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LDRC Libel Defense Resource Center

LIBELLETTER

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In This Issue . . .

Food Lion Judge Issues Opinion On Why Publication Damages Barred: No Proximate Cause

One of the most important legal issues presented by *Food Lion v. Capital Cities/ABC* was Food Lion's unsuccessful effort to recover damages alleged to have been caused by *Prime Time Live*'s November 1992 report on the supermarket chain. Food Lion did not sue for libel, but sought nevertheless to recover publication damages on the theory that they were proximately caused by tortious activity committed during the newsgathering process. Food Lion claimed up to $2.5 billion in broadcast damages.

In 1995, the court ruled that the First Amendment barred Food Lion from recovering reputational damages caused by the broadcast. Relying principally on *Hustler Magazine v. Falwell*, Judge N. Carlton Tilley reasoned that such a claim would effectively constitute an end-run around the constitutional requirement that public figures seeking reputational damages prove both falsity and actual malice.

He rejected Food Lion's claim that *Cohen v. Cowles Magazine, Inc.* permitted recovery of broadcast damages under "generally applicable" tort principles. However, at the time Tilley left open the issue of which categories of Food Lion's alleged damages – reduced stock value, lost sales, profits, etc. – should be categorized as "reputational." Thus, ABC filed a pre-trial *motion in limine* seeking exclusion of all broadcast damages.

Tilley ultimately ruled at the end of the liability phase of the bifurcated trial that evidence of all broadcast damages would be excluded. On May 9, he issued an opinion stating the grounds for that ruling. Those grounds differed substantially from his 1995 ruling. He found no reason to reach any constitutional issue, because Food Lion's claim failed to satisfy "generally applicable" proximate cause of principles.

Analyzing each of the three torts (fraud, trespass, and breach of the duty of loyalty) found to have been commit-

(Continued on page 2)

For An In-Depth Review of *Damage Considerations When the Press is Sued for Gathering the News* see the April 1997 LDRC Bulletin. Report on page 3.

NOT GUILTY IN TAIWAN

By Robert D. Balin

In a significant decision handed down on April 22, 1997, a trial judge in Taiwan dismissed criminal libel charges brought by a powerful member of Taiwan's ruling party against American journalist Ying Chan and others. (*Liu Tai Ying v. Ying Chan, et al.*)

Recognizing that "[p]ress freedom is the cornerstone of constitutional democracy," the Taiwanese court adopted a *Sullivan*-type fault standard and ruled that, on matters of public concern, journalists may not be prosecuted for claimed errors in reporting where

(Continued on page 18)

Food Lion

(Continued from page 1)

ted by the jury, Tilley held that none of those tortious acts were the proximate cause of damages allegedly caused by the broadcast. Fraud and trespass may have enabled ABC to gain access to Food Lion stores, but "it was the food handling practices themselves -- not the method by which they were recorded or published" which were the legal cause of "the loss of consumer confidence" in the store. Thus, Food Lion's own acts "interrupted any causal connection" between ABC's newsgathering methods and any damages flowing from *PrimeTime Live*'s broadcast.

One of the most curious aspects of the *Food Lion* case was Food Lion's claim for breach of an employee's duty of loyalty, which Tilley acknowledged is a state-law theory explicitly recognized for the first time in this case. The Food Lion jury found that ABC journalists had breached this duty because they failed to adequately perform their jobs as Food Lion employees. Tilley stated that this finding could not have any causal connection to broadcast damages. However, he noted that if ABC journalists had "breached their duty by setting up scenes which were later broadcast", there could be a sufficient causal connection to broadcast damages.

During the first phase of the trial, Tilley permitted Food Lion (over ABC's objection) to argue that ABC journalists tried to "stage" scenes of poor food-handling practices. He permitted the jury to specifically consider Food Lion's theory that an ABC producer had disabled a water heater in order to set up a scene of a dirty meat room. The jury found that the producer did not damage any Food Lion property. After that finding, Tilley held a hearing on whether Food Lion should be permitted to seek both broadcast and punitive damages on the basis of "staging" evidence. Upon reviewing the evidence concerning each scene in the broadcast Food Lion argued was "staged," Tilley ruled that he saw no evidence of "staging" and barred the issued from being raised in the punitive damage phase of the trial.

In Tilley's recent opinion, he reviews in detail the facts regarding the specific broadcast scenes Food Lion claims were "staged." In each case, he found that ABC's undercover journalists "did not create a situation which would not otherwise have existed in order to allow *PrimeTime Live* to report on that situation." Consequently, no broadcast damages could flow from any breach of loyalty.

The fact that allegations of "staging" occupied such a prominent role in both initial jury argument and this opinion demonstrates how Food Lion succeeded in effecting an end-run around libel law as a matter of trial tactics, if not legal theory. Food Lion was permitted to use a novel "breach of loyalty" claim to make arguments about "staging" without any regard for legal definitions of falsity, actual malice, etc.

However, Tilley's opinion is an important precedent for media lawyers faced with similar efforts to recover publication damages through alleged newsgathering torts. Virtually all plaintiffs making such claims argue that the act of gaining access to facts which are ultimately published "cause" damages flowing from the publication. The *Food Lion* court's conclusion that it is the facts themselves that are the legal cause of viewer's reaction to them is likely to apply to almost any case. Given the paucity of appellate law on this issue, the narrow, tort-law basis for the *Food Lion* result may provide comfort to trial judges disinclined to enter unchartered constitutional territory.

ABC's motions for judgment notwithstanding the verdict remain pending before Judge Tilley.

MOTIONS TO DISMISS IN JEWELL SUIT AGAINST ATLANTA JOURNAL-CONSTITUTION DENIED

DISCOVERY TO GO FORWARD

Motions to dismiss from *The Atlanta Journal-Constitution* defendants and the Piedmont College defendants have been denied, along with a motion to change venue filed by the College. *Jewell v. Cox Enterprises, Inc.*, Civil Action File No. 97VS122804 (Fulton Co. 4/30/97).

Richard Jewell, once suspected Atlanta Olympics bomber, filed suit against the newspaper and a number of its employees, as well as against Piedmont College, a former employer of Jewell, and its president and spokesperson,who were sources for the newspaper and other news media. The suit is pending in state court in Georgia, in Fulton County.

The parties have asked the Court of Appeals to look at the decisions, but in the meantime, discovery is expected to proceed.

In denying the motion for change of venue, the court found that the complaint alleged that newspaper defendants and the College defendants were joint tortfeasors and that Plaintiff-Jewell's injury -- alleged to be damage to his reputation around the world -- was "single and indivisible." Slip op. at 4. The court found that the College could anticipate that its statements to the newspaper would be published and redistributed around the world as they were picked up by all forms of media.

Finding that defendants' motions to dismiss were, in fact, motions for summary judgment, the court granted Plaintiff's Motion to Extend the Time Within Which To Respond To Defendants' Motions in order to afford Plaintiff time for discovery.

In so doing, the Court also denied the newspaper-defendants' motions to stay discovery. *The Atlanta Journal-Constitution* defendants had premised the stay request, in part, on the difficulty they foresee in attempting to obtain documents from the government during the pendency of what remains an on-going investigation into the bombing. While acknowledging that some difficulty may exist, the Court noted that the newspaper-defendants had "already demonstrated their ability to obtain such documents," citing *The Journal-Constitution* and other media's partial success last fall in convincing a federal district court to order disclosure of portions of law enforcement affidavits that had been filed with the court in support of FBI search warrants of Jewell's premises. Slip op. at 6.

Web Site Retraction

The alleged failure of an electronic and print publisher to properly retract an allegedly false and defamatory statement posted on its web site has led to the filing of a complaint by Sawyer-Ferguson-Walker Company (S-F-W), a newspaper advertising representation company and John Power, its former Senior Vice president against Cowles Business Media Inc., publisher of *Inside Media*, and its editor-in-chief. The suit highlights the potential pitfalls in web page/cyberspace publication and the difficulty of insuring that corrections catch up with text.

The plaintiffs in *Sawyer-Ferguson-Walker Inc., et al. v. Cowles Business Media, Inc., et al.*, No. 97/101918 (N.Y. Sup. Ct., complaint filed January 27, 1997), allege that defendants published allegedly false and defamatory statements in the print and electronic editions of *Inside Media* which injured plaintiffs in their business reputations. On October 30, 1996, the defendant published an article in both of its *Inside Media* print and electronic editions, linking Power to a felon convicted of mail and wire fraud. The plaintiffs also allege that subsequent articles unfavorably compared the plaintiffs activities with that of a less reputable company.

Upon a demand of retraction by the plaintiffs of the October article, defendants published in its Print Edition a correction on November 13, 1996, together with an article about the plaintiffs. The plaintiffs contend that the correction was only partially correct and further false statements were printed in the article.

The corrections were not published on the *Inside Media* web site and, moreover, the allegedly untruthful October 30 article still appeared on the web site. The November 13 article about the plaintiffs did appear on the web page but without the correction.

Following an unsuccessful search for the correction on the site, plaintiffs demanded the defendants publish the

(Continued on page 4)

Maine Newspaper Loses Libel Suit
Town Selectman Awarded$125,000

A Maine jury, by a 6-2 vote, on May 15 awarded Melrose Beal, a town selectman and former security guard at the Cutler Navy Base, $125,000 against the *Bangor Daily News* and a former reporter. Interviews with jurors after the verdict suggested that, at least for some, a failure to adequately manage the complaint and correction process with regard to what apparently were errors in the original stories may have been a significant element in the verdict.

The Bangor paper had reported that Plaintiff-Beal learned in his Navy job that the police chief had lent a piece of town equipment to the naval base and had reported the information to the town manager; that Beal had been reprimanded at the naval base for "breaching national security" and for conflict of interest. Five months later the newspaper reported that, in fact, Beal had not been the one to leak the information to the town manager and had not received any reprimands.

Bernard Kubetz, counsel for the defendants, was quoted in the *Bangor Daily News* on the day after the verdict as expressing concern that the jury did not fully understand the concept of actual malice. One juror, for example, reported to Kubetz that the jury considered actual malice when it decided to deny loss of consortium damages to Beal's wife because she had not been named in the article. Plaintiff's counsel had argued that the defendant-reporter relied on sources who were clearly biased against the Plaintiff.

The newspaper has not decided whether it will seek an appeal.

LDRC Bulletin On Damage Issues Released

In the wake of *Food Lion* and the re-emergence of increasingly high punitive damage awards in last year's media trials, LDRC is pleased to announce the publication of LDRC BULLETIN 1997 Issue No. 2, containing articles addressing the issues of newsgathering damages and punitive damage awards in the years since *BMW v. Gore*.

***Damage Considerations When The Press Is Sued For Gathering The News*, by Carolyn K. Foley and David A. Schulz**, explores the damages that may properly be claimed when newsgathering techniques are alleged to have been tortious. While courts have yet to adopt a consistent approach when addressing the scope of damages available for non-publication torts committed by the press, the article argues that both the common law and recognized First Amendment principles should serve to limit the availability of reputational and emotional damages flowing from the subsequent publication of information tortiously obtained.

***The Model Punitive Damages Act and Its Implications For Punitive Damages In Defamation Cases*, by P. Cameron DeVore and Michele Earl-Hubbard**, examines the ways in which both state and federal courts have addressed punitive damage issues in the three years since the United States Supreme Court's decision in *BMW v. Gore*. Finding that the courts have generally failed to set meaningful limits under *Gore*, the article also examines how the Model Punitive Damages Act, recently promulgated by the National Conference of Commissioners on Uniform State Laws, may facilitate judicial review of punitive damages awards and help ensure that the awards satisfy due process under the Fourteenth Amendment.

