

MILRC Media Law Resource Center
MEDIA LAW LETTER 52

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Massachusetts Supreme Judicial Court Affirms Verdict Against Boston Herald *Newspaper Petitions for Rehearing*

By Bruce W. Sanford and Bruce D. Brown

Objecting to several crucial factual and legal errors made by the Supreme Judicial Court of Massachusetts in a ruling earlier this month that affirmed a \$2 million libel verdict in favor of Superior Court Judge Ernest B. Murphy, the *Boston Herald* and its reporter, David Wedge, filed a petition for reconsideration on May 21 arguing that the court's mistakes were so fundamental to the outcome of the case as to render the court's opinion invalid. *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. May 7, 2007).

In its petition, the *Herald* writes that the Supreme Judicial Court misstated the testimony of the key witness in the case, prosecutor David Crowley, to suggest that Murphy made a caring remark about a 14-year-old rape victim rather than an insensitive one as reported in the newspaper; that it failed to conduct the appropriate level of review of the jury verdict under *Bose v. Consumers Union*; and that, absent evidence of the publication of a knowing falsehood, the court couldn't simply rely on the notion that reporters should be skeptical of outrageous allegations about judges to find actual malice and to uphold the verdict.

Background

Murphy sued the *Herald* and several of its reporters in 2002 for a series of articles that detailed Murphy's lenient sentencing practices and reported on an insensitive statement about a young rape victim that courthouse sources attributed to Murphy. The allegations printed by the *Herald* were not the first of their kind. In the six months Murphy had been hearing criminal cases, his reputation for handing out minimal sentences to defendants while showing a lack of sensitivity for the interests of crime victims had become the focus of several articles in other newspapers.

The statements attributed to Murphy in the *Herald* arose in an off-the-record "lobby conference" in which prosecutor Crowley was arguing for jail time for two young men who had robbed a 79-year-old woman. Crow-

ley told Murphy that the age of the elderly victim was an aggravating factor in the robbery, to which Murphy replied: "I don't care if she's 79. I don't care if she's 109."

Crowley testified that as he continued to push Murphy, the judge defended his decision by mentioning the age of a young rape victim whose attacker he had sentenced the day before to probation instead of to prison as requested by prosecutors. Crowley testified Murphy said that the girl couldn't go through life as a victim, that she was 14, that she had been raped, and that he said: "Get over it."

Wedge learned of the statements from three district attorneys – Crowley, Gerald Fitzgerald, and Paul Walsh, the latter two of whom heard the statements directly from Crowley. The public record showed that together Walsh and Fitzgerald had been sources for Wedge more than 40 times over the course of many years, and no evidence was introduced at trial that information they supplied was ever inaccurate. Wedge interviewed all three, including a face-to-face meeting with Crowley and Fitzgerald. Wedge also sought out Murphy for comment but was turned away.

A jury found the *Herald* and Wedge published the statements either knowing they were false or with reckless

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Massachusetts Supreme Judicial Court Affirms Verdict Against Boston Herald

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disregard for the truth and awarded the judge \$2.1 million. (See “Boston Jury Awards \$2.1 Million to Judge,” *MLRC MediaLawLetter* Feb. 2005 at 19.) The *Herald* appealed the jury’s verdict directly to the Supreme Judicial Court, which upheld the jury verdict on May 7.

Court Misstated Testimony Of Key Witness

At trial, Crowley testified he told Wedge “[T]he judge had said, ‘That she can’t go through life as a victim. You’re 14; you’ve been raped. Get over it.’” The only difference between Crowley’s trial testimony and the comment in the *Herald* was the words “tell her.” Crowley testified at trial the gist of the statement as published in the *Herald* – “She can’t go through life as a victim. She’s 14. She got raped. Tell her to get over it.” – was correct.

The court, however, badly misstated Crowley’s testimony in its opinion. “Crowley ... testified that the plaintiff had said words to the effect of ‘she needs to get on with her life and get over it,’” the court wrote, presenting Crowley’s testimony as if he viewed the statement about the young rape victim as compassionate. In fact, Crowley never testified that Murphy used the phrase “she needs to get on with her life,” and he was on the record (at deposition) calling the comment from Murphy “insensitive.”

Because the court misstated Crowley’s testimony, its conclusion that the “difference between the statements attributed to the plaintiff in the *Herald* articles, and the statement that Crowley testified he told Wedge the plaintiff had made, cannot ... be characterized as a minor discrepancy protected by the First Amendment” is plainly erroneous.

The court effectively conducted a review of the jury’s findings in the light most favorable to the plaintiff.



Reporter David Wedge

None of Wedge’s three sources in the DA’s office ever testified that the words “tell her” preceding “get over it” changed the meaning of a remark they all found insensitive. Fitzgerald, in fact, distinctly remembered Crowley using the words “tell her get over it” when Wedge confirmed the quote with Crowley.

Court Erred In Applying Independent Review

In lieu of conducting the independent review of the facts the jury “must have” found as required by *Harte-Hanks v. Connaughton*, the court erred by establishing a new standard that called for accepting “all of the facts implicitly established” by the verdict.

In applying this new standard, the court effectively conducted a review of the jury’s findings in the light most favorable to the plaintiff, which is not the standard of review under *Bose*. This mistake sent the court on a search for testimony that supported its erroneous conclusion that Wedge purposefully altered the “get over it” remark to create an “impression (false) of callousness” and allowed it to ignore testimony that proved any error on Wedge’s part was unintentional.

For example, the ruling misconstrued Wedge’s testimony when it stated that “[a]ccording to Wedge, the confrontation context may have been a fabrication” and repeatedly labeled Wedge a knowing fabricator. Wedge did acknowledge at trial, “I can’t say for certain whether or not the sources that I had, had fabricated something. I can’t get into – get into their mind.” But he never testified that *he* fabricated anything as the court suggested.

