP opposed the war in Iraq and supported the "gay lifestyle." USA Next's ad was published on the website of *The American Spectator* magazine from Feb. 15-21, 2005.

Plaintiffs brought suit, alleging that because of the advertisement they "have suffered embarrassment, extreme emotional distress, and the invasion of their privacy," and that "their reputations as patriotic American citizens has been severely damaged." Plaintiffs' pled causes of action for libel, false light, misappropriation and intentional infliction of emotional distress. They also sought temporary and permanent injunctive relief.

Advocacy Ads / Commercial Speech

The D.C. District Court ruled that Oregon law applied to the claim. That state's misappropriation law requires a showing that plaintiffs' "names, pictures or likeness have been used without their consent to advertise a defendant's product, to accompany an article sold, to add luster to the name of a corporation, or for some other business purpose." *Citing* § 652C *Restatement (Second) of Torts* (1976).

In a very brief analysis, the court held that plaintiffs have a substantial likelihood of success on their misappropriation claim because the ad was being used "indirectly" to raise money. The court noted that while the ad did not "directly" seek contributions, "it is not unreasonable to infer such an incendiary advertisement would assist USA Next in their efforts to raise monetary contributions."

The court found it relevant that by clicking on the ad one would be taken to USA Next's own website which did solicit financial contributions. Having concluded that USA Next used the photograph for financial gain, the Court held that it was not entitled to raise the newsworthy exception to the claim.

Private Figures' Injury

Looking next to whether plaintiffs would suffer irreparable injury should the order not be granted, the court recognized that, unlike the misappropriation of the image of a public figure which may be compensated financially, the harm to a non-public figure caused by misappropriation may be "intangible."

The court went on to find that "because it may be difficult to place monetary value on the infringement of a privacy interest when it has purely intangible consequences, a non-public figure cannot be adequately compensated monetarily, and thus the only possible means of addressing a violation is through injunctive relief."

The court rejected defendant's argument that plaintiffs' motion should be denied because their photograph had already been featured in the newspaper and for sale on the *Tribune*'s website, instead concluding that "the use of the plaintiffs' images to condemn a view they actually support as portrayed in the misappropriated photographs amounts to irreparable harm."

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Federal Court Grants TRO on Misappropriation Claims Over Advocacy Ad

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The court found that defendant would not be harmed by the grant of injunctive relief in that it had informed the court during oral argument that it had already removed the photograph from *The American Spectator* website and did not intend to use it in the future.

Finally, the court ruled that the public interest also favored granting plaintiffs' motion in that the public has "a strong interest in preventing the image and likeness of an individual from being used in a manner inconsistent with the person's beliefs and values without their permission."

Plaintiffs were represented by Christopher Wolf of Proskauer Rose LLP's Washington D.C. office.

Federal Court Dismisses Libel-by-Juxtaposition Claim Arising From *Boston* Magazine Article on Teen Sex

By Robert A. Bertsche

A small first-page disclaimer persuaded a reluctant federal district court judge in Massachusetts to dismiss a libel-by-juxtaposition claim brought by a teenager whose photograph was used to illustrate a magazine article on teen sexuality. *Stanton v. Metro Corp.,* Civ. No. 04-10751-FDS (D. Mass. Mar. 7, 2005) (Saylor, J.).

The opinion illustrates how a prepublication-review decision can play a pivotal role in keeping a sympathetic case from a jury – in a state that seems rapidly to be becoming one of the nation's most hostile to the media.

The 25-page ruling in *Stanton v. Metro Corp.* reads like an Agatha Christie page-turner, with the ultimate outcome seemingly in doubt until the very last chapter. Despite his "considerable sympathy for the position of the plaintiff," United States District Judge F. Dennis Saylor IV ultimately dismissed plaintiff's claim, commenting acerbically, "The exercise of dubious judgment ... is not the same as the commission of the tort of defamation." The judge also dismissed a false-light invasion of privacy claim, noting that the tort is not recognized in Massachusetts.

The 25-page ruling in* Stanton v. Metro Corp. *reads like an Agatha Christie page-turner, with the ultimate outcome seemingly in doubt until the very last chapter.

The ruling offered welcome relief for *Boston* magazine at a time when that city's two major dailies have each been slammed with $2.1 million verdicts, an alternative weekly has been hit with a $950,000 libel judgment, and another daily has been pummeled in the press for an inappropriate racial comment made more than a year ago by one of its top managers. (To be sure, there was at least one other piece of good news to be had in Boston: the *Globe* won a private-figure libel trial in Superior Court after the jury concluded that its reporters had performed their job accurately.)

Teen Plaintiff Denies "Sexuality"

The plaintiff sued *Boston* magazine over its publication in May 2003 of a double-truck photo of her and several friends at an after-prom party, next to a feature headlined, "The Mating Habits of the Suburban High School Teenager." A prominent subhead proclaimed, "They hook up online. They hook up in real life. With prom season looming, meet your kids – they might know more about sex than you do."

The plaintiff – who was not identified by name in the magazine – said she had not authorized the taking or publication of her photograph, and had not "engaged in the activity described in the article." She also took issue with a photo caption that noted that her photograph, and the other photographs used to illustrate the article, were "from an award-winning five-year project on teen sexuality" by a New Hampshire photojournalist. Plaintiff said she was not the subject of any such project, and had not participated in it.

She sued the magazine in state court, alleging libel based both on the juxtaposition of her photograph with the article and headline, and on the photo caption, which she said implied that she "participated in" the "project on teen sexuality."

She also brought a claim for invasion of privacy under a Massachusetts statute proscribing any "unreasonable, substantial or serious interference" with an individual's privacy.

The magazine successfully removed the claim to federal court, then responded with a motion to dismiss for failure to state a claim on which relief could be granted under Fed. R. Civ. P. 12(b)(6).

With its motion to dismiss, the magazine attached for the court a copy of the challenged article and photographs, and also included pages from the photographer's website, revealing that indeed the same photograph had been publicly displayed in connection with the photographer's photo essay on teen sexuality.

The magazine argued in its motion to dismiss that the article and photo essay did not make any defamatory statement of and concerning the plaintiff, for two reasons.

First, the magazine argued, there was no single meaning to the article that could be described as defamatory, since the article described a wide variety of sexual and asexual behaviors.

Second, the magazine argued, there was no reason to ascribe any defamatory meaning to the plaintiff, particularly since a disclaimer at the bottom of the article's first page noted that the "individuals pictured are unrelated to the people or

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Federal Court Dismisses Libel-by-Juxtaposition Claim Arising From *Boston* Magazine Article on Teen Sex

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events described in this story." The magazine also argued that the appearance of the disclaimer negated any claim of negligence as a matter of law.

The magazine relied particularly on a virtually identical case decided by the Massachusetts Supreme Judicial Court 25 years earlier: *Tropeano v. The Atlantic Monthly Co.*, 379 Mass. 745 (1980). The plaintiff in *Tropeano* also sued for defamation arising out of the use of her photograph, without her permission, to illustrate a magazine article headlined, "After the Sexual Revolution."

Even in the absence of any disclaimer, the Massachusetts court had dismissed the claim on the grounds that the publication was not defamatory on its face, and that the plaintiff had not specifically pleaded any defamatory innuendo arising from the publishing of her photograph in connection with the article.

The federal district court distinguished *Tropeano* in two sentences, however, attributing the result there to a pleading deficiency by the plaintiff, and noting that Ms. Stanton, by contrast, contended that the use of her photograph in context "insinuated that she was involved in the sexual misconduct described in the article." Had it not been for the disclaimer, it is clear, the federal district court in 2005 would have allowed the plaintiff to proceed with a libel-by-juxtaposition claim that the state's highest court in 1980 had deemed insufficient as a matter of law. Whether that difference reflects loosened pleading standards or a heightened sense of sexual propriety is anyone's guess.

Judge Calls Article "Shocking," "Sensational"

The magazine's motion to dismiss was the focus of a hard-fought 90-minute hearing in federal court in Worcester, in which the judge inquired whether, if he were to grant the magazine's motion, the same magazine might not feel free to display a photograph of the judge's wife juxtaposed with an article on illegal conduct in the suburbs. The judge then permitted both parties to submit supplemental briefs to address the concerns discussed during the argument.

The magazine's supplemental brief emphasized the particular facts of this case: that the photograph depicted nothing tortious, and was lawfully taken; that the photo essay did not imply false or highly offensive facts; that the article stated opinions based on disclosed, newsworthy facts, the truth of which was not challenged; that the article was expressly not "of and concerning" the plaintiff; and that the caption did not allege any intimate or defamatory conduct by the plaintiff.

The brief also emphasized First Amendment protections for speech on a wide range of issues, and prominently noted the Supreme Court's observation in *Time, Inc. v. Hill* that "[e]xposure of the self to others … is a concomitant of life in a civilized community."

In his carefully constructed opinion, Judge Saylor first examined the article and photo essay as if the disclaimer had not appeared, and then addressed the impact of the disclaimer. The judge concluded that the allegedly defamatory statement was "of and concerning" the plaintiff because her photograph was identifiable next to the article. Citing to other Massachusetts libel-by-juxtaposition cases, he noted that persons could "reasonably interpret" the article to refer to the plaintiff, and that the magazine "was negligent in publishing it in such a way that it could be so understood."

Similarly, he concluded that the article contained "generally defamatory" statements attributing to teenagers a "sensational" number of sexual behaviors "that a considerable segment of society will find … to be shocking." Thus, the issue before the court, the judge wrote, was "whether a reasonable reader would make a connection between the photograph (which identifies [the plaintiff]) and the statements (which are generally defamatory)."

Plaintiff's "Innocence" Heightens Mag's Culpability

To the federal district court, it was "apparent" that the photograph – depicting tuxedo-clad "boys" and evening-gown-wearing "girls," one holding a cigarette, another with an unidentified beverage – "was selected at least in part because of its suggestive nature and sexual implications." He determined that the photograph was "very plainly intended to convey the impression that teenagers such as these are likely to have experimented in particular with adult sexual behavior."

The court rejected the magazine's protestations that the photograph itself showed nothing overtly sexual.

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Federal Court Dismisses Libel-by-Juxtaposition Claim Arising From *Boston* Magazine Article on Teen Sex

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> [W]hy was *this* photograph used to illustrate *this* article about sexual misconduct, if there is no connection between the two? The editor who selected the photograph apparently thought that there was a connection; why wouldn't the average reader?

He ruled that his conclusion was bolstered by the fact that the plaintiff herself appeared such a picture of "innocence"; "The use of a photograph of a wholesome-looking girl" to illustrate that ordinary suburban teens were engaging in "shocking sexual behavior … can hardly be considered coincidental."

The court said that whether the photograph conveyed that the plaintiff "specifically is likely to have engaged in the specific types of sexual behavior outlined in the article" was a "closer question." Still, the court addressed the question with no apparent difficulty. It ignored those statistics in the article reciting that most male and female high-schoolers had not engaged in intercourse, and concluded instead that "[n]o reasonable person, reading the article, would come away with the impression that most, or even many, teenagers are responsible and prudent in matters of sexual behavior." Thus, if indeed the plaintiff had engaged in no such irresponsible behavior, the court concluded, she had been defamed.

The disclaimer "directly contradicts the otherwise-defamatory connection between the photograph and the text"

Saved by the Disclaimer

Turning to the disclaimer, the judge noted that it appeared "in the smallest font on the page," and he described it as "relatively inconspicuous by deliberate design." He assumed that "some percentage" of readers would ignore it.

Nonetheless, he said, the disclaimer "*directly* contradicts the otherwise-defamatory connection between the photograph and the text" by stating that the individuals photographed (including the plaintiff) are "unrelated" to the people and events in the story. Here in his opinion the judge's heart and head come into most obvious conflict:

> For the Court to conclude that the photograph is defamatory, therefore, it must assume that a reasonable reader would overlook the disclaimer, misunderstand it, or fail to give it credence. The Court, reluctantly, is unwilling to go so far.

His next paragraph offers a primer on the minimum requirements of an acceptable disclaimer. *Boston* magazine's disclaimer, the judge noted, was "not unreadable, or readable only with magnification"; it was "not buried in an ocean of fine print"; it was "set off from the rest of the text by italicized print and a line of demarcation"; it was published on the article's first page of text, and positioned "near the attention-grabbing headlines and lead photograph."

The Court was thus "forced to conclude" that the disclaimer "adequately negates the defamatory connotations about plaintiff otherwise arising from the article and photograph."

Clearly troubled by that conclusion, the Court noted that a disclaimer will not render the media free "to use embarrassing or humiliating photographs of nonconsenting individuals without restriction." The Court expressed its dismay over the absence of case law "suggesting that the unique vulnerability of teenagers (or children) provides them any additional protection under the law of defamation."