Copies of the BULLETIN are currently available from LDRC.

Editorial Process Fair Game for Discovery in *Time* Libel Suit

In a decision that surprised many libel experts (*New York Times*, Business Section, April 28, 1997), United States Magistrate Judge J. Attridge found the scope of discovery on actual malice broad enough to include editorial decisions by defendant *Time* on matters not directly related to the underlying defamation action. *Richard Ellis v. Time, Inc.*, No. 94-1755 (NHJ/PJA) (D.D.C. March 21, 1997). The editorial policies at issue concerned the creation and use of allegedly "deceptive photographs" including, specifically, an artist's rendering of O.J. Simpson's mug shot and the cropping of a picture of President Clinton.

In this tortious interference and defamation action, Richard Ellis, a former photographer for Reuters, has alleged that *Time* libeled him in an editorial to *Time's* readers and in an e-mail message from the editor to the staff. *Time's* statements commented on Ellis's behavior in attempting to prove that several photographs (published in *Time*) of a Russian pimp and two boy prostitutes were "wholly fraudulent." The libel claim is not based on the photographs, which *Time* later learned the photographer had staged (although confirming its initial conclusion that the subjects were indeed engaged in prostitution).

Ellis moved to compel discovery responses on other instances involving the use of allegedly deceptive pictures. *Time* opposed the motion, arguing that the Simpson and Clinton pictures were unrelated to the subject matter of the libel suit and could not in any event be used to illustrate the editors' state of mind in this case. (Moreover, the Simpson and Clinton pictures were published the year after the Russian prostitute pictures.) Nonetheless, Judge Attridge ruled that the "editorial decisions made by the defendant to publish other photographs is not unrelated to the instant dispute." *Slip op.* at 5.

Judge Attridge reasoned that since the plaintiff might be found to be a "public figure," he must meet the "daunting task" of demonstrating actual malice by clear and convincing evidence and should be able to gather evidence at the discovery stage that may allow a trier of fact to infer requisite fault. *Slip op.* at 2. The exercise and implementation of the magazine's policy surrounding the publication of "deceptive photographs" may provide such inferential evidence and the "requested discovery will lead to circumstantial evidence that may assist the trier of fact in determining the defendant's state of mind at the time of publication." *Slip op.* at 2-3.

The Court limited discovery to the Simpson and Clinton photographs, and to instances of other allegedly deceptive photographs published in *Time*, *Life* and *People* to the extent the same editors were involved. The trial is scheduled to begin July 8 in Washington, D.C.

Web Site Retraction

(Continued from page 3)

correction on the web site. The defendants responded that the correction was added to the home page of the defendant as of December 13, 1996, but the correction did not appear on the web site together with the November 13, 1996 article.

According to the plaintiffs, during a Media Central web search for "Sawyer-Ferguson-Walker" the *Inside Media* home page did not appear and the correction was not accessed. Thus, anyone looking for the November 13, 1996 would have found the article on the web site but would not be able to access the correction.

A lawsuit for libel and disparagement followed. The "inadequate retraction" led to claims of malice and intent to harm.

UPDATE: New York's Highest Court Finds Report that Plaintiff Has Cancer is Not Defamatory

Liz Taylor Publicist Suit Dismissal Affirmed

The New York Court of Appeals, New York's highest court, affirmed the dismissal of a libel suit brought by Chen Sam, a now-deceased public relations consultant, against the Star for its report alleging that Chen Sam had cancer. *Aaron Richard Golub, as Executor of the Estate of Chen Sam, Inc., v. Enquirer/Star Group, Inc.*, 1997 NY Int. 84 (May 13, 1997).

Plaintiff-Chen and her corporation had argued that the accusation of cancer would cause clients to lose confidence in her ability to perform in a professional capacity, and that cancer constituted a "loathsome disease." The Court rejected both positions in a relatively short memorandum opinion.

Noting that a statement, in order to be actionable, must reflect on plaintiff's performance or be incompatible with the proper conduct of her business, the Court found that reportedly having cancer simply did not imply that the individual was incompetent or incapable or unfit, even assuming that physical condition was of significance to her line of work. Individuals with cancer in modern society often carry on with their professional lives.

And cancer, because it was neither contagious nor attributed in any way to socially repugnant conduct, was not a disease that fell into the category of "loathsome" as understood in libel law.

Another Pennsylvania Judge Gets A Libel Trial

The Pennsylvania Supreme Court has refused to review a Pennsylvania Superior Court decision holding that an inaccurate headline, the implications created by the article and the headline together, and the defendants inability to identify the headline writer created a triable issue of fact with regard to actual malice in a suit brought by a judge who alleged he was wrongfully linked by the defendant to corruption and case fixing. *Merriweather v. Philadelphia Newspapers Inc., et al.* No. 03271 (Pa. Sup. Ct., Phila., *allocatur* denied April 2, 1997).

The plaintiff, Judge Ronald B. Merriweather, filed suit in 1987 over an article entitled "Feds: Court Reporter's Pot Trial Fixed," which was published by Philadelphia Newspapers, Inc. The article reported that a grand jury indictment charged Judge Kenneth Harris with extortion and racketeering surrounding his activities in several cases. The article correctly identified Judge Merriweather as the judge who presided over a drug possession trial, which was one of the cases in question, and also correctly reported that Judge Merriweather had acquitted the defendant in the case. The article also accurately stated that the plaintiff was not accused of any wrongdoing.

Judge Merriweather however, filed suit in 1987, alleging that because the article depicted the trial as being fixed and mentioned him as the presiding judge, the defendants wrongfully suggested that he was instrumental in fixing the trial.

The Superior Court's decision marks the second time that a grant of summary judgment in favor of the defendants has been reversed in the case. In 1992 the Superior Court reversed the trial court's grant of summary judgment on the issue of fair report. *Merriweather v. Philadelphia Newspapers, Inc.*, 426 Pa. Super. 647, 620 A.2d 1242 (1992), *appeal dismissed*, 538 Pa. 482, 649 A.2d 434 (1994). In that instance the Pennsylvania Supreme Court granted allocatur only to dismiss the appeal following oral argument.

The trial court granted a second motion for summary judgment in 1995 holding that the plaintiff could not establish actual malice. On appeal, the plaintiff argued that triable issues remained because the headline was inaccurate and the article created a suggestion that the plaintiff, who had total control of the case, was involved in the conspiracy. In addition, the plaintiff contended that the defendants' inability to disclose the identity of the headline writer created a triable issue of fact.

In viewing the record in the light most favorable to the nonmoving party for determination of summary judgement, the Superior Court agreed with Merriweather, ruling that a factfinder could find that the article was published with actual malice. The court adopted Merriweather's contentions, stating that the implication was obvious, the "obvious" inconsistencies between the article and the indictment, the lack of basis for the implications, and the potential adverse inference stemming from the failure of the defendants to identify the headline writer all created triable issues of fact. The court also ruled that even though the article mentioned that the plaintiff was not formally accused of any wrongdoing, this brief statement did not negate the implications of involvement with the alleged fixing of the case.

KATO KAELIN'S ACTION AGAINST THE GLOBE SLAPP-ED OUT OF COURT: KATO UNABLE TO SHOW ANY MALICE

By Amy D. Hogue

On May 5, 1997, the Los Angeles Superior Court granted Globe Communications Corp.'s anti-SLAPP motion, striking Kato Kaelin's libel suit, *Kaelin v. Globe Communications Corp., et al., No. SC041404 (Los Angeles Superior Ct., 3/19/96).* The *Globe* magazine article at issue recounted Gloria Allred's October 1995 KABC radio talk show interviewing Klein Al'n as the featured guest.

Mr. Al'n was among Kaelin's circle of friends when Nicole Brown Simpson and Ron Goldman were murdered. Al'n told Allred and her listeners that Kaelin confidentially admitted, a few days after the murders, that he saw O.J. Simpson dressed in dark clothing on the night of the murders, and helped Simpson hide blood-soaked clothing in a green plastic trash bag.

After deposing Mr. Al'n and *Globe* magazine reporter, Craig Lewis, Kaelin argued that Globe knew or must have known the article was false because (1) the District Attorney never called Al'n as a witness; (2) the Los Angeles Superior Court had, in an unrelated action unknown to Globe, allegedly sanctioned Al'n $5,000 for filing a frivolous lawsuit; and (3) that Lewis' reliance on California's reporter's shield law, Evidence Code Section 1070, to protected the identity of confidential sources, violated Kaelin's due process by preventing fair and adequate discovery of malice.

Sitting in the same Santa Monica courthouse in which Simpson's civil case was pending, Superior Court Robert Letteau agreed with Globe that Kaelin failed to establish a prima facie case of malice against Globe or its reporter, Craig Lewis, and struck Kaelin's complaint.

Globe first filed its special motion

(Continued on page 6)

KATO UNABLE TO SHOW ANY MALICE

(Continued from page 5)

to strike under Section 425.16 of the California Code of Civil Procedure, California's provision against SLAPP suits ("Strategic Lawsuits Against Public Participation") on April 26, 1996, in response to Kaelin's March 19, 1996 Complaint. The Superior Court, Judge Lorna Parnell presiding, agreed with Globe that the anti-SLAPP statute is constitutional and should be applied to Globe because its article involved a matter of public interest. The Court also ruled, however, that to ensure due process, Kaelin could engage in limited discovery on the issue of malice in an effort to establish a prima facie case.

Globe renewed its SLAPP motion after Kaelin deposed Klein Al'n and Globe reporter Craig Lewis and after Globe responded to written discovery pertaining to malice. Although the Superior Court declined to rule on the issue, Globe also raised the "neutral reportage" privilege articulated in *Ward v. News Group Int'l Ltd.*, 733 F. Supp. 83 (C.D. Cal. 1990), arguing that its article was a fair and neutral report of the Allred talk show. This is the same argument raised in Globe's successful petition for a hearing before the California Supreme Court in *Khawar v. Globe*, (Cal. No. S054868) (hearing pending).

The Superior Court's decision striking Kaelin's complaint follows the United States District Court's January 6, 1997 grant of summary judgment to Globe in *Kaelin v. Globe Communications* (C.D. Cal., No. 96-2935DT), in which Kaelin asserted libel based on an article in Globe's *National Examiner* magazine.

Globe is represented by Amy D. Hogue, Walter Allan, and Jason R. Erb of DCS member firm Pillsbury Madison & Sutro LLP of Los Angeles, California, and by Michael B. Kahane, General Counsel.

Magistrate Recommends $2.2 Million Judgment Against Punk Rock Band For Use of Photo on CD Cover

A federal magistrate judge has recommended that the Crucifucks, a punk rock band, be ordered to pay a $2.2 million default judgment to the Philadelphia Fraternal Order of Police ("FOP") and a police officer for misappropriation, false light, defamation and civil conspiracy claims arising out the band's unauthorized use of an FOP commissioned poster on the back cover of its 1992 CD, *Our Will Be Done: Compilation. Fraternal Order of Police, et. al, v. The Crucifucks, et. al*, No. 96-CV-2358 (E.D. Pa. April 4, 1997). *See LDRC LibelLetter*, October 1996 at p. 9.

