



LIBELLETTER

Reporting Developments Through May 16, 2001

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September 12-14, 2001

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Sheraton New York Hotel & Towers

ANNUAL DCS BREAKFAST

Friday, November 9th, 2001

Sheraton New York Hotel & Towers

California Supreme Court Transforms Balance Between First Amendment and Publicity Rights

By Stephen G. Contopoulos and Bradley H. Ellis

The California Supreme Court has announced a new balancing test designed to reconcile First Amendment and publicity rights in California. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 2001 DJDAR 4163 (Cal. April 30, 2001), the Court held that a defendant in a case arising under California's publicity rights statute for successors of deceased personalities (California Civil Code § 3344.1) has an affirmative defense based upon the First Amendment if the work at issue containing a celebrity's likeness "adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." Under this test, Andy Warhol wins, but Gary Saderup does not.

In California, any person who uses a deceased personality's name, voice, signature, photograph, or likeness on or to sell products, merchandise, goods or services without proper consent violates California Civil Code § 3344.1. The statute excepts uses in connection with certain media, including original works of art.

The plaintiff in *Comedy III* is the registered owner of all rights to The Three Stooges under Civil Code § 3344.1 (In its opinion, the Court refers to the statute by its previously denominated code section, Civil Code § 990). The defendant Gary Saderup is an artist whose specialty is charcoal drawings of celebrities. Without securing plaintiff's consent, Saderup created an original drawing of the Stooges, from which he created and sold lithographs and T-shirts bearing the image he created.

Lower Courts: No Protection for Celeb Lithos

The trial court awarded damages to plaintiff and issued a broad injunction against Saderup, which excepted only the original drawing from the activities it prohibited. Rejecting Saderup's contention that his conduct was protected by the constitutional guaranty of freedom of speech, the trial court (and the intermediate appellate court) concluded that reproductions of celebrity images are beyond First Amendment

protection. (The Court of Appeal did modify the judgment by striking the injunction.)

Supreme Court Disagrees

The California Supreme Court rejected the lower courts' analysis. The Court noted that Saderup's drawings were expressive works, and the fact that he enjoyed financial gain from selling reproductions did not cause him to lose his First Amendment right to do so. And in the absence of an advertisement for or endorsement of a product, the artwork and its reproductions could not be considered commercial speech. Moreover, the Court noted that even art that conveys no discernible message is protected by the First Amendment. The medium Saderup used to convey repro-

ductions of his artwork also did not strip Saderup of his First Amendment rights. The fact that a message appears on a T-shirt does not mean that it receives any less protection than a message conveyed in the *New York Times*,

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according to the Court, nor would the fact that the artwork was reproduced to create numerous copies of the image.

In addition, the Court acknowledged that celebrities take on "public meaning" and that the use of their likenesses may be important in discussion of public issues, particularly those about culture and values. Quoting from Professor Madow's article, "Private Ownership of Public Image: Popular Culture and Publicity Rights" 81 Cal. L.Rev. 125, 143-145 (1993), the Court stated that right of publicity claims could result in "censoring of significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity's meaning."

But Must Balance Speech and Celebrity Rights

But, having made clear its understanding of the importance of and its due deference to First Amendment rights,

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the Court declined to sanction all speech that “trenches on the right of publicity.” The Court equated the publicity right with copyrights which society has deemed to have social utility. Expressing perhaps a surprising degree of admiration for the work of The Stooges (including the “nyuk-nyuks, and ‘whoop-whoop-whoops,’ eye-pokes, slaps and head conks”!) and the “long and arduous” road they took to achieve “a kind of mythic status in our culture,” the Court concluded that society, through the Legislature, could recognize that the heirs and assigns of a celebrity “have a legitimate protectible interest in exploiting the value to be obtained from merchandising the celebrity’s image.” The question was, then, how to reconcile the two rights.

To find its answer the Court first turned to three cases: *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (First Amendment does not protect broadcast of human cannonball’s entire act); *Guglielmi v. Spielberg-Goldberg Productions*, 25 Cal.3d 860 (1979) (First Amendment protects fictional film based on the life of Rudolph Valentino); and *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (First Amendment does not protect Elvis impersonator’s “The Big El Show.”). The unifying theme of these cases for the Court seems to be that in each of them the court engaged in a balancing of First Amendment rights and rights of publicity. Thus, the Court deemed a balancing test to be the appropriate means by which to reconcile the competing rights.

Draws From Fair Use Test

Next, the Court looked for the appropriate weights to place on the scales, finding them in the traditional first factor of the four-factor “fair use test” of copyright law: what is the purpose and character of the use. The Court noted that the purpose of that inquiry is to see “whether the new work merely “supercede[s] the objects” of the original creation [citations], or instead adds something new” that renders it “transformative” of the original, citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). That is, does the “something new” effectively alter the expression, meaning or message of the original. This inquiry, according to the Court, is “necessarily at the

heart of any judicial attempt to square the right of publicity with the First Amendment.”

The Court suggests that in close cases a court might inquire whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.” If not, then it may be assumed that the work is sufficiently transformative to enjoy First Amendment protection. If the answer is “yes,” however, it does not necessarily mean that the work is without First Amendment protection. Rather, the work must still be analyzed to determine whether it is transformative.

Not a Clear Formula

In the course of its opinion, the Court described the question to be answered in no less than half a dozen different ways:

- whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation;
- whether a work contains significant transformative elements;
- whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question;
- whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness, with the use of the word “expression” here meaning expression of something other than the likeness of the celebrity;
- whether the artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, and if so, then the artist’s right of free expression is outweighed by the right of publicity; and

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- whether the artist depicting a celebrity has contributed something more than a merely trivial variation, or has created something recognizably his own.

The Court's varied formulations leave unanswered questions as to the limits of this new balancing test, and how courts should go about applying the test. For example, to say that a work must contain "significant creative elements so as to transform it into something more than a mere celebrity" suggests that a work of art in which a celebrity image predominates could still qualify for First Amendment protection.

On the other hand, several of its formulations suggest that the Court intended that such works would rarely pass muster. Indeed, the Court apparently felt constrained to reassure that "we do not hold that all reproductions of celebrity portraits are unprotected by the First Amendment." The works of Andy Warhol, according to the Court, through the added elements of "distortion and careful manipulation of context," convey a message beyond the commercial exploitation of celebrity images, and are instead "form[s] of ironic social comment on the dehumanization of celebrity itself." The Court somewhat tentatively concludes that "[s]uch expression may well be entitled to First Amendment protection."

The Court, once again keeping an eye on the First Amendment, clearly tells courts that quality is not their concern. Rather, "[t]he inquiry is in a sense more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate in the work." But one must wonder whether in the case of Warhol, for example, most judges viewing his work would find that it is Warhol's "distortion and careful manipulation of context" that predominates over the image of the celebrity depicted. And, like any new legal test, it will take additional lawsuits, and in this case, the artistic sensibilities of judges, to truly define when a work containing a celebrity image is "transformative."

Messrs. Contopoulos and Ellis are partners in the Los Angeles office of Sidley Austin Brown & Wood.

Choreographed Arrest and "Perp Walk" Did Not Violate Plaintiffs' Rights

New York Federal Court Finds Second Circuit Lauro Decision Inapplicable

On March 16, a District Court for the Southern District of New York ruled that an arrest and "perp walk" that had been choreographed specifically for media publicity did not violate the rights of the three arrestees. *Caldarola et al. v. The County of Westchester et al.*, 2001 U.S. Dist. LEXIS 4421 (S.D.N.Y. Mar. 16, 2001).

Judge McMahon held that having Westchester County employees film the plaintiffs as they were led in handcuffs from the Department of Correction building where they were arrested into a waiting police car, showing the footage of the "perp walk" at a press conference later, giving copies of the footage to the media, and telling the press that the plaintiffs would be traveling to the courthouse for their arraignment did not violate the Fourth Amendment rights of the plaintiffs.

The Facts and Plaintiffs' Claims

The plaintiffs — Rocco Caldarola, Joseph Freeman, and James Santerello — current and former corrections officers with the Westchester Department of Correction ("DOC"), were the subject of a DOC investigation into whether corrections officers who were on leave for injuries were filing false job injury claims. The investigation revealed that Freeman and Santerello, among others, had filed false claims, and that Caldarola was not living in New York State, in violation of laws which required him to do so. The plaintiffs were asked to report to the DOC headquarters on July 12, 1999, and upon arrival each was arrested, charged with grand larceny, and handcuffed.

The plaintiffs claimed their Fourth Amendment rights against unreasonable search and seizure were violated by the coordination of the arrests and the filming itself by the County employee, the showing and distribution of the tape at the press conference, and the advance advisory given to the press about the

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Choreographed Arrest and “Perp Walk” Did Not Violate Plaintiffs’ Rights

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plaintiffs’ arraignment. The plaintiffs relied upon the recent case of *Lauro v. City of New York*, 219 F.3d 202 (2d Cir. 2000), reported in the Sept. 2000 *Libel-Letter* at 33, which upheld a lower court’s decision that a staged “perp walk” was unconstitutional. In *Lauro*, the arrestee was brought outside, put in a car, driven around the building, removed from the car, and taken back inside the building, solely for the purpose of permitting the media to film the accused. The court found that the perp walk “was unrelated to the object of the arrest, . . . had no legitimate law enforcement justification, and . . . invaded [the accused’s] privacy to no purpose.” *Lauro*, 219 F.3d at 213.

Although the “perp walk” was choreographed . . . the court found that “[t]heir time before the camera was not prolonged beyond that which was necessary to walk from the building to the car.”

Court Limits Lauro to Its Facts

In distinguishing the immediate case from the facts of *Lauro*, Judge McMahon specifically noted that the *Lauro* court itself pointed out that “we do not address the case — seemingly much more common than the kind of staged perp walk that occurred here — where a suspect is photographed in the normal course of being moved from one place to another by the police.” Accordingly, Judge McMahon limited *Lauro* to its facts, “wholly fictitious events like the unnecessary perp walk,” *Caldarola* at *25, and refused to apply it to the instant case.

First, in holding that the filming of the plaintiffs as they left the building was constitutional, the court found that there was no “seizure” involved. There was no physical seizure or physical intrusion that interfered with any possessory interest the plaintiffs had, the court said. The court noted that with the current frequency of brutality and other allegations against law enforcement officials, the agency had a self-protection interest in videotaping an encounter.

The court found that the County’s choreographing of the arrests so as to allow the videotaping did not alter the fact that it was constitutional. As distinguished from the *Lauro* case, the court said that the plaintiffs here really were arrested at the time the videotape was made, and that “nothing that happened to the plaintiffs was fictitious.” Although the “perp walk” was choreographed since plaintiffs were required to wait until they were taken outside, the court found that “[t]heir time before the camera

was not prolonged beyond that which was necessary to walk from the building to the car.”

Second, the court found the use of the footage at the press confer-

ence to be constitutional. Although no cases were directly on point, the court analogized the argument of alleged seizure to a line of cases addressing potential right to privacy violations. According to the court, those cases, in which each plaintiff was subjected to very detrimental publicity because of the law enforcement officers, hold that there is no right under the constitution to be free from reputational injury alone.

Finally, the court found that the advance advisory given to the press about the plaintiffs’ arraignment was not unconstitutional. The court concluded that the government does have a legitimate interest in the accurate reporting of police activity, and thus is free to advise the press about events related to a suspect’s arrest, processing and arraignment. The court acknowledged that the plaintiffs’ arrest was “a newsworthy event,” finding that “[t]he press could not be kept from covering it, and the police are not constitutionally compelled to make their job more difficult.”

Federal Judge Denies Death Row Inmate's Request to Enjoin Book Publication

By Robert D. Balin and David J. Porter

On April 10, 2001, Judge Loretta Preska of the U.S. District Court for the Southern District of New York denied a motion in which death row inmate Mumia Abu-Jamal sought to preliminarily enjoin St. Martin's Press from publishing a book about his case that was written by one of Abu-Jamal's attorneys, death penalty expert Dan Williams. *Abu-Jamal v. St. Martin's Press*, No. 2001 Civ. 2850 (S.D.N.Y. April 10, 2001). Ruling from the bench, Judge Preska found that Abu-Jamal had made no showing that publication of the book would cause certain and irreparable harm to his Sixth Amendment fair trial rights, as required under *Nebraska Press v. Stuart*, 427 U.S. 539 (1976) to overcome the Constitution's heavy presumption against the issuance of prior restraints.

Executing Justice

Abu-Jamal, an African-American political activist who was convicted and sentenced to death in 1982 for the murder of a Philadelphia police officer, is perhaps the best-known death row inmate in America. His trial, death sentence and subsequent appeals have attracted widespread media coverage, Abu-Jamal has himself written three books while in prison, and his attempts to secure a new trial have been publicly championed by, among others, Jesse Jackson, E.L. Doctorow and Amnesty International. Abu-Jamal's case has also become a focal point for the broader ideological debate that rages between death penalty proponents and opponents.

In 1999, Abu-Jamal's team of defense attorneys filed a federal habeas corpus petition challenging the fairness of his original murder trial, and that habeas petition is currently *sub judice* before Judge William Yohn of the Eastern District of Pennsylvania. As part of a concerted effort to raise public awareness about the case, Abu-Jamal's attorneys, with his active encouragement, have also over the years delivered speeches and written several essays, articles and books advocating Abu-Jamal's cause.