It derided the use of the photograph as "gratuitous" and "sensational," despite the monthly publication's "ample opportunity for reflective and considered editorial judgment prior to the selection of a photograph that was certain to embarrass its teenage subjects."

Nonetheless, noting that defamation actions are disfavored, the court concluded, "The exercise of dubious judgment … is not the same as the commission of the tort of defamation." The Court also dismissed the invasion of privacy claim, noting that it was a "false light" claim in disguise, and that Massachusetts has not recognized the tort of false light invasion of privacy.

Did the Forum Make the Difference?

A footnote: In a close decision like this one, details may make a difference. The plaintiff was a New Hampshire resident who brought the case in Massachusetts state court – not

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Federal Court Dismisses Libel-by-Juxtaposition Claim Arising From *Boston* Magazine Article on Teen Sex

(Continued from page 25)

in Boston, where the magazine was based, but in Worcester, where jurors could be expected to be somewhat more conservative.

After careful research into state and federal case law and attitudes, the magazine removed the case to federal court in Boston, even though to do so it had to establish diversity jurisdiction by emphasizing that the magazine's parent company is based in Philadelphia, and that the plaintiff (who had submitted a non-binding civil action cover sheet alleging $50,000 in damages) was likely, if she prevailed, to obtain far more than that.

Plaintiff then transferred the case back to Worcester, but was unable to take it from federal court, where it was in the hands of a judge who split his time between Boston and Worcester.

One can only speculate whether a state court judge in Worcester would have had the time and resources to delve so deeply into the case law and reach a legal conclusion that so obviously contradicted the judge's instinctive sympathies.

Robert A. Bertsche, chair of the Media and Intellectual Property Group at the Boston law firm of Prince, Lobel, Glovsky & Tye LLP, represented the defendant, Metro Corp., with the assistance of PLGT media law associate Amy E. Serino.

Court Freezes Defendant's Assets in Public Official Libel Suit

In an unusual pretrial ruling in a libel case, a Connecticut trial court granted a plaintiff's motion for a prejudgment attachment order freezing $150,000 of the defendant's assets pending resolution of the libel case. *Burgess v. Marino*, No. AAN-CV-04-4001823-S (Conn. Super. Ct. Ansonia/Millford; ruling March 14, 2005).

The plaintiff, Ronald Burgess, is the Assistant Fire Chief of Ansonia, Connecticut. The defendant, Richard Marino, publishes a weekly local newspaper out of his home in nearby Beacon Falls called the *Star News*. The paper focuses on local issues, gossip and criticism of local officials.

At issue is a report in the newspaper that an "assistant chief" in the fire department with the initials "R.B." had an affair with a 17-year-old female. The newspaper also characterized plaintiff as a "lying, oversexed, nonthinking pervert." Burgess sued Marino for $150,000, alleging that the report was "of and concerning" him because he is the only chief in the department with the initials R.B., that the allegation was false and published with actual malice. He also moved for a prejudgment attachment order on defendant's assets.

Prejudgment Remedies

Connecticut provides for prejudgment remedies in "actions in law and equity." C.G.S. Sec. 52-278; available online at: www.cga.ct.gov/2005/pub/Chap903a.htm.

The standard under the statute is "probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff." C.G.S. Sec. 52-278d. The defendant is entitled to an evidentiary hearing on the application.

Prior to this decision, MLRC was not aware of the allowance of prejudgment attachment orders in libel cases. Connecticut has a few other recent decisions in this area, but *Burgess* appears to be the only libel case where an order was granted.

In *Martin v. Griffin,* No. CV 990586133S, 2000 WL 872464 (Conn. Super. Ct. June 13, 2000), the court rejected a request for a prejudgment attachment order in a defamation claim over a political campaign advertisement, concluding after a lengthy examination of evidence that there was insufficient evidence of actual malice. *See also Tresky v. Dimartino,* No. CV020814360S, 2002 WL 1904383 (Conn. Super. Ct. July 11, 2002) (denying request for prejudgment attachment based on lack of evidence of actual malice); *Benton v. Simpson*, No. CV010385675S, 2002 WL 180931 (Conn. Super. Jan 10, 2002) (granting a prejudgment attachment order on claims for emotional distress).

Probable Cause for Libel

At a March 3rd hearing on the attachment motion, the defendant called three firefighters as witnesses who he said would corroborate the information he published. But all of them testified that they had no knowledge of any affair between Burgess and a minor.

In his ruling, Superior Court Judge Patrick L. Carroll III wrote that "there was not even a scintilla of evidence presented at the hearing that would suggest the defendant conducted even the most cursory of investigations to confirm the veracity of the allegations he made against Ronald Burgess." The judge also found probable cause that plaintiff's reputation was damaged by the publication.

The pre-judgement attachment applies to $150,000 of defendant's assets until the libel suit is resolved. No court date has been set for that trial.

Plaintiff was represented by Roger L. Crossland of Shepro & Brown, LLC in Stratford, Conn. Defendant appeared pro se.

Prejudgment Remedies in Libel Cases?

Please let MLRC know if you are aware of similar practices in your state.

Call us, or send us a note.

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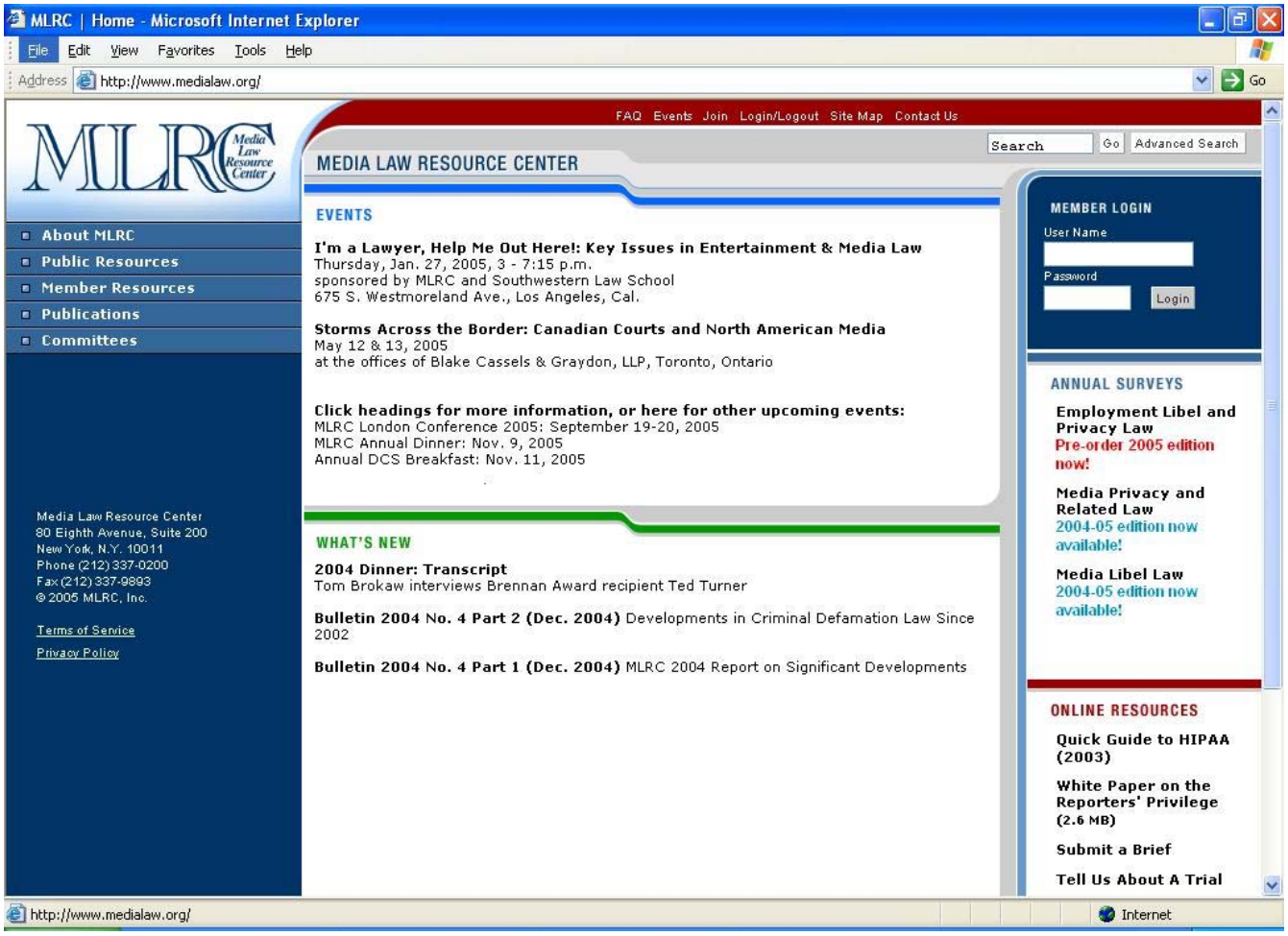

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Contact Debby Seiden, dseiden@medialaw.org, for details.

California Court of Appeals Rejects Magazine's Anti-SLAPP Motion

In an unpublished decision the California Court of Appeals has rejected an anti-SLAPP motion filed on behalf of the *National Enquirer*, relying on plaintiff's status as a "non-celebrity" to find that two articles published in the magazine did not involve a public issue or an issue of public interest. *Santini v. American Media, Inc. et al.*, No. B174471, 2005 WL 459195 (Cal. Ct. App. Feb. 28, 2005) (Spencer, P.J.).

Background

In the summer of 2003, the *National Enquirer* published two articles detailing an alleged one-night encounter between plaintiff Antonella Santini, a dancer at a "gentleman's club," and the actor Ben Affleck, who at the time was romantically linked to performer Jennifer Lopez. According to the articles plaintiff was one of four nude strippers who performed at the club for Affleck, and "Affleck had sexual contact, including oral sex, with plaintiff during a nude lap dance."

The Court apparently conflated its finding that plaintiff was a private figure with its analysis of whether the speech at issue was of public concern.

Plaintiff claimed the two articles falsely accused her of participating in "an improper sexual encounter," and brought an action for libel, slander, false light invasion of privacy, misappropriation of common law right of privacy, and violation of Civil Code Section 3344 (right of publicity).

Defendants filed an anti-SLAPP motion to strike, arguing that the articles pertained to a subject that had already garnered a vast amount public interest- namely, the relationship of Affleck and Lopez, and Affleck's fidelity to Lopez. Defendants further argued that plaintiff was a public figure given her occupation and her voluntary participation in activities that were certain to draw intense public scrutiny, and that her claims all failed because she was unable to establish the existence of constitutional actual malice by clear and convincing evidence.

A superior court judge denied the motion on the ground that the anti-SLAPP statute does not apply because the speech at issue was not about "a public issue or issue of public interest." The Court of Appeals affirmed.

Articles Did Not Implicate a "Public Issue"

In order to be classified as conduct stemming from a "protected activity" under the California anti-SLAPP statute, defendants were required to prove that the articles amounted to "conduct in furtherance of the exercise of the constitutional right of ... free *speech in connection with a public issue or an issue of public interest.*" § 425.16 (e)(4) (italics added by court).

Drawing from an earlier appellate court opinion discussing the type of conduct implicating a public issue, the court found the statements under consideration must "either concern[] a person or entity in the public eye ... , conduct that could directly affect a large number of people beyond the direct participants ... or a topic of widespread, public interest ...." *Citing Rivero v. American Federation of the State, County and Municipal Employees, AFL-CIO,* 105 Cal. App. 4th 913, 924 (2003).

Turning first to the issue of whether plaintiff was a "person in the public eye," the court found that prior to her "15 minute" encounter with Affleck, plaintiff was "merely a private person" leading an "anonymous life" whose image had not generated significant debate on the issue of celebrity relationships.

The court further held that the *Enquirer* could not unilaterally turn the plaintiff into a public figure by documenting her activities, reasoning that such a finding would give the media "unwarranted First Amendment protection" by allowing any private individual to become a public figure through the publication of arguably defamatory accusations.

The court went on to hold that while the two articles at issue may have been of concern to that segment of the population interested in the "foibles of celebrities" – and specifically the activities and relationship between Ben Affleck and Jennifer Lopez – the plaintiff's alleged conduct did not amount to "'private conduct that impacts a broad segment of society.'" (citations omitted).

The court rejected defendants' argument that the articles stemmed from a public issue that had already captured considerable national attention- the Affleck and Lopez relationship – on the basis that the case at issue was not "about" them and they were not parties to the action.

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CA Court of Appeals Rejects Magazine's Anti-SLAPP Motion

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Finally, the court ruled that the articles at issue did not concern a topic of widespread public interest. The Court apparently conflated its finding that plaintiff was a private figure with its analysis of whether the speech at issue was of public concern.