Arising in a confusing procedural posture, Magistrate Judge Melinson's recommendation comes nearly a year after the July 1996 decision of District Court Judge Herbert J. Hutton dismissing all of the claims on the merits against Borders Books & Music, which was also named as a defendant in the original complaint. The band, its record company, and the company president, however, did not join Borders' motion to dismiss and have, in fact, never appeared in court to answer the claims. Judge Hutton entered a default judgment against the band on November 25, 1996 and then handed the case over to Magistrate Judge Melinson for a recommendation on damages.

The FOP and Sergeant John Whalen filed the complaint after discovering that the 1987 FOP commissioned poster, for which Whalen posed as a slain officer lying in a pool of blood in order to protest proposed police budget cuts, appeared on the back cover of the CD. In addition to the misappropriation of likeness claim, the plaintiffs also contended that the CD, containing songs such as, "Cops for Fertilizer," and "Pig in a Blanket," advocated and celebrated the death of police officers, defaming Whalen and the FOP and placing them in a false light by suggesting that they condone or endorse "lyrics that glorify and invite the murder of police officers." *Slip op.* at 8.

The defendants' failure to appear has apparently led to the inapposite results of the July 1996 decision and Magistrate Judge Melinson's recommendation. For instance, while Judge Hutton wrote in 1996 that, "[a]ssuming knowledge of Sergeant Whalen's position as a police officer and the FOP's function as a union for police officers (as those persons who are capable of recognizing the plaintiffs from the photograph must know), the Court can think of no circumstances under which police officers or the union would support violence against police officers," Magistrate Judge Melinson now stated that "the plaintiffs have demonstrated the defendants defamed them by implying that the plaintiffs support, endorse, or condone 'lyrics that glorify and invite the murder of police officers.'" *Slip op.* at 8.

Given the default judgment, Magistrate Judge Melinson found that each of the plaintiffs' allegations had merit and recommended that the defendants be ordered to pay $200,000 in compensatory damages and $2,000,000 in punitive damages to the FOP and Whalen. With the glaring inconsistencies between Judge Hutton's opinion and Magistrate Judge Melinson's recommendation, it is unclear whether the recommendation will be approved and adopted by Judge Hutton.

Oklahoma Supreme Court Rejects, Again, Summary Judgment for Tort Cases

Defamation Judgment Reversed

By Robert D. Nelon

The Oklahoma Supreme Court recently used a defamation case to continue its assault on summary judgments in tort cases. Summary judgment granted to KFOR-TV in Oklahoma City and upheld by the Oklahoma Court of Appeals was reversed by a unanimous Supreme Court in *Malson v. Palmer Broadcasting Group*, 1997 OK 42, 68 Okla.B.J. 1454 (Okla. 4/8/97).

The suit was based on a series of reports by Brad Edwards, a consumer reporter for KFOR's "In Your Corner" segment. Edwards reported that M&M Drum Company, an industrial drum cleaning and recycling business owned by the plaintiffs Glen and Virginia Malson, had dumped toxic chemical residues in the city sewer system. The reports were based on information from former employees of the company, on-site observation by the reporter, and public records documenting excessive levels of chemical residue draining from the plaintiff's facility.

Professional Negligence Standard Effectively Disregarded

The plaintiffs sued for defamation. At first they showed only modest interest in their suit, doing little in the way of discovery. KFOR therefore thought an early summary judgment motion might dispose of the case. Because Oklahoma uses a professional negligence standard of fault in private figure cases, *see Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976), a summary judgment motion was filed addressed only to the absence of negligence. The motion was supported by the affidavit of a journalism professor who opined that KFOR had not departed from the standard of care ordinarily adhered to by persons engaged in the same kind of business.

Surprisingly, the plaintiffs found their own journalism professor to submit a counter affidavit that KFOR was negligent. In the deposition of the plaintiff's expert, however, he said his opinion of negligence was based on his view that *any* error of fact in reporting was negligent. The plaintiff's expert even admitted that he did not know the true facts of the case, but believed that KFOR had been negligent if one *assumed* that the broadcast reports contained some error of fact. KFOR argued that the affidavit of the plaintiff's expert did not create a *genuine* issue of material fact because the expert relied upon a standard of negligence at odds with Oklahoma defamation law.

The trial court granted summary judgment without a written opinion, concluding only in a brief minute order that "there is no evidence of negligence of defendants presented to the Court." The intermediate appellate court affirmed in a not-for-publication slip opinion. The Oklahoma Supreme Court granted certiorari and reversed. The court made clear its objective in the first paragraph of its opinion:

> We promulgate this opinion to reemphasize the well established principle that a motion for summary judgment may not be granted when there are disputed issues of material fact presented in the motion and response which are supported by evidentiary materials such as affidavits.

1997 OK 42, ¶1.

The court seemed to have no use for examining the basis or quality of the expert opinions, chastising the Court of Appeals for improperly weighing the evidence, and saying that "summary judgment was clearly improper in this case." 1997 OK 42, ¶8. The court said that summary judgment was "especially inappropriate in the present case because there were conflicting affidavits concerning whether television station had used ordinary care. Issues of negligence are ordinarily not fit subjects for summary adjudication." 1997 OK 42, ¶12.

The court indicated that the best evidence of ordinary care in a private-figure defamation case "will normally come from an expert" because of the professional negligence standard. 1997 OK 42, ¶10. But the opinion can only be read to say that if the plaintiff can present the affidavit of someone who claims to have expertise, that will be enough to create an issue of fact preventing summary judgment on the fault element, regardless whether the opinion is well-grounded in fact or law.

Summary Judgment Rejection for Torts is the Rule

The court's opinion, while disappointing to KFOR, is not necessarily a setback for first amendment interests, or unexpected. There is no indication in the decision that the defamation context had anything to do with the outcome; in the court's view, this was a negligence case, and the plaintiffs had presented an expert opinion that the defendants were negligent. The decision is, in addition, typical of the outcomes in appeals of summary judgment in Oklahoma. In the last two and a half years, roughly 85 cases in which the trial court has granted summary judgment have made their way to the Oklahoma Supreme Court for review.

In cases involving statutory rights or construction, the cases are about

(Continued on page 8)

California's Statute of Limitations Bars Florida Libel Suit Against The Kansas City Star

By Thomas R. Julin

One year and 364 days after *The Kansas City Star* published a front-page report accusing him of engaging in misleading, unethical, and illegal fundraising for Veterans of Foreign Wars ("VFW") departments in 11 states, Gul Jaisinghani filed suit in Miami claiming to be a citizen and resident of Florida. Under Florida's two-year statute of limitations on libel actions, the suit appeared to have been filed just in time.

Jaisinghani alleged *The Star's* report – which included seven lengthy articles that had been researched during the course of a two-year investigation – contained numerous false statements and implications and had caused him more than $10 million in damages. Jaisinghani sued not only *The Star*, but Capital Cities/ABC, Inc., *The Star's* parent; Bill Dalton, the author of the report; DataTimes Corp., a computer archiving service that had made the report available nationwide; and Prodigy Services Corp. on whose electronic bulletin board a subscriber posted a summary of *The Star* article.

In response to discovery requests, Jaisinghani produced hundreds of thousands of records attempting to support his claim of falsity.

The mountain of paper revealed not only facts bearing on the truth of the statements in The *Kansas City Star's* report, but also on Jaisinghani's claim to be citizen and resident of Florida.

A request for a driver's license, resulted in the production of a California permit, but none from Florida. Jaisinghani's passport showed that he was a citizen of India.

Records concerning a car he drove in Florida revealed the car was not registered to him. Utility records for Jaisinghani's Miami condominium suggested that he either enjoyed south Florida's stifling heat and humidity so much that he rarely used his air conditioner or that he was hardly present at the condominium at all. Telephone records similarly suggested that Jaisinghani, who testified in his deposition that he first learned of and read *The Star* report in Florida, in fact spent far less time in Florida than in California.

Accounting records reflected that his personal income tax returns had been prepared in California and that his business maintained many of its records in California.

Most tellingly, Jaisinghani had filed applications for fund raising permits in Florida claiming that he was a resident of California shortly before publication of *The Kansas City Star* report. Jaisinghani also had testified in lawsuits in Michigan and California that he was living with his girlfriend in California.

Jaisinghani's California contacts meant the action might be time-barred because California's statute of limitations for libel actions is just one year and Florida, like most states, borrows the statute of limitations of the state in which a claim arises and regards a libel claim as arising in the state that has the most significant relationship to the claim. The plaintiff's domicile or residence usually is the most important factor in identifying the state that has the most significant relationship to a claim.

Closely analyzing the detailed factual record presented through a summary judgment motion, U.S. District Judge Lenore Nesbitt held California had the most significant relationship to this case notwithstanding Jaisinghani's claims the he lived and worked in Florida at the time of publication and that he had suffered most of his damages in Florida. Judge Nesbitt entered judgment for all defendants on March 22,1997.

Jaisinghani has appealed this ruling to the Eleventh Circuit Court of Appeals.

Thomas R. Julin, Edward M. Mullins, Marc J. Heimowitz, and Heather L. Gatley of Steel Hector & Davis LLP, Miami, Florida are representing Capital Cities/ABC, Inc., The Kansas City Star Company, and DataTimes Corp. in this lawsuit.

Oklahoma Supreme Court Reverses Summary Judgment

(Continued from page 7)

even between affirmances and reversals. In cases involving business disputes or contract issues, slightly more have been affirmed than reversed. However, in tort cases, four cases have been reversed for every one that has been affirmed. *Malson*, unfortunately for the defendants, is simply another in a long list of cases in which the Oklahoma court has taken a narrow view of the usefulness of summary judgment in tort-based actions.

Ironically, Glen Malson died during the pendency of the appeal, thus ending his defamation claim against KFOR. It is not clear whether Virginia Malson, who was not mentioned in the news reports and who played little part in the pretrial proceedings, will try to pursue the case on remand. From KFOR's perspective, numerous defenses remain, including substantial truth. And if the battle of experts moves from the affidavit-on-summary-judgment stage to the courtroom, KFOR is confident it will prevail on the negligence issue. For now, however, KFOR must add itself to the list of defendants who could not cross the final hurdle of the Oklahoma Supreme Court's opposition to summary judgment in tort cases.

Robert D. Nelon is a senior partner in the Oklahoma City office of DCS member firm Hall, Estill, Hardwick, Gable, Golden & Nelson, which represented KFOR in this action. The Malson decision is available in full text on the Oklahoma Supreme Court's web page at www.oscn.state.ok.us. Oklahoma is the first state to adopt a public domain citation form for its entire body of case law.

Fourth Circuit Hears Argument in *Hit Man* Case

By Seth Berlin

On May 7, 1996, a panel of the United States Court of Appeals for the Fourth Circuit heard oral argument in two wrongful death actions brought against publisher Paladin Enterprises, Inc. ("Paladin"). The cases arise out of three 1993 contract murders in which, plaintiffs alleged, the murderer, James Perry, relied upon the Paladin publication, "Hit Man: A Technical Manual for Independent Contractors" ("*Hit Man*"), in committing the crimes. The plaintiffs asked the Court of Appeals to overturn an order, entered in September 1996 by United States District Court Judge Alexander Williams, Jr., granting summary judgment in favor of Paladin on the grounds that its book is protected by the First Amendment.