The ruling also took aim at a statement in the article that Crowley “confronted” the judge in the lobby confer-

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ence. The court suggested that Wedge had no basis to use the term “confronted” and was, in fact, told by Walsh that the exchange was a “good-faith dispute.” The court, however, omitted Walsh’s testimony that he told Wedge that Crowley was “exasperated” and “being vigorous in his advocacy” when he met with Murphy – comments which explained Wedge’s use of the term “confronted.”

The court failed in its independent review once again when it found that the “substance” of Walsh’s testimony was that Murphy had said, “She’s got to get on with her life. She’s got to get over it.” But Walsh’s full testimony was that Murphy had stated, “‘She’s 14,’ or words to this effect, ‘She’s 14, She’s been raped – she – get over it. She needs to get over it. Tell her to get over it.’ I don’t know exactly what the words were, but I got the import pretty well from Mr. Crowley.” The import was that the judge made an insensitive remark, just as Wedge wrote.

The court justified spinning Walsh’s testimony as sympathetic-sounding to Murphy by stating that the comment he gave to Wedge could have been made by Murphy at an earlier lobby conference in the rape case. The lobby conference in the rape case had occurred more than two weeks before the lobby conference in the robbery case, and Murphy’s “theory” of the case was that a compassionate remark he made in that lobby conference (that the young rape victim needed counseling to help her get on with her life and “get over it”) was taken out of context by prosecutors and turned into the insensitive remark reported in the *Herald*.

The *Herald* argued on appeal that the statements in the earlier lobby conference were irrelevant and confusing and that Murphy never introduced evidence to support his theory. For example, none of the prosecutors Wedge used as sources were even aware of Murphy’s earlier remark, and Walsh testified consistently that the insensitive comment heard by Crowley and reported in the *Herald* was made in the later lobby conference in the robbery case. But given the misstatements in the opinion, it seems clear that the Supreme Judicial Court made the very mistake about which the *Herald* warned – the earlier lobby conference statements Murphy succeeded in placing in the record created an artificial sense of falsity and actual malice.

Liability For Failure To Be “Skeptical”

Leaving aside the evidence which the court misread to conclude that Wedge knowingly altered Murphy’s words to create an impression of insensitivity, the court’s decision rests solely on the parochial premise that a newspaper acts in reckless disregard for the truth when it publishes “outrageous” claims about a judge.

Indeed, the author of the court’s opinion, Justice John M. Greaney, published a 1997 op-ed in the *Herald* disapproving of its reporting on state judges. In the article, Greaney criticized the paper for a “name-calling headline” attacking a judge for being soft on crime and stated that the “popular wrath” against judges is “often uninformed” and “whipped up.” Greaney warned: “It pays to be a bit skeptical about judicial horror stories, especially those fed under the courageous cloak of anonymity.”

Despite decades of law protecting reporters from liability in actual malice cases unless obvious reasons existed to doubt the veracity of a source, the Supreme Judicial Court has punished the *Herald* and Wedge for essentially failing to be skeptical about comments attributed to Murphy provided by three reliable public officials.

The petition for rehearing is pending.

Bruce W. Sanford and Bruce D. Brown of Baker & Hostetler LLP represent the defendants in the appeal. M. Robert Dushman, Elizabeth A. Ritvo, and Jeffrey P. Hermes of Brown Rudnick Berlack Israels LLP represented the defendants at trial. Michael Avery of Suffolk Law School and Howard M. Cooper of Todd & Weld LLP represent the plaintiff in the appeal.

SAVE THE DATE

November 7, 2007

MLRC ANNUAL DINNER

New York City

Sidebar: Libel Trials With Judges As Plaintiffs

Murphy v. Boston Herald stemmed from several articles in *The Boston Herald* in 2002 and 2003 regarding Judge Ernest Murphy's sentencing practices, and comments by reporter David Wedge on Bill O'Reilly's cable talk show.

Following a two week trial in February 2005, the jury awarded Judge Murphy \$2.09 million in compensatory damages. *Murphy v. Boston Herald*, 02-2424B (Mass. Super. Ct., Suffolk County verdict Feb. 18, 2005) (the award was reduced by \$80,000 on post-trial motion).

On direct appeal to the Massachusetts Supreme Judicial Court, the verdict was unanimously affirmed. The defamatory nature of the statements about the judge "requires little discussion" the Court noted in a footnote, since "to charge that a judge is biased or unfair, or otherwise cannot be trusted to administer justice according to the law, is to strip away the qualities for which the office is respected and held to be legitimate."

The Court found "overwhelming evidence" of falsity. (See the main article by defense counsel for a discussion of the Court's characterization of testimony in the trial). The Court also found sufficient evidence of actual malice based on "disbelief" of the reporter's testimony about his sources and retention of notes. Even though it was the reporter's practice to discard notes, the Court found that "highly improbable" where plaintiff's lawyer contacted the *Herald* two days after publication to complain that the quote was inaccurate. Moreover, the Court found there was obvious reasons for the newspaper to doubt the quotation's accuracy because of its "outrageousness" – which the Court seemed to premise on the attention the quote generated, rather than its inherent improbability.

Notably the Court also held that it was not error for the jury to have heard expert testimony about defendants' conduct. Basing her testimony on various codes of journalistic ethics, plaintiff's expert testified *inter alia* that potentially explosive information should be verified by at least two independent primary sources before being published, and, when possible, the "best thing ... is to get [a] quote directly from the person who [said] it."

The trial court was within its discretion to allow the testimony, according to the Court, because: "A plaintiff is entitled to prove the defendants' subjective state of mind through circumstantial evidence, however, and evidence concerning a reporter's apparent reckless lack of care may be one factor in the actual malice inquiry."