The court ruled that the fact that the articles concerned Ben Affleck, a public figure, was insufficient for purposes of the anti-SLAPP statute in that not "'all speech about [a] celebrity is necessarily a public issue or an issue of public interest for purposes of § 425.16(e)'" and stressed, once again, the neither Affleck nor Lopez was a party to the action.

Instead, the court focused on its earlier finding that plaintiff was merely a dancer in a club with no celebrity status, and that even though plaintiff may have been "entwined" with Affleck's celebrity, any interest in plaintiff's alleged improper sexual activities stemmed from a "mere curiosity" that did not rise to the level necessary to establish a "public interest."

The court concluded that because "plaintiff is not a public figure, defendants' articles about plaintiff's alleged encounter with Affleck are not a matter of public interest" and thus affirmed the superior court's denial of defendants' motion.

Defendants are represented by Kenneth R. Chiate and Timothy L. Alger of Quinn Emanuel Urquhart Oliver & Hedges. Plaintiff is represented by Robert W. Hodges and Michael B. Garfinkel of Rintala, Smoot, Jaenicke & Rees.

Georgia District Court Dismisses Creationist's Defamation Lawsuit Against Penn & Teller's *Bullshit* Cable Television Show

By Vincent H. Chieffo

A Georgia federal court recently dismissed libel and related claims brought by a creationism advocate over a cable television show that criticized his views. *Brock v. Viacom*, No. 1:04-CV-1029-CAP (N.D. Ga. Feb. 25, 2005) (Pannell, J.).

Background

On March 14, 2003, Showtime aired an episode of the *Penn & Teller: Bullshit!* television series. This episode, entitled "Creationism," concerned an ongoing public debate before the Cobb County (Georgia) School Board regarding creationism versus evolution and whether either or both should be taught in Cobb County's public schools. The debate before the Cobb County School Board received widespread local and national media attention.

The Penn & Teller show contacted several individuals who had supported creationism before the Cobb County School Board and offered them the opportunity to give an interview to explain their position in favor of the teaching of creationism. At least one of these individuals, Russ Brock, had already appeared at a public hearing before the Cobb County School Board during which he advocated the teaching of creationism. Those who accepted the opportunity to be interviewed for the program executed releases with respect to their appearance and interviews for that show.

The final content of the program was a combination of those interviews, film clips from the media's coverage of the Cobb County School Board hearings, and the caustic and critical commentary by Penn & Teller. Penn Jillette of the duo orally expressed a negative opinion of the creationist's point of view while his partner, Teller, never spoke but conveyed his opinions and similar criticisms by using gestures, facial expressions, posture and body language.

A year after the episode initially aired, Mr. Brock and three others filed an action seeking damages arising from their depiction on the Penn & Teller program. The nine count Complaint asserted a variety of claims including fraud in the inducement, invasion of privacy, intentional infliction of emotional distress, misappropriation of name and likeness, breach of contract, promissory estoppel, libel, and unjust enrichment.

Plaintiffs specifically alleged that the "program was an aggressive, irreverent expose of the beliefs of Christianity and creationism, and a personal attack on plaintiffs for their desire that both creationism and evolution be taught as alternative theories in the public school system of Cobb County." Plaintiffs further alleged that "as a result of the broadcast of [the] episode ..., plaintiffs have each been embarrassed and suffered public ridicule and humiliation [and that] ... each plaintiff has endured emotional distress and damage to their personal relationships ...."

After removing the action to federal district court, the defendants filed a motion to dismiss the action pursuant to F.R.C.P. Rule 12(b)(6) on the basis that all of the claims were barred by the First Amendment. On January 28, 2005, District Judge Charles A. Pannell, Jr., entered his order granting the Motion to Dismiss and a judgment of dismissal was entered the following day.

Statements Not False

The District Court first determined that plaintiffs sought to impose liability upon defendants for defendants' "speech," the Penn & Teller program. The District Court acknowledged that claims related to speech against the media have been divided into two categories based upon the type of damages sought. When a party seeks to recover damages for harm to reputation or state of mind, the constitutional requirements of a defamation claim must be satisfied. On the other hand, when a party seeks damages for non-reputational harm, then the First Amendment will not prohibit a suit brought under generally applicable laws.

The District Court concluded that although the Complaint alleged various legal theories, the damages sought were reputational and emotional distress damages and, therefore, that plaintiffs were obligated to satisfy the constitutional requirements for alleging a defamation claim.

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Georgia Court Dismisses Creationist's Defamation Lawsuit Against Penn & Teller's *Bullshit* Cable Television Show

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For purposes of that constitutional analysis, the District Court assumed, without deciding, that plaintiffs were not public figures but rather were private figure defamation plaintiffs. The Court then applied the standard set forth in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776, 106 S.Ct. 1558, 1563 (1986), and required that the plaintiffs allege both falsity and fault (as determined by state law) before recovering damages for defamation.

The Court noted that the plaintiffs had failed to state facts upon which relief could be granted because the Complaint failed to allege that any of the program's statements pertaining to the plaintiffs were false. Moreover, the Court determined that there were no set of facts upon which the plaintiffs could prove that any statements made during the episode were false.

The Court analyzed the episode as containing two kinds of statements. The first type was the statements actually made by plaintiffs themselves during either the interviews or the news clips of their prior public statements.

Plaintiffs did not, and could not, allege that their own statements were false. The second type of statements in the program were those criticizing the plaintiffs' views. The Court concluded that Mr. Jillette's comments, the non-verbal gestures of Mr. Teller, and the comments of others featured on the program who opposed the teaching of creationism were all expressions of protected opinion.

As the Court noted, "just as the plaintiffs are entitled to express their beliefs regarding Christianity and their opinion that creationism should be taught in public schools, Mr. Jillette, Mr. Teller and the others on the Episode are entitled to express their beliefs that plaintiffs' views are wrong."

Based upon its conclusion that plaintiffs had not, and could not, allege that the episode of the Penn & Teller program contained false statements of fact concerning the plaintiffs, the District Court made its order dismissing the Complaint without leave to amend.

Vincent H. Chieffo, Valerie Ho, and Joseph Akers of the Los Angeles and Atlanta offices of Greenberg Traurig represented the defendants. Plaintiffs were represented by James K. Creasy of the law offices of James K. Creasy, and by Henry R. Thompson and John A. Pursley, of Thompson & Pursely P.C., of Atlantic and Marietta, Georgia respectively.

Missouri Appellate Panel Rejects Defamation Action Based on Flyer

A Missouri Court of Appeals recently granted a writ of prohibition sought by a defendant in a libel action after finding that the term "trash terrorist" could not support an action for defamation. *Diehl v. Kintz*, No. ED 84905, 2005 WL 524947 (Mo. Ct. App. Mar. 8, 2005) (Mooney, J.).

Background

Thomas Diehl, while in the midst of a dispute with Fred Weber, Inc. ("Weber"), attended a public hearing to oppose a trash transfer station being built and operated by a company in which Weber was the "managing member." While at the hearing, Diehl distributed a flyer informing citizens of what they could do to "FIGHT THE TRASH TERRORISTS."

Weber sued for defamation, claiming the term "trash terrorist" was defamatory, and sought an injunction prohibiting distribution of the flyer. After Diehl's motion to dismiss was denied he sought an extraordinary writ from the Missouri Court of Appeals, which issued a preliminary writ of prohibition while taking the matter under consideration.

"Trash Terrorist" Not Defamatory

In considering Weber's defamation claim, the court first recognized that allegedly defamatory words must be considered in the context in which they are stated, and are to be construed in "their most innocent sense." *Citing Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993). Further, the court found that statements of opinion would not support a claim for defamation so long as they did not imply an assertion of objective fact.

Turning to the term "trash terrorist," the court found that when viewed in the context in which it was employed – on a flyer distributed at a public hearing concerning a trash transfer station – the term was not meant to accuse Weber of actually being a terrorist, but rather reflected Diehl's "staunch opposition to the proposed trash transfer station."

The court further concluded that readers of the flyer would not believe that Weber was a terrorist, but rather would recognize that the language was "imaginative expression or rhetorical hyperbole" employed as "an epithet used to voice opposition to the proposed transfer station." After holding that the term "trash terrorist" was not defamatory, the court found that an accompanying civil conspiracy claim likewise failed, and that the company was not entitled to an injunction.

Writ of Prohibition Appropriate

The court went on to hold that under the circumstances of the case, the issuance of an extraordinary writ – which may be employed to prevent "unnecessary, inconvenient, and expensive litigation" – was a proper remedy. Although the court felt it unnecessary to consider whether the suit was a SLAPP action, it found that in exercising its discretion to issue a writ, it could consider the "chilling impact that might be suffered in public discourse if the underlying meritless action were allowed to proceed."

The court went on to recognize that in the instant case Diehl's speech had been made during a public hearing – conducted to encourage public discourse – and that the "free exchange of ideas between citizens and government is a hallmark of democracy." The court thus issued a writ prohibiting the trial judge from taking further action in the case aside from granting Diehl's motion to dismiss.

Thomas Diehl was represented by Michael D. Quinlan of Louis, Mo. Fred Weber, Inc. was represented by Jeffrey B. Hunt and Albert A. Michenfelder, Jr. of St. Louis, Mo.

Default Verdict in Virginia for Refusal to Allow Computer Inspection

$2,500 Award One of Several Recent Defaults for Failing to Reveal Sources

In the aftermath of the *Ayash* case, in which the Massachusetts Supreme Judicial Court affirmed a $2.1 million libel damage award against the *Boston Globe* after the trial judge defaulted the *Globe* on liability because of its unwillingness to name a confidential source, the MLRC has discovered another case in which a media defendant was held in default for withholding source information.

In *Burcham v. McClure*, the court entered a default judgment of $2,500 against the publisher of a website, www.roanokejournal.com, that features local news and political commentary. No. CL-04-000612-00 (Va. Cir. Ct. default verdict entered Nov. 19, 2004).

The damage award was much less than in *Ayash* (the plaintiff's initial demand in the suit was only $20,000), but it is the third recent case in which a default verdict has been entered against a media defendant who has refused to reveal source information. *See Ayash v. Dana-Farber Cancer Institute*, 2005 WL 289185; *MediaLawLetter* Feb. 2005 at 23; and *Bohl v. Hesperia Resorter*, No. SCV SS68052 (Cal. Super. Ct., San Bernardino County, default Nov. 2004) (damages hearing pending); MLRC 2005 Report on Trials and Damages at 12.

Background

The plaintiff, Darlene Burcham, is the City Manager of Roanoke, Virginia. In the Jan. 27, 2004 edition of his online publication (www.roanokejournal.com), defendant Bill McClure wrote that he had witnessed Burcham driving erratically in the parking lot of a local mall, and that she had almost forced McClure to crash his car.

Burcham denied being in the parking lot on that day, and while mall surveillance tapes showed a vehicle like Burcham's city-issued vehicle driving erratically in the lot, the license plates did not match.

McClure removed his column from his site in February after Burcham demanded a retraction. He then posted Burcham's retraction demands, and challenged Burcham to prove that she was not in the parking lot. He then posted several third party comments criticizing Burcham, which he said were from city employees and others.

Burcham filed suit in June, and filed discovery requests which included a request to inspect McClure's computer, including his e-mail files. McClure refused, leading to a motion for default judgment against him.

All of the city's circuit judges then recused themselves, leading the Virginia Supreme Court to appoint retired Virginia Circuit Court Judge Charles B. Flannagan II to preside over the case. Flannagan was formerly a judge in Bristol, Va.; he is now affiliated with a professional arbitration and mediation practice.

At a November 17 hearing on the default judgment motion and damages, Burcham's attorney argued that even though he removed the original column, McClure continued to defame the official by posting the third party comments. McClure, who represented himself, argued that newspaper articles about the posting and Burcham's lawsuit drove more visitors to the site than ever saw the original posting.

Default Issued

Judge Flannagan issued the default judgment to plaintiff after McClure refused to allow inspection of his computer which presumably would have led plaintiff to the identities of the third party sources. He then awarded $2,500, saying that no amount could compensate the city manager for the statements. "It's like trying to unring a bell," Flannagan said, according to *The Roanoke Times*. "You can't do it."

McClure, who was quoted by the newspaper as saying, "I feel great," after the proceeding, did not say whether he would appeal. But he did say that he planned to continue his site, and to criticize Burcham when appropriate.

Plaintiff was represented by Stan Barnhill of Woods Rogers PLC in Roanoke. McClure represented himself.