Proceedings in the District Court

Perry had been hired by Lawrence Horn to kill Horn's ex-wife, Mildred, and son, Trevor, so that Horn would inherit a $1.7 million settlement awarded to Trevor for medical malpractice that had left him a quadriplegic. Also murdered was Janice Saunders, Trevor's nurse. Both Perry and Horn were convicted, the former sentenced to death and the latter to life without parole. Prosecutors had argued, in attempting to establish premeditation, that Perry, who had ordered a copy of *Hit Man* a year before the crime, followed its instructions in committing the murders. Plaintiff's wrongful death actions alleged that Paladin and its president, Peter Lund, aided and abetted Perry in committing the murders. Plaintiffs also alleged causes of action for products liability, civil conspiracy, and negligence.

To test its First Amendment defense, the publisher filed a motion for summary judgment based upon a Joint Statement of Facts. In that Joint Statement, agreed to by the parties only for purposes of the motion, it was stipulated that defendants "intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in their publications."

By the same token, plaintiffs stipulated that defendants also intended their books to be used by authors seeking information for the purpose of writing books about crime and criminals, law enforcement officers, persons who enjoy reading accounts of crime for entertainment, persons who fantasize about committing crimes but do not thereafter commit them, and criminologists and others who study criminal methods. In addition, plaintiffs stipulated that Paladin had no knowledge that Perry or Horn planned to make use of the book to commit a crime.

In granting summary judgment, the district court applied *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its progeny to hold that the First Amendment bars the imposition of liability in this case because *Hit Man* was not directed to, nor was it likely to, incite imminent lawless action. The district court also rejected other arguments offered by the plaintiffs, including that the Court should recognize a new category of unprotected speech encompassing expression which arguably "aids or abets" murder; that *Brandenburg* only applies to political advocacy; and that the *Soldier of Fortune* cases, which involve commercial speech, apply to these facts. *See Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993); *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1391 (W.D. Ark. 1987).

Department of Justice Report

On the eve of oral argument, the United States Department of Justice issued a report, entitled a *Report on the Availability of Bombmaking Informa-*

(Continued on page 10)

A Trilogy of Victories in "The Speech Made Me Do It" Cases

And No Jurisdiction in Texas over Rap Performer

By Laura Lee Stapleton

In an era of rampant litigation trying to lay blame on the media for individuals actions, it is uplifting to see the judiciary dismiss three "the speech made me do it" cases outright. As reported in the February, 1997 issue of the *Libel Letter*, two of the cases arising out of the *Natural Born Killers* movie were dismissed, in Georgia and Louisiana, for failure to state a claim against the media. The third in the trilogy of recent defeats for Plaintiffs came from a court in Texas in a case which has become known as the "Cop Killer" case.

On March 28, 1997, United States District Judge John D. Rainey in Victoria, Texas handed down a resounding victory for the media, on all counts, in *Davidson v. Time Warner, Inc.*, Civ. Action No. V-94-006 (S.D. Texas 3/31/97). This was the civil lawsuit brought by the decedents of Texas Department of Public Safety Trooper, Officer Bill Davidson, after he was killed by Ronald Howard, who was listening to the audio cassette of Shakur's *2Pacalypse Now* as well as driving a stolen car when he was stopped by Officer Davidson.

In a forty-one page decision, Judge Rainey entered final judgment in favor of Time Warner, Inc., Tupac Amaru Shakur, Interscope Records, East West Records America, a Division of Atlantic Recording Corporation, and Atlantic Recording Corporation. Of note, Judge Rainey refused to exercise jurisdiction over Time Warner, Inc. (the parent of the media defendant) and Tupac Amaru Shakur (the artist who sang the song at issue); he threw out all claims of

(Continued on page 11)

Fourth Circuit Hears Argument in Hit Man Case

(Continued from page 9)

tion, the Extent to Which its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May be Subject to Regulation Consistent with the First Amendment to the United States Constitution (the "Report"). The parties submitted the Report, which also addressed specifically the district court's ruling on *Hit Man*, to the Fourth Circuit and have been ordered to file supplemental briefs addressing the Report's analysis.

The Report notes that, while the Constitution would not preclude criminal or civil liability when a person disseminated information to a third party intending that the third party will use it to commit a crime, the "First Amendment would impose substantial constraints on any attempt to proscribe indiscriminately the dissemination" of such information to a mass, undifferentiated audience. Moreover, the Report points out that the First Amendment precludes liability where the published information is lawfully obtained and is already in the public domain.

Nonetheless, the Report suggests that there may be a category of speech in which the *Brandenburg* test need not be applied, namely, "general publication of explosives information, when the writer, publisher or seller of the information has the purpose of generally assisting unknown and unidentified readers in the commission of crime." On this basis, the Report concludes that the district court in Paladin's case erred in granting summary judgment. In so doing, the Report appears to perform an end-run around the requirement in *Brandenburg* that the expression is likely to result in *imminent* lawless action, rather than at some point in the future.

Fourth Circuit Oral Argument

The presiding Fourth Circuit panel was comprised of Judges William W. Wilkins, Jr., Judge J. Michael Luttig, and Judge Karen Williams. While Judge Williams asked only a few questions and Judge Wilkins asked none, Judge Luttig engaged in extended colloquy with counsel for both parties.

Advocacy vs. Instruction

During much of Judge Luttig's questioning of plaintiff-appellants' counsel, Professor Rodney Smolla, Judge Luttig focused on whether *Hit Man* was merely an "instruction manual" or contained advocacy. Professor Smolla initially contended that the book was, in essence, an instruction manual. Judge Luttig responded that, in his view, such an admission would in effect concede the plaintiff-appellants' case, because it would mean both that *Brandenburg* was not satisfied and that Paladin could not have aided and abetted the murders as a matter of law.

Similarly, Judge Williams seemed skeptical that the book was not a form of advocacy of vigilante-style justice: "Is that not the whole ideology this whole book promotes, that you can take the law into your own hands and get revenge and retribution in the way in which you want to?" Apparently, picking up on these cues, Professor Smolla reversed himself during his brief rebuttal and conceded that the book was both replete with instruction and advocacy. As a result, he contended, the book both satisfies the *Brandenburg* test and falls within the category of unprotected speech not subject to *Brandenburg* advocated by the plaintiffs and the Department of Justice Report.

Judge Luttig also made it clear during his questioning of Thomas B. Kelley, Esq., counsel for Paladin, that he viewed the text of the book, from which he read extended passages, as "incitement". According to Judge Luttig, "if you read the words of the text and you really get into the book, from start to finish, it's incitement." In response, Mr. Kelley pointed to numerous signals in the book that suggest it is a work of fantasy and adventure, which is not intended to be taken seriously. In addition, Mr. Kelley questioned, as Paladin had in its brief, whether a book distributed to a mass audience could ever satisfy the "imminence" requirement of *Brandenburg*.

Intent

Because the Joint Statement stipulated that Paladin intended to distribute the book to various categories of readers within its mass audience, both parties focused on the import of this stipulated "intent." Professor Smolla argued that the stipulation should be interpreted to include criminal intent and that, as a result, Paladin could be held liable for "aiding and abetting" without application of the *Brandenburg* test.

While Mr. Kelley conceded that certain cases have done so, he also pointed out that those cases are limited to circumstances where the expression in question is directed solely to an audience of would-be criminals with the sole pur pose of the facilitation of a crime. Here, in a civil case, where the Court should apply the broader definition of civil intent (which also includes conduct undertaken with *knowledge* of a foreseeable outcome), Mr. Kelley argued that adopting plaintiff-appellants' arguments would restrict a wide range of expression, including many mainstream works of fiction. Although the Joint Statement makes clear that *Hit Man* was distributed to a mass audience with multiple purposes, Judge Luttig expressed his view, at several points during the argument, that perhaps the case should be remanded to "interpret" the Joint Statement and to allow a jury to determine whether the book was in fact marketed to a broad audience and with what intent.

Thomas D. Kelley and Steven D. Zansberg of Faegre & Benson LLP in Denver, Colorado and Lee Levine and Seth D. Berlin of Levine Pierson Sullivan & Koch, L.L.P., in Washington, D.C. are counsel for Paladin Enterprises, Inc. in this case.

A Trilogy of Victories in "The Speech Made Me Do It" Cases

(Continued from page 9)

negligence and products liability on state law grounds, and he gratuitously addressed the constitutional issues of concern in favor of the media.

Cop Killer Claims To Have Been Enraged By Song

During the criminal proceedings, in an attempt to avoid the death penalty, the assailant, Ronald Howard, claimed that listening to *2Pacalypse Now* caused him to shoot Officer Davidson. At least one song on the recording, "Crooked Ass Nigga", describes the commission of violence against police officers:

> *Now I could be a crooked nigga too*
> *When I'm rollin with my crew*
> *Watch what crooked niggas do*
> *I got a nine millimeter Glock pistol*
> *I'm ready to get with you at the trip of the whistle*
> *so make your move and act like you wanna flip*
> *I fired 13 shots and popped another clip*
> *My brain locks, my Clock's life a f--kin mop,*
> *the more I shot, the more mothaf--ka's dropped*
> *And even copes got shot when they rolled up.*

The jury in the criminal case apparently did not believe Howard's explanation because it sentenced Howard to death.

After the criminal proceedings, the Davidsons brought a civil action against Shakur and the media entities they believed were involved in the production and distribution of *2Pacalypse Now* echoing several of the arguments made by Howard during his criminal trial. The Davidsons claimed that the album *2Pacalypse Now* does not merit First Amendment protection because it: (1) is obscene, (2) contains fighting words," (3) defames peace officers like Officer Davidson, and (4) tends to incite imminent illegal conduct on the part of individuals like Howard. Because the recording lacks constitutional protection, the Davidsons argue that the defendants were liable for producing violent music that proximately caused the death of Officer Davidson.

The Court Finds No Jurisdiction Over Time Warner or Tupac Shakur In Texas

The Court initially addressed the jurisdictional issues and found that it did not have personal jurisdiction over Time Warner, Inc. The defense argued that Time Warner had insufficient minimum contacts with Texas for the purposes of general jurisdiction and that the Court could not exercise specific jurisdiction because Time Warner had no involvement in the creation, production or distribution of *2Pacalypse Now*. Time Warner continued by arguing that the action should proceed, if at all, against its subsidiaries, which were solvent corporations that did not challenge the exercise of personal jurisdiction.

Performing a two-step analysis to determine whether the Court could exercise personal jurisdiction over the nonresident defendant, the Court concluded in Time Warner's favor. First, the Court had to determine whether the Texas long-arm statute would permit the exercise of jurisdiction. Next, the Court must determine whether such exercise comports with due process. Because the Texas' long-arm statute extends to the limits of the Due Process Clause of the Fourteenth Amendment, state law merges into the federal question of due process.

Under the Supreme Court genre beginning with *International Shoe*, one knows that in performing the due process inquiry, the defendant must have purposefully established minimum contacts with the forum state, invoking the benefits and protection of the state's laws, and thus, reasonably anticipate being haled into court in that state. Next, the exercise of personal jurisdiction, under the circumstances, cannot offend traditional notions of fair play and substantial justice. Personal jurisdiction exists in two forms, general and specific. General jurisdiction exists when the defendant has "continuous and systematic" contacts with the forum state, and specific jurisdiction exists when the defendant purposefully directed its activities to the forum state and when those activities are what gives rise to the injury at issue in the lawsuit.

The Plaintiffs argued that the Court could exercise personal (general) jurisdiction over Time Warner, Inc. because Time Warner conducted business in Texas and committed a tort in Texas. The Plaintiffs further argued that the Court could exercise personal (specific) jurisdiction over Shakur and Time Warner because they "purposefully" directed activities in producing, distributing, selling and profiting from *2Pacalypse Now* to a nationwide market, of which Texas and Texas citizens were a part. The Court rejected both claims.