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***Murphy v. Boston Herald* is the 13th media trial since 1980 that MLRC is aware of with a judge as plaintiff. These judges won seven of the trials, with damage awards ranging from \$35,000 to \$8.3 million. The trials in chronological order, and with the results on appeal, are:**

1. *Kirk v. Marcum* (Ky. Cir. Ct., Pike County April 1981) (verdict for defendant not appealed)
2. *DiSalle v. Pittsburgh Post Gazette*, No. 367 September Term 1979 (Pa. Ct. C. P. 1986) (\$2.2 million verdict for plaintiff affirmed)
3. *McDermott v. Biddle*, No. 3693 March Term 1984 (Pa. C.P. 1990) (\$600,000 award to judge against newspaper remanded on appeal, then dismissed by stipulation).
4. *Hinerman v. Daily Gazette Co., Inc.*, 423 S.E.2d 560, 20 Media L. Rep. 2169 (W. Va. 1992) (\$300,000 jury award affirmed)
5. *Lewis v. News Press & Gazette Co.*, Civil No. 91- 6037 (W. D. Mo. 1992) (\$35,000 verdict not appealed)
6. *Bentley v. Bunton*, No. 37488 (Tex. Dist. Ct. 1997) (\$8.3 million verdict reduced on appeal to \$1.3 million)
7. *Vislosky v. Courier Times, Inc.*, No. 88-1727 (Pa. Ct. C. P. , Bucks Cty. 2000) (defense verdict not appealed)
8. *Merriweather v. Philadelphia Newspapers, Inc.*, No. 771, Sept. Term, 1987 (Pa. Ct. C. P. 2000) (\$500,000 jury verdict reversed by grant of JNOV)
9. *Hosemann v. Loyacono*, No. 02-0127-CI (Miss. Cir. Ct. 2003) (jury verdict for defendant)
10. *Sweeny v. New York Times Co.*, No. Civil 00-2942 (N. D. Ohio 2003) (verdict for defendant not appealed)
11. *Popovich v. Daily News Publishing Co.*, No. GD 99-6343 (Pa. C.P. 2004) (hung jury in March 2004; verdict for defendant in July 2004 not appealed).
12. *Murphy v. Boston Herald*, 02-2424B (Mass. Super. Ct., Suffolk County verdict Feb. 18, 2005) (\$2.1 million verdict affirmed, motion for reconsideration pending).
13. *Thomas v. Page*, No. 04-LK-013 (Ill. Cir. Ct. 2006) (\$7 million award for plaintiff reduced to \$4 million on post-trial motions; appeal pending).

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Massachusetts Media Trials

The award in *Murphy* is the highest trial award in a case against the media in Massachusetts since MLRC began tracking trials in 1980.

Before *Murphy*, there had been 16 media trials in state and federal court in Massachusetts since 1980; including four since 2003. Plaintiffs won 13 of these trials (81.3 percent), with awards ranging from \$10,000 to \$1 million.

Only two of the 13 plaintiff victories survived intact at the conclusions of these cases. Plaintiff victories were modified (meaning that the award was reduced) in two more cases, and defendants had total wins in 10 cases. Two of the cases settled after trial.

Murphy was only the second media trial in Massachusetts since 1980 involving a public official plaintiff: the other is *King v. Globe Newspaper Co.*, No. 52488 (Mass. Super. 1986), in which a former governor sued the *Boston Globe*. That trial resulted in a jury verdict for the defendant that was not appealed.

A case that did not go to trial yet is significant in Massachusetts is *Ayash v. Dana-Farber Cancer Inst.*, Civ. No. 96-565-E (Mass. Super. Ct., Suffolk County 2002), in which the court entered a \$2.1 million default verdict after the defendant newspaper refused to identify a confidential source.

The verdict was affirmed by the Massachusetts Supreme Judicial Court, 443 Mass. 367, 822 N.E.2d 667, 33 Media L. Rep. 1513 (Mass. Feb. 9, 2005).

SAVE THE DATE

November 9, 2007

New York City
Defense Counsel Section Breakfast

There have been 17 trials against media defendants in Massachusetts since 1980. In chronological order by trial date, they are:

1. *Cole v. Westinghouse Broadcasting Co.* (Mass. Super. 1980) (\$100,000 award reversed on appeal).
2. *Gouthro v. Gilgun* (Mass. Super. Ct. 1980) (\$28,500 award reversed on post-trial motions).
3. *Bose v. Consumers Union*, 529 F.Supp. 359 (D. Mass. 1981) (\$115,296 award reversed on appeal).
4. *Schrotzman v. Barnicle*, 7 Media L. Rep. 1487 (Mass. Super. Ct. 1981) (\$25,000 award reversed on appeal).
5. *Sibley v. Holyoke Transcript-Telegram* (Mass. Super. Ct. 1982) (\$30,000 award reversed on appeal).
6. *Pacella v. Milford Radio Corp.* (Mass. Super. Ct. 1983) (\$15,000.00 award reversed on post-trial motions).
7. *Lakian v. Boston Globe* (Mass. Super. Ct. 1985) (verdict for defendant no appealed).
8. *King v. Globe Newspaper Co.*, No. 52488 (Mass. Super. Ct. 1986) (verdict for defendant).
9. *Anderson v. Avco Embassy Pictures Corp.*, (D. Mass. 1987) (\$150,000 award not appealed).
10. *Lussier v. Woonsocket Call*, (D. Mass. 1988) (\$10,000 award not appealed).
11. *Scibelli v. Springfield Union News* (Mass. Super. Ct. 1990) (\$75,000 award reversed on appeal).
12. *Valdez v. Champion Broadcasting* (Mass. Super. Ct. 1997) (\$100,000 award; settled).
13. *Adams v. Fox Sports Networks, LLC*, Civil No. 01-10523 (D. Mass. 2003) (\$1.0 million award reduced to \$350,000 on post-trial motions).
14. *Mandel v. The Boston Phoenix, Inc.*, Civ. No. 03-10687 (D. Mass. 2004) (\$950,000 verdict reversed and remanded for retrial; retrial pending).
15. *Columbus v. Globe Newspaper Co., Inc.*, No. 00-724 (Mass. Super. Ct., Middlesex County 2005) (verdict for defendant).
16. *Murphy v. Boston Herald*, Civil No. 02-2424B (Mass. Super. Ct., Suffolk County 2005) (\$2.03 million verdict affirmed on appeal).
17. *Reilly v. The Boston Herald, Inc.*, Civil No. 98-294 (Mass. Super. Ct., Barnstable Co. 2005) (\$225,000 verdict; case subsequently settled).