In late 2000, Williams, a full-time death penalty lawyer who has been one of Abu-Jamal's lead counsel for eight years, wrote a book entitled *Executing Justice*. In the book, Williams makes the argument that Abu-Jamal's original murder trial was tainted with errors and passion-

ately advocates his client's grounds for a new trial. Having previously written a published essay about the case (called *The Ordeal of Mumia Abu-Jamal*), Williams had informed Jamal that he was expanding this essay into a book and, according to Williams, Jamal "enthusiastically agreed." Williams also submitted a synopsis of the book and drafts of several chapters to Abu-Jamal's literary agent.

In late February 2001, Williams' publisher, St. Martin's Press, sent advance copies of *Executing Justice* to Abu-Jamal, to many of his supporters and to over 50 media organizations (including *The New York Times*, the Associated Press, *The Wall Street Journal*, CNN, *Newsweek*, and the *Washington Post*). The book was scheduled for general distribution starting April 11, 2001.

The Prior Restraint Proceeding

In late March, Abu-Jamal sued Williams and St. Martin's in the U.S. District Court for the Western District of Pennsylvania (which is the district where Abu-Jamal is currently incarcerated). In the complaint, Abu-Jamal alleged that Williams had breached his fiduciary duty of loyalty by disclosing "confidential" information in *Executing Justice* and that St. Martin's, by publishing the book, would be "assisting" Williams in violating his fiduciary confidentiality obligations. Based on these allegations, Abu-Jamal sought preliminary and permanent injunctive relief prohibiting St. Martin's from taking further steps to distribute the book. In the alternative, he sought the judicial imposition of a constructive trust under which all proceeds from sales of *Executing Justice* would be diverted from St. Martin's and Williams to Abu-Jamal.

Abu-Jamal did not assert that Williams revealed any attorney-client privileged information or discussions in his book. Instead, the gist of Abu-Jamal's claims were that, in Chapter 16 of the book (entitled "Fighting Ideology"), Williams disclosed defense team "tactics" by discussing a defense witness and by criticizing two attorneys from the far-left Partisan Defense Committee who had unsuccessfully sought to insert ideologically-driven arguments into the case. In responding affidavits, Williams denied that he had revealed any confidential or

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Inmate's Request to Enjoin Book Denied

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sensitive information, pointed out that his discussion of the witness was based on that witness's own public hearing testimony and noted that the very purpose of Chapter 16 was to show that the defense team has successfully resisted ideological pressures and arguments in representing Abu-Jamal.

On March 30, Judge William Standish of the Western District of Pennsylvania found that venue was not proper in that district and transferred Abu-Jamal's action to the Southern District of New York, where St. Martin's and Williams both reside. In New York, the case was assigned to Judge Preska, and the parties agreed to argue Abu-Jamal's preliminary injunction motion on affidavits and briefs, without the need for an evidentiary hearing. The preliminary injunction argument was thereafter held on the afternoon of April 10, only hours before copies of *Executing Justice* were scheduled to be boxed for shipment to book stores.

Judge Preska's Bench Ruling

In her decision from the bench, Judge Preska held that Abu-Jamal had failed to satisfy both the exacting First Amendment requirements for the extraordinary remedy of a prior restraint as well as traditional preliminary injunction standards.

Turning to the constitutional inquiry, Judge Preska noted that, under *Nebraska Press*, a prior restraint on publishing information about criminal proceedings is prohibited except where the movant demonstrates that (a) dissemination of the information would cause irreparable and near certain damage to his Sixth Amendment fair trial rights, (b) no less extreme measures are available, and (c) a prior restraint would be effective. *Nebraska Press*, 427 U. S. at 562.

No Irreparable Injury

With respect to the first *Nebraska Press* requirement, Judge Preska found that Abu-Jamal had made "no demonstration of any irreparable injury . . . from publication of the book."

Specifically, Judge Preska determined that the portions of the book to which Abu-Jamal objected did not appear to

disclose any privileged or confidential information. As to Jamal's claim that Chapter 16 disclosed infighting among his defense team, Judge Preska found that "the tugs and pulls between the strictly legal advocates and some of Mr. Jamal's more vociferous political supporters . . . has already been reported numerous times."

Judge Preska further noted that Abu-Jamal's trial took place decades ago, and that the only matter currently pending is the *sub judice* habeas proceeding in which the book would be inadmissible hearsay. Finding Abu-Jamal's allegations of irreparable harm to be "wholly speculative," Judge Preska concluded that it was "unlikely in the extreme" that the federal judge who is considering Abu-Jamal's habeas petition would be influenced by an inadmissible book rather than the papers and evidence that comprise the judicial record.

Less Extreme Options Available

Judge Preska also held that Abu-Jamal had failed to satisfy the second *Nebraska Press* requirement since, in the event a new trial is granted to Abu-Jamal, *voir dire* and other measures far less extreme than a prior restraint (such as cautionary jury instructions) would be "equally effective" in "countering whatever publicity is attendant upon this book."

Finally, noting that advance copies of *Executing Justice* had been sent to numerous news organizations and that articles about the book have already begun appearing, Judge Preska concluded that "the cat is already out of the bag" and that, therefore, any prior restraint would be futile.

In addition to ruling that Abu-Jamal's prior restraint request could not pass constitutional muster, Judge Preska also determined that, under traditional preliminary injunctive relief standards, Abu-Jamal was unlikely to prevail on the merits of his claims against Williams or St. Martin's. As to the breach of fiduciary duty claim against Williams, Judge Preska found that Abu-Jamal was unlikely to demonstrate that, in *Executing Justice*, Williams disclosed either privileged or confidential information. She further opined that an

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Inmate's Request to Enjoin Book Denied

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alleged breach of the Code of Professional Responsibility did not necessarily, in and of itself, give rise to a private cause of action against an attorney.

As to St. Martin's, Judge Preska held that governing Pennsylvania law does not recognize the tort of aiding a breach of fiduciary duty. Judge Preska further ruled that, even if Pennsylvania were to recognize such a tort, there was no indication that St. Martin's either knew that Williams was disclosing confidential information or gave substantial assistance or encouragement to Williams to breach his fiduciary obligations to Jamal. Judge Preska noted that, quite the opposite, Williams expressly warranted to St. Martin's in his author's contract that "the work contains no material . . . which would disclose any information given to the author on the understanding that it would not be published or disclosed." Having found that Abu-Jamal is unlikely to prevail on these grounds, Judge Preska did not reach St. Martin's argument that the First Amendment prohibits tort claims (however labeled) against publishers for the mere act of publishing information alleged to be confidential.

With the denial of Abu-Jamal's preliminary injunction motion, copies of *Executing Justice* were timely distributed to bookstores around the country. Upon agreement of the parties, the case has since been placed on Judge Preska's suspense calendar while Abu-Jamal determines whether or not to prosecute his surviving post-publication damage claim for a constructive trust.

Mark R. Hornack and David J. Porter of Buchanan Ingersoll Professional Corporation represented St. Martin's Press and Dan Williams in the Western District of Pennsylvania and submitted defendants' opening brief in opposition to the preliminary injunction motion. John Lankenau and Robert Balin of Davis Wright Tremaine LLP represented defendants in the Southern District of New York. Abu-Jamal was represented by Jere Krakoff and Andrew Shubin.

Court Enjoins Publication of *Gone With the Wind* Parody

In a highly publicized copyright infringement case, a federal court in Atlanta, Georgia preliminarily enjoined publication of *The Wind Done Gone*, a novel described by its author, publisher, distinguished academics and writers as a parody of *Gone With the Wind's* portrayal of blacks in the antebellum South and Civil War era. *Suntrust Bank, as trustee of the Mitchell Trust v. Houghton Mifflin Company*, 1:01 - CV -701, (N.D. Ga. April 20, 2001).

In a 51-page decision, District Court Judge Charles Pannell, Jr. found that while the new novel by Alice Randall contained some fair use parody, it was coupled with extensive infringing duplication of the characters, settings, dialogue, theme and plot of Margaret Mitchell's 1936 novel. Finding a likelihood of success on the merits, potential irreparable harm to plaintiff, and a public interest in preserving plaintiff's copyright, the court enjoined any further production, display, distribution, or advertising of the book.

The 11th Circuit Court of Appeals granted a motion for expedited review, with oral argument set for May 25th. A copy of the district court decision, the supporting motion papers, affidavits and hearing transcripts are all available online at www.thewinddonegone.com.

Controversial Prior Restraint

The case has highlighted a number of interesting copyright and First Amendment law issues, foremost being whether prior restraints in copyright cases fairly take into account First Amendment interests, particularly in a case such as this where the enjoined book appears to be a paradigm example of core-protected speech. Indeed, the Supreme Court has noted in dicta that the goals of copyright law "are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994).

A media coalition of CNN, Cox Enterprises, Dow Jones & Company, Media General, The New York Times Company and Tribune Company has filed an amicus brief with the 11th Circuit challenging the granting of a prior restraint in the case. Microsoft filed a separate amicus brief challenging the fair use determination, as did a coal-

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***Gone With the Wind* Parody Enjoined**

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tion of free speech groups that include PEN, the American Booksellers Foundation for Freedom of Expression, the Freedom to Read Foundation, National Coalition Against Censorship and Washington Lawyers for the Arts.

Parody Defense

The parody defense to copyright infringement is on its own an intriguing issue in the case, particularly how it should be applied to a book in light of the Supreme Court's decision in *Campbell*. Although the Supreme Court examined the nature of parody at length, it acknowledged that no bright line rules exist to make an individual determination. In *Campbell* the Court found that taking the "heart" of another work may be protected. In this case deciding what that is is the dilemma.

Both sides have enlisted heavyweight literary experts to opine on the merits of the book and its reliance on the earlier work. Nobel Prize winning author Toni Morrison and distinguished Harvard Pro-

fessor Henry Louis Gates, among others, weighed in on Houghton Mifflin's behalf, describing Alice Randall's novel as "a classic parody." Plaintiff's experts dismiss the book as unimaginative piracy.

Moreover, plaintiff argues that a finding of fair use would resonate beyond this case and literally end copyright law as we know it by opening up every protected work and fictional character to exploitation under the guise of parody. In this brave new world, the "parodist" can enter the fictional worlds of *Rabbit Run*, *Portnoy's Complaint*, *Harry Potter* or *The Godfather*, for example, to correct stereotypes and historical myths or inject new perspectives. It is a provocative argument that will no doubt give pause to copyright owners and intrigue literary critics. On the other hand, defendant argues that the district court's decision threatens parody as we know it.

Of course, the only literary critic that counted in the end was Judge Pannell. His task, as described in the decision, was to read *The Wind Done Gone* as a whole and

compare it to *Gone With the Wind*, "assimilating the tone, plot, characters, theme, setting, mood and pace of each work" to see whether there was substantial similarity and then to "determine what the author likely intended to achieve in creating her new work and whether the work accomplishes this goal." Slip op. at 9, 26. While it is clear that Judge Pannell found that *The Wind Done Gone* is not a fair use parody, the injunction makes it impossible now for anyone other than appellate judges to undertake a similar comparison of the two books.

Gone With the Wind

For the unfamiliar, Margaret Mitchell's *Gone With the*

Wind is a sweeping, 1000-page novel which chronicles the life of its main character Scarlett O'Hara from her plantation childhood in the antebellum South, through the Civil War and Reconstruction. The novel's other well-known characters, including Rhett Butler,

Mammy and Ashley Wilkes, are vividly drawn, both in the novel and in a 1939 film version. The book and its characters are American icons. The plaintiff authorized a 1988 sequel novel and has contracted with St. Martin's Press for a second sequel.

Despite its icon status, as one of Houghton Mifflin's experts, Harvard Professor Henry Louis Gates opined, the book "is widely regarded in the black community as one of the most racist depictions of slavery . . . in American literature." Blacks are described as "stupid and lazy," "creatures of small intelligence," and "apes" whom Scarlett would have liked to have "whipped until the blood ran down their backs." According to Alice Randall, author of the *Wind Done Gone*, *Gone With the Wind* "is the South without miscegenation, without whippings, without families sold apart, without free blacks striving for their education, without Booker T. Washington and Frederick Douglass. *Gone With the Wind* depicts a South that never ever

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[P]laintiff argues that a finding of fair use would resonate beyond this case and literally end copyright law as we know it . . . on the other hand, defendant argues that the district court's decision threatens parody as we know it.

Gone With the Wind Parody Enjoined

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existed.” Slip op. at 27.

The Wind Done Gone

The Wind Done Gone is a slimmer, 200-page book, described in its publishing agreement as a “meaningful parody” of *Gone With the Wind*. According to the publisher’s blurb, “imagine simply, that the black characters in Mitchell’s tale were other than one-dimensional stereotypes. Then imagine, audaciously, that Scarlett O’Hara had an illegitimate mulatto sister, and that this sister, Cynara — gets to tell her story.” The story is told in a first person diary account that conjures up its target using renamed fictional characters but which provides a different viewpoint of the antebellum and post-bellum world, taking Cynara’s story into the 20th Century. As described in an afterword by the author, *Gone With the Wind* “presented and helped perpetuate an image of the South that I, as an African-American woman living in the South, felt compelled to comment upon and criticize.” Slip op. at 32 n.16.