National Geographic CD-ROM Collection Is a Permitted Revision

Second Circuit Ruling Gives Publishers Guidance on Collective Works in the Digital Age

By Robert G. Sugarman and Pierre M. Davis

The Second Circuit, in an opinion by Judge Ralph K. Winter, unanimously affirmed that "The Complete National Geographic" (the "CNG"), a CD-ROM reproduction of all of the issues of *National Geographic Magazine* (the "Magazine"), is a "revision" permitted by § 201(c) of the Copyright Act of 1976 (the "1976 Act"). *Faulkner v. Nat'l Geographic Soc'y*, 2005 WL 503652 (2d Cir. Mar. 4, 2005) (Winters, Raggi, Katzman, JJ.), *affirming*, 294 F. Supp. 2d 523 (S.D.N.Y. Dec. 11, 2003).

The Second Circuit agreed with District Judge Lewis A. Kaplan's exercise of discretion against giving preclusive effect to the Eleventh Circuit's decision in *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267 (11th Cir. 2001) (holding CNG was a "new collective work"), *cert. denied*, 122 S.Ct. 347 (2001), because that decision is inconsistent with the U.S. Supreme Court's intervening decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), and that the CNG was protected by the publisher's privilege under § 201(c) of the 1976 Act because it preserved the context of the original paper publication of the Magazine. *See Faulkner II,* at *8-*9.

The Court also affirmed the district court's holding that the § 201(c) privilege applied to all contributions published in the Magazine, regardless of who owned the copyright in the individual contributions or whether they were originally published prior to the effective date of the 1976 Act, and that a publisher's privilege under § 201(c) is transferable. *Id.* at *9-*11.

The Court rejected Plaintiffs-Appellants' argument that the mere existence of a contract between the parties makes § 201(c) inapplicable. Read in conjunction with the Supreme Court's and its own decision in *Tasini,* the decision provides significant guidance for publishers as to the Second Circuit's view of their rights under § 201(c).

The "Complete National Geographic"

The CNG was created by digitally scanning each issue of the Magazine published between 1888 and 1996 into a computer system. *Faulkner II*, at *1. As a result of the scanning process, "the CNG user sees exactly what he or she would see if viewing an open page of the paper version, including the fold of the magazine." *Id.*

Except for a small number of images that were blacked out in some iterations of the CNG due to contractual arrangements excluding electronic reproduction – none of which were at issue on appeal – "there are no changes in the content, format, or appearance of the issues of the magazine," which appear chronologically "as they do in the print version, including all text, photographs, graphics, advertising, credits and attributions." *Id.*

As the Court noted, "[t]he individual images and texts are therefore viewed in a context almost identical – but for the use of a computer screen and the power to move from one issue to another and find various items quickly – to that in which they were originally published." *Id.*

The CNG also contains a search engine, which allows a user to find stories by title, subject matter, contributor, date, advertisements, cover and page images, and page maps. *Id.* To view a story using the search engine, a user must insert the disk containing the issue in which the story appeared. *Id.*

In addition to the search engine, the CNG contains introductory materials, including a multimedia sequence, a moving display of the National Geographic Society logo, a Kodak advertisement, and a digital transition of ten covers of the Magazine (the "Moving Cover Sequence"), and some conclusory materials, including a "moving spines sequence" and credits. *Id.* Finally, some iterations of the CNG contain various multimedia tools, such as the capability to bookmark and rotate pages and darken text (the "Program").

11th Circuit's Greenberg *Decision*

Photographer Jerry Greenberg filed the *Greenberg* action in the Southern District of Florida in December 1997. Like the Plaintiffs-Appellants in *Faulkner*, Greenberg claimed that the Society's rights to publish his images in the paper version of the Magazine did not include the right to publish them in the CNG.

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National Geographic CD-ROM Collection Is a Permitted Revision

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On June 8, 1999, Judge Joan A. Lenard granted the Society's motion for summary judgment, holding that the CNG was a "revision" permitted by § 201(c). *Greenberg v. Nat'l Geographic Soc'y*, 1999 WL 737890 (June 8, 1999 S.D. Fla. 1999), *rev'd,* 244 F.3d 1267 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 347 (2001).

In April 2001, one week before the oral argument in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), in the United States Supreme Court, the Court of Appeals for the Eleventh Circuit reversed, holding that the combination of the Replica, Moving Cover Sequence and the Program resulted in a "new work" which was not protected by § 201(c). *Greenberg*, 244 F.3d at 1268.

Tasini*'s Impact on the § 201(c) Landscape*

The plaintiffs in *Tasini* were freelance authors who sold individual articles to *The New York Times, Sports Illustrated* and *Newsday* between 1990 and 1993. Those publications then licensed the articles for republication in three on-line database services: NEXIS, and two CD-ROM databases, the "New York Times OnDisc" and "General Periodicals OnDisc" ("GPO"). *Tasini*, 533 U.S. at 490.

With the exception of the GPO, which is image-based, the products at issue in *Tasini* are text-based and do not contain the graphical or layout information contained in the original print publications. *Id.* at 490-91. While GPO preserves the layout and graphics of the original print version of the article, it does not include surrounding pages or otherwise depict the issue or edition of the publication in which the article originally appeared. *Id.* With regard to the products at issue in *Tasini*, then, individual contributions are reproduced out of the context of the publications in which they originally appeared. See *Id.* at 499-500.

Reversing the district court's grant of summary judgment in favor of the publishers, the Second Circuit held in *Tasini* that the "electronic and CD-ROM databases containing individual articles from multiple editions of various periodicals did not constitute 'revisions' of individual periodical issues within the meaning of Section 201(c)." *Tasini*, 206 F.3d at 168.

The Supreme Court affirmed, holding that, "[t]he publishers are not sheltered by § 201(c)…because the databases reproduce and distribute articles standing alone and not in context…" *Tasini*, 533 U.S. at 488.

Judge Kaplan's Opinion in Faulkner

Judge Kaplan began his analysis in *Faulkner* by declining to apply non-mutual offensive collateral estoppel against defendants because, *inter alia*, "a new determination is warranted in order to take account of an intervening change in the applicable legal context" wrought by the *Tasini* decision. *Faulkner* I, at 535 (internal citations omitted).

Judge Kaplan then found the Eleventh Circuit's conclusion in *Greenberg* that the presence of independently copyrightable material precluded the CNG from being a "revision" under § 201(c) privilege irreconcilable with the Supreme Court's decision in *Tasini* and § 201(c)'s legislative history. *Id.*, at 539.

Judge Kaplan, relying on *Tasini*, instead focused on "the manner in which [the freelancer's individual contribution] is 'presented to, and perceptible by, the user." *Id.* (internal citations omitted).

In deciding whether the CNG qualified as a revision, Judge Kaplan observed that the CNG created a page by page "exact image" of the Magazine, and that "each page of each issue appears to the user exactly as it was in the scanned print version of the *Magazine*, including all text, images, advertising and attributions." *Id.*

Despite the addition of additional elements, Judge Kaplan found that, "the CNG is not a new collection…a new anthology or an entirely different magazine or other collective work." *Id.* at 542 (internal citations omitted). Instead, the CNG "is a package that contains substantially everything that made the *Magazine* copyrightable as a collective work – the same original collection of individual contributions, arranged in the same way, with each presented in the same context." *Id.* at 543.

Second Circuit Opinion in Faulkner *II*

In affirming the district court's decision, the Second Circuit in *Faulkner* II began by providing the legal background for its analysis, first quoting § 201(c) of the 1976 Act, which provides:

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> Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Faulkner II, at *5, quoting 17 U.S.C. § 201(c). As did the district court, the Court then quoted the most pertinent passage in § 201(c)'s legislative history, the House Judiciary Committee Report, which in relevant part states:

> Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

Id., quoting H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 122-23 (1976), *reprinted in* 5 U.S.C.C.A.N. 5659, 5738 (1976).

The Court continued setting the legal pretext for its ruling, next turning to the basis for its own ruling in *Tasini*, stating:

> In Tasini, we held that electronic and CD-ROM databases containing individual articles from multiple editions of various periodicals did not constitute "revisions" of individual periodical issues within the meaning of Section 201(c). Crucial to our decision was the fact that each article had to be retrieved individually from the particular database and made "available without any material from the rest of the periodical in which it first appeared.

Faulkner II, at *6 (internal citation omitted). As then noted by the Court, the Supreme Court in *Tasini* adopted its analysis, stating:

> In agreement with the Second Circuit…[]§ 201(c) does not authorize the copying at issue here…[] because the databases reproduce and distribute articles standing alone and not in context, not "as part of that particular collective work" to which the author contributed, "as part of…any revision" thereof, or "as part of…any later collective work in the same series."

Id., quoting *Tasini*, 533 U.S. at 488.

The Second Circuit then rounded out the legal background by contrasting the Eleventh Circuit's approach in *Greenberg* to the Supreme Court's and its own approach in *Tasini*: "*Greenberg* did not utilize the *Tasini* analysis in determining whether the CNG was a 'revision' under Section 201(c). It did not discuss whether the articles were presented in the context of the previous collect[ive] works or mention our discussion in *Tasini*." *Faulkner* II, at *7.

Instead, the Court found, *Greenberg* erroneously focused on the three independently copyrightable elements contained in the CNG, which included the Replica, the Program and the Moving Cover Sequence. *Id.*

Shifting from the legal pretext for its decision, the Court held that the district court properly declined to apply the doctrine of offensive collateral estoppel because "the *Tasini* approach so substantially departs from the *Greenberg* analysis that it represents an intervening change in law rendering application of collateral estoppel inappropriate." *Faulkner* II, at *8-9 (also noting that a denial of certiorari is not a comment on the merits of a case). The Court then turned to the merits, holding:

> [B]ecause the original context of the Magazines is omnipresent in the CNG and because it is a new version of the Magazine, the CNG is a privileged revision…The CNG presents the underlying works to users in the same context as they were presented to the users in the original versions of the Magazine. The CNG uses the almost identical 'selection, coordination, and arrangement' of the underlying works as used in the original collective works.

Id. at *9 (internal citations omitted).

In further explicating why the CNG qualifies as a "revision" under § 201(c), and therefore why "*Tasini* is… contrary to *Greenberg*," the Court stated that, "because the

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Section 201(c) privilege of reproduction and distribution extends to that collective work and any revision of that collective work, a permissible revision may contain elements not found in the original – for example, a collection of bound volumes of past issues with a copyrightable index to the entire collection." *Id.*

Accordingly, the blacked out images and the Moving Cover Sequence in the CNG "do not substantially alter the original context which, unlike that of the works at issue in *Tasini*, is immediately recognizable." *Id.*

After determining that the § 201(c) privilege permitted the CNG, the Court turned to Plaintiffs-Appellants' remaining arguments. Relying on the district court's analysis in *Tasini*, the only court other than the district court in *Faulkner* to have squarely addressed the issue, the Court held that the § 201(c) privilege is transferable.

According to the Court, it is reasonable to read § 201 (c) in conjunction with § 201(d) of the Copyright Act, which allows the holder of "[a]ny of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106," to transfer those rights "in whole or in part." *Faulkner* II, at *10. Because, "[s]ection 201(c) transfers some of the copyright in a contribution to publishers in the form of a limited privilege… publishers may transfer [the] subdivision of a copyright that they acquire." *Id.*

Thus, the Society did not err in licensing the right to develop, produce and distribute the CNG product to its wholly owned subsidiaries and to third parties such as Mindscape (a third party distributor).

The Court succinctly affirmed the remainder of the district court's findings. First, the Court affirmed the district court's determination that the § 201(c) privilege applied to works published in the Magazine both before and after the effective date of the 1976 Act, because "at all relevant times [NGS] owned the copyrights in issues of the *Magazine* published before and after January 1, 1978…the privileges conferred upon it by Section 201(c) as the holder of those copyrights govern regardless of when they were published." *Faulkner* II, at *10, quoting *Faulkner* I, at 543.

Determining who owned the individual copyrights in the photographs and texts under either the Copyright Act of 1909 or the 1976 Act was therefore irrelevant because § 201(c) applies regardless of who owns the copyright in the underlying contributions. *Id.*

Next, the Court rejected Plaintiffs-Appellants' argument that the mere existence of a contract between the parties makes § 201(c) inapplicable because that section states that it applies "in the absense of an express transfer of the copyright or of any rights under it." *Faulkner* II, at *11.

The Court instead found that, "the plain effect of the quoted language is only to establish the minimum rights acquired by publishers absent contractual provisions expressly overriding Section 201(c)." *Id.* Thus, according to the Court, "in the absence of a contract stating otherwise, publishers acquire '*only* the privilege of reproducing and distributing the contribution as part of'" one of the three enumerated instances in that section, and "the mere existence of contracts does not, therefore, render Section 201(c) inapplicable." *Id.*

The Court also dismissed the *Faulkner* Appellants' claims that, in entering their contracts, they intended to limit their claims to non-digital uses. *Faulkner* II, at *11. Because the copyright law is medium neutral, the Court reasoned, the *Faulkner* Appellants' failure to communicate to the Society any such intent to limit their agreement to non-digital uses was fatal to their claim. *Id.*

(Like the district court, the Second Circuit found that summary judgment was not appropriate with regard to certain invoices expressly denying NGS electronic rights. *Faulkner* II, at *12. While Defendants-Appellees had voluntarily withdrawn two such photographs from their summary judgment motions, and the district court thus excepted those photographs from its grant of summary judgment, the Second Circuit found, based on declarations submitted by Plaintiffs-Appellants, that five additional photographs should have been excepted from the district court's grant of summary judgment.)