Default verdict: Ayash v. Dana-Farber Cancer Inst., Civ. No. 96-565-E (Mass. Super. Ct., Suffolk County 2002) (\$2.1 million default verdict affirmed).



MLRC London Conference September 17-18, 2007 International Developments in Libel, Privacy, Newsgathering and New Media Law

MLRC's London Conference 2007 on September 17-18, 2007 is a two-day event for media lawyers and press experts to discuss the latest developments in media law and practice.

Delegates from around the world will gather to participate in a series of facilitated discussions on developments in media libel law, privacy law, newsgathering laws and the challenges posed by the new digital media environment.

Among the highlights of the London Conference are a roundtable discussion with UK libel judges on the challenges of press litigation in the 21st century. Justice Henric Nicholas of the Supreme Court of New South Wales will comment on the Asian media law landscape from a Commonwealth law perspective. And Alan Rusbridger, editor of *The Guardian*, and Richard Sambrook, Director BBC Global News, will discuss the impact of the new digital media environment on journalism and the business of journalism.

The closing session of the conference is an Oxford-style debate on privacy law, with English and American lawyers facing off on the difficult question of the boundary between freedom of expression and privacy: What should be private? Who should decide what is private?

The conference also includes a delegates dinner on Sunday night September 16th and a breakfast meeting on September 19th for in-house media counsel.

The London Conference is a unique opportunity to meet colleagues from around the world. Space is limited, so we urge you to register early to ensure a place. We hope you will join us!

Contact londonconference@medialaw.org for more information.

The MLRC London Conference is presented with the support of:

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En Banc D.C. Circuit Reverses Earlier Ruling and Restores First Amendment Right to Publish Truthful Information – Even If Source Acted Unlawfully

By Theodore J. Boutros, Jr. and James C. Ho

In a 4-1-4 decision issued on May 1, the United States Court of Appeals for the District of Columbia Circuit, on rehearing en banc, reversed the court's earlier ruling and restored the First Amendment right to publish truthful information of public concern – even if the information was originally obtained by a third party source through unlawful conduct. *Boehner v. McDermott*, No. 04-7203, 2007 WL 1246438, (D.C. Cir. May 1, 2007).

The court maintained the earlier finding of a three-judge panel that Representative James McDermott violated federal law when he disclosed to two reporters a tape recording of an illegally intercepted conversation between other members of Congress. But in doing so, the court also set aside another portion of the panel ruling that had previously been condemned by the dissenting judge as “fraught with danger” to the media.

The decision in is an important development that restores First Amendment protections for journalists nationwide against

potential civil and criminal liability for publishing truthful information received from a source known by



Representative John Boehner

the reporter to have obtained that information unlawfully. The ruling also serves as an important reminder that litigation between non-media interests can have a profound effect on the media.

Background

In December 1996, Representative John Boehner participated by cellular phone in a conference call with other members of the Republican Party leadership to discuss an on-going ethics investigation of then-House Speaker Newt Gingrich. John and Alice Martin used a police radio scanner to eavesdrop on and record that conversation, in violation of 18 U.S.C. § 2511(1)(a),

which prohibits unauthorized interception of telephone conversations (they later pled guilty and were fined \$500).

The Martins provided the tape to Representative McDermott, who was then the ranking Democratic member of the House Committee on Standards of Official Conduct, commonly known as the House Ethics Committee.

Congressman McDermott subsequently played the tape for Adam Clymer of *The New York Times* and Jeanne Cummings of *The Atlanta Journal-Constitution*, who in turn published news articles describing the contents of the recording in January 1997.

Although Representative McDermott broke no law in receiving the tape from the Martins, Representative Boehner filed suit on the ground that, by playing the tapes for two reporters, McDermott violated 18 U.S.C. § 2511(1)(c), which prohibits the intentional disclosure of any illegally intercepted conversation by a person who knew or had reason to know that the recording was unlawfully obtained.

In its initial decision, the D.C. Circuit held that Representative McDermott had no First Amendment right to disclose the tape to the public through the media, even though the tape plainly contains information of public concern. *See 191 F.3d 463 (D.C. Cir. 1999)*.

The U.S. Supreme Court subsequently vacated that decision and returned the case for further consideration in light of *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Bartnicki confirmed that the First Amendment generally protects the right to publish information of public concern – including information that is “lawfully obtained” from a source who may have secured that information through unlawful means. Nevertheless, on remand the district court granted summary judgment in favor of Representative Boehner and awarded \$10,000 in statutory damages, \$50,000 in punitive damages, and attorneys’ fees and costs.

On appeal, a panel of the D.C. Circuit affirmed the judgment against Representative McDermott. *See 441 F.3d 1010 (D.C. Cir. 2006)*. In a decision authored by Judge Raymond

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En Banc D.C. Circuit Reverses Earlier Ruling and Restores First Amendment Right to Publish Truthful Information – Even If Source Acted Unlawfully

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Randolph and joined by Chief Judge Douglas Ginsburg, the panel distinguished *Bartnicki* and held that the First Amendment does not protect individuals who disclose information *knowing* that the information had previously been obtained by the source through unlawful means.

According to the panel, because Representative McDermott knew that the tape had been illegally secured, he did not “lawfully obtain” the recording for purposes of the First Amendment, as required under *Bartnicki*. Such conduct was, in the panel’s words, akin to knowingly “receiving stolen property.”