Time-Warner, The Parent Corporation

The Court found that Time Warner clearly lacked the contacts necessary for general jurisdiction. It found that Time Warner was merely a holding company that owned stock in separately incorporated entities, including Atlantic Records, that do business in Texas. Time Warner had no employees in Texas, owned no real estate in Texas, and had no agent for service of process in Texas. Time Warner's Board of Directors was separate from the board of directors of its subsidiaries. Finally, Time Warner had no part in the distribution or production of *2Pacalypse Now*. The Court relied upon *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 492, 498-99 (5th Cir. 1989 (per curiam) and explained "it is well settled that a foreign corporation [like Time Warner] is

(Continued on page 12)

A Trilogy of Victories in "The Speech Made Me Do It" Cases

(Continued from page 11)

not subject to the jurisdiction of a court merely because of any contacts which its subsidiary [like Atlantic Records or Interscope Records], may have with the forum state." For all of these reasons, the Court found that it did not have personal jurisdiction over Time Warner and dismissed the case against Time Warner.

Shakur, The Recording Artist

The Court continued by ruling that it also had no jurisdiction over Shakur. Shakur never owned property in Texas, and he visited Texas only once in 1988, and had not been in Texas either before or since. Shakur gave all of his rights to distribute *2Pacalypse Now* to Interscope, so he had no control over its distribution in Texas. Finally, the fact that Shakur recorded *2Pacalypse Now* under contract with Interscope Records could not create personal jurisdiction, since, as the Court stated,

> to permit the exercise of *general* jurisdiction on that basis would create nationwide personal jurisdiction over major entertainers and authors. Without more contacts, the Court cannot conclude that due process is satisfied by permitting the exercise of general jurisdiction over every voice heard on recordings sold in Texas, every face that appears on a cereal box sold in Texas, or every author of a news article found in the State.

Because such acts are not sufficient to satisfy the requirements for specific jurisdiction, let alone the more rigorous tests for general jurisdiction, the Plaintiffs arguments failed.

The Plaintiffs attempted to make the same argument that Shakur committed a tort in Texas when he distributed, marketed and sold *2Pacalypse Now* within the state; however, the Court, once again, would not permit the improper bootstrapping of the activities of the record labels to Shakur. The Court explained that Shakur committed only two acts that are relevant to specific jurisdiction. First, he recorded *2Pacalypse Now* – outside of Texas, and, second, he signed a contract with Interscope Records granting Interscope the exclusive rights to *2Pacalyse Now* – this contract was signed in California. Neither of these acts constitute the commission of a tort. Even though Shakur may have hoped that his album would receive the widest possible distribution, including in Texas, this "fervent desire" does not make him amenable to personal jurisdiction in Texas. Nothing that Shakur did could have made him "anticipate being haled into Texas Courts;" thus, due process would not permit the exercise of personal jurisdiction over Shakur in this case.

Under Texas Law the Plaintiffs Did Not Have A Viable Claim

After disposing of the parties it did not have jurisdiction over, the Court then addressed the negligence theory proposed by the Plaintiffs and granted summary judgment on the grounds of Texas negligence law, without the necessity of reaching the constitutional issues. Relying on the analysis performed in *Einmann v. Soldier of Fortune Magazine*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024, 110 S. Ct. 729 (1990) and *Way v. Boy Scouts of America*, 856 S.W.2d 230 (Tex. App. B Dallas 1993, writ denied) -- a risk utility balancing test -- the Court concluded that the Defendants had no duty to prevent the distribution of *2Pacalypse Now*.

The Court found that the probability that a listener of *2Pacalypse Now* would react violently toward police officers was slim, a common sense conclusion evidenced by the fact that after more than three years and 400,000 sales, no evidence was presented that the album had served as the source of any other "music-inspired crime." Furthermore, "to create a duty requiring the Defendants to police their recordings would be enormously expensive and would result in the sale of only the most bland, least controversial music," a high burden on Defendants and society at large.

Even though the Court found that Shakur's music is violent and socially offensive, it did not believe that the Defendants could reasonably foresee that distributing *2Pacalypse Now* would lead to violence. The Court did not view the killing of Officer Davidson as a random act of violence against a peace officer, but rather as an attempt to elude justice by an adult gang member driving a stolen automobile. Because the murder of Officer Davidson was irrational and illegal, the Defendants were not bound to foresee and plan against such conduct. The Court held, because there was no duty and no foreseeability, summary judgment in favor of the Defendants should be granted. The Court also rejected the Plaintiffs' products liability theory because, under Texas law, one cannot sue the creator of a message over its content on a strict products liability theory.

Although Not Required, The Constitutional Issues Were Addressed By The Court

Even though the Court decided the outcome of this case based upon the lack of duty and foreseeability, it did address the First Amendment issues, as well. The Court found that the Plaintiffs' arguments that *2Pacalypse Now* should lose its constitutional protection because of its content was not valid.

Although the Court found the album "riddled with expletives and depictions of violence, and overall . . . extremely repulsive," it lacked the patently offensive representations or descriptions required by the Supreme Court to be obscene. Also, there was no evidence the recording was made to appeal to the prurient interest. Finally, because it

(Continued on page 13)

"The Speech Made Me Do It" Cases

(Continued from page 12)

was the violent nature of the album, not the sexual lyrics, that allegedly caused the death of Davidson, finding that the album is obscene would be irrelevant to the case at hand.

The Court did not believe that *2Pacalyse Now* defamed Officer Davidson, nor did it find the album was made up of "fighting words." The Court explained,

> [W]ithout question, *2Pacalypse Now* falls into the category of 'generally offensive' speech; however, no reasonable jury could conclude that persons would reflexively lash out because of the language of Shakur's recording. Shakur's words are offensive but are not by their very nature' likely to cause violence. Further, ... Ronald Howard did not reflexively react based on Shakur's offensive speech. Therefore, the fighting words doctrine does not apply.

In addition, the Court noted that this doctrine generally does not apply when one person's words cause another to commit violence against a third, non-hearing party, but requires the words to be of a personal nature directed at a specific individual.

Finally, the Court considered whether *2Pacalypse Now* contained "inciting speech" and found that it did not. The Court found that Shakur did not intend to incite imminent illegal conduct when he recorded *2Pacalypse Now* nor was it likely that the album would incite or produce illegal or violent action. The Court refused to find that the musical recording incited the killing of Officer Davidson merely because the killing occurred after Howard had listened to the recording. In fact, the Court believed it was far more likely that Howard, a gang member driving a stolen car, feared his arrest and shot Officer Davidson to avoid capture. Under these circumstances, the Court concluded that *2Pacalypse Now* was not likely to cause imminent illegal conduct.

Not hiding his personal distaste for and dislike of Shakur's music, Judge Rainey concluded:

> *2Pacalypse Now* is both disgusting and offensive. That the album has sold hundreds of thousands of copies is an indication of society's aesthetic and moral decay. However, the First Amendment became part of the Constitution because the Crown sought to suppress the Framers' own rebellious, sometimes violent views. Thus, although the Court cannot recommend *2Pacalypse Now* to anyone, it will not strip Shakur's free speech rights based on the evidence presented by the Davidsons.

This is what the First Amendment is about and this is what free speech stands for – recognizing other differing viewpoints, opinions and approaches – whether or not we agree with, approve of, or like them and providing, permitting and offering a forum in which those viewpoints can be expressed. These recent decisions in Georgia, Louisiana and Texas all have in common decisions by a strong judiciary that acknowledges our differences and continues to uphold the First Amendment's paramount canon.

Ms. Stapleton is a senior associate at the firm of George, Donaldson & Ford, L.L.P. George, Donaldson & Ford, L.L.P. represented the Defendants in the foregoing cases

No Claim For Suicide Following News Report

By Mark J. Cannan

The San Antonio-based Fourth Court of Appeals of Texas has upheld the summary judgment dismissal of an invasion of privacy/intentional infliction of emotional distress/wrongful death action arising from a June, 1994 article in the *San Antonio Express-News* which had allegedly "outed" a homosexual. In *Hogan v. The Hearst Corporation d/b/a The San Antonio Express-News and Elisandro Garza*, No. 04-96-00326-CV (Tex. App.–San Antonio, April 16, 1997), the Court held that the summary judgment evidence negated elements of the privacy and emotional distress claims and established an affirmative defense to the wrongful death claim.

Criminal Exposure Claim Leads To Outing

In May of 1994, Bennie Hogan was arrested for indecent exposure in a San Antonio public park. On June 2, the *San Antonio Express-News* published an article written by reporter Elisandro Garza concerning a series of arrests made by the San Antonio Police Department targeting sex offenders in certain public parks. The article summarized a three-month undercover operation and identified over forty individuals, including Mr. Hogan, who had been arrested either on public lewdness or indecent exposure charges. Three days after the newspaper article, Mr. Hogan committed suicide.

The family of Mr. Hogan brought suit, claiming that the article had the effect of "outing" Bennie Hogan as a homosexual, something that to that date he had not revealed to family and business associates. It was alleged that the shame and humiliation caused to Mr. Hogan as a result of the publication caused him to take his own life.

(Continued on page 14)

No Claim For Suicide Following News Report

(Continued from page 13)

Privacy

The newspaper article had been based upon information released and made available by the San Antonio Police Department. At a press conference, police officials summarized the three-month-long operation as having been initiated as a result of extensive public complaints. The summary judgment evidence on behalf of the newspaper included the arrest report for Bennie Hogan and the additional admissions of the Plaintiffs that it was a true and correct copy of the offense report.

The Plaintiffs' invasion of privacy claim alleged that the article constituted a public disclosure of embarrassing private facts. In affirming the summary judgment, the Court of Appeals confirmed that the information regarding the arrest was derived from a public record. The Court noted that notwithstanding the assertion of the Plaintiffs to the contrary, "the article never labeled Bennie a homosexual," but merely described the police operation and "reported the names of the persons arrested based upon facts obtained from the police department." Thus, the Defendants, by proving the facts published were not private information, "negated the first element of [the] claim for invasion of Bennie's privacy."

Emotional Distress

In connection with the claim for intentional infliction of emotional distress, the Hogan family claimed that the publication was done intentionally or with reckless disregard of the consequences on those whose names would be published.

In affirming the summary judgment, the Court of Appeals focused on that element of the cause of action requiring that the conduct in question be extreme and outrageous, such being a question of law for the court to determine. In order for conduct to reach that level, the Court observed that the conduct must go "beyond all possible bounds of decency," so as to be "regarded as atrocious and utterly intolerable in a civilized community." The Court of Appeals properly noted that it had no editorial role in determining what the newspaper *should* publish, and indicated that it need not condone behavior in order to determine that it does not reach the necessary level of outrageousness or go beyond the bounds of decency. The Court concluded that the publishing of information contained in public records was "as a matter of law not outrageous," thus negating an element of a cause of action for intentional infliction of emotional distress.

Wrongful Death

In defending the wrongful death cause of action, the newspaper and reporter had asserted alternative grounds in support of the summary judgment. It was argued that there being no foreseeability of the risk, no duty could be established, the basic element of a negligence cause of action. However, the Court assumed, without discussion or decision, that a cause of action for wrongful death could be established. Nonetheless, the Court held that if such cause of action could be established, there could be no imposition of damages upon the newspaper arising out of the truthful publication of information in public records where such information was lawfully obtained and concerned a matter of public significance. Here, all those elements were present and, as a result, the Court concluded that the Defendants successfully "established an affirmative defense to [the] wrongful death claim."