The District Court’s Copyright Analysis — Prima Facie Copying

The District Court engaged in a two-step copyright analysis, first comparing the works for substantial similarity and then analyzing whether a fair use defense applied under the four factor test included in the Copyright Act. As to prima facie copying, plaintiff alleged that Randall’s book copied Mitchell’s core characters, their traits and relationships, famous scenes, other elements of the plot and dialogue and descriptions from the book. Defendant conceded similarities in setting, character and plot but argued that thematically the books are radically different in style and purpose.

In support of its motion, plaintiff submitted a series of exhibits charting the alleged similarities between the two books. The district court, however, found such exhibits to be “inherently subjective and unreliable,” slip op. at 9, and instead undertook an independent comparison of the books. The court’s finding was that:

The Wind Done Gone uses fifteen fictional characters from *Gone With the Wind*, incorporating their physical attributes, mannerisms, and the distinct features that Ms. Mitchell used to describe them, as well as

their complex relationships to each other. Moreover, the various locales ... settings, characters, themes, and plot of *The Wind Done Gone* closely mirror those contained in *Gone With the Wind*. . . . The new work does not create a new story of the South during Reconstruction. Rather, with the canvas of *Gone With the Wind* as a backdrop, *The Wind Done Gone* repeats the story of *Gone With the Wind*, by utilizing a detailed encapsulation of the older work and exploiting its copyrighted characters, story lines, and settings as the palette for the new story. Slip op. at 10-11.

Furthermore, as to the different themes of the books, the court added that “the fact the two works may present polar viewpoints of the same fictional world fails to mitigate the fact that it is the same fictional world, described in the same way and inhabited by the same people, who are doing the same things.” *Id.* at 14.

Analyzing the similarities further, the court found that Randall’s book consisted of “fragmented literal similarity” — copying of exact sentences out of *Gone With the Wind* — as well as comprehensive nonliteral similarity — summarization of the story and plot. Jargon aside, the court’s “crucial holding [is] that an average lay observer would recognize *The Wind Done Gone* as having appropriated from *Gone With the Wind*. Slip op. at 17.

Fair Use

Finding substantial similarity, the district court’s next step was to consider whether the book was a fair use parody under the standards promulgated in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). In *Campbell* the Supreme Court discussed at length the nature of parody and its relationship to each of the four factors included in the fair use provision of the Copyright Act — 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the work used; and 4) the effect of the use on the market value of the original. 17 U.S.C. § 107.

Purpose and Character of Use

In *Campbell*, Justice Souter defined parody as a work that imitates the characteristic style of an author for comic effect or ridicule. *Id.* at 580. The Supreme Court recognized that parody provides social benefit by shedding light on an ear-

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Gone With the Wind Parody Enjoined

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lier work, and, in the process, creating a new one. As such “parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination.” *Id.* at 580-81. Houghton Mifflin argued that its book does exactly this, achieving a parodic effect by, for example, reversing stereotypes, criticizing the earlier work’s one-sided views, as well as providing a more complete picture of the antebellum South.

The essence of the district court’s analysis, however, was that while the book contained some parody of the earlier work overall its intent was not only to criticize it, but also to give the author’s social commentary on Southern history and the treatment of black Americans in the South in the 1930’s, 1940’s and 1950’s as well as today. Citing to *Campbell*, the court reasoned:

[T]he parodical work must parody the work itself and not other general concepts and ideas about the way black Americans have been and are treated in the South. As the defendant’s expert Toni Morrison, queried, “Who controls how history is imagined? Who gets to say what slavery was like for slaves?” The answer to that question is of course anyone who chooses to write about historical events, whether as history or fiction. The question before the court is not who gets to write history, but rather whether Ms. Randall can permeate most of her new critical work with the copyrighted characters, ploy, and scenes from *Gone With the Wind* in order to correct the “pain, humiliation and outrage” of the “a-historical representation” of the previous work, while simultaneously criticizing the antebellum and more recent South. Parody has its place in copyright law, but the extent of the use of the copyrighted work and the purpose of the author’s prose may limit the parodical effect and nullify the fair use defense. Slip op. at 33 (citations omitted).

Thus, although in part transformative, in the view of the district court *The Wind Done Gone* is on the whole a “sequel” to the earlier work, taking its character, Cynara, on “new adventures” but relying on scenes, plot, themes and characters from *Gone With the Wind*. Slip op. at 34.

Gone With the Wind’s nature as a work of fiction also

weighed against fair use (citing *Harper & Row v. The Nation*, 471 U.S. 539, 563 (1985)), but the more important factors weighing against fair use were the amount used and the effect on the original’s value. The court’s findings on parody and on substantial similarity effectively determined both these factors in plaintiff’s favor.

Amount Used

As the Supreme Court in *Campbell* noted, parody presents a difficult case on this third fair use factor. Parody depends on a recognizable allusion to its target and therefore must be able to conjure up at least enough of its target to make the object of its critical wit recognizable. But what is enough? Here, according to the district court, the amount used was excessive, because Randall’s “use does not merely ‘conjure up’ the earlier work, but rather has made a wholesale encapsulation of the earlier work” not merely to parody it, but to correct the “inaccurate portrait of Southern history” of *Gone With the Wind*. Slip op. at 40.

Effect on the Value of the Original

Because the court found *The Wind Done Gone* to be a derivative sequel, it naturally followed that it would damage the market value of *Gone With the Wind*, despite the radically different perspectives of the two books. In fact, the court acknowledged that because of the transformative elements of *The Wind Done Gone* its impact as a market substitute is “less certain.” But the court found that to assess potential market harm to the original, it would also have to consider “the effect that would occur if that type of use became widespread.” Slip op. at 42.

If the defendant is permitted to publish *The Wind Done Gone*, an unauthorized derivative work, then the court concluded, anyone could tell the love story of *Gone With the Wind* from another point of view and/or create sequels or prequels populated by Ms. Mitchell’s copyrighted characters without compensation to the Mitchell Trusts. The court says this is precisely the kind of work that the copyright laws prohibit. Slip op at 42.

Copyright Injunction

Having dismissed the parody defense, the court found in

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***Gone With the Wind* Parody Enjoined**

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short order that an injunction should issue. The court presumed irreparable harm that could not be measurable solely by lost sales or defendant's profits. The balance of harmed favored plaintiff since if an injunction issued in error it would only cause a temporary delay in publication. Finally the public interest favored an injunction for according to the court:

When the reader of *Gone With the Wind* turns over the last page, he may well wonder what becomes of Ms. Mitchell's beloved characters and their romantic, but tragic world. Ms. Randall has offered her vision of how to answer those unanswered questions, albeit with a partially parodic purpose in mind. The right to answer those questions and to write a sequel or other derivative work, however, legally belongs to Ms. Mitchell's heirs, not Ms. Randall. Slip op. at 48.

Ignoring the ameliorative words of *Campbell* regarding copyright injunctions in parody cases, the court concluded that "injunctive relief may be freely granted by the courts in order to prevent infringement of a copyright." Slip op. at 49 n.21 citing, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (preliminarily enjoining biography of J.D. Salinger containing excerpts from unpublished letters); *Gilliam v. ABC, Inc.*, 538 F.2d 14 (2d Cir. 1976) (preliminarily enjoining broadcast of Monty Python program that was edited without copyright owner's permission).

Houghton Mifflin's brief to the 11th circuit arguing that the district court erred in enjoining the book and in analyzing its transformative value is now also available at www.thewinddonegone.com

Plaintiff Suntrust Company is represented by Martin Garbus, Rick Kurnit, Maura Wogan, Thomas Selz and Jessie Beeber of Frankfurt Garbus Kurnit Klein & Selz, P. C. Houghton Mifflin is represented by Miles Alexander, Jerre Swann and Joseph Beck of Kilpatrick Stockton PPL.

The amicus briefs were filed by Gregg Thomas, James Lake and Rachel Fugate, Holland & Knight (on behalf of the media coalition); Professor Leon Friedman, Hofstra Law School, and Peter Canfield, Dow Lohnes & Albertson (on behalf of the free speech organizations); and E. Edward Bruce, Covington & Burling (on behalf of Microsoft).

Court May Decide Tobacco Speech Case On Non-First Amendment Grounds

By Bruce E.H. Johnson and Eric M. Stahl

One of the most closely watched First Amendment issues argued before the Supreme Court this term is one that it might not decide. Confronting the Court in *Lorillard Tobacco Co. v. Reilly* and *Altadis U.S.A. v. Reilly* (Nos. 00-596 and 00-597) is the permissibility of Massachusetts regulations severely restricting public display of tobacco advertisements, including a near-total ban on billboards in populated areas. The case has been widely viewed as a test of the Court's commitment, apparent in its most recent commercial speech cases, to holding the government to a high burden whenever it seeks to restrict non-deceptive advertising for lawful products, no matter how disfavored the product may be.

Some have predicted that the case could spell the end of the *Central Hudson* test, the intermediate scrutiny standard the Court has applied for over 20 years to commercial speech limits. Indeed, the petitioner tobacco companies and numerous *amici* including some media and advertising *amici*, have urged the Court to junk *Central Hudson* in favor of strict scrutiny.

NAA, et al. Filed Amicus

Amici including the Newspaper Association of America, the ACLU, Dow Jones & Co., Magazine Publishers of America, and the Reporters Committee for Freedom of the Press argued in favor of strict scrutiny, but emphasized that the case could easily be decided under *Central Hudson*; that the lower courts failed to vigorously scrutinize the government's efforts to advance policy goals by suppressing truthful, non-misleading advertising. The interest of these organizations in the case, as stated in their brief, stems not only from their support of constitutional protection for commercial speech as valuable in its own right, but also because advertising is a primary source of revenue that enables the media to report news and disseminate other forms of speech.

Preemption Might Be Key

At the April 25 oral argument, however, the Court gave every indication that it might not reach the First Amendment issue but instead might rest on the narrower question of

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whether the Massachusetts regulations are preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. Sec. 1334. Indeed, according to Dahlia Lithwick of *Slate* magazine, no one but tobacco lawyer Jeffrey Sutton got to talk about the speech claims, except to say, “If I might use my remaining 12 seconds to address the First Amendment issue. . . .” (One other highlight was a question from the normally silent Justice Thomas – who wondered about whether fast-food advertising would be next if Joe Camel is outlawed.)

Lithwick described the oral argument about the scope of the Massachusetts law, which she said bars retail and convenience stores from displaying outdoor cigarette ads within 1,000 feet of schools, parks, or playgrounds and requires that cigarette, cigar, and smokeless tobacco ads in stores be posted five feet off the ground “so that children and dwarves will not see them.” As Lithwick notes (perhaps somewhat tongue-in-cheek):

[A]ccording to Dahlia Lithwick of Slate magazine, no one but tobacco lawyer Jeffrey Sutton got to talk about the speech claims, except to say, “If I might use my remaining 12 seconds to address the First Amendment issue. . . .”

Breyer points out that the petitioners’ maps suck. How is he supposed to figure out what proportion of Massachusetts is affected if he can’t even find Worcester on their damn maps? Sutton then turns to the speech issue and explains that if racist speech and “fighting words” warrant strict scrutiny (the highest order of governmental protection), why is commercial speech accorded less protection? Here is where Ginsburg reminds Sutton that smoking is more dangerous than “sticks and stones may break my bones.”

Smoking is probably also more dangerous than a beating with actual sticks and stones, but Ginsburg is too subtle to tell us that.

“There is no vice exception to the First Amendment,” thunders [tobacco lawyer Jeffrey] Sutton (except he thunders very softly because both he and William Porter, the assistant attorney general from Massachusetts, speak so softly, you might think a baby was napping in the clerk’s alcove this morning).

“Speak up!” hollers Justice O’Connor at Porter.

. . .

Justice Stevens, patron saint of children and, well, me, asks Sutton: “What is the message your advertising tries to convey?”

Sutton: “Brand loyalty.”

Stevens: “ONLY brand loyalty?”

Sutton: “Yes.”

Souter tags in: “If that were so, you’d only need the name and image of your product.” He adds that it’s not necessary to post ads that say “Smart Kids Smoke” or feature “characters” to show that cigarette

ads target kids. Ads show “people in country suits, bars, and beaches doing healthy and sophisticated things.”

Hope For Strong Central Hudson Ruling

While a decision resting on preemption grounds alone no doubt would satisfy the tobacco companies, it might be seen as a disappointment, or at least a missed opportunity, by the many news, advertising, publishing, and civil (and just plain) libertarian organizations that appeared as *amici* to emphasize the constitutional issues presented in *Reilly*. All of these groups argued that the Massachusetts regulations — which include a ban on outdoor advertising of tobacco products within 1,000 feet of a school, a zone that encompasses 90 percent of the land area in the state’s three largest cities — could not withstand scrutiny under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980).

The *Central Hudson* test requires, among other things, that the restriction directly advances a substantial government interest and is no more restrictive than necessary to further that interest. Though this test has been criticized as too flexible to provide meaningful and predictable protection for commercial speech, in recent cases the Court has buttressed *Central Hudson* — making clear, for example, that the bur-

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den rests with the government to prove that the speech restriction directly and materially advances its asserted interest, in a manner that could not be achieved equally well with other means that do not limit speech.