Judge David Sentelle issued a sharp dissent, arguing that *Bartnicki* applies so long as the “publisher of information has obtained the information in question in a man-

ner *lawful in itself* but from a source who has obtained it unlawfully” (emphasis added). He concluded that, whatever the government’s authority to punish the unlawful conduct of the source, the First Amendment forbids the government from punishing the subsequent publication of that information by an innocent third party.

In addition, Judge Sentelle pointedly observed that the panel’s ruling was “fraught with danger,” for “just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. I see no distinction ... between the constitutionality of regulating communication of the contents of the tape by McDermott or by *The Washington Post* or *The New York Times* or any other media resources.” Indeed, under the panel’s holding, “no one in the United States could communicate on this topic of public interest because of the defect in the chain of title.”

Decision on Rehearing En Banc

On rehearing en banc, the D.C. Circuit affirmed the judgment against Representative McDermott – but did so on substantially narrower grounds that should have little

if any impact on the media. A majority of the court supported Judge Sentelle’s view that the First Amendment generally protects “the publication of information originally obtained by unlawful interception but otherwise lawfully received by the communicator.”

A different majority of the court nevertheless concluded that Representative McDermott was not entitled to First Amendment protection. Writing again for the court, Judge Randolph noted that, under *United States v. Aguilar*, 515 U.S. 593 (1995), “Government officials in sensitive confidential positions may have special duties of nondisclosure” – duties which are presumably inapplicable to members of the media – and do not have a First Amendment right to disclose information in violation of such duties.

Judge Randolph further observed that Representative

On rehearing en banc, the D.C. Circuit affirmed the judgment against Representative McDermott – but did so on substantially narrower grounds that should have little if any impact on the media.

McDermott, as the ranking Democratic member of the House Ethics Committee, had violated his special duty of nondisclosure under Committee Rule 9, which provides that “Committee members and staff shall not disclose any evidence relating to an in-

vestigation to any person or organization outside the Committee unless authorized by the Committee.”

Judge Sentelle disagreed, joined by three of his colleagues. He observed that “this case is unrelated to whatever ‘special duty of nondisclosure’ McDermott may have had as a member of Congress,” and that there is no logical basis for incorporating whatever duty may exist under House rules into the First Amendment analysis as applied to the federal wiretapping statute.

The decision of the Court ultimately turned on Judge Tom Griffith, who agreed with Judge Sentelle’s broader First Amendment analysis but voted to join Judge Randolph’s narrower ruling based on *Aguilar*.

The en banc ruling will likely have little directly adverse impact on journalists, who will rarely if ever be subject to the kind of independent, pre-existing duty of nondisclosure that could trigger the exception to *Bartnicki* recognized by Judge Randolph’s opinion. Nonetheless, the ruling could chill speech by whistleblowers and other government and

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En Banc D.C. Circuit Reverses Earlier Ruling and Restores First Amendment Right to Publish Truthful Information – Even If Source Acted Unlawfully

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private sources, who may be at risk under the Court's application of *Aguilar*, and discourage them from disclosing information of public concern that they have previously promised to keep secret.

The Court's decision nevertheless upholds a long tradition of newsgathering from sources who may have broken the law in the course of leaking newsworthy information – including the Pentagon Papers case, Watergate, the Monica Lewinsky scandal, and the health hazards of tobacco.

The decision may also have implications for the ongoing prosecution of two former lobbyists of the American

Israel Public Affairs Committee, who have been accused of receiving and then discussing with reporters national defense information in alleged violation of the Espionage Act.

Theodore J. Boutros is a partner, and James C. Ho, of counsel, with Gibson, Dunn & Crutcher LLP. Mr. Boutros filed several amicus briefs on behalf of 18 news organizations in Boehner v. McDermott during the course of the appellate proceedings. Congressman Boehner was represented by Michael A. Carvin, Jones Day, Washington, D.C. Congressman McDermott was represented by Frank Cicero Jr. and Christopher Landau, Kirkland & Ellis LLP.



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New Hampshire Supreme Court Rejects Libel-Proof Defense and Narrows Fair Report Privilege

By William Chapman

On May 1, 2007 the New Hampshire Supreme Court issued its second opinion in *Thomas v. Telegraph Publishing Co. et al.*, 2007 WL 1299870 (*Thomas II*), in which its two most important holdings were to reverse the trial court's determination that the plaintiff was libel-proof and to narrow the scope of the fair report privilege.

Background

The case arises out of a feature article in *The Telegraph* in December, 1999, headlined "Police Said A Burglar's Luck Has Run Out After 25 Years." The gist of the article is captured in one of its opening sentences:

"The Nashua resident is suspected in more than 1,000 home burglaries in Massachusetts and New Hampshire since the mid-1970's, according to police and court records."

Claiming that 58 statements in the article were defamatory, Terry Thomas sued the newspaper and its publisher and reporter, four law enforcement officers and a professor of criminal justice.

In *Thomas I*, 151 N.H. 435 (2004), the court held that personal jurisdiction could be asserted over three law enforcement officers and the professor, each of whom resided in Massachusetts and had been a source for the article.

Following remand, the trial court granted summary judgment on the ground that the plaintiff's "habitual criminal record" made him libel-proof. It also ruled on other several issues, most notably the fair report privilege. This article focuses on the supreme court's rulings on the libel-proof plaintiff defense and fair report privilege.

Libel-Proof Plaintiff Defense

Thomas II is the first case in which the New Hampshire Supreme Court considered the libel-proof plaintiff defense. The court began by discussing two different strands of the defense, the incremental harm doctrine and the issue-specific libel-proof plaintiff.

The Telegraph replied on the incremental harm doctrine. It argued that the plaintiff had acknowledged his criminal record had been accurately reported, which without more demolished his reputation. The court disagreed, ruling that even though the plaintiff had admitted "to several arrests and convictions," his "status as a convicted criminal and his admission to various criminal activities, alone, are not dispositive under the incremental harm doctrine."