The last two items discussed by the Court in affirming the district court decision were the propriety of the district court's dismissal of Plaintiffs-Appellants' claims for contributory infringement and its dismissal of Plaintiffs-Appellants' motion for Judge Kaplan to recuse himself.

The Court found that the district court properly dismissed the contributory infringement claims because a finding of contributory infringement is proper only where

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there has been a finding of direct infringement. *Faulkner* II, at *11.

As for recusal, the Court first noted that the movants had raised the issue only after Judge Kaplan had ruled against them. *Id.* Like Judge Kaplan, however, the Second Circuit discussed the merits of the recusal motion, the Second Circuit doing so because it wanted "to erase all doubt as to the propriety of Judge Kaplan's continuing to preside over this matter." *Id.* at *12 n.10.

The Court found that neither the fact that Judge Kaplan was a law partner of a former member of National Geographic's board of trustees, the late United States Circuit Judge Leon A. Higginbotham, while in private practice, nor the fact that he had represented a subsidiary of defendant Kodak, warranted recusal under the appropriate standard. *Id.*

At least two Plaintiffs-Appellants have been quoted in the press as saying they intend to file a petition for certiorari to the United States Supreme Court.

Robert Sugarman, a partner, and Pierre Davis, an associate, at Weil, Gotshal & Manges, LLP represent the defendants in this case.

Notes

1. The full citation numbers have been omitted from the short-form citations of both the district court and Second Circuit opinions throughout this article. The district court's decision in *Faulkner v. National Geographic* will be referred to herein as *Faulkner* I, and the Second Circuit's opinion as *Faulkner* II. Short-form citations to *Faulkner* I are made to the Federal Supplement and short-form citations to *Faulkner* II are made to the Westlaw star pagination numbers.

The decision is applicable to four of the several actions brought by photographers and authors against the National Geographic Society, National Geographic Holdings, its wholly owned subsidiary (collectively referred to herein as the "Society"), Eastman Kodak Company and Mindscape, Inc. It is not currently applicable to defendant Dataware Technologies, Inc., which is currently in bankruptcy.

Jay Leno Prevails In His Attempt to Clarify Gag Order in *People v. Jackson*

By Theodore J. Boutrous, Jr., and Michael H. Dore

This month Judge Rodney S. Melville of the Santa Barbara Superior Court, the presiding judge in the high-profile Michael Jackson child molestation trial, clarified that the court's gag order on subpoenaed witnesses does not limit *The Tonight Show* host Jay Leno, who was subpoenaed by Jackson, from publicly commenting on the felony prosecution of the singer. *People v. Jackson*, (Ca. Super. Ct. Mar. 11, 2005).

Judge Melville made clear that the gag order, which applies to anyone subpoenaed in the case, would have the same application as the court had earlier applied to British journalist and ABC News correspondent Martin Bashir. That is, Leno generally may comment on the case like anyone else, but he may not disclose specific facts related to the case to which he is a percipient witness, if any such facts exist.

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Request for Clarification

In the earliest phases of the Michael Jackson prosecution, even before the grand jury proceedings in the case, the Santa Barbara Superior Court issued a Protective Order ("Gag Order"). This January 16, 2004 order prevents anyone subpoenaed to testify in the case from, among other things, making any out-of-court public comment as to "the weight, value, or effect of any evidence as tending to establish guilt or innocence."

The order likewise prevents any such person from making a public statement about the "content, nature, substance, or effect of any statements or testimony that have been given or is expected to be given" in the case.

On February 17, 2005, Michael Jackson served Jay Leno with a subpoena requiring Leno to appear and tes-

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Jay Leno Prevails In His Attempt to Clarify Gag Order in *People v. Michael Jackson*

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tify at Jackson's criminal trial. Based on the broad language of the Gag Order, Leno filed a request for clarification the following day.

Leno noted that the court could not have intended its January 2004 order to limit the ability of entertainment personalities like himself to talk about the Jackson case, and he asked the court to clarify either that the Gag Order does not apply to him at all, or else that it limits only Leno's ability to speak publicly about evidence of which he has direct, first-hand knowledge, if any exists.

The prosecution did not oppose Leno's motion, though Jackson filed an opposition brief which argued that Leno's commentary was "hardly crucial . . . on important political or social topics." Leno's reply to this opposition pointed out the well-established precedent that the use of humor to engage in social commentary is no less valuable and worthy of First Amendment protection than other forms of speech.

Meanwhile, during the week leading up to the hearing, Leno interrupted his monologue each night and stood aside as special guests told Michael Jackson jokes. Comedians from Drew Carey to Carrot Top took the stage and showed that, under any interpretation of the Gag Order, jokes about Jackson were as inevitable as the tides.

The Superior Court's Clarification

At a hearing on March 11, 2005, Judge Melville indicated that "the only restrictions that Mr. Leno should be subject to is that he can't talk about the specific facts that he is a percipient witness of in this case." Outside of this narrow sliver of information, assuming there is any, the court held that Leno can publicly comment on the case, just as any other entertainment personality in the world can do.

Jackson's counsel then lamented Leno's ability to tell "cruel jokes" about Jackson, which "may be funny, unless you're Michael Jackson," and asked the court to "expand [its] order to cruel jokes." According to Jackson's counsel, "we're not putting him out of business if he can't talk about Michael Jackson for a few weeks."

Judge Melville rejected this attempt to prevent Leno from telling jokes about Jackson, noting his belief that the Constitution would not allow such an order. According to Judge Melville, Leno "makes a living as a comedian," and "it wasn't the way I read the gag order that it would stop him from commenting on or telling jokes about the case."

Indeed, Melville "would not have expected him not to continue to tell jokes, if that's what he wanted to do." As one report explained, the ruling allows Leno to pursue "his craft's time-honored and constitutionally protected pursuit of shtick." Steve Chawkins, *Gag on Jackson Gags is Loosened*, L.A. Times, Mar. 12, 2005, at B1.

The court's ruling mirrored its earlier decision regarding application of the Gag Order to journalist Martin Bashir, who was called as the first witness of the trial. The court further indicated that the same principle would apply to the long list of other prospective witnesses, which includes several celebrities. They, like Leno and Bashir, may publicly comment on any aspect of the case except for any relevant information of which they have first-hand knowledge.

Theodore J. Boutrous, Jr., is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP and Co-Chair of the firm's Media Law Practice Group; Michael H. Dore is an associate in the firm's Los Angeles office and member of the group. The authors represent a coalition of major media organizations in the pending Michael Jackson criminal case, as well as Mr. Leno and journalist Martin Bashir, who has been called to testify in the case. James Lichtman, Senior Vice President of Litigation with NBC Universal, Inc., also represented Mr. Leno in his efforts to clarify the scope of the Superior Court's Gag Order.

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Court Holds Blanket Closure of Court-Martial Proceeding Was Unlawful

In a decision with potentially widespread impact on the press' access to court-martial proceedings, the United States Army Court of Criminal Appeals recently found an Investigating Officer acted unlawfully in issuing the blanket closure of an Article 32 hearing involving homicide charges against four United States soldiers. *Denver Post Corp. v. United States*, Army Misc. 20041215 (A.C.C.A. Feb. 23, 2205) (Clevenger, J.).

Background

In November 2003, Abed Hamed Mowhoush, the former Iraqi Air Defense commander under Saddam Hussein, died while undergoing a two-week interrogation by the United States military in Iraqi. According to the U.S. Government, Mowhoush was placed head-first into a heavy sleeping bag, bound with an electrical cord, and rolled from front to back on the ground while soldiers sat upon his chest and back.

In December 2004, an evidentiary hearing was commenced pursuant to Article 32 of the Uniform Code of Military Justice to determine whether four soldiers would stand trial for homicide charges in connection with Mowhoush's death.

The day before the hearing was scheduled to begin, the government issued a press release announcing that significant portions of the hearing would be closed to the press and public due to the "security classification" of the anticipated evidence.

Although *The Denver Post* ("*The Post*") attended the hearing to argue that access should be granted to the public and press representatives, Investigating Officer Robert Ayers closed the proceeding – even before taking the testimony of a security specialist – after finding that classified materials were "inextricably" involved in the investigation, and that "it would be tough to redact portions of classified information from non-classified information."

The Post's motion for a stay of the proceedings until the issue of access could be decided was granted on December 3, 2004, after testimony in the Article 32 proceeding had already commenced.

Unclassified Testimony Must Be Open

Upon review, the Court of Criminal Appeals held that the Investigating Officer's blanket closure was "clearly erroneous" and amounted to an "usurpation of authority." Drawing from the Court of Military Appeals' opinion in *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977), the court found that the decision to close a court-martial proceeding must be "'narrowly and carefully drawn,'" and that exclusion could only be had upon "'a compelling showing that such was necessary to prevent the disclosure of classified information.'"

After noting that the Investigating Officer had committed a procedural error in closing the hearing before allowing *The Post* to address the matter of access on the record, the court went on to find that the "rule of law" required an Investigating Officer to examine in advance how the substance of each specific witness' expected testimony would reveal classified material before the decision to close a hearing could be made.

The appeals court adopted the *Grunden* court's requirement that the public must have access to witness testimony that does not implicate classified material, and that when a witness's testimony "partially concerns" classified material the proper course of action is to conduct a bifurcated presentation in which only the testimony involving classified issues is presented in closed session.

The Court found that such a narrowly-tailored remedy comported with the Investigating Officer's responsibility to "act impartially to safeguard the integrity of the military justice system by only authorizing the most limited necessary degree of closure" even in instances in which defense counsel agreed with the government's desire to close the proceedings.

The court further ordered that *The Post* be granted access to a 285-page transcript of the proceedings that had already occurred with the classified information redacted, but denied a writ of prohibition that would require the testimony to be presented again in open court because the Investigating Officer's decision had been based in part on "a sketchy consideration of the applicable legal standards," and had not been made "arbitrarily."

The Denver Post was represented by Eugene R. Fidell and Matthew S. Freedus of Feldesman Tucker Leifer Fidell LLP of Washington, D.C. and Thomas B. Kelley and Steven D. Zansberg of Faegre & Benson LLP of Denver, CO.

Vermont Court Dismisses Declaratory Judgment Action Over Meeting Law Violation

In a decision characterized by the applicant newspaper as another "blow" to the ability of the press – and public – to gain access to government meetings in Vermont, a Superior Court dismissed an action brought by the *Times Argus* against the Moretown Selectboard – even after finding the board violated the state's Open Meeting law. *Times Argus Association v. Town of Moretown*, No. 555-10-04 (Va. Super. Ct., Washington County, Mar. 4, 2005) (Katz, J.).

Backgound

At issue was an "executive session" of a local Selectboard convened to discuss a town clerk's successful application to lower the valuation of her property. This issue had become a matter of public interest and local residents complained about the reappraisal. The Moretown Selectboard agreed that the revaluation would be appealed to the state appraisal board. Before the appeal took place, the town clerk requested a meeting with the Selectboard, which granted her request that the meeting be closed to the public. The meeting was held in private "executive session" and no minutes were taken.

The Times Argus ("*The Times"*) brought suit under Vermont's Open Meeting statute 1 V.S.A. § 313, seeking a declaratory judgment and injunction barring the Selectboard from conducting such executive sessions in the future.

Statute Violated But No Relief

The court rejected the town's argument that a closed session was appropriate under the state's Open Meeting law, which allows for, *inter alia*, closed executive sessions to address "grievances ... where premature general public knowledge would clearly place the state, municipality, other public body, or person involved at a substantial disadvantage." 1 V.S.A. § 313(a)(1).

The court ruled that the "generalized gripe" of a town clerk over the personal issue of her property value did not constitute the type of "formal and particularized dispute of some labor action" contemplated by the statute.

Although the court agreed with *The Times* that the town was thus in violation of Vermont's Open Meeting law, it denied the newspaper both forms of relief sought.

No Standing

In declining to enter a declaratory judgment, the court ruled that such relief necessitated the existence of "an actual controversy; the claimed result or consequences [of which] must be so set forth that the court can see that they are not based upon fear or anticipation but are reasonably anticipated." *Citing Robtoy v. City of St. Albans*, 132 Vt. 503, 504 (1974). Drawing from the United States Supreme Court's opinion in *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), which recognized that declaratory judgments could not be used to address "hypothetical situations" or to determine "the scope ... of legislation in advance of its immediate advese effect in the context of a concrete case" the court ruled that a declaratory judgment would not be entered based on the "remote possibility" that the town would conduct unlawful executive sessions in the future.