The Court has applied this “*Central Hudson*-with-teeth” standard in recent years to hold unconstitutional, for example, federal regulations prohibiting broadcast advertisements for private casinos and state laws barring advertisements from mentioning the price of alcoholic beverages. *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

These cases also established that *Central Hudson* contains no “vice” exception that would provide the government more leeway to regulate advertising for products that, while lawful, are socially disfavored or even harmful. Tobacco presents perhaps the ultimate test of this principle. What is the regulator’s burden in justifying restrictions on advertising for a product that is legal but indisputably deadly, and undeniably one in which the government has a legitimate interest in reducing consumption? Under *Central Hudson*, it is not enough for the government to argue that smoking is dangerous: it must prove, with concrete evidence, that restricting advertising about the product actually serves, directly and materially, to reduce tobacco use.

Government Level of Proof at Issue

The manner in which the government goes about proving its case is a key question in *Reilly*. The First Circuit held that the Massachusetts Attorney General had satisfied its burden of showing direct and material advancement by submitting, on a summary judgment record, “[n]early two thousand pages ... of reports and surveys by governmental, scientific, and academic entities” regarding the effect of smoking on youth, and the extent of tobacco advertising. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 48 (1st Cir. 2000). Some of these studies purported to show a causal link between to-

bacco advertising and tobacco use.

Of course, the tobacco companies submitted their own evidence, some of which refuted this alleged causal link. Neither the district court — which refused to hold the government to even a “preponderance of the evidence” standard — nor the First Circuit weighed the evidence or made independent factual findings. Both courts held, in effect, that the government satisfies its constitutional burden of proof by papering the record with a large volume of studies, some of which may show that it reasonably could believe the restriction might be effective.

Petitioners and numerous *amici* argued that the lower courts shirked their obligation to independently determine whether the advertising restriction in fact directly and materi-

Petitioners and numerous amici argued that the lower courts shirked their obligation to independently determine whether the advertising restriction in fact directly and materially advanced the government interest.

ally advanced the government interest. As a brief submitted on behalf of the Newspaper Association of America, other media *amici* and the ACLU argued, the “Court’s commercial speech

jurisprudence requires a greater degree of judicial vigilance and oversight than the courts below provided. Absent meaningful review, the Attorney General’s studies are just so much paper.”

These *amici* called on the Court to make clear that lower courts reviewing First Amendment challenges to commercial speech restrictions must independently evaluate conflicting evidence; must require the government regulator to meet its *Central Hudson* burden by at least a preponderance of the evidence; and must require that the admissibility of that evidence be established, particularly with regard to purported scientific evidence.

Was it Least Extensive Limitation

The Massachusetts regulations also fall short on the final *Central Hudson* factor — the requirement that the speech restrictions be no more extensive than necessary to serve the interests that support it. The Attorney General submitted, and the lower courts required, no evidence that the draconian advertising restrictions were carefully calculated to limit

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no more speech than necessary. To the contrary, the First Circuit suggested it would be “splitting hairs” to consider whether banning certain advertisements within 1,000 feet of a school was too extensive, because tobacco manufacturers had agreed voluntarily to a 500-foot ad-free zone. Under Supreme Court precedent, however, the availability of less onerous speech restrictions is itself sufficient to suggest the restriction enacted is not narrowly tailored. Nor did the First Circuit require the state to explain why it failed to consider whether non-speech restrictions — that is, laws aimed directly at the product, rather than at speech about the product — would have been enough to achieve its asserted interest in curbing youth tobacco use.

Rather than hold the government to its burden on this prong of *Central Hudson*, the First Circuit found that the Massachusetts regulations were narrowly tailored because they “are focused on areas where children are most likely to be present.” 218 F.3d at 53. In effect, the court defined a message to the general public as “advertising to children,” which then could be restricted out of government solicitousness for children.

As the Association of National Advertisers, Inc. noted in its *Reilly amicus* brief, filed by Steve Brody of King & Spalding and John Walsh of Carter, Ledyard & Milburn, such a “child protection” exception to the First Amendment would provide government with a simple recipe for creating speech restrictions that would withstand constitutional scrutiny:

First, government would select the disfavored or unpopular speech Next, government would assert that such speech must be restricted in order to protect children Then, government would claim that children frequent the entire geographic area of the relevant jurisdiction and, consequently, that the “offensive” speech must largely be eliminated from the landscape. Based on these factors, government would adopt far-reaching restrictions on speech that, while ostensibly adopted for the sole purpose of protecting minors, in fact would decimate the ability of

adults to communicate with one another.

The Supreme Court has held in a variety of contexts that First Amendment rights cannot be reduced to some lowest common denominator of expression that is fit for children. *E.g., Butler v. Michigan*, 352 U.S. 380 (1957). It seems unlikely that the Court would find that because children may be found almost anywhere, a near-universal ban on tobacco advertising is no more extensive than necessary.

Is Central Hudson Vulnerable?

The tobacco petitioners thus appear to have a strong case for reversal under *Central Hudson*. Nevertheless, they have treated *Central Hudson* as their fallback argument, and have urged the Court to evaluate the regulations under strict scrutiny. Perhaps this is because they are concerned that a “win” under *Central Hudson* might gain them only a remand for a

factual hearing on whether tobacco advertising and tobacco use can in fact be causally linked. Or perhaps they believe there is a good chance the Court will conclude the time has come to shelve *Central Hudson* and treat commercial speech as, simply, speech.

This hope is not without basis: in its most recent commercial speech decision, the Court noted *Central Hudson* has been criticized (including by some members of the Court) as not sufficiently “straight forward and stringent.” The *Reilly* petitioners, along with numerous *amici*, have asserted that whenever the government seeks to regulate commercial messages based on the ideas conveyed, rather than on the need to maintain a fair, non-deceptive marketplace, strict scrutiny should apply.

The Court will only reach these important First Amendment issues if it first concludes that the state regulations are not preempted by federal statute. A decision is expected by end of June.

Bruce E.H. Johnson is a partner and Eric M. Stahl is an associate with Davis Wright Tremaine LLP in Seattle, which submitted an amicus curiae brief in support of the Reilly petitioners on behalf of the Newspaper Association of America, the ACLU, Dow Jones & Co., Magazine Publishers of America, and the Reporters Committee for Freedom of the Press.

It seems unlikely that the Court would find that because children may be found almost anywhere, a near-universal ban on tobacco advertising is no more extensive than necessary.

Senator Lieberman's Media Marketing Accountability Act Introduced to Questions of its Constitutionality

By Kevin M. Goldberg

Explaining that the entertainment industry has not kept a promise to refrain from marketing inappropriate movies, music and electronic video games to minors, Senator Joseph Lieberman (D-Conn.) has held true to his threat to legislate in this area. On April 27, 2001, Sen. Lieberman introduced the Media Marketing Accountability Act, S. 792, 107th Cong., 1st Sess. (2001), which seeks to expand the Federal Trade Commission's ("FTC") authority to regulate the advertising of these products to children; the bill is co-sponsored by Senators Byrd (D-W. Va.), Clinton (D-N.Y.), and Kohl (D-Wisc.). The constitutionality of this legislation has been called into question by a number of groups.

The Legislation

S. 792 has three sections: (1) Findings; (2) Prohibitions on the targeted marketing to minors of adult-rated media as an unfair or deceptive practice; and (3) The commissioning of a study regarding the marketing practices of entertainment industries regarding adult-related materials.

FINDINGS

The findings build on last fall's FTC study regarding the marketing practices of the movie, music and electronic video game industries. Specifically, the findings section notes that the FTC's September 11, 2000 study reported that:

- 80 percent of R-rated movies studied had been marketed to children under the age of 17; marketing plans for 64 percent of the R-rated movies studied explicitly mentioned children under the age of 17 as part of the target audience;
- Marketing plans for all music recordings with explicit content labels either specifically mentioned children under the age of 17 as part of the target audience or called for ad placement in media that would reach a substantial percentage of children under 17; and
- 70 percent of mature-rated video games studied were

marketed to children under the age of seventeen, with 51 percent of the marketing plans specifically mentioning children under seventeen as part of the target audience. Additionally, 91 percent of video game manufacturers studied had, at one time, expressly identified children under the age of 17 as the core, primary, or secondary audience of a mature-rated game.

The other major findings include:

- Figures concerning the viewing, listening, and game-playing habits of children:
 - Children aged eight through 13 spend an average of approximately three hours per week in a movie theater; 62 percent of children aged nine through 17 spend an average of 52 minutes per day watching video tapes;
 - 82 percent of children play electronic video games, with an average of 33 minutes of play per day; and
 - Children aged 14 through 18 listen to an average of approximately 2 1/2 hours of music per day.
- Based upon the tens of millions of dollars teenagers spend annually on movies, music and electronic video games, this is a highly valuable demographic group to producers and distributors of entertainment products.
- "Most" scholarly studies on the impact of media violence find a correlation between exposure to violent content and aggressive or violent behavior, with additional studies finding a high correlation between exposure to violent content and a desensitization to, and acceptance of, violence in society.

PROHIBITIONS ON TARGETED MARKETING TO

CHILDREN

The basic thrust of the bill is to allow the FTC to prosecute the targeted advertising or marketing to minors of an adult-rated motion picture, music recording, or electronic video game as a deceptive practice within the meaning of Section 5 of the Federal Trade Commission Act; violations

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of this act carry a fine of \$11,000 per day.

The bill broadly defines "targeted advertising or marketing" as:

- Advertising that is intentionally directed to minors (a minor is defined as anyone below the age established as appropriate for that product; in no event does it include anyone 17 or older);
- Advertising that is presented to an audience of which a substantial proportion is minors; or
- Anything else the FTC may determine is directed or targeted to minors.

An "adult-rated" product is defined as one which has a rating or label voluntarily assigned by its producer or distributor that indicates the product is or may be appropriate only for adults. In the case of a music recording, it also includes any rating or label which indicates the product contains explicit content in the form of strong language or expressions of violence, sex, or substance abuse.

Any government-mandated rating or labeling structure would almost certainly be unconstitutional. Therefore, the bill sets up a voluntary self-rating and self-regulatory scheme with criteria laid out by the FTC. These criteria must include the following elements: (1) an age-based rating or labeling system; (2) prohibitions on the targeted advertising or marketing to minors of the products and policies to restrict the sale, rental or viewing of these products by minors; and (3) procedures within the industry for non-complying producers and distributors. Any producer or distributor who complies with the self-regulatory scheme will not be subject to prosecution.

FTC STUDY OF MARKETING PRACTICES OF ENTERTAINMENT INDUSTRIES REGARDING ADULT- RATED MATERIALS

The bill also directs the FTC to conduct a study of the marketing practices of the motion picture, music recording, and electronic video game industries regarding adult-rated products. Among the issues to be studied are:

- The extent to which industries market adult-rated materials to minors, with particular emphasis on whether

the materials are promoted in media outlets in which minors comprise a substantial portion of the audience;

- The policies in place to restrict the sale, rental or viewing by minors of adult-rated products;
- The extent to which these industries require, monitor, or encourage the enforcement of voluntary rating or labeling systems by industry members; and
- The extent to which these industries educate the public regarding the existence and/or efficiency of their voluntary rating or labeling systems and whether these policies and procedures are effective in restricting the access of minors to adult-rated materials.

The FTC would have to submit an initial report to Congress within two years after the date of enactment of the legislation. A final report would be due within six years of the enactment of the legislation.

The Constitutionality of the Legislation

There exist serious doubts about the constitutionality of the Media Marketing Accountability Act because the bill is not narrowly tailored to meet its goal of protecting children from accessing inappropriate materials in the media. It is, to say the least, overbroad, in that it restricts the First Amendment rights of adults as well as children; according to the affected industries, the likely result of this legislation would be the exact opposite of that which is intended — parents seeking to shield their children from inappropriate movies, music and electronic video games would have less information with which to arm themselves for this task.

The interest in protecting children from the marketing of inappropriate movies, music or electronic video games likely passes muster. The data set forth in the "Findings" section of the bill provides enough empirical evidence to support the claim that there is a real threat to children.

However, this bill fails miserably with regard to the means used to protect children. The bill is not narrowly

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Lieberman's Media Marketing Accountability Act Introduced to Questions of its Constitutionality

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tailored because it substantially restricts valid speech in order to prevent children from being exposed to harmless speech about potentially harmful products. There exist a number of deficiencies, including:

- S. 792 directly regulates speech by imposing a ratings code and implicitly regulating the industries involved. By requiring the FTC to create guidelines for the ratings systems to be used by each industry, the bill is, in essence, creating a government-imposed ratings system.
- The FTC would have to pass judgement on the content of the advertisements themselves, something which the FTC itself has stated may be unconstitutional. In a memorandum sent to Congress in November 2000, the FTC opined that to prove deceptive marketing of an R-rated movie, it would have to show that advertising or other promotional indicated the film was appropriate for audiences under the age of 17; it would also have to pass judgement on whether the rating provided by the relevant producer or industry was, in fact, in line with its criteria.
- The bill is unconstitutionally vague because it defines "targeted advertising" as marketing intentionally directed at minors or presented to an audience of which a "substantial portion" were minors. The term "substantial portion" does not provide enough guidance to the marketer to allow it to avoid prosecution under the act.
- The law is substantially overbroad in its reach. Producers and distributors are not allowed to market their adult-rated products to an audience substantially consisting of children. This will prevent some adults in those same audiences from being informed about products they have a right to purchase. In fact, the result of this law is likely to be the exact opposite of its stated goal. The law would not prevent advertisements for adult-rated movies, music and electronic video games from reaching children; it would simply result in the end of self-imposed ratings systems which are intended to help parents determine which of the products are appropriate for their children. Under the bill, only

those manufacturers that rate their products would be prohibited from marketing them to children. Both the Motion Picture Association of America ("MPAA") and the Recording Industry Association of America ("RIAA") have indicated that legislation would serve as a disincentive to self-regulation. In other words, parents would have no basis upon which to judge whether a movie, recording or electronic video game should be appropriate for their children.