According to the court, "the article's potential harm to the plaintiff's reputation derives not only from admitted facts but also from other statements which, at this time, have not been either admitted as true or deemed not actionable." Given that view of the record, the court declined to "wade into the debate over the wisdom of adopting the incremental harm doctrine," and turned to the second strand of defense.

The court first "accept[ed] the principle that a convicted criminal may have such a poor reputation that no further damage to [i]t is possible at the time of an otherwise libelous publication." (citing *Jackson v. Longscope*, 476 N.E. 2d 617, 619 (Mass. 1985)). But it added this cautionary note: "while we now adopt this version of the libel proof plaintiff doctrine, we warn that it should be applied with caution and sparingly" (emphasis added). Quoting from the *McBride v. New Braunfels Herald-Zetung*, 894 S.W. 2d 6, 10 (Tex. App. 1994), the court held:

To justify applying the doctrine, the evidence of record must show not only that the plaintiff engaged in criminal or anti-social behavior in the past, but also that his activities were widely reported to the public. The evidence of the nature of the conduct, the number of offenses, and the degree and range of publicity received must make it clear, as a matter of law, that the plaintiff's reputation could not have suffered from publication of the false and libelous statement (emphasis added.)

The trial court ruled that "the plaintiff's 'habitual criminal record in three ... states' damaged his reputation decades prior to the publication of the Telegraph article."

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New Hampshire Supreme Court Rejects Libel-Proof Defense and Narrows Fair Report Privilege

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However, it also found that “the plaintiff has received little media attention regarding his prior arrests and convictions.” Based on that finding, the supreme court reversed the grant of summary judgment.

Fair Report Privilege

Probably the most important aspect of New Hampshire Supreme Court’s *Thomas II* decision is its rulings on the fair report privilege, which it first expressly recognized in *Hayes v. Newspapers of New Hampshire*, 141 N.H. 464 (1996).

The plaintiff in *Hayes* claimed she had been defamed by a news account of a public meeting during which “the selectmen and townspeople apparently discussed the controversial activities” of her family. The court adopted the formulation of the privilege in *Restatement (Second) of Torts § 611 (1977)*:

the privilege applies to ‘[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern ... if the report is accurate and complete or a fair abridgement of the occurrence reported.’

The privilege ‘extends to the report of any official proceeding, or any action taken by any officer or agency of the government.’

The trial court ruled that some statements were protected by the fair report privilege. The plaintiff appealed this ruling, arguing that the privilege should not apply because he had submitted “affirmative circumstantial evidence...from which actual malice could be inferred.”

The Telegraph countered that the fair report privilege does not depend on state of mind. Disagreeing, the supreme court relied on *dicta* in *Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003) (applying Massachusetts law) for the proposition that the fair report privilege can be defeated on a showing of “malice.” (Reliance on *Yohe* is even more problematic because the First Circuit relied on *dicta* in *Migi, Inc. v.*

Gannett Massachusetts Broadcasters, Inc., 25 Mass. App. Ct. 394, 397 (1988), for the malice proposition.)

Yet the only circumstantial evidence the court discussed was “asserted police misconduct” and the plaintiff’s argument that the police had “acted maliciously toward him.” That conduct, according to the court, could not be imputed to *The Telegraph*. As that was the extent of the court’s discussion of malice, one can well question why it had any reason to address the issue.

Even if the issue of malice were properly before the court, there are sound reasons why malice should not defeat the fair report privilege. One rationale for the privilege “is the interest of the public in having information made available to it concerning official proceedings.” *Restatement (Second) of Torts § 611 comment a.*

The *Restatement* takes the position that “the privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false.” Indeed, the First Circuit in *Yohe* stated that “it is well established that the fair report privilege

‘should not be forfeited even if the party making the report knew the statements to be false.’”

A second rationale for privilege is the “agency theory,” discussed in *Medico v. Time, Inc.*, 643 Fed. 2d 134, 140-141 (3rd Cir. 1981) and cited by the *Hayes* court in adopting the fair report privilege. Since the public has the right to inspect public records and attend public proceedings, the press in reporting on those records and proceedings merely “informs the public of what they might have seen for themselves.” *See, generally*, Prosser and Keeton on *The Law of Torts* (5th ed) at 836 (1984) (“The privilege rests upon the idea that any member of the public, if he were present, might see and hear for himself, so that the reporter is merely a substitute for the public eye – this together with the obvious public interest in having public affairs made known to all”).

The New Hampshire Supreme Court significantly narrowed the scope of the fair report privilege. *Hayes* held that an article reporting on discussions at a public meeting, if a rough-and-ready summary, would come within the privilege. But in *Thomas II*, the court held that several

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The New Hampshire Supreme Court significantly narrowed the scope of the fair report privilege.

New Hampshire Supreme Court Rejects Libel-Proof Defense and Narrows Fair Report Privilege

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statements drawn from an “Initial Investigation Report” that was part of a public arrest record fell outside the privilege. The court so ruled not because the statements were an inaccurate or unfair account.

Rather, it “conclude[d] that the term ‘report,’ in the context of the fair report privilege, refers to the news report of an official action ‘not to the police record.’” Continuing, it added: “Statements 20-23 derive from records of investigations. The statements *do not involve official actions* and records of investigations are not inherently within the privilege” (emphasis added).

If *Thomas II* stands, news organizations will be left to ask what contents of a public record do qualify for the privilege, and more narrowly, what constitutes “an official action”?

Other Rulings

The court ruled on the additional issues of substantial truth, opinion, limited purpose public figure and common law qualified privilege. On substantial truth, it observed that “only rarely” could the defense be decided prior to trial because it “necessarily implies a thread of untruth” and the jury would have to decide whether “whatever er-

rors are in the statements are irrelevant in the minds of the audience.”