The court went on to consider *The Times*' request for an injunction, finding that such an "extraordinary remedy" is only appropriate in cases in which a plaintiff is "threatened by some injury for which he has no legal remedy" and in which there is more than "a mere possibility or fear" that the injury will occur. (citations omitted).

The court ruled that in the instant case it would be "wholly speculative" to conclude that the Selectboard would conduct executive sessions to discuss subjects in violation of the Open Meeting law in the future, and thus declined to enter an injunction.

Finally, the court ruled that it would "take counsel at his word" that no minutes or other notes were taken at the meeting which could be turned over to *The Times.*

The Times Argus was represented by Robert Hemley of Gravel & Shea, Vt.

Any developments you think other MLRC members should know about?

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Organized Crime Reporter Wins Access to Mob Trial Tapes

A reporter representing himself successfully intervened in an ongoing mob murder trial to obtain access to copies of recordings played for the jury at trial. *United States v. Massino*, No.03 Cr. 307, 2005 WL 336304 (E. D.N.Y. Feb. 14, 2005) (Garaufis, J.).

Background

The intervenor, journalist Jerry Capeci, is a veteran chronicler of the mafia and organized crime. He writes a weekly column for the *New York Sun* and also publishes the website www.ganglandnews.com.

Capeci applied on January 11, 2005 for an order directing the government to make copies of five redacted tape recordings introduced into evidence at the trial of Joseph Massino. Massino was one of a number of individuals indicted in connection with the illegal activities of the Bonnano crime family, and the government planned to use portions of the same tapes – containing conversations with a cooperating witness – in future trials involving Bonnano associates.

The media were also allowed to listen to the tapes, and were provided transcripts –which they were not permitted to keep – as listening aids.

Reporter Allowed to Duplicate Tapes

In ruling that Capeci was entitled to copies of the sound recordings, the court first recognized that the common law right of access to evidence presented in the courtroom could only be overcome in "the most extraordinary of circumstances." (citation omitted).

The court went on to reject each of the government's arguments against access in turn. First, the court found that security concerns pertaining to the cooperating witnesses and their families were inadequate to block Capeci's access to the tapes. The court recognized that releasing the tapes – which the media had already had the opportunity to listen to and report on – would disclose no additional substantive information, and that the cooperating witness had already testified in open court.

The court further rejected the government's argument that publication of the information on the Internet should change the access analysis, finding that such distinction would constrain any media outlet with an online presence – not just "internet journalists" – in violation of the First Amendment, and that the common law right of access encouraged widespread distribution of information of the sort contemplated by Capeci.

The court next rejected the government's argument that allowing release of the tapes would comprise the fair trial rights of defendants in future Bonnano crime family trials. The court held that adequate means existed for rectifying any potential jury contamination caused by release of the tapes, and that if an impartial jury could not be impaneled in the jurisdiction through voir dire, courts had the option of granting a continuance or change of venue motion.

Although the government argued that "no apparent benefit to the public" would be achieved by duplicating the tapes because they did not involve the "core issues of democracy at stake in political corruption cases," the court disagreed, finding that "the transparency and legitimacy of the judicial process is *always* implicated when a federal court receives information into evidence."

The court found that the trial at issue was a "centerpiece" of the government's attempt to eradicate organized crime from the district, and that the public had a legitimate interest in reviewing the materials entered into evidence in the case.

The court further rejected the government's argument that the release of the tapes could have a chilling effect on the participation of cooperating witnesses, finding that witnesses understood that their participation could become public knowledge during the trial process, and that such cooperation would unlikely be deterred by the possibility of recordings being released *after* a public trial.

Finally, the court rejected the government's request to bifurcate the rights of access and duplication, which would allow Capeci to listen to – but not duplicate – the tapes. The court held that absent countervailing concerns or the inability to reproduce the materials at issue, the presumption of public access to court documents "embraces duplication as well as inspection."

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Pennsylvania Court Allows Partial Release of Heinz Estate Documents

A Pennsylvania Court of Common Pleas recently modified a decision sealing the estate records of late Pennsylvania Senator John Heinz, paving the way for a partial release of documents in late March. *In re Petition to Unseal Records of the Estate of H. John Heinz, III, Deceased*, No. 4316/2004 (Pa. Ct. C.P., Allegheny County, March 8, 2005) (Lucchino, J.).

Background

The estate records were sealed following Heinz's death in 1991 ("April 5th Order"). Teresa Heinz later married Senator Kerry and her wealth and support of Kerry's candidacy became public issues during the 2004 campaign.

Last year five newspapers, including *The Pittsburgh Post-Gazette* and *The Pittsburgh Tribune-Review*, filed a petition to have the sealing order modified on the grounds that "substantial public interest" was invested in the ways in which the Heinz estate could impact the candidacy and potential presidency of Sen. Kerry.

Even after Sen. Kerry was defeated in the election, the *Post-Gazette* and *Tribune-Review* continued to petition for the modification of the April 5th Order.

The Heinz family and the executors of the estate opposed the newspapers' petition, arguing that documents containing "detailed personal and financial information," that would create "an increased theft and personal security risk" if released had been filed in reliance on the fact the April 5th Order would prevent their public disclosure.

Limited Documents Will Be Released

In considering the newspapers' petition, the court recognized the presumption under Pennsylvania law that all court proceedings and judicial records are open to the public. The presumption is rebuttable, however, and subject to the court's inherent discretion to limit access when appropriate.

Turning to the estate records, the court found that in order to address the competing access and privacy interests of the public and estate, it would be necessary to balance a number of "significant" factors including: a) the presumption of openness with respect to court records; b) the reliance of the estate's executors on the April 5th Order; c) the fact that while the order was entered in 1991 and the estate formally closed in 1998, petitioners did not seek access to the records until 2004; d) the withdrawal of three of the five original petitioners after Sen. Kerry lost the 2004 election; e) the remaining two newspapers' failure to submit any additional evidence in support of the petition; and f) the ease with which information – including financial data such as account numbers – could be transmitted over the Internet and "accessed by mischievous people" around the world once released.

The court went on to hold that items that are "routinely part of an estate file and do not implicate security or privacy concerns" could be unsealed, which included Heinz's Will and summaries of the account and inventory of the estate. Personal information, including social security and bank account numbers, home addresses, and the location of certain tangible assets, will be redacted before the documents are released.

The court went on to consider the additional documents sought by petitioners – the Inventory, First and Final Account, and Trust Account documents of Sen. Heinz's estate – which the court found included "highly detailed descriptions of the Estate's property and the detailed manner in which that property was administered after Senator Heinz's death."

In declining to modify the April 5th Order with respect to these documents, the court ruled that petitioners had failed to establish a legitimate public interest in the information that could outweigh the reliance of the estate's executors on the Order in filing the documents. *Citing Katz v. Katz*, 514 A.2d 1374 (Pa. 1986).

In enumerating the factors that led to its decision to allow for a limited modification of the April 5th Order, the court noted that petitioners had failed to substantiate their continued interest in unsealing the records after Sen. Kerry's failed bid for the presidency with anything more than "a generalized desire and claim of right to know;" had not expressed an interest in the unsealing the records until nearly 15 years after Heinz's death; and the fact that access could act as a vehicle for "harmful or improper purposes" through the release of the information by "inexpensive, worldwide transmission."

The Pittsburgh Tribune-Review was represented by Ronald D. Barber of Strassburger McKenna Gutnick & Potter, P.C. of Pittsburgh, Pa. *The Pittsburgh Post-Gazette* was represented by Charles Kelly of Sinclair Kelly Jackson Reinhart & Hayden, LLC of Canonsburg, Pa.

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Canadian Court Hears *Bangoura* Appeal

The Ontario Court of Appeal heard arguments earlier this month from the *Washington Post* and a coalition of over 50 "global media giants" in an appeal that is being closely watched for its potential impact on free speech on the Internet. *Bangoura v. Washington Post*, No. C41379 (Ontario Court of Appeal, oral argument Mar. 8, 2005).

A lawyer at the hearing described the Court as "receptive" to the media's argument that taking jurisdiction in the case threatens the freedom of the press.

Background

The *Washington Post* and the media coalition are seeking to overturn a decision of the Ontario Superior Court allowing jurisdiction in Ontario over a libel suit brought by Cheikh Bangoura, a former senior official with the United Nations against the *Washington Post* ("*Post*"). *Bangoura v. The Washington Post*, (2004) 235 D.L.R. (4th) 564 (SCJ).

Bangoura is seeking $9 million in connection with two allegedly libelous articles published in the *Post* that were accessible through the *Post*'s website for a 14-day period in 1997.

At the time the articles were published, the *Post* had only seven subscribers in Ontario, and presented evidence that the only individual to access the article through the *Post*'s online archives was the plaintiff's counsel. Although Bangoura himself did not move to Ontario until June 2000 – more than three years after the articles appeared – the court denied the *Post*'s motion to dismiss for lack of a substantial connection with the forum, stating that "those who publish via the Internet are aware of the global reach of their publications, and must consider the legal consequences in the jurisdiction of the subjects of their articles."

On appeal before Ontario Court of Appeal Justices Armstrong, McMurty, and Lang, the *Post*, along with the media coalition, argued that upholding the trial court's judgment would expose any publisher with an online presence to the risk of facing liability before a court anywhere in the world for material published on a website regardless of the publisher's other contacts with the forum.

Such holding would result in the media being constantly unsure of the standards that might be applied to a publication, and would thus "discourage and inhibit a free flow of information" as media entities become constrained by what they feel they can safely publish and employ means of restricting access to online information in an effort to avoid liability.

The media coalition argued in a written brief that such decision fails to comply with the test adopted by the Supreme Court of Canada for determining jurisdiction, which looks to whether there is a "real and substantial connection" between the case and the jurisdiction, and "raises the issue of whether it was 'reasonably foreseeable' that a foreign defendant could face litigation in the forum at issue."

The Court of Appeal reserved its decision in the matter. Paul Schabas, Blake, Cassels & Graydon, argued on behalf of the *Washington Post.* Brian MacLeod Rogers argued on behalf of the media coalition. The plaintiff was represented by Kikélola Roach.

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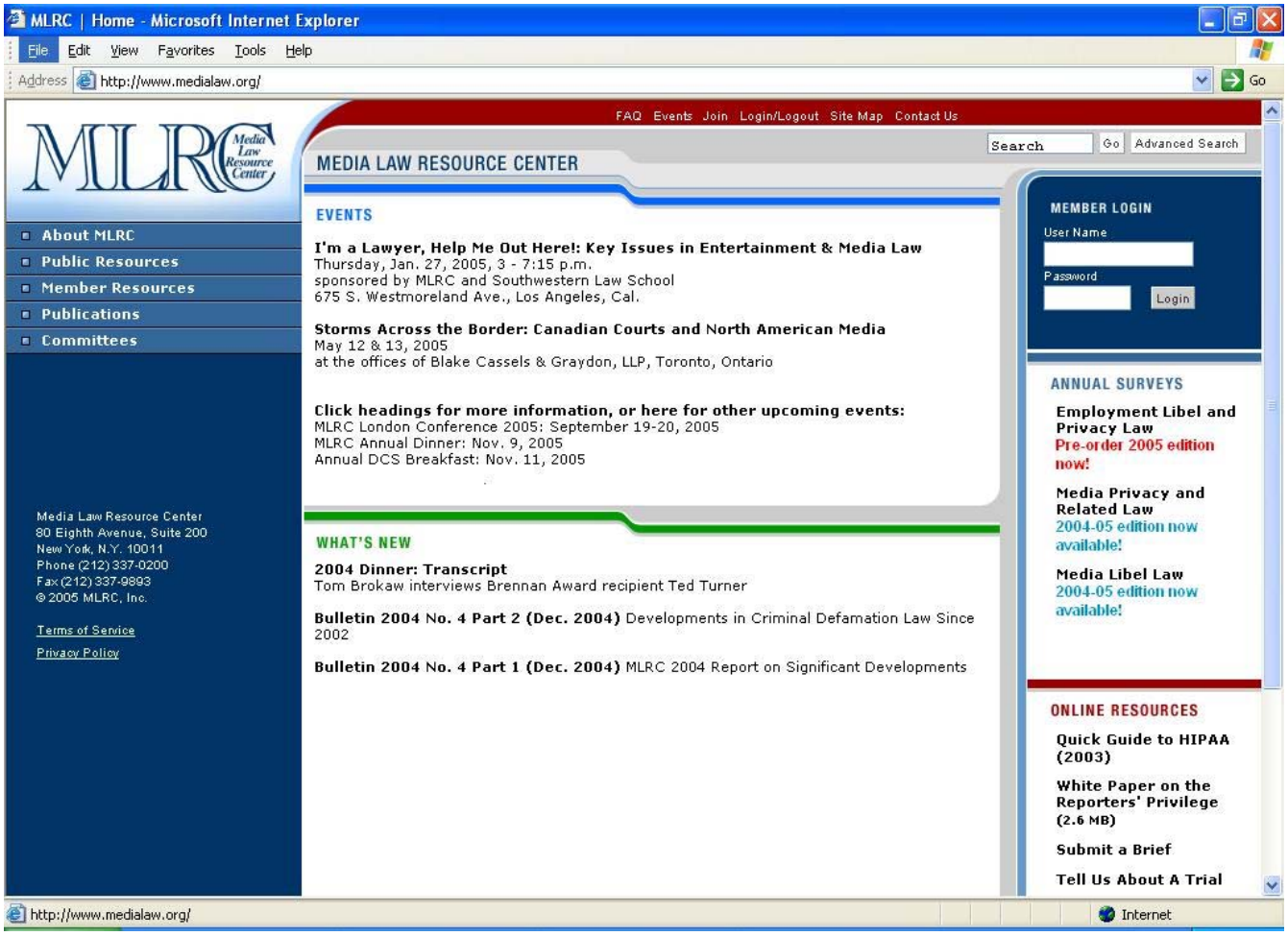

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Contact Debby Seiden, dseiden@medialaw.org, for details.