S. 792 was referred to the Senate Committee on Commerce, Science, and Transportation. No hearings have been scheduled on the bill.

Kevin M. Goldberg is an associate at Cohn and Marks in Washington, D.C. He is advising the American Society of Newspaper Editors regarding this legislation.

The FTC Releases Follow-Up Report On Entertainment Companies Marketing Violence to Children

Acknowledges Movie and Video Game Industries' Efforts, Criticizes Music Industry for "Failure" to "Institute Positive Reform"

The entertainment media found itself, yet again, on the defensive on the issue of "violent" content. The families of several Columbine massacre victims filed a lawsuit on April 19 (close to the two-year anniversary of the shootings) against companies that create violent video games and sex-oriented Web sites, claiming these products influenced the gunmen. Companies named in the lawsuit include Nintendo of America, Sega of America, Sony Computer Entertainment, Time Warner Inc. and ID Software Inc. and GT Interactive Software Corp. (creators and publishers of the game "Doom.") A similar suit involving a school shooting in Kentucky (reported on in the LDRC LibelLetter, April 2000 at 43) was dismissed. *James v. Meow Media* 90 F. Supp. 798 (W.D. Ky. 2000).

Senator Joseph Lieberman introduced a bill addressing

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FTC Follow-Up Report

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violent content, labeling and FTC enforcement. See page 17 of the LDRC *LibelLetter*.

Behind Senator Lieberman's bill, however, and generating substantial public discussion, however, was the Federal Trade Commission's release of a follow-up report to its September 2000 report evaluating the changes made by entertainment industries in their advertising of violent materials to children. In its first report, the Commission laid out several recommendations to "enhance self-regulatory efforts" in the marketing practices of the movie, video game and music industries.

The FTC's follow-up report released in April, *Marketing Violent Entertainment to Children: A Six-Month Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, tracks the entertainment media's progress in light of these recommendations by monitoring advertisements from several television, magazine and newspaper sources aimed at a select teen audience; reviewing movie trailer placement during G, PG and PG-13 feature films; reviewing official industry Internet Web sites; and obtaining information from the industry trade associations. In the 70-page report, the FTC acknowledges changes made by the movie and video game industries to control advertising violent material to children since the September 2000 report. However, the music industry was lambasted for not adopting any of the Commission's suggested controls.

Report Finds Movie Industry, Electronic Game Industry "Made Progress"

The follow-up report further examined the two main issues raised in the first report: 1) whether the industries advertise R-rated movies, explicit content labeled music and M-rated electronic games in popular teen media and 2) whether rating or label information is included in teen media or other advertising. According to FTC statistics, the movie industry has met many of the FTC suggestions for improvement. The Commission found virtually no advertisements for R-rated movies in the select teen magazines reviewed. Trailers for R movies were generally not shown during reviewed G and PG-rated feature films and motion picture studios now routinely include

reasons for ratings in their print and television advertisements. The majority of official movie Web sites reviewed included the film's ratings, reasons for the rating and links to sites where information on the rating system could be obtained. The FTC, however, noted that ads for R-rated movies appeared during television programs most popular with teens (according to Nielsen's top ten ranked syndicated programs in terms of youth audience during weekday after-school and pre-prime-time periods) and rating reasons in ads were small, fleeting or inconspicuously placed.

The electronic game industry, according to the FTC report, also showed some conformance to the suggestions laid out in the September 2000 report. The commission found no ads for M-rated games on the "teen" television programs reviewed, and that the game company print ads included a rating icon the majority of the time and sometimes even content descriptors. The television ads surveyed disclosed the games' rating in audio and video, and over 80 percent of the official game publisher Web sites reviewed displayed the games' ratings. The major point of contention for the FTC though, were the large number of ads for M-rated games in magazines with a large under-17 audience.

Music Recording Industry Criticized For its "Failure" to "Institute Positive Reform"

The FTC reserved most of its criticism for the music recording industry. The report found that advertising for "explicit content" labeled music recordings regularly appeared on the popular "teen" television shows. All of the major recording companies placed advertising for "explicit content" music on television shows and in magazines with a large under-17 audience. The advertisements for "explicit content" labeled music reviewed by the FTC usually did not indicate that the recording was stickered with a parental advisory label. And only roughly a quarter of the print ads, television ads and about half the official recording company or artist Web sites surveyed in the Report showed the "explicit content" label or gave notice that the recording contained "explicit content." Even if the parental advisory label was present, it was frequently so

(Continued on page 21)

FCC Issues Policy Statement on Broadcast Indecency

By Jerianne Timmerman

On April 6, 2001, the Federal Communications Commission released a policy statement purporting to provide guidance to the broadcast industry on indecency. See *Policy Statement, In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, FCC 01-90 (rel. April 6, 2001) ("Policy Statement" or "Statement"). Under the terms of a settlement agreement with Evergreen Media Corporation, the FCC agreed in 1994 to publish industry guidance on its broadcast indecency policies. Although seven years in the making, this *Statement* essentially only reiterates the Commission's existing indecency policies and describes its existing enforcement processes.

Federal law prohibits the broadcast of obscene or indecent programming. See 18 U.S.C. § 1464. In implementing Section 1464, the FCC defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."

The Supreme Court has determined that the government can constitutionally regulate indecent broadcasts (see *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)), and the

FCC's indecency definition has been upheld against constitutional challenges in a series of cases before the D.C. Circuit Court of Appeals. See *ACT (I) v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *ACT (II) v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 1282 (1992); *ACT (III) v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), cert. denied, 116 S.Ct. 701 (1996). The *ACT* cases also approved a "safe harbor" of 10:00 p.m. to 6:00 a.m. during which indecent programming may be legally broadcast, and upheld the regulation of broadcast indecency outside of those hours as furthering the compelling government interests in supporting parental supervision of children and in generally protecting the well-being of children.

In its recent *Policy Statement*, the FCC described the analytical approach it uses in making indecency determinations. According to the Commission, indecency findings "involve at least two fundamental determinations." *Statement* at ¶ 7. First, the material alleged to be indecent must be found to describe or depict sexual or excretory organs or activities. *Id.* Second, the "broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at ¶ 8. In determining whether material is patently offensive, the FCC emphasized that "the full context in which the material appeared is critically important." *Id.* at ¶ 9.

The FCC's *Policy Statement* also included a comparison of a number of indecency cases to illustrate the various factors that impact any determination of patent offensiveness. In reviewing these cases, the FCC concluded that the following factors have proved significant in its decisions:

1. the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;
2. whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and
3. whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value. *Id.* at ¶ 10. However, the Commission cautioned that contextual determinations are "highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material." *Id.* at 9. Because each in-

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FTC Follow-Up Report

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small as to be illegible and the ads never explained the reasoning behind the label. The FTC claimed that the only positive change made in the music recording industry since the September 2000 report was the growing number of Web sites with the music's lyrics, a way parents can screen recordings.

The Aftermath of the Report

The FTC Report has already spurred much activity in its aftermath. In addition to Senator Lieberman's bill, the Recording Industry Association of America (RIAA), along with the National Association of Recording Merchandisers (NARM), have begun forming a task force to ensure the industry follows marketing guidelines to avoid discs with violent and lewd lyrics being sold to children.

FCC Policy Statement on Indecency

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decency case “presents its own particular mix” of factors that “must be balanced to ultimately determine whether the material is patently offensive and therefore indecent,” *id.* at ¶ 10, the illustrative past cases cited by the FCC will likely provide relatively limited guidance for broadcasters in the future.

Enforcement Process

The *Policy Statement* also described the FCC’s enforcement processes. Again, the *Statement* appeared to establish no new policies, but merely set forth the Commission’s existing procedures.

As explained in detail in the *Policy Statement*, the Commission does not independently monitor broadcasts for indecent material. Instead, enforcement actions are based on documented complaints of indecent broadcasting received from members of the public. For a complaint to be considered, the Commission has generally required it to include (1) a full or partial tape or transcript or significant excerpts of the program; (2) the date and time of the broadcast; and (3) the call sign of the station involved. *Statement* at ¶ 24.

If a properly documented complaint falls within the FCC’s indecency definition and the material complained of was aired outside “safe harbor” hours, then the broadcast at issue is evaluated for patent offensiveness. Where the staff determines that the broadcast is not patently offensive, the complaint will be denied. If, however, the staff determines that further enforcement action might be warranted, the FCC’s Enforcement Bureau, along with other Commission offices, will examine the material and decide upon an appropriate disposition. The most common penalty imposed on broadcasters for airing indecent material is a monetary forfeiture.

Two Commissioners Beg to Differ

Although this *Policy Statement* appeared to do little more

than restate the FCC’s existing indecency policies and procedures, it elicited very different responses from two of the Commissioners in particular. Commissioner Gloria Tristani, consistent with her past statements criticizing the Commission’s record on enforcing its indecency rules, dissented from the *Statement*. In her opinion, the *Policy Statement* only served to divert the FCC’s “attention and resources away from the ongoing problem of lax enforcement, which is a pressing concern of America’s citizens,” and she again called upon the FCC to get “serious about enforcing the broadcast indecency standards.” *Statement* at 25, 27, Dissenting Statement of Commissioner Gloria Tristani.

In stark contrast, Commissioner Harold Furchtgott-Roth, in a separate statement, opined that the stage may be set “for a new constitutional challenge regarding our authority to regulate content,” due to the doubtful continuing validity of cases like *Red Lion v. FCC*, 395 U.S. 367 (1969), and

Because each indecency case “presents its own particular mix” of factors . . . the illustrative past cases cited by the FCC will likely provide relatively limited guidance for broadcasters in the future.

Pacifica, supra. In Commissioner Furchtgott-Roth’s judgment, “broadcast content restrictions must be eliminated,” as “alternative sources of programming and distribution” have so greatly increased.

Statement at 22-23, Separate Statement of Commissioner Harold W. Furchtgott-Roth.

Radical Change Unlikely

Given such divergent opinions on broadcast indecency, it seems unlikely that the Commission will make any radical changes to its indecency rules and policies in the near future. Although Supreme Court Justice Potter Stewart may have known obscenity when he saw it, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), the Commissioners of the FCC obviously have greater difficulty in clearly defining indecency, or in agreeing how to approach that issue. As a practical matter, therefore, broadcasters in the future will be presented with the same challenges when considering the highly subjective and constitutionally sensitive area of indecency as they have faced in the past.

Jerianne Timmerman is Associate General Counsel with the National Association of Broadcasters, Washington, D.C.

Single Publication Rule Bars Product Labeling Claim under New York Privacy Statute

By Michael A. Bamberger and Jill Abitbol

A federal district court in New York City has clearly reaffirmed that the single publication rule applies to claims based upon misappropriation in product packaging under New York law. In doing so the court correctly rejected an attempt to limit the single publication rule by engrafting a discovery rule on to it. *Pelton v. Rexall Sundown, Inc., et al.*, 2001 WL 327164 (S.D.N.Y. April 4, 2001).

Judge John S. Martin of the U.S. District Court for the Southern District of New York granted summary judgment in favor of the defendant, Rexall Sundown, Inc., a manufacturer and seller of vitamins and dietary supplement products. The plaintiff, Jean Pelton, a professional model, had claimed that the use of her photograph on the packaging of two dietary supplement products was unauthorized and violated both the Lanham Act and New York Civil Rights Law § 51, the New York statute, and the only provision in New York law, that authorizes suits for use of likeness for trade or advertising purposes without consent.

The Parties

Plaintiff Jean Pelton ("Pelton") brought this action against defendants Rexall Sundown, Inc. ("Rexall"), Advanced Research Products, and Richardson Labs ("Richardson") (collectively, "Rexall Defendants") based on their use of her photograph on the packaging of two of their dietary supplements.

Factual Background

In 1986, Pelton participated in a photo shoot with photographer Brian Biemann for *Surfing* magazine, and subsequently signed releases, the meaning of which was disputed. The magazine later published four of these shots in its 1987 and 1988 calendars. One of the photographs that Biemann took during that session was the subject of this action (the "Photograph.")

The Photograph was used by the Rexall Defendants on the labels and packaging of two products that are marketed as dietary supplements and natural appe-

titute suppressants — CitraLean and Ultra CitraLean. A former employee of defendant Richardson, who was responsible for creating the artwork for CitraLean and Ultra CitraLean, obtained the Photograph of plaintiff from a CD-ROM called Swimsuit Volume 1 which he purchased from Third-Party Defendants for purposes of finding a photograph to use on the products' label. Rexall subsequently acquired Richardson and its inventory of products, including CitraLean and Ultra CitraLean. CitraLean was first sold to the public in 1993, and Ultra CitraLean was introduced in 1995.