The Plaintiffs have filed no timely motion for rehearing with the Court of Appeals, that being a pre-requisite for further appeal to the Texas Supreme Court.

Mark J. Cannan is a member of Lang, Ladon, Green, Coghlan & Fisher, San Antonio, Texas, which represented defendants in this action..

New York: Cameras in Courts in Doubt

By Jon Fine

An inauspicious end may be at hand for New York's lengthy "experiment" with cameras in the courtrooms, as the legislation authorizing audio-visual coverage expires on June 30. Legislative wrangling over the budget and rent regulations have left efforts to extend the authorization in doubt, despite a near-unanimous recommendation that the legislation be made permanent from the State Committee charged with evaluating the experiment. If the legislation lapses, New York will become one of only three states, along with the District of Columbia, that do not permit cameras in their courtrooms.

Cameras have been permitted in New York's courts since 1987 under a series of two-year experiments commissioned by the State Legislature, except for one year when the legislation lapsed. The experiment's current incarnation, Section 218 of the Judiciary Law, gives trial judges the discretion to permit audio-visual coverage of both civil and criminal proceedings -- access is not presumptive.

Although the implementing regulations require judges to consider the objections of any trial participants, the statute provides that, absent a finding of good or legal cause, camera coverage of most proceedings "shall not be limited by the objection of counsel, parties or jurors."[1] Instead, trial judges must consider five statutorily-defined factors when ruling on an application for audio-visual coverage, including the type of case; whether coverage would harm a participant, or interfere with the rights of the parties, the fair administration of justice, or the advancement of a fair trial; whether coverage would render ineffective an order excluding witnesses prior to their testimony; whether coverage would interfere with law enforcement activity; and whether coverage would involve lewd or scandalous matters.[2]

The legislation also contains several safeguards, the broadest of which permits the judge to alter or eliminate the terms of camera coverage anytime during the trial.[3]

(Continued on page 15)

Cameras in Courts

(Continued from page 14)

Other limiting provisions permit non-party witnesses in criminal trials to have their identities obscured[4] and forbid most coverage of jurors and jury selection.[5]

As in previous stages of the experiment, the legislation also created a committee – the New York State Committee to Review Audio-Visual Coverage of Court Proceedings – to examine and evaluate the "efficacy" of the program. The Committee's April 1997 report recommended that the law be made permanent[6] -- the same recommendation made by each of the three prior panels charged with evaluating cameras in the courts since the experiment began in 1987. The Committee determined that access provided substantial public benefits, and "did not find that the presence of cameras ... interferes with the fair administration of justice, " noting that the law's safeguards granted adequate discretion to judges to protect the legitimate concerns of the participants.[7]

Yet, the Committee's strong recommendation may not be enough to overcome New York's legislative stasis, which threatens to make cameras in the courts a mere bargaining chip in its ritualistic battle of the budget. Without a concerted effort from proponents of audio-visual coverage to raise this issue's profile, New York may find itself in the distinct minority of states that do not permit cameras in its courts.

Jon Fine is broadcast counsel for NBC.

Endnotes

1 *Judiciary Law § 218(5)(a).*
2 *Judiciary Law § 218(3)(c).*
3 *Judiciary Law §§ 218(7), 218(4)(c).*
4 *Judiciary Law § 218(5)(c).*
5 *Judiciary Law § 218(7).*
6 *New York State Committee to Review Audio-visual Coverage of Court Proceedings, An Open Courtroom - Cameras in New York Courts 1995-97 (April 4, 1997). One Committee member did not join in the 12-member panel's recommendation and issued a minority report recommending that the experiment be ended.*
7 *id., at 1.*

Ninth Circuit Rejects Fair Use for Broadcast of L.A. Riot Videotape

Holding that there were disputed issues of fact as to whether the broadcast by Los Angeles' KCAL-TV of videotape footage of the beating of Reginald Denny during the 1992 Los Angeles riots was a fair use, the U.S. Court of Appeals for the Ninth Circuit has reversed and remanded a district court grant of summary judgment. *Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997). Plaintiff Los Angeles News Service ("LANS") recorded and copyrighted the footage at issue.

On April 29, 1992, LANS, an independent news organization that provides news stories, photographs and other services to the news media, recorded the Denny beating with a camera on board its news helicopter. LANS subsequently copyrighted and licensed the tape to a number of media outlets. KCAL's request for a license, however, was refused. Nevertheless, KCAL obtained a copy of the videotape from another station and broadcast it a number of times on April 30 and thereafter during its news programs. Following the broadcasts LANS sued KCAL for copyright infringement.

District Court Grants Summary Judgment

While KCAL's use of the videotape was undeniably without permission, the district court nonetheless held that the doctrine of fair use exempted KCAL from liability for copyright infringement. As the Court of Appeals summarized, the district court found that, "the Denny Videotape is a unique and newsworthy videotape of significant public interest and concern; KCAL used portions of the tape in its newscasts for purposes of news reporting; and LANS failed to identify any sale or license or potential sale or license that it lost due to KCAL's conduct." *Id.* at 1120.

LANS moved for reconsideration arguing that it had proof that it had lost at least one sale as a result of the unlicensed use and that KCAL had other footage of the beating available to it. After the district court rejected the motion LANS appealed to the Ninth Circuit.

On Appeal

On appeal, LANS argued that the district court erred in applying the fair use factors "because KCAL's use was non-transformative, commercial and improper; it interfered with LANS's ability to control the initial dissemination of the Denny tape; the use was substantial even though KCAL broadcast only 30 seconds of the four minute, 40 second Videotape because it was the heart of the work; and it had a serious effect on the potential market for LANS's copyrighted work because KCAL's unauthorized commercial broadcasts competed directly with LANS's authorized licensees." *Id.* at 1120.

KCAL argued that its use of the tape for news reporting purposes was a productive use rather than nontransformative use. KCAL also noted that only a portion of the tape was broadcast, and that evidence that LANS entered into more than a dozen licenses for the videotape after the KCAL broadcast showed that KCAL's use did not diminish LANS's potential sales. Further, KCAL asserted that the videotape is unique because the videotape itself became part of the news event.

The Ninth Circuit Opinion

With the question of unauthorized use undisputed, the Ninth Circuit Court of Appeals turned to balance the non-exclusive fair use factors set out in 17 U.S.C. § 107. Under § 107, fair use is determined by considering, *inter alia*:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

27 U.S.C. § 107.

Purpose and Character of Use

Addressing the first of the fair use fac-

(Continued on page 16)

Ninth Circuit Rejects Fair Use for Broadcast

(Continued from page 15)

tors the Court of Appeals stated that while "the fact that KCAL was reporting news weighs heavily in its favor . . . the fact that LANS and KCAL are both in the business of gathering and selling news cuts the other way." *Los Angeles News Service*, 108 F.3d at 1121. Thus, the court found that 'the fact that KCAL used LANS's copyrighted footage free of charge, rather than paying LANS or someone else for the footage, or investing in its own helicopter and crew to obtain the footage itself, at least raises an inference that its articulated purpose of reporting the news was mixed with the actual purpose of doing so by using the best version -- whether or not it meant riding LANS's (or some other station's) copyrighted coattails." *Id.* at 1121.

In addition, the court found that while "there is a forceful argument that the LANS tape of the Denny beating itself became a news item shortly after it was published because the view was so extraordinary," the argument did not help KCAL because there was "no evidence that KCAL used the tape in this way." *Id.* at 1121-22. Rather, the court noted that the record indicated that KCAL "aired [the tape] as if it were KCAL's own." *Id.* at 1122.

Finally, the court recognized that while the fact that KCAL requested and was refused a license is not dispositive, "'the propriety of the defendant's conduct' is relevant to the character of the use at least to the extent that it may knowingly have exploited a purloined work for free that could have been obtained for a fee." *Id.* at 1122, *quoting Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

The court then distinguished *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), in which the defendant was refused a license but nonetheless used the protected work in order to create a parody, by noting that in this case "KCAL obtained a copy of the tape from another station, directly copied the original, superimposed its logo on the LANS footage, and used it for the same purpose for which it would have been used had it been paid for." *Los Angeles News Service*, 108 F.3d at 1122.

Nature of the Copyrighted Work

The court then found that the nature of the tape weighed strongly in KCAL's favor as it was "informational and factual and news" in addition to the fact that it was published before its use by KCAL. *Id.* at 1122.

Amount and Substantiality of What Was Used

The court however, ruled that the amount and substantiality of what was used was a factor that weighed heavily in LANS's favor. The court reasoned that while "a small amount of the entire Videotape was used, it was all that mattered." *Id.* at 1122. Citing *Harper & Row*, the court stated that KCAL took the "heart" of the LANS footage, noting, "'the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression.'" *Id.* at 1122, *quoting Harper & Row*, 471 U.S. at 565.

Effect on the Market

Finally, the court held that while the case does not fit into a "traditional niche," because "news" does not normally have a secondary market, "KCAL's use of LANS's works for free, without a license, would destroy LANS's original, and primary market." *Id.* at 1122-23. In other words, the court explained, if other stations simply obtained a copyrighted work from other sources when the owner would not grant a license, "it no doubt would adversely affect LANS's creative incentives." *Id.* at 1123.

Thus, despite the fact that the tape was a recording of a newsworthy event, KCAL's actions following the refusal of the license, the potential impact on LANS's primary market, and the fact that the portion broadcast was the "heart" of the tape, led the court to conclude that fair use was not the only conclusion that a trier of fact could reach in this case.

International Trademark Association Meeting
Few Changes For Media

By Charles J. Glasser, Jr.

The 119th Annual Meeting of the International Trademark Association, held from May 5 to May 7 in San Antonio, Texas saw several discussions and review of recent cases worth noting, particularly for those DCS members involved in advertising defense, and Trademark claims sometimes brought against publishers.

Personal Jurisdiction in Cyberspace

Like the media bar, trademark attorneys are closely watching developments in this area, particularly as they relate to the viability of claims which may be brought against or on behalf of their clients. Although most cases in this regard concern "domain name" litigation, (See, Feb. 1997 *LDRC LibelLetter*, Pg. 17, "Virtual Uncertainty") claims of trademark infringement arising from content have begun to surface. *IDS Life Insurance Co. v. SunAmerica*, 1997 WL 7286 (N.D. Ill., Jan. 3, 1997) saw the federal district court reject personal jurisdiction because of the "random and fortuitous" contacts of a nationwide advertisement. which allegedly violated Section 43(a) of the Lanham Act.

As in *Bensusan Restaurant v. King*, 937 F. Supp. 295, (S.D.N.Y. 1996) the mere availability of a web page in a forum is not sufficient for jurisdiction to attach, and courts are more and more beginning to apply an "interactivity" test to the offending web page. The more interaction through on-line sales orders, two-way transmissions of passwords, product shipment, and other forum contacts, the more likely jurisdiction will attach. See, e.g., *Zippo Manufacturing v. Zippo Dot Com*, 1997

(Continued on page 17)

International Trademark Association Meeting

(Continued from page 16)
WL 37657 (W.D. Pa., Jan. 16, 1997).