On the plaintiff’s status, the court noted there was some authority for holding one involved in criminal activity as a limited purpose public figure, but those cases involved “substantial public interest and controversy” and were “highly publicized.”

In contrast, the criminal activity of the plaintiff, “while serious, affected those whose homes had been burglarized, but did not otherwise garner much public attention.”

The Telegraph has requested the supreme court to reconsider its rulings on the fair report privilege.

William Chapman is a partner with Orr & Reno in Concord, NH. He filed a memorandum in support of The Telegraph on behalf of The Associated Press, Inc.; Hearst-Argyle Properties, Inc., owner of WMUR-TV/Channel 9; Keene Publishing Corp., publisher of Keene Sentinel; New Hampshire Association of Broadcasters; New Hampshire Press Association; Newspapers of New Hampshire, Inc., publisher of Concord Monitor and Valley News; Seacoast Media Group, publisher of Portsmouth Herald; and Union Leader Corporation, publisher of Union Leader. The Telegraph was represented by Richard Gagliuso. Plaintiff acted pro se.

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California Supreme Court Upholds Constitutionality of Post-Trial Injunction in Defamation Case

By Jean-Paul Jassy

On April 26, 2007, the California Supreme Court issued its decision in *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339, 57 Cal.Rptr.3d 32.

The Court unanimously affirmed the Court of Appeal's ruling that a lower court's injunction on speech issued after a defamation trial was unconstitutionally overbroad.

The Court was split 5-2, however, over whether a narrower injunction could be crafted to pass constitutional muster. The five-member majority held that a narrow injunction preventing the defendant from repeating statements found to be defamatory would not be an impermissible prior restraint on speech. The two dissenters disagreed that a narrower injunction was a permissible remedy, even following a defamation trial.

With this decision, the California Supreme Court joined the highest courts in six other States (Minnesota, Georgia, Ohio, Nevada, Alabama and Massachusetts) and three federal circuits (the Fifth, Sixth and Ninth) that permit injunctions on false speech.

Background

In 1989, Anne Lemen ("Lemen") purchased a home, the "Island Cottage," across an alley from the Balboa Island Village Inn ("Village Inn"), a bar and restaurant, which has been owned and operated since 2000 by the Toll family. Lemen lives in the cottage for part of the year, and also rents the cottage as a vacation home for part of the year.

Lemen has been a vocal critic of the Village Inn for many years, complaining of excessive noise and the behavior of inebriated customers leaving the bar. She became so exasperated that she tried to sell her property.

She filed several complaints against the Village Inn with law enforcement and regulatory agencies, and attempted to bring change through a door to door petition campaign within the community. Lemen obtained hundreds of signatures on her petition (the Court of Appeal and dissenting Supreme Court Justice Kennard put the number at 400 (out of 1100 residents on Balboa Island), but the majority of the Supreme Court put the number at only 100).

In order to document wrongdoing at the Village Inn, Lemen purportedly stood outside the bar's entrance on a regular

basis, or sat in her parked van across the street, and videotaped customers and employees entering and leaving the premises. Lemen's videotaping allegedly upset the Village Inn's customers.

Lemen allegedly confronted customers and employees entering or leaving the BIVI, calling them "whores," "drunk[s]," "satan," or "satan's spawn." Lemen purportedly called the wife of one of BIVI's owners the "madam whore." Lemen also allegedly confronted Village Inn employees, asking about their immigration status.

Lemen purportedly told various Balboa Island residents that the Village Inn sold liquor to minors, had child pornography, sold drugs, filmed sex videos, attracted "bikers," stayed open until 6:00 a.m., had prostitutes, had lesbian sex taking place, served tainted food, and was owned or influenced by organized crime.

BIVI claimed that Lemen's conduct drove away customers from the Village Inn, causing it to lose an unquantified amount of business.

BIVI sued Lemen for nuisance, defamation, interference with business, and preliminary and permanent injunction. The first amended complaint, the operative pleading, sought only injunctive relief – *i.e.*, BIVI sought no damages from Lemen.

Libel Trial & Appeal

A bench trial was conducted over five days. Twenty witnesses testified. On October 11, 2002, the trial court found that Lemen had made the aforementioned statements and that they were false and defamatory.

The trial court entered judgment for BIVI and issued a permanent injunction prohibiting Lemen and "her agents, all persons acting on her behalf or purporting to act on her behalf and all other persons in active concert and participation with her" from: (1) "initiating contact with individuals known to [Lemen] to be employees of" the Village Inn; (2) making the identified defamatory statements to "third persons"; or (3) filming within 25 feet of the Village Inn unless to document an "immediate disturbance" on Lemen's own property.

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Lemen appealed. In a published decision, the California Court of Appeal upheld the restriction on filming, but struck down the injunction's other prohibitions on speech, holding that they were overbroad prior restraints in violation of the federal and California Constitutions. See 17 Cal.Rptr.3d 352.

BIVI sought review in the California Supreme Court. The California Supreme Court granted review, but held briefing until the outcome of the United States Supreme Court's decision in *Tory v. Cochran*, 544 U.S. 734 (2005), another case stemming from a California Court of Appeal decision, which had the following question presented: "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure violates the First Amendment."

The U.S. Supreme Court vacated the injunction in that case on overbreadth grounds, but did not reach the underlying prior restraint question because the plaintiff died. *Tory v. Cochran*, 125 S.Ct. 2108, 33 Media L. Rep. 1737 (U.S. 2005).

The Majority's Decision

Writing for a majority of the Court, Justice Moreno spent a great deal of time extolling the virtues of free speech and detailing the harms caused by prior restraints, recognizing the long-standing rule, particularly in the press context, that "the publication of a writing could not be prevented on the grounds that it allegedly would be libelous."

The decision, however, limited its recognition of prior restraints to injunctions issued before trial: "an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment."

Thus, the Court held that a post-trial injunction was not a prior restraint on speech (and therefore presumptively unconstitutional), even though the injunction is designed to stop speech from occurring in the future.