FCC Tempers Move Toward Strict Liability in Indecency Decisions

By Reginal J. Leichty

A trio of decisions last month suggest that, after pushing the broadcast indecency standard's outer limits for nearly a year, the Federal Communications Commission may be charting a more balanced approach in 2005.

In the most high-profile of these decisions, addressing complaints filed against ABC Television and its affiliates for airing an uncut version of the graphic WW II movie "Saving Private Ryan," the Commission found that expletives used in the film were not used to pander, titillate, or shock the audience, but rather to provide a realistic depiction of what soldiers experienced during the war. *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* FCC 05-23, (2005).

A trio of decisions last month suggest that the Federal Communications Commission may be charting a more balanced approach in 2005.

This decision suggests that – after Janet Jackson's revealing moment during the 2004 Super Bowl triggered a notable shift in the FCC's enforcement of the indecency rules – the Commission is once again placing a significant emphasis on context when analyzing indecency complaints.

Under traditional Commission analysis, actionable broadcast indecency describes or depicts sexual or excretory organs or activities in a manner patently offensive as measured by contemporary community standards for the broadcast medium (indecent content is prohibited during non-safe harbor hours of 6 am to 10 pm).

In making indecency findings the Commission has considered: (i) the context of the broadcast; (ii) the explicitness or graphic nature of the broadcast; (iii) whether the broadcast repeats or dwells upon sexual or excretory subjects; and (iv) whether it appears to pander, titillate or shock.

In several cases last year the Commission stretched this traditional balancing test, finding violations where the material only *referenced* sexual acts and where the depiction of a sexual organ was fleeting. These decisions seemingly ignored the Commission's usual consideration of whether the material "dwells on or repeats at length" descriptions of sexual or excretory organs and activities and appeared to soften the "patently offensive" requirement to a standard where mere innuendo is actionable.

The Commission also took action in 2004 to define "profanity" and prohibited profane words during the 6 am-10 pm time period, while suggesting that a single utterance of the "F-Word" is an actionable violation without regard to context. These changes appeared to set the stage for a near strict liability indecency standard.

Complaint Against "Saving Private Ryan"

In three decisions released in late February, however, the Commission seems to be taking a more restrained approach, including placing a renewed emphasis on context. In the "Saving Private Ryan" decision, the Commission stated that "in light of the overall context of the film, including the fact that it is designed to show the horrors of war … and the repeated warnings provided by ABC, not only in the introduction, but also at each commercial break, we find that the complained-of-material is not patently offensive as measured by contemporary community standards."

Commenting on the case, FCC Chairman Powell said, "Context remains vital to any consideration of whether profanity or sexual content constitutes legally actionable indecency…[t]he Commission must stay faithful to considering complaints within their setting and temper any movement toward stricter liability if it hopes to give full effect to the confines of the First Amendment."

This raises the question of whether the indecency standard will be applied consistently. Will, for example, the indecency standard be applied in the same way to a "realistic" police drama as it is in a WWII movie?

Complaints Against Sitcoms

In another departure from last year's aggressive enforcement practices, the Commission appeared, in two recent cases, to strengthen the "patently offensive" prong of the indecency analysis. Considering com-

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FCC Tempers Move Toward Strict Liability in Indecency Decisions

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plaints about the shows "Will and Grace" and "Arrested Development" that allegedly included "references" to graphic sexual content and "sexual innuendo," the Commission determined that the material was not patently offensive because the cited dialogue was "neither sufficiently graphic nor explicit" to render the program indecent. *In re NBC Telemundo licensing Co., Licensee of Station WRC-TV, Washington, D.C.*, Memorandum, Opinion and Order, FCC 05-38, (2005); *In re Fox Television Stations, Inc, Licensee of station WTTG(TV), Washington, D.C.*, Memorandum, Opinion and Order, FCC 05-36 (2005).

Despite these recent decisions, the future of the broadcast decency standard is murky. The House of Representatives recently approved legislation to significantly increase the penalties for indecency violations, including mandatory license reviews for repeat offenders and individual liability for artists. Similar legislation is pending in the Senate, where the Chairman of the Senate Commerce Committee has called for expanding the indecency regulations to cable and satellite services.

This Congressional pressure, combined with the departure of FCC Chairman Michael Powell and other expected turnover at the Commission, could easily cause the FCC to once again take a more aggressive stance.

President Bush's recent comments suggesting that parents need to take responsibility for what their children watch on television has shifted some of the intense focus away from broadcasters, but only the appointment of a new FCC Chairman, resolution of pending indecency legislation on Capitol Hill, and completion of the Janet Jackson case, will provide the clarity broadcasters seek in this area of the law.

Reginal J. Leichty is with Holland & Knight LLP in the Washington D.C. office.

LEGISLATIVE UPDATE

Shield Law, FOIA Bills & Indecency

By Kevin Goldberg

Things are starting to move in Congress with regard to bills affecting the media. A hearing was held on the "Open Government Act" introduced by Senators Cornyn and Leahy. Those two Senators also introduced the "Faster FOIA" Act, which will oversee FOIA processing, recommending changes where necessary. In addition, the long fight toward passage of a federal reporter's shield law is in full swing with advocates swarming Capitol Hill in support of the bill.

Free Flow of Information Act (HR 581 and S 340)

- On February 2, 2005, Rep. Mike Pence (R-IN) introduced the "Free Flow of Information Act" (HR 581), which is largely based on existing Department of Justice guidelines for issuing subpoenas to members of the press. On February 9, 2005 Senator Richard Lugar (R-IN) introduced the same bill in the Senate as S 340.
- The main provisions of this bill include:
  - An absolute privilege against compelled testimony before any federal judicial, legislative, executive or administrative body regarding the identity of a confidential source or information that would reveal the identity of that source
  - A qualified privilege against the production of documents to these bodies unless clear and convincing evidence demonstrates that the information cannot be obtained by a reasonable, alternative non-media source and:
    - In a criminal prosecution or investigation:
      - There are reasonable grounds to believe a crime has occurred and
      - The information sought is essential to the prosecution or investigation
    - In a civil case, the information is essential to a dispositive issue in a case of substantial importance
  - The protections discussed above apply to information sought by a third party but related to a "covered entity", such as telephone toll records or E-mail records and, in the event that they are sought, the party seeking the information shall give the covered entity reasonable and timely notice of the request and an opportunity to be heard before disclosure
  - A "covered entity" includes
    - The publisher of a newspaper, magazine, book journal or other periodical; a radio or television station, network or programming service; or a news agency or wire service, with a broad listing of media such as broadcast, cable, satellite or other means
    - Any owner or operator of such entity, as well as their employees, contractors or any other person who gathers, edits, photographs, records, prepares or disseminates the news or information
- The bill's sponsors in both Houses are currently trying to get co-sponsors, especially among the members of the Senate and House Judiciary Committees. Washington representatives of major media organizations and companies have met with the staffs of these Committees and members of these committees, urging them to co-sponsor the bill and demand that the Chairs of these Commitees (Sen. Arlen Spector (R-PA) and Rep. James Sensensbrenner (R-WI)) hold hearings on the bill. MLRC members are urged to do the same. A list of members of the Senate Judiciary Committee can be found at: http://judiciary.senate.gov/members.cfm; a list of House Judiciary Committee members can be found at: http://judiciary.house.gov/CommitteeMembership.aspx.

Open Government Act of 2005 (S 394 and HR 867)

- The Open Government Act was introduced by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) as S 394 on February 16, 2005; Rep. Lamar Smith (R-TX) introduced the bill as HR 867 in the House on the same day.

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LEGISLATIVE UPDATE

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- Among the changes proposed in this bill are:
  - A broader definition of the "news media" for purposes of fee waivers
  - An increase in the circumstances where "fee shifting" would occur to award attorney's fees to a litigant who must go to court to obtain documents from a federal agency
  - Creation of an annual report to track the use of the FOIA exemption for critical infrastructure information that was created in the Homeland Security Act of 2002
  - Stricter enforcement of the 20 day deadline by which agencies must respond to a FOIA request and the penalties for non-compliance
  - Maintenance of accessibility of records that have been given to private contractors for storage and maintenance
  - The creation of a "FOIA Ombudsman" within a new Office of Government Information Services to oversee FOIA
- A massive lobbying effort has supported this bill, leading to a hearing being held in the Senate Judiciary Committee on March 15, at which Walter Mears, formerly of the Associated Press, was the lone press representative testifying in support of the bill (the House Government Reform Committee, which has jurisdiction in that chamber, has not scheduled a hearing).

Faster FOIA Act

- Senators Cornyn and Leahy also introduced the "Faster FOIA" Act on March 10, 2005. This bill is intended to support the Open Government Act by establishing an advisory commission on Freedom of Information Act processing delays.
- The 16 member commission would report to Congress and the President with recommendations for ways in which delays can be reduced in FOIA processing. This report would be due no later than one year after the date of enactment of the law, and would include recommendations for legislative and administrative action to enhance FOIA performance. The Commission would also have to produce a study to ensure the efficient and equitable administration of FOIA throughout the federal government, which would include an examination of the system for charging fees and granting fee waivers.

Broadcast Decency Enforcement Acts (S 193 and HR 310)

- Two bills were introduced once again that would increase the penalties for broadcasters who air obscene, indecent or profane programming, as those terms are already defined by Section 503 of the Communications Act of 1934
- On January 26, 2005, Senator Sam Brownback (R-KS) introduced S 193.
  - The bill would very simply increase the penalty for violations of these content provisions to a maximum of $325,000 per violation, up to a total of $ 3 million
  - The current penalty is $27,500 per violation.
- One day earlier, Rep. Fred Upton (R-MI) introduced HR 310, which is more extensive
  - It would also increase the penalty for these violations, though Rep. Upton's bill proposes a maximum of $500,000 per violation
  - This bill also proposes that certain mitigating factors be considered such as:
    - whether the material was live or recorded, scripted or unscripted;
    - whether the violator had a reasonable opportunity to review recorded or scripted programming;
    - if the violator originated live or unscripted programming, whether a time delay blocking mechanism was implemented for the programming;
    - the size of the viewing or listening audience of the programming;
    - whether the programming was part of a children's television program;
    - whether the violator is a company or individual;
    - if the violator is a company, the size of the company and the size of the market served.

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- It also provides that the licensee or permittee may be required broadcast public service announcements that serve the educational and informational needs of children, with those announcements perhaps being required to reach an audience that is up to 5 times the size of the audience that is estimated to have been reached by the obscene, indecent, or profane material
- The bill also states that repeat offenders may find themselves subject to license revocation hearings
- The bill passed the House of Representatives by a 389-38 vote on February 16, 2005 and has now moved on to the Senate. However, it faces some hurdles in that chamber, as the chair of the Senate Committee on Commerce, Science and Transportation Committee, Ted Stevens (R-AK), has stated his intention to broaden the reach of the FCC's indecency regulations to cover cable and satellite television. Debate over this proposal is likely to be contentious and slow down the progress of the bill.

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or Kevin.Goldberg@cohnmarks.com.

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ETHICS CORNER

"E-Advice": Lawyers, Chat Rooms, and Ethics

By Stephen A. Bogorad & Judith F. Bonilla

For lawyers interested in selling their services, the Internet is an unbeatable marketing tool. The ease and efficiency of the Internet make it possible for lawyers to communicate with potential clients across the country and around the world about their needs and the lawyer's ability to meet those needs. But it also provides almost unbearable temptation.