The Federal Dilution Act

Effective from January 16, 1996, the Federal Dilution Act, (amendment to the Lanham Act at 15 U.S.C. 1114) strengthened proprietary interests in trademarks by circumventing the usual requirement that the complained-of use creates a likelihood of confusion. The Act instead allows injunctive relief against the use of a mark which may lessen the famous marks' capacity to distinguish goods. Cited as hypotheticals of dilutive use were KODAK shoes and BUICK telephones. Only "famous" marks are eligible for this heightened protection, and such fame is statutorily defined as a combination of factors such as distinctiveness, duration and extent of use, and geographic considerations.

Generally, publishers enjoy exemption from the act through statutory allowances for non-commercial use and news reporting, as well as fair use in comparative advertising and commentary. Such non-commercial use allowed Jim Henson of Muppet fame to create a character (and sell licensed products) bearing the name "Spa'am" over the objections of Hormel Foods, the makers of SPAM. *Hormel Foods v. Henson Productions*, 73 F.3d 497 (2d Cir. 1996). The Act also provides for damages in the extraordinary case of willful intent to trade on another's reputation.

The injunctive measures of the Act have been applied recently, however. The Ninth Circuit Court of Appeals recently affirmed a district court injunction prohibiting the publication and distribution of "The Cat NOT in the Hat!" by "Dr. Juice," a book satirizing the O.J. Simpson murder trial, because it infringed on the trademarks and copyrights of "The Cat in the Hat," a children's story first published in under the pseudonym "Dr.Seuss." *Dr. Seuss Enterprises v. Penguin Books*, 924 F. Supp. 1559 (S.D. Cal. 1996) , ____ F.3d ____, 9th Cir. 1997. Despite this outcome, which seems to look a lot like a prior restraint, most commentators at the meeting agreed that the Act wouldn't diminish the protections for parody and satire articulated in *L.L. Bean v. Drake Publications*, 811 F.2d 26 (1st Cir. 1987). This distinction was generally agreed upon by panelists because while the L.L. Bean catalog was itself the subject of the parody of the "Back-to-School Sex Catalog", the trademarks and copyrights of Dr. Seuss were incidental means (and were thus infringed) by which to satirize the O.J. Simpson trial.

Comparative Advertising

A few recent cases were reported under the Lanham Act's false advertising prohibitions. Generally, a statement is false under the Act if it is either: a) literally false or b) impliedly false and likely to mislead consumers. Last year saw two pharmaceutical giants battle it out in *Glaxo Warner-Lambert v. Johnson & Johnson Merck*, 935 F. Supp. 327 (S.D.N.Y. 1996), a case selected by panelists as a "perfect brightline example" of a case involving specific claims of product superiority. The case, about competing antacids, neatly spelled out standards and burdens of proof with regard to proving the falsity of advertiser's claims, and the use of scientific studies to support assertions of product effectiveness.

Another form of claim often analyzed under the Act is that of the generalized statement of product superiority analogous to libel law's defense of opinion. In *LensCrafters, Inc. v. Vision World*, 943 F.Supp. 1481 (D. Minn. 1996) the plaintiff had advertised "the most advanced equipment available." Although the statement was found to be literally false, this self-exaggeration constituted "mere puffery" and was thus non-actionable. Citing Prosser & Keeton with approval, the judge noted in LensCrafters that "the puffing rule amounts to a sellers' privilege to lie his head off, so long as he says nothing specific."

The use of a competitor's trademark in comparative advertisements was also allowed in *Lasermaster Corporation v. Sentinel Imaging*, 931 F. Supp. 628 (D. Minn. 1996) because although the competing product's mark was in fact used in ads, it was done in a side-by-side manner, and the use distinguished, rather than confused the marks. However, other courts have been less lenient, and in *JR Tobacco v. Davidoff of Geneva*, (95 Civ. 0319, S.D.N.Y., Feb. 11, 1997) the court enjoined the use of photographs of competitor's cigars when no effort was made to distinguish them from the defendant's product.

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NOT GUILTY IN TAIWAN

(Continued from page 1)

they have "conducted reasonable investigation" and "believe in the truthfulness of the[ir] report." Heralded in Taiwan as an historic victory for the press, the *Ying Chan* decision also presages a growing independence by Taiwan's judiciary as Taiwan begins to move away from 40 years of martial law.

The News Story and Response

The *Ying Chan* case arose from an investigative article that appeared in the October 1996 issue of *Yazhou Zhoukan* (or "*Asia Weekly*"), a Chinese-language magazine that is published in Hong Kong and distributed throughout Asia. In one of the first news stories to probe allegations of off-shore fundraising during the U.S. presidential election, the *Asia Weekly* article reported that, in 1995, Mark Middleton, a former member of the Clinton White House staff, had made several trips to Taipei where he met with various officials of Taiwan's ruling party, the Koumintang (or "KMT"). In August 1995, Mr. Middleton met with Liu Tai Ying, who directs the KMT's extensive business operations and is a long-time associate of Taiwan's President. As reported in the article, according to a source who was present at this meeting, Mr. Middleton discussed campaign financing and Mr. Liu offered to contribute $15 million to the Clinton re-election campaign. A denial by Mr. Liu was also included in the article, and there was no claim that money ever changed hands.

The *Asia Weekly* article was co-authored by a Taiwanese journalist named C. L. Hsieh and by Ying Chan, an American reporter who writes for *The Daily News*. When the article appeared, the Taiwanese government promptly condemned it and called for legal action. Shortly thereafter, Mr. Liu (acting in the role of "private prosecutor") brought criminal libel charges in Taiwan against the two reporters. Also named as a defendant was their source for the story, a Taiwanese businessman and lobbyist named Chen Chao Ping. After being sued, Chen held a press conference in which he publicly confirmed that he had been present at the Middleton-Liu meeting and that (as reported in the *Asia Weekly* article) he had indeed heard Liu offer to donate $15 million to the Clinton campaign.

Taiwan's Criminal Libel

As exemplified by the *Ying Chan* case, in several countries around the globe, political reporting on sensitive issues can subject journalists not only to civil damage suits, but to criminal prosecution as well. In this regard, Article 310 of Taiwan's Penal Code provides that a person who "circulates a fact which will injure the reputation of another" commits "the offense of defamation" and may be punished by up to two years imprisonment.

Dating from the 1930s, Taiwan's criminal libel statute was often used as a tool to stifle public criticism of the governing KMT during four decades of martial law. Even after martial law was lifted in 1985, criminal prosecutions against government critics have continued (although jail sentences are usually "substituted" by fines). Indeed, sounding very much like an indictment for seditious libel, the complaint in the *Ying Chan* case sought criminal penalties on the ground that the *Asia Weekly* article "will hurt the reputation of the KMT."

The Source Bolts

The criminal libel prosecution ultimately had its intended effect on the source for the story, Mr. Chen. Consistent with his post-publication press conference, Chen had initially testified that he was indeed the source for the information contained in the *Asia Weekly* story. Then, in what can only be described as furious backpeddling, Mr. Chen buckled and reached an out of court settlement in which he stated that he had "misunderstood" what was said at the Middleton-Liu meeting and that he was *not* the source for the story. In exchange for this recantation, criminal charges were dropped against Chen, and Liu -- having forcibly secured evidence of dubious credibility -- proceeded solely against the media defendants.

Chen's recantation obviously made it problematic for the *Asia Weekly* defendants to prove truth (which is a defense under the Taiwanese statute), and made the availability of a fault defense crucial. In this regard, the Taiwanese libel statute provides that where a statement is published with "good intent" on a matter "subject to public criticism", no criminal liability may be imposed. Penal Law Article 311.

A Fault Standard

While there was no prior judicial precedent (Taiwan being a civil law country where few decisions are accorded precedential status), the "good intent" language from the libel statute strongly indicated that the court should recognize a fault requirement (at least as to matters of public concern). Moreover, relying on the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1974), the media defendants in the *Ying Chan* case argued that, given the central role played by a free press in a democratic society, the "good intent" requirement should be construed to prohibit criminal liability for allegedly false statements absent a showing that the defendants

(Continued on page 19)

NOT GUILTY IN TAIWAN

(Continued from page 18)

had acted with knowledge of falsity or reckless disregard of the truth.

In pitching an "actual malice" defense to the Taiwanese court, Ying Chan and her co-defendants received invaluable assistance from the Committee to Protect Journalists and a group of major American news organizations which included The New York Times, The Washington Post, Dow Jones & Company, The Los Angeles Times, Time, Inc., The Daily News, The Associated Press, ABC, CBS and NBC. In an *amici* brief written by Debevoise & Plimpton, these media organizations forcefully noted that in democratic nations journalists are not sent to jail for alleged errors in reporting and that criminal punishment of journalists is too often a tool employed by authoritarian regimes, such as Taiwan's nemesis, the People's Republic of China. Additionally, *amici* urged that, at the very least, the court should apply some form of actual malice standard and pointed out that, on matters of public concern, courts in several Asian countries (including Japan, South Korea and the Philippines) have adopted a heightened fault standard to shield reporters from liability for false statements.

In April 1997, Ying Chan (who resides in New York), flew to Taiwan to testify. Although Ms. Chan was outside the court's jurisdiction (and, under Taiwanese law, could not be tried *in absentia*), she nonetheless went to Taiwan to impress on the government, as well as the court her commitment to the important issues at stake in the case. The trial in Taipei followed an inquisitorial format (in which the judge conducts all the questioning); and, surprising as it may seem to American attorneys, Judge Li Wei-shin questioned Ms. Chan, her co-author Hsieh and the plaintiff Liu all in the space of two and one half hours.

One week later, Judge Li issued a decision from the bench finding Ying Chan and her co-defendants not guilty of libel. Significantly, rather than base his decision on truth or falsity, the court held that "regardless of the truth of the matter," the reporters could not be found guilty since they had reported on an issue of obvious public concern "in fact believ[ing] in the truth of their writing." Using language it is hoped will become an entrenched principle in Taiwan, Judge Li eloquently noted that:

> It is the purpose of press freedom to protect the organized news media, so that such media can execute its supervisory function as an institution. . . . Press freedom is the cornerstone of constitutional democracy and a free society. There is a direct correlation between press freedom and democracy, and there exists a need to prevent the media from self-limitation or censorship for fear of libel liability, a situation that would deprive the public of its right to know. Therefore, the good intent provision under the above penal code must be strictly interpreted in order to guarantee the protection of press freedom. . . .

Reasonable Investigation and Belief in the Truth

In "strictly" construing the "good intent" provision (and accepting the arguments made by defendants and *amici*), Judge Li then held that, "on matters of public comment", no penalties may be imposed under Taiwan's criminal libel statute where a media defendant "has conducted reasonable investigation and verification" and "believes in the truthfulness of the report," "even if it is learned later that the report does not correspond to the truth."

Applying this standard to the facts of the *Ying Chan* case, the court had no difficulty in determining that the issue of political contributions was a "matter of public interest" in Taiwan and "should be subjected to public comment." So too, the court held that the reporters' reliance on Mr. Chen as a source for their story constituted "reasonable investigation and verification." In this regard, the court noted that, while Chen had changed his story (and belatedly claimed in the settlement agreement that he was not the source for the article), Chen's earlier trial testimony (where he acknowledged he was the source) "is more credible." Finally, in applying its modified actual malice standard, the Taiwanese court held that Ying Chan and her co-reporter "in fact believe[d] in the truth of their writing" and that, as such, could not be held guilty of criminal libel "regardless of the truth of the matter."