At some point in time, Pelton learned from a friend that her image appeared on the Ultra CitraLean label. She thereafter filed a complaint against the Rexall Defendants in May 1999.

Summary Judgment Granted to Defendants

After extensive discovery, the Rexall Defendants moved for summary judgment, which was granted on both claims. As to the Lanham Act, the Court found that plaintiff was not a recognizable celebrity; nor did her photograph indicate that she endorsed or sponsored the product. The crucial determinant under the Lanham Act is a showing of likelihood of consumer confusion as to the source or sponsorship of the product. *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 584 (2d Cir. 1990). The District Court held that there was "nothing about the use of Plaintiff's photograph that implies her endorsement of the CitraLean and Ultra CitraLean products."

As to the privacy claim under New York Civil Rights Law, Section 51, the Court ruled it was barred by the one-year statute of limitations because the "single publication rule," while developed in the context of media defamation cases, also applies to the right of privacy in product labeling cases. Although plaintiff claimed that the suit was timely since plaintiff had learned of the Photograph's use less than one year before commencement of the suit, the Court,

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**Single Publication Rule Bars Product Labeling Claim
under New York Privacy Statute**

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citing *Rostropovich v. Koch Int'l Corp.*, 1995 WL 104123, at *7 (S.D.N.Y. Mar. 7, 1995), found, that "[u]nder this rule, the limitations period runs from the first distribution of the offending item." The products at issue in this case were distributed to national retail chains for sale to the public several years prior to Pelton's commencement of this case, and therefore, the Court held that the period of limitations had expired.

Defendants were represented by Mr. Bamberger and Ms. Abitbol of Sonnenschein Nath & Rosenthal's New York office. Plaintiff was represented by Edward Greenberg of Greenberg & Reicher, LLP.

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Maui Skateboard Activist Is Public Figure

Man Loses to Big Brother Magazine on Summary Judgment

By **Lerisa L. Heroldt**

In October 1998, Larry Flynt Publishing, Inc. (“L.F.P., Inc.”) published an article on the Maui skateboarding scene in *Big Brother* magazine. The article stated that skateboarders on Maui:

were pointing fingers at a woman named Martha Ferris, who is apparently embezzling the park funds and halting skateboard projects left and right. I was told that for the last few years she has been allotted a large budget for skateboard parks, yet no parks have been built, and what little does exist is in a state of decay. Her family, however, has been living high on the hog.

Martha Ferris (“Ferris”) subsequently sued L.F.P., Inc. for defamation, false light invasion of privacy, and intentional infliction of emotional distress. In response, L.F.P., Inc. filed a motion for summary judgment arguing that the article was written in good faith and Ferris — a public official and a limited purpose public figure — could not prove actual malice. Judge Helen Gillmor, of the United States District Court for the District of Hawai’i, granted L.F.P., Inc.’s motion and dismissed the complaint. *Martha Ferris v. Larry Flynt Publishing, Inc. et al.*, Civil No. 99-00662 HG-LEK (D. Haw. April 13, 2001) (order granting motion for summary judgment (“Order”) at 33).

Assumed Role in Controversy

The District Court followed the rule that “[a] person may become a public figure by assuming societal roles of special prominence, or by thrusting themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Order at 11 (citing *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 164 (1979)). “A public controversy exists if the issue involves more than ‘purely private matters’ and affects the general public.” Order at 16 (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1159 n.18 (9th Cir. 1995)).

In support of its motion for summary judgment, L.

F.P., Inc. argued:

- Ferris was a public official because she had, or appeared to have, substantial responsibility for or control over the conduct of governmental affairs involving skateboard facilities, *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966);
- Ferris was a limited purpose public figure because she “thrust [herself] to the forefront of particular public controversies [intending to] influence the resolution of the issues involved”, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974);
- a public controversy is a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way, *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980), and such a controversy existed during the 1990’s with respect to skateboarding and skateboard parks on Maui; and
- since the author saw no reason to doubt the veracity of his sources (notwithstanding their attire, avocation, and youth), Ferris could not demonstrate with convincing clarity that the author either realized the article was false assuming it was or that he subjectively entertained serious doubts as to the truth of his statement.

In opposition, Ferris argued:

- she was never a public official;
- as of the date of the article’s publication, she was not a limited purpose public figure; and
- although she was active in the skateboarding “social cause” in the early 1990’s, she consciously curtailed her involvement prior to the publication of the article.

The District Court agreed with L.F.P., Inc., finding that “[t]he uncontroverted evidence it presented persuasively demonstrated that Ferris continued to be in-

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Maui Skate Board Activist Is Public Figure

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volved in, and recognized as a prominent figure in, the public controversy about skateboarding and skateboard parks on Maui, through the date of publication of the October 1998 issue of *Big Brother*.” Order at 6. Because it found Ferris was a public figure, the court never determined whether she was a public official. *Id.* at 11.

An array of factors convinced the court that Ferris was a public figure:

- Ferris founded an association to enable the skateboarding community to work with local government;
- Ferris worked for the County on skateboarding issues;
- Ferris was interviewed and written about because of her involvement in skateboarding;
- Ferris spoke in public forums about skateboarding and the need for skateboard parks;
- Ferris sent hundreds of public service announcements concerning skateboarding events.

Order at 4-5. In short Ferris “thrust herself into the controversy about skateboarding and skateboard parks on Maui, and became the central figure applauded and blamed for events relating to the opening of skateboard parks on Maui.” Order at 23.

Failed to Prove Actual Malice

As a public figure, Ferris faced the task of proving actual malice. She failed. The author did not doubt the trustworthiness of his sources or their information. Because he had no personal knowledge of Ferris’ activities, the author relied solely on the information of third parties and had no reason to doubt the informants’ veracity. “The allegedly defamatory statements were not fabricated by [the author], were not a product of his imagination, were not based on an anonymous source, and were not ‘so inherently improbable that only a reckless man would have put them in circulation.’” *Id.* at 28-29 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). It was not disputed that the article accurately reflected what sources told the author about Ferris. Order at 29.

Because Ferris could not prove actual malice, she also

failed to prove false light invasion of privacy and intentional infliction of emotional distress. Holding otherwise, the court noted, “would defeat the purpose of the protections afforded to defendants by the First Amendment” as articulated in *Times v. Sullivan*. *Id.* at 33.

L.F.P., Inc. and author David Carnie were represented by Paul Alston, Bruce H. Wakuzawa and Lerisa L. Heroldt of Alston Hunt Floyd & Ing in Honolulu, Hawaii. Martha Ferris was represented by Mark Choate and James Krueger of Krueger & Choate in Wailuku, Maui, Hawaii.

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Texas Appeals Court Reverses Summary Judgment for *Forbes*

Opinion Revives "Article As a Whole" Theory Following Texas Supreme Court Decision in Turner v. KTRK Television, Inc.

By Peter D. Kennedy

Breaking a recent string of favorable Texas appellate decisions, in April the 14th Court of Appeals in Houston reversed the dismissal on summary judgment of business disparagement claims brought by two public companies complaining about a 1991 *Forbes* magazine article. *Granada Biosciences, Inc. v. Forbes, Inc.*, – S.W.3d –, 2001 WL 333203 (Tex. App. – Houston [14th Dist.] April 5, 2001, mot. for rehearing filed) (available online at <http://www.14thcoa.courts.state.tx.us/Opinions/040501/990736f.pdf>) (opinion by former Justice Maurice Amidei, sitting by assignment, joined by Senior Chief Justice Paul C. Murphy, sitting by assignment, and Justice J. Harvey Hudson).

*Long
Litigation
History*

The case was filed in 1992, on the eve of limitations, and has had a tortuous history. Initially filed as multiple lawsuits, the claims of two publicly-traded companies and two individual officers were consolidated and then dismissed in their entirety on summary judgment in 1995. Appealed to the Houston Court of Appeals, the case was transferred to Amarillo on a docket-balancing order, and in 1997 summary judgment was affirmed as to the individuals' claims but reversed and remanded on a procedural ground as to the corporations' claims. *Granada Biosciences, Inc. v. Barrett*, 958 S.W.2d 215 (Tex. App. – Amarillo 1997, pet. denied). The Texas Supreme Court was interested enough to request full merits briefing, but not enough to take the case, and ultimately declined to review the Amarillo court's decision.

Back in Houston on remand, the trial judge again granted summary judgment. After a second trip to the Houston Court of Appeals, the Fourteenth Court of Ap-

peals in *Granada* did something it has not done in years: published an opinion remanding a public figure defamation case for trial because the court found sufficient evidence of actual malice to warrant a trial.

The *Granada* case has the same elements that have led to almost routine appellate decisions in favor of defendants in Texas: a public figure's unsuccessful attempt to create a fact issue as to actual malice in the teeth of a reporter's detailed exposition of his research, his reliable sources, and his unshaken belief in the accuracy of each statement in his article at the time it was published. *E.g.*, *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413 (Tex. 2000); *WFAA-TV v.*

[T]he Houston court found that their general allegation that "[v]irtually in its entirety, the Forbes article is disparaging and false" was enough to raise a claim that the article "as a whole" was disparaging under Turner.

McLemore, 978 S.W.2d 568 (Tex. 1998); *Associated Press v. Cook*, 17 S.W.3d 447 (Tex. App. – Houston [1st Dist.] 2000, no pet.) *Colson v. Grohman*, 24 S.W.3d 414 (Tex.

App. – Houston [1st Dist.] 2000, n.w.h.).

What was different, if anything, about this case from the many other recent Texas appellate decisions granting or affirming summary judgment? Although the court made secondary holdings as to fact questions on the substantial truth of certain statements, the key to the court's more significant decision on actual malice may have been influenced by the Texas Supreme Court's recent disavowal of a string of court of appeals' decisions on the substantial truth doctrine.

The Specter of Turner v. KTRK Television

Until December 2000, many intermediate appellate courts in Texas seemed to have pronounced "libel by implication" dead: if each statement in a publication was substantially or literally true, the article was not ac-

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Texas Appeals Court Reverses Summary Judgment for *Forbes*

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tionable, even if a reader might draw a false, defamatory impression from the true facts that were reported. *E.g.*, *ABC v. Gill*, 6 S.W.3d 19 (Tex. App. – San Antonio 1999, pet. denied); *Evans v. Dolcefino*, 986 S.W.2d 69 (Tex. App. – Houston [1st Dist.] 1999, no pet.); *KTRK Television, Inc. v. Folkes*, 981 S.W.2d 779 (Tex. App. – Houston [1st Dist.] 1998, pet. denied); *Hardwick v. Houston Lighting & Power Co.*, 943 S.W.2d 183 (Tex. App. – Houston [1st Dist.] 1997, no pet.).

But in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000), the Supreme Court disavowed those appellate decisions and pronounced “libel by implication” — or rather, “libel by impression” — alive and well, even though it went on to affirm the reversal of a jury verdict for lack of evidence of actual malice.

See “Impressions, Implications, and ‘Article as a Whole’ Libel in Texas: Dealing with the Fallout of *Turner v. KTRK-TV*,” in this issue, p. 29. The court in *Turner* declared:

that a plaintiff can bring a claim for defamation when

discrete facts, literally or substantially true, are published in a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.

Turner, 38 S.W.3d at 115. The *Turner* opinion went on to reject arguments that the First Amendment prohibited claims by public figure that a publication “as a whole” was defamatory, finding room in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), for public figure defamation suits “when a publication as a whole conveys a false and defamatory meaning either by omission or juxtaposition.” *Id.* at 116.

But Granada Isn’t Turner

In *Granada*, the plaintiffs had neither identified specific

omissions or juxtapositions, nor identified any false meaning arising from the article “as a whole” that was separate from their complaints about specific statements in the article; however, the Houston court found that their general allegation that “[v]irtually in its entirety, the *Forbes* article is disparaging and false” was enough to raise a claim that the article “as a whole” was disparaging under *Turner*. *Granada*, slip op. at 14. Conversely, however, the court did not find the author’s affidavit sufficient to even address this “as a whole” claim, even though the affidavit detailed at length his numerous sources and the basis for his belief that each statement in the article was true — potentially leaving the question of the author’s actual malice as to the article “as a whole”

open for yet another round of summary judgment practice before trial.

Turner’s discussion of “omissions,” “juxtapositions,” and libel “as a whole” is not a welcome development because it unmoors libel claims from the certainty of specific express factual statements.

However, *Turner*’s reach is not as broad as the Houston Court of Appeals appears to have concluded. *Turner* still requires specific allegations of specific omissions or juxtapositions that give rise to specific, reasonable, and substantially false defamatory impressions of and concerning the plaintiff.

Actual Malice — When?

As an initial matter, the court held that the “malice” required in Texas disparagement cases, at least where the plaintiff is a public official or figure, is “actual malice.” But as it lost sight of these limitations in the *Turner* opinion, the Houston court also allowed imprecision to creep into its analysis of the alleged actual malice evidence.