The Internet forums available to today's lawyer include chat rooms, message boards, listservs, newsgroups, etc. Along with a host of new marketing opportunities, these cyber-forums also pose numerous ethical risks to lawyers who participate in them. Chat rooms raise the most serious ethical concerns because the communication is in "real-time."

Solicitation

The American Bar Association recently addressed the risks posed by Internet chat rooms when it revised Model Rule 7.3, governing direct contact with prospective clients. The rule now includes the prohibition against solicitation for professional employment from a prospective client via "real-time electronic contact" when the motive for doing so is the lawyer's pecuniary gain.

The Reporter's Explanation of Changes states that a distinction was made between e-mails and real-time communication because "the interactivity and immediacy of response in real-time communication presents the same dangers as those involved in live telephone contact" also covered by Rule 7.3.

The Comment to Rule 7.3 further explains that "[t]hese forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter . . . fraught with the possibility of undue influence, intimidation, and over-reaching."

Whether or not real-time electronic communications fall under the prohibition against in-person solicitation has been the big question among state bar associations' ethics committees over the past few years. Some states, such as Florida, Michigan, and Utah, have issued ethics opinions holding that electronic contact (i.e., chat rooms) fall within the prohibitions of their respective Rule 7.3. Fla. Ethics Op. A-00-1 (2000); Mich. Ethics Op. RI-276 (1996); Utah Ethics Op. 97-10 (1997).

Other states, like Arizona, have issued opinions finding that communications with potential clients in chat rooms are not analogous to in-person solicitation because the layperson "has the option of not responding to unwanted solicitation." Ariz. Ethics Op. 97-04 (1997). Some bar associations, like the D.C. Bar, do not have rules similar to that of Model Rule 7.3 and, therefore, make no distinctions between in-person and written solicitations. D.C. Ethics Opinion 316 (2002). Some state bar associations may amend their professionalism rules in accordance with the ABA's revisions, and, in fact, some states have already taken amendments into consideration.

Regardless of whether a state's version of Model Rule 7.3 covers real-time electronic communication, no state's ethical rules completely prevent a lawyer from participating in chat rooms for purposes other than solicitation. The nature of the communication with a layperson determines which ethical issues arise.

Which State's Rules Apply?

There are no jurisdictional borders in the world of the Internet. A lawyer should understand that engaging in legal discussions via the Internet can subject them to the rules of multiple jurisdictions. And, according to Louis L. Hill, in an article for the Symposium of Online Activities & Their Impact on the Legal Profession, it has been said that no two jurisdictions have the same rules.

The Model Rules of Professional Conduct, promulgated by the ABA in 1983, have been adopted in 43 states. Yet this does not provide lawyers with a uniform standard of rules. Consider, for example, that of the 43 states, only 9 have rules governing lawyer communications identical to the Model rules. Louis L. Hill, *Electronic Communications and the 2002 Revisions to the Model Rules*, 16 St. John's Legal Comment 529 (2002).

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Even where the rules are identical, questions of interpretation and application are still left open.

A lawyer communicating in chat rooms has no way of verifying which jurisdictions he or she becomes subject to. Some individuals may throw caution to the wind, thinking that they will never be subject to discipline in another state due to the difficulty in enforcing the disciplinary rules outside the state.

However, the ABA is trying to ease these difficulties with the goal of providing the consumer with adequate protections. Model Rule 8.5, governing disciplinary authority, was revised to expand a state's enforcement jurisdiction to lawyers who "provide or offer to provide legal services" in its jurisdiction. The Comment notes that "reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule." Comment, Model Rule 8.5 (citing Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement.)

Legal Advice v. Legal Information

Even in states that prohibit real-time electronic solicitation, a lawyer can participate in online chat rooms provided the lawyer avoids solicitous communication. Lawyers must also avoid the unintentional creation of the attorney-client relationship, otherwise they may find themselves engaging in the unauthorized practice of law ("UPL"). This is easier said than done.

The general advice offered to avoid ethical entanglements is that a lawyer should refrain from imparting specific advice tailored to an individual's particular situation. In other words, a lawyer should always speak in generalities. But, the reality is that most inquiries made by laypersons are prompted by their specific situations. One can almost assume that the information provided in response to the inquiry – general or otherwise – is going to be relied upon by the inquirer. Thus, the line between legal advice and legal information often seems to disappear.

Without the ability to accurately predict whether a communication will be construed as advice or information, the lawyer runs the risk that casual engagement in chat room discussions may inadvertently result in the formation of the attorney-client relationship.

According to the *Restatement (Third) of Laws Governing Lawyers* § 14 (2000), an attorney-client relationship is formed when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and . . . the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services ..."

No written contract or fee arrangement is required. The following analogy helps put things in perspective:

> The lawyer who offers gratuitous advice is in a position analogous to a physician who witnesses a traffic accident. The law does not impose a duty on physicians to treat a victim of the accident. Should the physician undertake to treat a victim, however, he will be liable if he does so negligently. Similarly, if a lawyer voluntarily offers legal advice to an individual, an attorney-client relationship should be deemed to be established and he should be liable if his negligence causes harm to the individual.

Comment, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 Minn. L. Rev. 758 n. 50 (1979) (citing William L. Prosser, Handbook of the Law on Torts §56 (4th ed. 1971)).

In order to predict a state's position on chat room communications, one commentator recommends looking to state bar ethics opinions concerning communications in more traditional contexts. Joel M. Schwarz, *Practicing Law Over the Internet: Sometimes Practice Doesn't Make Perfect*, 14 Harv. J. L. & Tech. 657, 674 (2001). For example, opinions about discussions on radio call-in shows, pre-recorded audio tapes, and "900 number" call-in lines, have generally approved the giving of general legal information while prohibiting specific, targeted advice to individuals.

Unauthorized Practice of Law

The formation of the attorney-client relationship triggers a slew of other ethical considerations, including the possibility of the unauthorized practice of law ("UPL").

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ETHICS CORNER

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What constitutes UPL varies from state-to-state, and many states' rules and/or statutes do not yet address Internet activities.

It, therefore, is not clear whether offering legal advice in chat rooms can subject a lawyer to discipline for UPL. Looking to UPL determinations in other contexts may provide some insight. In Texas, advising a person regarding the filing of a form has been found to require legal skill and knowledge and, therefore, constitute the practice of law. *Unauthorized Practice of Law Comm. of State Bar of Tex. v. Cortez*, 692 S.W.2d 47, 49 (Tex. 1985).

In California, the practice of law does not require physical presence in the state and involves rendering legal advice, guidance, or services to a resident on matters specific to the state's jurisdiction. *See Birbrower v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998).

On the other hand, Illinois appears quite clear on the matter. In Illinois Ethics Opinion 96-10 (1997), the Bar found that when a lawyer participates in chat room discussions or other online services that permit the offering of specific legal advice, the lawyer is engaged in the practice of law.

Other Ethical Considerations

A lawyer is still a lawyer, whether "in the flesh" or "virtual." Therefore, the same rules of conduct that govern lawyer interactions in traditional context, also govern communications in chat rooms. The D.C. Bar explained this as follows, "If a lawyer subject to the D.C. Rules of Professional Conduct engages in chat room communications of sufficient particularity and specificity to give rise to an attorney-client relationship under the substantive law of a state with jurisdiction to regulate the communication, that lawyer must comply with the full array of D.C. Rules governing attorney-client relationships." D.C. Op. 316 (2002).

Even where no attorney-client relationship is established, a lawyer must still follow the rules governing interactions with nonlawyers. Some of the other ethical duties possibly triggered by participation in a chat room include the following:

- **Scope of Representation:** Some states do not allow lawyers to limit the scope of representation. Others permit a lawyer and client to agree to a limited representation where reasonable, but the representation is still subject to other applicable rules such as that of competence. Model Rule 1.2.
- **Conflict of Interest:** Expected immediate responses to inquiries leaves no time for lawyers to engage in conflicts checks. This creates the risk that a lawyer may provide guidance to a party adverse to an existing client. Or, the lawyer may learn information useful to an existing client, but be constrained by a duty of confidentiality, thereby disqualifying him or her as counsel. Model Rules 1.7-1.12.
- **Competence, Diligence, and Communication:** The real-time nature of chat rooms and the casual setting can lead a lawyer to respond in a manner that he or she would not ordinarily think to do in another setting. A lawyer must exercise the legal knowledge, skill, thoroughness, and preparation necessary to carry out representation. Model Rule 1.1. Where an attorney-client relationship is formed, the lawyer must act diligently and communicate accordingly with the client. Model Rules 1.3 and 1.4. Even where an attorney-client relationship is not formed, a lawyer still owes a duty of reasonable care.
- **Confidentiality:** Where an attorney-client relationship is formed, the lawyer is under a duty to safeguard certain communications with the client. The D.C. Bar noted that this duty may be applicable even where such a relationship has not been formed "but the lawyer is in a situation in which he or she properly should regard an advice seeker as a prospective client, as might be especially likely to arise in settings in which lawyers are permitted to solicit or follow up with chat room visitors." D.C. Op. 316, Model Rules 1.6 and 1.16. The attorney may be required at some point to reserve his or her communications with a chat room participant for the eyes of that participant only. *Id*.
- **Legal Advertising Rules:** In jurisdictions that allow solicitation through real-time electronic communications, lawyers must follow the rules pertaining to the advertisement of legal services. Even where there is

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no solicitation, the information provided must not be false or misleading. Model Rules 7.1-7.5.

- **Restrictions on Partnering and Fee-Splitting with Nonlawyers:** Where the chat rooms are moderated by a third party, a lawyer faces the risk that he or she is assisting another person in UPL. There is a particular risk where the laypersons are required to pay a fee in order to participate in the discussions and the fee is shared with the nonlawyer provider of the chat room services. Model Rule 5.4(b).
- **Persons Represented by Counsel:** A lawyer cannot discuss the subject of representation with a person already represented by counsel. This applies even where the client initiates communications. Model Rule 4.2.

Disclaimers

A common mechanism used by lawyers participating in chat rooms to avoid liability and discipline is the disclaimer. Before entering a chat room, laypersons may be asked to click through a number of disclaimers.

The disclaimers may warn that: the chat room is for informational purposes only and not intended to serve as legal advice; participation in the chat room discussion does not establish an attorney-client relationship; there are no warranties as to the accuracy or quality of the information provided. It could also state the jurisdictions the lawyer is authorized to practice in. It may state that any information revealed in the chat room will not be confidential. It may also inform the individual that the discussions in the chat room are not intended to serve as solicitation or advertisement of legal services.

However, despite the extensive language or conspicuousness of the disclaimer, it may not serve as absolute insulation from liability. A lawyer's subsequent conduct with the layperson, if inconsistent with the disclaimer, can negate the acceptance of its terms.

Conclusion

The Internet chat room provides the ordinary lawyer with a highly accessible forum for providing legal information. It also furnishes vastly enhanced networking opportunities. However, a lawyer must take reasonable care when dealing with laypersons and always abide by the traditions of ethics and professionalism that serve as a foundation for the legal profession.

A solid familiarity of the rules of ethics – at a minimum, those of the jurisdiction in which a lawyer is licensed – is essential to ensuring the continued success in the union of Internet technology and the legal profession.

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List of Relevant State Ethics Opinions

Ariz. Op. 97-04 (1997) (guidelines governing Internet communications by lawyers); Conn. Op. 97-29 (1997) (Internet communications subject to same rules as other media); D.C. Op. 316 (2002) (a lawyer may participate in chat rooms); Fla. Op. A-00-1 (2000) (a lawyer's participation in a chat room to solicit employment is prohibited); Ill. Op. 96-10 (1997) (participation in chat rooms or other electronic communications may implicate solicitation rules and lead to the establishment of attorney-client relationship); Iowa Op. 00-1 (1996) (Internet guidelines are the same as those for printed formats); Mich. Op. RI-276 (1996) (a lawyer participating in a chat room must follow in-person solicitation rules); N.M. Op. 2001-1 (2001) (a lawyer may participate in listservs); N.D. Op. 99-02 (1999) (lawyer advertising or solicitation via Internet governed by the same ethics rules applicable to traditional methods); NY Op. 1998-2 (1998) (guidelines governing Internet communications by lawyers); Phil. Op. 98-4 (1998) (a lawyer may participate in chat rooms or bulletin boards); Utah Op. 97-10 (1997) (a lawyer's participation in chat rooms is subject to the rules regarding in person solicitation); Va. Op. A-0110 (1998); W.Va. Op. 98-03 (1998) (lawyers who participate in chat rooms must abide by in-person solicitation rules).