Liu Tai Ying has publicly indicated that he intends to appeal the verdict in the *Ying Chan* case to Taiwan's High Court. In the meantime, Judge Li's ground-breaking decision has been greeted with acclaim by the Taiwanese press and has fueled calls in Taiwan for repeal of the criminal libel statute. Equally important, the *Ying Chan* decision places Taiwan among a growing number of Asian countries where courts have recognized that, for democracy to truly flourish, the press must be free to comment on and criticize those in power without fear of government retribution.

Mr. Balin, a partner at Lankenau Kovner Kurtz & Outten, LLP, is the American attorney for Ying Chan and Yazhou Zhoukan magazine.

LDRC would like to thank summer intern Jason Zedeck, Boston University School of Law, Class of 1998, for his contributions to this month's *LDRC LibelLetter*

UPDATE: Margin of Victory Widens in Newsroom Political Activity Ban Case

The Supreme Court of Washington has issued a modification, increasing the paper's margin of victory on First Amendment grounds from 5-4 to 7-2, of its February 1997 decision which held that the First Amendment protects a newspaper's ability to ban high-profile outside political activity by reporters in the interest of maintaining the objectivity of its news coverage and its editorial creativity. *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 279 (Wash. 1997, *modified* May 8, 1997). *See LDRC LibelLetter*, March 1997, at p. 1.

Justice Durham and Justice Talmadge have dropped their concurrence and fully joined the First Amendment-based majority opinion authored by Justice Sanders. Justice Dolliver, joined by Justice Johnson, who also concurred in the result, continued his disagreement, however, now characterizing his opinion as a full dissent to the First Amendment issue.

The decision affirmed a trial court dismissal of a reporter's challenge to her reassignment from an education beat to a copy editor position at the *News Tribune* in Tacoma. The paper ordered the reassignment because the reporter actively and visibly campaigned for a gay rights initiative and other political causes and refused to reduce her activism. The reporter's challenge was based in part on a Washington state statute which prohibits employers from discriminating against employees on political grounds. The majority opinion found that the statute would unconstitutionally infringe on the newspaper's right to freedom of the press.

In the original opinion, Justices Durham and Talmadge expressly did not reach the First Amendment issue but rather, based their concurrence in the result on their belief that the plaintiff lacked standing because the discrimination statute does not provide a private cause of action. Justices Dolliver and Johnson also felt that the statute did not support a private cause of action, but continued to state that the procedural barrier notwithstanding, the statute's application was not barred by the First Amendment.

The plaintiff is expected to file a petition for certiorari with the United States Supreme Court.

PLEASE MARK YOUR CALENDARS FOR THE FOLLOWING LDRC EVENTS:

1997 NAA/NAB/LDRC BIENNIAL LIBEL CONFERENCE
SEPTEMBER 10-12, 1997
HYATT REGENCY, RESTON TOWN CENTER
RESTON, VA
With a First International Media Law Forum on September 10 at 2:00 p.m.

LDRC FIFTEENTH ANNUAL DINNER
WEDNESDAY, NOVEMBER 12, 1997
WALDORF ASTORIA
WITH PRESENTATION OF THE
"WILLIAM J. BRENNAN JR. DEFENSE OF FREEDOM AWARD"
TO FRED W. FRIENDLY

LDRC DEFENSE COUNSEL SECTION ANNUAL BREAKFAST
THURSDAY, NOVEMBER 13, 1997
CROWNE PLAZA MANHATTAN

Surveys Show Dissatisfaction with the News Media

(Continued from page 22)

line sources and 30% get the news at least once a week from the Internet, higher than any other group, and significantly higher than those 45 years of age and older.

The Newseum found that people tended to evaluate rather favorably the news source they used most and to rate local news outlets, and particularly local television news, fairly well. This is not inconsistent with the Pew findings, in which national television news and national newspapers were viewed less favorably than local news outlets, and less favorably than they were in 1985. The news media that did not lose any significant ground with its viewer/readership was local television news which has had a fairly stable and reasonably high favorableness rating. Lowest in the Pew study were national newspapers, with a favorability rating of half that of local television news.

Local television news is also watched more than any other news source. The Pew study found that 72% of Americans watch local news regularly, compared with only 56% who read a daily newspaper regularly or 41% who watch network television news.

Crime is a Favorite News Subject But Restraint Sought

While the Newseum study reported that a majority thought that news was too sensational, the number two news topic of most interest to those polled was crime. It followed local news, which was the number one topic of interest. Remarkably high percentages of Americans, according to the Pew survey, were following the JonBenet Ramsey case and, of course, the Simpson trials.

Surprisingly therefore, in light of the interest in crime reporting, 89% of those surveyed thought that the press should not release the name of a criminal suspect until formal charges have been brought. And a significant percentage admit to pre-judging suspects based on news reports.

Blaming the Messenger

An interesting corollary result in the Pew findings was that the public blamed the press, not law enforcement, for any damage to reputations caused by publicity about those accused of crimes such as Richard Jewell and the two Dallas Cowboys wrongfully accused of sexual assault. The Pew respondents believed that news media should show restraint when reporting on personal scandals as well, with seven of ten indicating that they supported a decision not to publish information about Bob Dole's extramarital affair during the last campaign.

Investigative Reporting Valued But Techniques Have Less Support

While the watchdog role of the media is less appreciated, investigative reporting remains valued. Most of the Pew participants (80%) approve of investigative reporting. Fully 80% say that in general they approve of the news media's practice of uncovering and reporting on corruption and fraud in business, government agencies and other organizations. Sixty percent of Americans would like to see more of this type of reporting, with only 28% looking for less.

But Americans are less supportive of some of the methods or tools used in investigative reporting. Over half (54%) disapprove of the use of hidden cameras for investigative reporting and even more (66%) do not approve of reporters concealing their identity or paying informers for information.

Quoting unnamed sources, however, is appropriate according to 52% of those surveyed by Pew (up from 42% in 1981) but 58% of those in the Newseum survey say that the news media quotes unnamed sources too much.

First Amendment Not Absolute... But No Interest in Making Libel Suits Easier to Win Either

The Newseum poll looked at attitudes toward the First Amendment and freedom of the press. First, few of those polled identified freedom of the press as a right guaranteed by the First Amendment. The poll found, in fact, that nearly 30% could not name any First Amendment right.

And not surprisingly, only one-third of those in the Newseum poll believe that freedom of the press is absolute and should be protected at all times.

Of special interest to libel lawyers, most people are hesitant to make libel claims against the news media easier to win. Over half in the Pew study believe that making libel suits easier would have a "chilling effect" and prevent important stories from being reported while only 34% think that the news media should be held more accountable and libel suits made easier.

More Trust for Reporters than Elected *Officials or* Talk Show Hosts

Finally, the Pew study adds a comforting note for the news media: the study shows that people have a higher regard for the media compared to other institutions such as Congress or the courts. The Newseum study figures similarly indicate that people trust the news media (except for radio talk-show hosts) more than their representative in Congress, the President, or a lawyer. Anchors were trusted more than newspaper reporters, and local anchors were trusted more than network anchors.

As to ethical standards, reporters were again higher than elected officials, lawyers, corporate executives and car salespeople. The exception was for radio talk show hosts.

Read More About It...

These studies should be a bit unnerving for those who litigate media cases before all of these readers and viewers. LDRC commends these studies to you, and the many findings that we did not report in this brief summary. As noted above, the Newseum material is available at their website. The Pew Research Center also has a website: www.people-press.org.

Surveys Show Dissatisfaction with the News Media

Does Media "Get in the Way" of Society Solving its Problems?

The American public seems to be more critical of the news media than ever according to two recent surveys conducted by The Pew Research Center and The Freedom Forum's Newseum. Pew found that the public assessment of media was that it was increasingly less accurate, less fair when dealing with political and social issues, more sensational and more intrusive. Overall, a majority of those polled by Pew felt that the news media "gets in the way of society solving its problems."

In addition to finding that Americans suspect and distrust manipulation of the news by special interests and that about half find the news biased or too negative in tone, the Newseum study found that most of those polled felt that the media was either getting worse or staying about the same. Only a minority, 20%, thought that the media was improving.

On the other hand, Pew found only modest enthusiasm (32%) for making it easier to win libel suits against the media. Fifty-two percent thought such changes would prevent the media form reporting important stories.

The Pew Study (*Fewer Favor Media Scrutiny of Political Leaders*, The Pew Research Center for the People and the Press, March 21, 1997), consisted of a survey of 1,211 adults in February 1997. The Newseum study entitled *News Junkies, News Critics*, (www.newseum.org) developed by the Newseum, the Freedom Forum's Media Studies Center in New York and the Roper Center for Public Opinion Research at the University of Connecticut interviewed 1,500 people in January 1997.

Often Inaccurate

Some of the Pew Research Center results are striking. Since 1986, when Pew did its first poll, to February 1997, the percentage of those who believe that the press is *often inaccurate* has grown to 56% from 34%. Minorities and those under the age of 30 showed significant increases in their skepticism of the accuracy of the media.

And Biased

Sixty-seven percent, up from 53% in 1985, believe that the media tend to favor one side over another in dealing with political and social issues. While there was not a significant difference based upon race in these numbers, males, and particularly males under the age of 30 -- to the tune of 78% -- believed that the press was biased. Republicans more than Democrats or Independents, high income more than low income, were of the view that the press was biased.

The Newseum study adds that people believe that media is influenced by politicians, big business, media owners, advertisers and profits and these forces affect how news is covered and presented.

And Intrusive

Nearly two-thirds (64%) of those polled in the Pew study felt that TV news programs unnecessarily invaded people's privacy. Only slightly fewer (57%) felt the same about newspapers. The Newseum study found that 82% of those it polled expressed some or a great deal of concern about the media's insensitivity to victims' pain.

Less Respect for the Press As Watchdog

While 56% in the Pew study expressed an appreciation for the press' role as watchdogs of political life, that is down from 67% in 1985. And 32% of those polled felt that press criticism kept political leaders from doing their jobs. That is up from 17% in 1985.

And in both the Pew and the Newseum polls, the majority of Americans felt that the press coverage of the personal and ethical behavior of political leaders was excessive. Sixty-five percent of the Pew respondents and 75% of the Newseum respondents expressed concern on this issue.

Pew found, however, that respondents distinguished between personal/ethical behavior coverage and criticism of political leaders' policies and proposals. Only 46% thought that criticism of the substance was excessive.

And while Pew found that a majority (54%) of Americans believe that the news media gets in the way of society solving its problems -- and only one-third (36%) felt that the media helps society solve problems -- this was, in fact, an improvement over past years in public assessment. Pew noted that in 1994, 71% felt that the media got in the way of problem solving, a seeming high-water mark for contempt of media involvement in public life.

Among the reasons given Pew for why Americans believe the press hinders society's problem solving: too sensational, too biased, over-emphasis on negative news, shallowness. The Newseum numbers indicate that 65% of those polled felt news reporting was too sensational, 52% found it too biased, 47% found it too negative, 39% found it too superficial, and 38% found it too inaccurate.

News is Important

The Newseum poll found that most Americans seek news from a variety of sources at least several times a week. News remains important to them. While the Newseum found that older people tend to spend more time with the news media, younger people are more likely to say that their need for news is increasing.

Interesting, but the Pew study found that respondents under the age of 30 were also the most critical of the media. Particularly critical of the news media were men under the age of 30. The Newseum poll, not surprisingly, shows that 10% of the 18-29 year-olds get their news daily from on-

(Continued on page 21)