The court found issues of fact on actual malice from
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Turner’s discussion of “omissions,” “juxtapositions,” and libel “as a whole” is not a welcome development because it unmoors libel claims from the certainty of specific express factual statements.

Texas Appeals Court Reverses Summary Judgment for *Forbes*

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events that occurred after the magazine was printed and in the distribution stream. The court confused “publication,” as it is defined in Texas for purpose of the statute of limitations, with the reality of publication.

According to the plaintiffs’ own evidence, the *Forbes* article was printed and mailed to subscribers on or before Friday, October 25, 1991, and was “on the streets” on Monday, October 28. However, the Houston court found that three things occurring from Friday to Monday were sufficient evidence of actual malice to warrant a trial: First, the author in an October 25 telephone conversation with a Granada official conceded that the article (a proof of which he had faxed to Granada) contained an error as to which “Edward Bass” had sued Granada for securities fraud — the Fort Worth near-billionaire, or another Edward Bass. Second, the Granada official made general claims in that Friday telephone conversation that the article was false. Finally, the court referred to a letter dated October 26 that Granada prepared to refute statements in the article (but which Granada’s own evidence showed was not received before Monday, October 28).

The court found a fact issue as to actual malice as of the time of publication, relying on a Texas single-publication case establishing that, for statute of limitations purposes, an article is “published” on the last day of mass distribution of the printed matter, and the court’s opinion suggested the existence of a fact issue without proof that the article’s distribution was completed as of Friday.

The practical difficulties with this ruling are evident. If followed, it will discourage any pre-publication distribution of articles and might require the recall of entire publications based on late-received claims of falsity in a single article.

Actual Malice — of What?

Moreover, *Turner’s* article “as a whole” language seems to have affected in *Granada* what has traditionally been Texas appellate courts’ careful review of evidence of alleged actual malice. Although *Turner* — which reversed a jury finding of actual malice — does not abandon the principle that actual malice must be linked to a specific,

provably false statement or impression, the court’s perfunctory actual malice analysis in *Granada* seems to reflect a lack of vigor in examining the constitutionally-necessary evidence. The *Granada* opinion does not identify what specific statements or impressions that the defendants are alleged to have known were false or the evidence that supports a finding that the author knew those statements or impressions were false; it simply finds a fact issue in the timing of “publication” in relation to the Friday telephone conversation and weekend letter.

Here is the danger of reading *Turner* too broadly: the substantial truth doctrine comes untethered from the concrete, predictable, and limited basis of factually false explicit statements, leaving a wandering concept of “falsity as a whole” that permits vague and hard-to-refute claims of actual malice advance to trial.

A motion for rehearing in *Granada* is pending.

Forbes Inc. and William P. Barrett are represented by David H. Donaldson, Jr. and Peter D. Kennedy, partners in the Austin, Texas law firm of George & Donaldson, L.L.P. and Tennyson Schad of Norwick & Schad, appearing of Counsel. Granada Biosciences Inc. and Granada Foods Corporation are represented by Michael A. Hawash of the Houston office of Verner Lipfert Bernhard McPherson & Hand.

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Impressions, Implications, and “Article as a Whole” Libel in Texas

Dealing with the Fallout of Turner v. KTRK-TV

By Jim Hemphill

After several intermediate appellate courts in Texas squarely held that no libel cause of action would lie if all the statements in an article or broadcast were true or substantially true, the Texas Supreme Court late last year disapproved of those holdings and observed that a plaintiff can bring a libel suit when an entire article or broadcast created a “false impression,” even if every individual statement therein was true. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000). However, the Court affirmed the reversal of the multi-million-dollar verdict for plaintiff, holding that there was insufficient evidence of actual malice.

Even though portions of *Turner* were (in the opinion of many journalists and media lawyers) insufficiently speech-protective, a careful analysis of the case shows that there are some common-sense limits to the “impression from the article as a whole” doctrine. However, a legitimate concern is how lower courts will interpret *Turner*, and one recent case indicates that a dangerously broad reading may be possible. *Granada Biosciences, Inc. v. Forbes, Inc.*, — S.W.3d —, 2001 WL 333203 (Tex. App. — Houston [14th Dist.] April 5, 2001, mot. for rehearing filed) (available online at <http://www.14thcoacourts.state.tx.us/Opinions/040501/990736f.pdf>).

This article will briefly analyze the Texas Supreme Court’s treatment of the “impression” issue in *Turner*, describe how *Turner* was applied (or misapplied) in *Granada*, and offer a few suggestions when dealing with potential “impression” cases in Texas. (For a detailed discussion of *Turner*, see Bob Latham’s excellent article, LDRC *LibelLetter*, Jan. 2001, at 5.)

Turner: “Implication” v. “Impression,” And Does It Really Matter?

Early on in the *Turner* opinion, the Texas Supreme Court stated that “libel by implication” and “article as a whole” libel are separate theories. 38 S.W.3d at 113. This was presumably necessary because in a pretrial hearing, the plaintiff’s counsel stated that he did not in-

tend to rely on a theory of libel by implication because he had not pleaded such a theory. *Id.* Throughout the opinion, the Court was careful to use the term “impression” rather than “implication” when describing the allegedly defamatory inferences the ordinary reader may have made from the article or the statements it contained. (Although at one point, the Court did note that the reporter “admitted at trial that he knew accusing a public official of conflicts of interest had serious *implications*,” *id.* at 136 (emphasis added)). The plaintiff’s theory, as described by the Court, was that the gist of the *entire broadcast* was substantially false.

Do Impression and Implication Differ?

This raises the question, of course, as to whether there is any meaningful difference between “libel by implication” and “libel by impression.” I think not, and I don’t find anything in *Turner* that logically suggests otherwise. The Texas Supreme Court seemed to consider “implications” to arise from an article or broadcast “as a whole,” when presumably “implications” were raised by discrete statements within a larger whole. But in fact, it seems that the Court in *Turner* — although perhaps claiming not to do so — recognized that a libel plaintiff may sue for impressions or implications made not only by a broadcast or article as a whole, but also by discrete statements within the article or broadcast.

By way of background, the broadcast at issue in *Turner* dealt with lawyer Turner’s representation of a man named Sylvester Foster, who committed insurance fraud by faking his own death after buying large life insurance policies. The ultimate question raised was whether Turner — who also is a state legislator and was then running for mayor of Houston — was a knowing participant in the fraud. This was the alleged implication from the broadcast as a whole, and the Court found that a reasonable jury could conclude that the broadcast gave this false impression.

However, when dealing with the impression issue, the Court also discussed several other, more specific im-

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Impressions, Implications, and “Article as a Whole” Libel in Texas

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pressions allegedly raised by something less than the entire article. For example, the Court discussed the implication — okay, the *impression* — that Turner was disqualified from serving as the estate’s lawyer because his own pecuniary interest conflicted with his representation, when in fact he was disqualified because he became a fact witness. *Id.* at 118-19. This was not an impression from the entire article, and (at least arguably) was not part of the overall impression that Turner was a knowing participant in the insurance fraud. However, the Court analyzed this alleged impression as if it were separately actionable.

Ultimately, the defendants in *Turner* won because the plaintiff failed to prove that the reporter “knew the broadcast would present a false impression or that he entertained serious doubts to that effect.” *Id.* at 121. In other words, there was no actual malice as to *the specific, allegedly false and defamatory impression.*

Does Require Specific Impressions

So *Turner*, despite language to the contrary, can reasonably read as endorsing libel by implication, through omission of fact or “juxtaposition” of true facts in a way to create a false impression. But throughout the opinion, the *Turner* Court was careful to identify alleged *particular, provably true or false* impressions when discussing falsity and actual malice.

This is an important point, because libel plaintiffs have been known to attempt to maintain cases based on vague claims that the entire article was somehow “false” without specifically identifying specifically *what* was “false.” The presence of a provably false factual connotation is, according to *Turner*, constitutionally mandated under *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), when the cause of action is based on something other than a simple, factually incorrect declaration.

If a plaintiff can get by with a vague and non-specific

claim that the “whole article” is false, then we are at a loss to defend. How can we prove truth or lack of fault when we don’t even know what it is that we need to prove is true, or not said with negligence or constitutional malice? Surely a court wouldn’t allow a libel claim to stand on such a nebulous contention.

Enter *Granada Biosciences. v. Forbes*.

Granada: Turner Misapplied

Granada was briefed and argued before the Texas Supreme Court issued its opinion in *Turner*, at a time when several courts — including the 14th Court of Appeals in Houston, which heard *Granada* — had held that

there was no cause of action for libel in Texas based on an “article as a whole” theory. (*Granada* is actually a business disparagement case, but for present purposes, the label on the tort makes no substantive difference.)

After the *Turner* opinion,

both sides presented letter briefs to the court, with plaintiffs claiming that they could sue for disparagement based on alleged impression.

The Court of Appeals agreed. It noted that *Granada*, in its briefing, alleged that “[v]irtually in its entirety, the *Forbes* article is disparaging and false,” which apparently was sufficient to plead an “impression from the article as a whole” claim — despite the failure to identify exactly *what* provably false impression the whole article allegedly made. (Interestingly, after holding that the briefing and evidence adequately raised a fact issue as to the *disparaging* nature of the entire article, the court never discussed the evidence, if any, that the “entire article” or any impression therefrom was false.)

The court discussed the “publication as a whole” theory again in the context of actual malice (the plaintiffs did not contest their status as public figures at the sum-

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Impressions, Implications, and “Article as a Whole” Libel in Texas

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mary judgment stage). In *Turner*, the Texas Supreme Court was careful to discuss evidence of actual malice in context of *each particular impression* allegedly made by the broadcast, to determine whether there was evidence that the defendants intended to convey each alleged impression with knowledge of its falsity or reckless disregard of the truth.

The *Granada* court, however, did not take this approach. Instead — again, without citing any particular, provably false impressions or implications — the court merely observed that the *Forbes* reporter had never specifically denied that he did not believe the *article as a whole* was true (even though he submitted a detailed affidavit denying actual malice for virtually every statement in the article that had ever been specifically challenged by the plaintiffs).

The court also noted that a fact issue existed as to whether the reporter misled the plaintiffs about when the article was published, which of course again has nothing to do with whether the defendants intended to make any particular implications with actual malice. The Court of Appeals reversed a defense summary judgment and remanded for trial. A motion for rehearing is pending.

Thus, under *Granada*, a plaintiff apparently simply could declare that the “article as a whole” is false and avoid summary judgment. Even if the defense offers mountainous evidence that every single statement in the article is literally true, a fact issue still exists, and the jury presumably would be asked the global and unguided question, “Is this article false?” A positive answer would be virtually impossible to review on appeal.

This can’t be the law of the great state of Texas. How do we avoid this result?

Some Ideas on Dealing With the Fallout

An attack on any “impression,” “implication,” or

“article as a whole” theory should be made from the very earliest stages of litigation. Interrogatories should pin down the plaintiffs on what *specific*, provably true or false impressions or implications they contend are made by the article as a whole or any statements therein. Plaintiffs should also be asked to specify all evidence showing that each impression or implication is false, and all evidence supporting the fault element.

In briefing — including in cases filed before the *Turner* opinion in which the plaintiff newly alleges “implication” — the focus should be on *Turner’s* evaluation of *specific* implications or impressions. Not only did the Texas Supreme Court take this approach in *Turner*, but

it is likely constitutionally required under *Milkovich* (which, in turn, was cited by *Turner*). It also may help to point out to the court that it is very difficult, if not impossible, to defend a global “false as a whole” claim.

There may be some rare instances in which a libel defendant *wants* a vague “article as a whole” jury instruction. For example, sometimes a piece might get one or two minor details wrong, but the overall gist is entirely accurate. A global instruction might serve to focus the jury on the thrust rather than secondary details (consistent with the substantial truth doctrine). However, at least in Texas, there is substantial case law allowing libel claims to proceed on false individual statements, so it would seem to be the plaintiff’s choice whether to proceed on a statement or the entire article (or both).

Turner has introduced some uncertainty into Texas libel law, and *Granada v. Forbes* seems to have taken the idea of “impression” libel several steps beyond what the Texas Supreme Court envisioned. Subsequent decisions will dictate whether the reasonable limitations of *Turner* are observed, or whether Texas libel plaintiffs have a powerful new tool at their disposal.

Jim Hemphill is a partner in the Austin firm George & Donaldson, L.L.P.

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of litigation.*

Hung Jury Over Article Alleging Mob Ties to Gaming Supplier

Late Summer Retrial Expected in Suit Against Warren Tribune-Chronicle

An Ohio Common Pleas judge declared a mistrial in late April after a eight-member jury remained deadlocked in a libel case brought by the president of a bingo-game supplier against a former reporter and the former owners of the Warren, Ohio *Tribune-Chronicle*. *Nannicola v. Warren Newspapers, Inc.*, No. 98-CV-771 (Ohio Ct. C.P. Trumbull County, mistrial declared April 27, 2001).

The lawsuit stemmed from an April 1998 article, written after Youngstown, Ohio police raided several clubs where equipment from Ninnacola Wholesale of Youngstown was being used for illegal gambling. The article stated that federal documents and a 1992 report by the Pennsylvania Crime Commission had concluded that Ninnacola Wholesale, which supplies bingo and other gambling games used for charity fundraisers, had organized crime connections.

Company president Frank Nannicola, Jr. sued the reporter, Lisa A. Abraham, and then-newspaper owner Thomson Newspapers, for \$30 million. Thomson later sold the *Tribune-Chronicle* to Ogden Newspapers.

"Guilt Through Association" Alleged

At trial, Nannicola argued that the article assigned guilt through association — he is the son-in-law of reputed Mafia member Charles Imburgia — and that the Pennsylvania government report which served as the basis of the article, *Racketeering and Organized Crime in the Bingo Industry*, had been discredited.

Plaintiff's witnesses included Rick Porrello, a policeman in suburban Cleveland who has written two books on the Mafia in Ohio, who testified that Nannicola's father-in-law is "a soldier" in the Pittsburgh mob. Company vice president Charles Nannicola, the plaintiff's brother, testified about the difficulties the article's allegations caused with the company's customers, which are mainly churches and other charitable organizations. And Warren, Ohio police chief John Mandopoulos testified that he had known Frank Nannicola, Jr. for thirty years and that he was "above reproach."

Frank Nannicola, Jr. testified on his own behalf, saying that he had never done business with the mob. He said that he had sued the Pennsylvania Crime Commission, but in the end agreed to a settlement under which any references to him and his company would be removed from any copies of the report distributed thereafter.

The plaintiff also called reporter Abraham, who testified during cross-examination that the Pennsylvania report was just one of several sources for the story, which also included affidavits for federal search warrants. She said that she spoke to the former Pennsylvania Crime Commission chairman about the lawsuit, and that he had said that the report was accurate. She also said that she left a message for Nannicola, but that he did not return her call.

In his testimony, Nannicola said that he returned the call, but that the person who answered in the newsroom, named "Bob," told him that Abraham was unavailable. Nannicola did not leave a message.

True and Fair Report Defense

The defense argued that the article represented a true and fair report of government documents and that there was no actual malice.

After a defense motion for directed verdict was denied, Abraham reappeared at the start of the defense case to detail the sources, methods and documents she had used to research and write the story. Under cross-examination, she stated that she did not believe, and her article did not state, that Nannicola was a member of the Mafia.

The defense then called former *Tribune-Chronicle* metro editor Edgar Simpson, who testified that the article was "thorough and accurate," and was supported "100 percent" by her sources. Simpson also said that reporters necessarily rely on government documents for much of their information.

The defense also called the only "Bob" associated with the editorial department at the time, freelancer Bob

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Hung Jury Over Article Alleging Mob Ties to Gaming Supplier

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Coupland, who used mileage records to show that he was not in the *Tribune-Chronicle* office that day.

In closing arguments, plaintiff's counsel called the article "reckless" and "malicious," and questioned why the defense had not offered testimony from any of those who accused Nannicola of mob connections. The defense labeled the suit as "an attempt to stifle the messenger," and said that Nannicola had not shown any economic impact on his business from the *Tribune-Chronicle* article. The defense also noted that the Pennsylvania report was covered when it was released by both the Youngstown, Ohio *Vindicator* and *U.S. News and World Report*.

Actual Malice Required

Judge John M. Stuard accepted the parties' agreement that the issue was one of public concern and that Nannicola had to show actual malice.

Thus Stuard instructed the jury that it must find actual malice, and that failure to verify the truth of a government report does not meet this standard. He added that Nannicola must have shown "clear and convincing evidence" that he sustained damages, and that it could award actual damages only if the story was "false and incapable of innocent construction." Otherwise, they could award only nominal damages. The jurors were told that they could award punitive damages on top of actual damages if they found that the newspaper had "consciously disregarded" Nannicola's rights.

The jury was also told that Ohio law allows newspapers to publish "fair and impartial reports" of government documents.

The jury selected a foreman, then retired for the evening. The next day, the jurors returned and deliberated until 3 p.m., when they reported an impasse. Judge Stuard instructed them to continue, but the jury returned at 4:07 p.m. to declare that they were deadlocked, five-to-three. Under Ohio law, six jurors were required to render a verdict.

The only juror to comment publicly, Walter Nolan,

said, "It was tough. Both sides represented their clients well." According to defense counsel, the jurors could not agree on whether the newspaper and reporter had acted with actual malice.

A retrial of the case is expected during the late summer.

The *Tribune-Chronicle* and Abraham are represented by Gregory Mersol of Arter & Hadden in Cleveland. Nannicola is represented by Michael Rossi of Guarnieri and Secrest in Warren, Ohio and Richard DiSalle and Susan Hileman Malone of Rose, Schmidt, Hasley & DiSalle, P.C. in Pittsburgh, Pa.

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LDRC Defense Counsel Section Committee Project Reports

Conference & Education Committee

Co-chairs: Daniel Waggoner and Peter Canfield

We are well along in the planning for the Sept 2001 version of the Biennial NAA/NAB/LDRC Libel Conference and have arranged for almost all speakers and facilitators. As well as our traditional breakout sessions, we will be trying out a mock jury presentation and a discussion of the ethics issues that arise in prepublication and other contexts. In addition, we will have a fuller introductory session on international issues and have made arrangements for space that will accommodate greater attendance at the international session.

* * *

Cyberspace Committee

Chair: Kurt Wimmer

Here are the projects that we plan for the year:

First, we will continue the successful practice of authoring a group of papers on Internet legal issues to be distributed at the fall Libel Conference in Arlington.

Second, we will continue to work with the full committee to bring articles on Internet-related topics to the LibelLetter.

Third, we hope to make the current committee listserv-like email system more interactive so that Cyberspace Committee members can inform the Committee quickly when important decisions are handed down or other developments occur.

Fourth, we continue to be on the lookout for Internet cases in which our clients might wish to participate as amici. The idea, in short, is to circulate to the Cyberspace Committee the details of any candidate case by email in hopes that we can generate interest among the client community and steer a court to a better decision.

Finally, we also hope to create more formal liaisons with other groups that deal with First Amendment issues relating to the Internet. There are some relationships that are sufficiently populated by common members, such as the ABA Forum Committee on Communications

Law, but there are other groups with which we should have closer connections, including the Center for Democracy and Technology, the Electronic Privacy Information Center, the Electronic Frontier Foundation, and the like.

* * *

Expert Witness Committee

Co-chairs: Michelle Tilton and John Borger

The Expert Witness Committee plans to update the existing media expert list by dividing the member list among the committee and e-mailing the expert database information to the LDRC firm contacts, who, in turn, will be encouraged to circulate the information among their firm's media attorneys.

If there is commentary about an expert, the particular individual's name and phone number/e-mail will be linked with the expert. Firms will also be e-mailed a form to report new media experts, as well as financial experts, who have performed well in media litigation and/or discovery.

The Committee will hopefully complete its database of experts for Canada and England.

* * *

International Committee

Co-chairs: Kevin Goering, Robert Hawley and Richard Winfield

We are working on the following projects: (1) Panels and topics are being developed for the NAA/NAB/LDRC Libel Conference international sessions; (2) David Korzenik and I are working on a French privacy outline and we may enlist others to help for inclusion in the LDRC 50-State Survey; (3) I proposed a by-law amendment concerning membership by non U.S. members; and (4) we continue to follow closely develop-

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ments in the U.K. and Europe, especially regarding the emerging privacy law in England.

* * *

Jury Debriefing Committee

Chair: Jim Stewart

The jury debriefing has identified cases for study, and the first may be a case being tried in Oklahoma City by Bob Nelson in June. Please let the Committee know if you have a case on the trial calendar.

UPCOMING TRIALS?!

Don't panic, but do let the LDRC Jury Debriefing Committee know about them.

If you know of any upcoming media trials, Please contact Tom Kelley at 303-592-9000 or TKelley@Faegre.com, or Jim Stewart at 734-213-3624 or Stewarje@butzel.com.

Legislative Affairs Committee

Chair: James Grossberg

The LDRC Legislative Affairs Committee continues to monitor legislative developments at the state and federal level that may impact the media's legal exposure for its content-related and information-gathering activities.

The Federal Legislative Affairs Subcommittee has begun tracking relevant federal legislative developments (including legislation and Congressional hearings) on a daily basis, and now that representatives of the principal news media trade associations serve on the committee, is positioned to alert LDRC's members and call upon LDRC's substantive resources as needed in a timely manner.

The State Legislative Subcommittee and LDRC staff have begun to establish ongoing contacts with various major media trade associations that have significant operations and interests at the state level, in an effort to better monitor state legislation and be able to make LDRC's resources available to respond to and, as appropriate, initiate such legislation. The State Legislative Subcommittee also intends to build a network of key state contacts who can promptly inform the subcommittee and LDRC's members about legislative developments of particular significance.

The Legislative Affairs Committee includes working groups on the UCCA, anti-SLAPP legislation, and agricultural disparagement legislation, each of which is charged with monitoring and, as appropriate, encouraging legislation in these areas.

* * *

LibelLetter Committee

Chair: Adam Liptak

The *LibelLetter's* main efforts in the past year have been devoted to:

1. sustaining the exceptional quality, depth and timeliness of the newsletter;
2. expanding the committee's membership to assure comprehensive on-the-ground coverage of legal developments;
3. defining the boundaries of the newsletter's subject-matter coverage mandate in light of significant developments at the fringes of the LDRC's core concerns; and

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LDRC Defense Counsel Section Committee Project Reports

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- 4. rethinking, in small steps, the format and delivery of the publication. Both the expanded table of contents and e-mail delivery have met with generally positive reviews. The committee is continuing to explore the enhanced role the LDRC Web site might play — for instance, in allowing links to the decisions reported on and in hosting a searchable archive of past issues.

* * *

Pre-Publication/Pre-Broadcast Committee

Chair: Bob Nelson

I am soliciting new ideas from the Prepublication Committee for projects this year, but for now I know we will be doing the following:

- 1. Continue work on the seminar bank, to get more materials from LDRC members and from DCS lawyers, and to continue (with LDRC staff guidance) organization of the materials for convenient retrieval.
- 2. Write at least one article for the LibelLetter about pre-publication issues. Once *Bartnicki* is decided, for example, our committee is likely to put forth some observations about the decision.
- 3. Provide resources for the 2001 Libel Conference in September. Committee members will be asked to list and highlight recent experiences that may provide topical examples for discussion at breakout sessions.

* * *

Pre-Trial Committee

Co-chairs: Joyce Meyers and Charity Kenyon

- In the Summer of 2000 the committee, through the leadership of Henry Abrams, published an Issue Checklist for Motions to Dismiss and Summary Judgment in a Defamation Action. The nine-member committee developed and annotated a checklist of ques-

tions to ask when a complaint arrives in the office. The list starts with jurisdiction, removal or remand, choice of law and early summary disposition alternatives. It proceeds through statute of limitations, elements of the prima facie case, burden of proof and summary judgment standards. It ends with standard of fault issues, elements of damages that may not be supportable as a matter of law, and the absolute or qualified privileges. The checklist cites major United States Supreme Court cases as well as some leading circuit court of appeals and state court cases where dispositive issues may receive different treatment.

- The committee embarked this Fall on a Discovery Roadmap with Dick Goehler taking the lead in coordinating assignments. The format for the project is evolving, but we think it likely will take the form of our recent Issue Checklist. This format will allow authors of particular sections to discuss discovery philosophy, strategy issues and approaches to discovery. The general topics that we have identified include discovery regarding: plaintiff's status as either a public or private figure, whether the publication is "of and concerning" the plaintiff; whether the publication tends to harm reputation; truth/falsity; standard of fault — actual malice or negli-

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

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gence; public concern or public controversy; absolute or qualified privileges; damages; and other tort or related non-libel claims. Contributors welcome!

- Steve Comen is formulating a project on mediation as well. Again, volunteers are welcome as well as suggestions for ways to give practical value to defense practitioners.

* * *

Trial Techniques Committee

**Co-Chairs: David Sanders and
Guylyn R. Cummins**

Long Term Goals

1. The creation of a repository (like the brief bank) of closing arguments (and perhaps opening statements) from media trials that the LDRC staff would maintain. The work would involve identifying media trials and the defense lawyers in those trials; contacting those lawyers to see if they can provide us a copy of the defendants' closing arguments and opening statements, preferably in computer format; reviewing the transcripts to determine what, if any, topics were covered that may be of value to the DCS membership; and completing an index sheet (similar to the brief bank index form) to identify those topics (e.g., First Amendment, free press, flag-waving; constitutional actual malice; defamatory meaning; fair report privilege, damages, etc.) and facilitate retrieval by the LDRC staff.

Short Term Goals:

1. We have been asked to participate in a joint effort with the DCS Jury Committee to gather information from the DCS members concerning their experience in using trial consultants in media trials, and to prepare a report concerning our findings. The goal would be to identify defense lawyers

who have used trial/jury consultants, and thereafter, to obtain information from them, with appropriate assurances of confidentiality (first from a simple survey, then from follow-up telephone interviews) concerning the specific tasks for which they used the consultants (e.g., attitude surveys, focus groups, mock trials, juror questionnaires, jury selection, shadow juries, mid-trial consultation, etc.); which tasks performed by the consultants they found helpful and which they did not; the range of costs involved; etc. The end product of this would be a report that summarizes the interviews and lists trial consultants who have received favorable reviews from defense counsel for their work on media cases.

2. Update of Model Trial Brief.

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