The majority's failure to consider a post-trial injunction a prior restraint is flatly contradicted by United States Supreme Court precedent. The decision in the seminal prior restraint case of *Near v. Minnesota*, 283 U.S. 697 (1931), came after a trial. In *Alexander v. U.S.*, 509 U.S. 544, 550 (1993), the U.S. Supreme Court held that "permanent injunctions – i.e., court orders that actually forbid speech activities – are classic examples of prior restraints" because they involve a "true restraint on future speech." And, in *Tory*, 544 U.S. at 736, the Court unequivocally described a very similar injunction as the one in *Lemen*, also issued after a trial, a "prior restraint."

The Court drew analogies to obscenity cases. But, as dissenting Justice Werdegar points out, those authorities "provide no direct analogy to the question of permissible remedies for defamation."

Eventually, the Court turned to the question of overbreadth, and concluded that the injunction in this case was

unconstitutionally overbroad because it limited too many speakers and too much speech. The Court's conclusion, therefore, was that "the injunction, to be valid, must be limited to prohibiting Lemen personally from repeating her defamatory statements." Thus, the only permissible injunction is a narrow one.

The Court also put additional restrictions on the injunction to be sure that it "does not prevent Lemen from presenting her grievances to government officials." The Court further held that Lemen may "move the court to modify or change the injunction" if there are changed circumstances. By the same token, however, the Village Inn "could move to modify the injunction if Lemen repeated her defamatory statements in a manner not expressly covered by the injunction."

Justice Baxter concurred fully with the majority, but added that Lemen should also be able to "speak out, notwithstanding the injunction, and assert the present truth of those statements as a defense in any subsequent prosecution for violation of the injunction." The decision, Baxter emphasizes, "thus does not require a citizen to obtain government permission before speaking truthfully."

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California Supreme Court Upholds Constitutionality of Post-Trial Injunction in Defamation Case

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The Strong Dissents

Justices Joyce Kennard and Kathryn Werdegar concurred with the overbreadth holding, but advanced strong, well-reasoned dissents to the majority's permissive approach to restraints on speech.

Justice Kennard wrote: "To forever gag the speaker – the remedy approved by the majority – goes beyond chilling speech; it freezes speech." Calling the majority's analysis a "flawed syllogism," Kennard warned of the dangers of judicial censorship, and cited authorities leaving no doubt that post-trial injunctions are prior restraints on future speech.

Kennard pointed out that the facts underlying the injunction may change and "the words in which a statement is formulated may vary," but that the enjoined party is nonetheless forced to ask for permission before speaking or else face the consequences of violating a court order, which is the "essence of censorship." "Because the injunction here makes no allowance for context, it muzzles non-defamatory speech entitled to full constitutional protection."

Kennard and Werdegar chastised the majority for permitting an injunction on speech when there was no showing that money damages would be an inadequate remedy, which is a typical prerequisite for equitable relief, separate from constitutional considerations. Kennard explained that the injunction is "unnecessary," it serves no compelling public interest, and it "cannot be assumed that an award of damages would not deter Lemen."

Werdegar's concurring and dissenting opinion focuses on the majority's misapplication of *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121 (1999). In *Aguilar*, Werdegar supplied the majority vote (in a concurrence) to permit an injunction on discriminatory speech in the workplace. Werdegar points out, however, that this case is different because it does not involve a competing constitutional right (to be free from racial discrimination) and it did not involve speech to a captive audience in the workplace.

Like Kennard, Werdegar explained that "this case, of course, constitutes a prior restraint on speech," and "the legal authority cited by the majority does not authorize a court to impose an injunction against future defamation."

Conclusion

This case is a departure from well-established rules governing prior restraints, but it is not unique on the national scene. It is a relatively narrow decision that poses no threat to speech before a trial. Indeed, it strongly reaffirms the overbreadth doctrine as well as protections for speech, except where the speech has specifically been held to be defamatory.

The majority distinguished *Near* by emphasizing that in this case, unlike in *Near*, there was a private dispute. (Of course, the hundreds of petitions gathered by Lemen suggest that the dispute went beyond being merely private.)

Also, the first footnote of the majority's decision points out that this case did not involve statements about a public figure. The Court's method of distinguishing *Near* and its note about public figures suggests that the decision may not apply to statements about public figures or public disputes.

Even before this decision, it was difficult to imagine a defamation defendant – especially one with financial means facing a money judgment – repeating statements already adjudicated to be false and defamatory. Thus, injunctive relief following a defamation trial is not only unconstitutional (as so many other courts have found), but is also, as Justice Kennard put it, an "unnecessary" encroachment on free speech.

Jean-Paul Jassy and Gary L. Bostwick of Bostwick & Jassy LLP (Los Angeles, CA) were counsel for Anne Lemen in the California Supreme Court while they were with Sheppard Mullin Richter & Hampton LLP, along with Professor Erwin Chemerinsky of Duke University Law School (who argued for Lemen in the Supreme Court). Chemerinsky, Bostwick and Jassy were also counsel for Ulysses Tory in Tory v. Cochran in the United States Supreme Court. D. Michael Bush was Lemen's attorney at trial, in the Court of Appeal and in the Supreme Court. BIVI was represented by J. Scott Russo.

California Appeals Court Reverses \$3 Million Libel Award

Judgment for Failure to Reveal Source Was Abuse of Discretion

A California appellate court this month reversed a \$3 million libel judgment against a California publisher that was entered as a sanction following the publisher's refusal to answer interrogatories about the source for the allegedly libelous articles. *Bohl v. Pryke*, No. E039392, 2007 WL 1301006 (Cal. App. 4 Dist. May 4, 2007) (Hollenhorst, McKinster, King, JJ.).

The court held that under the circumstances entry of judgment as a discovery sanction was an abuse of discretion where the publisher was asserting his rights under the California shield law.

Background

The defendant Raymond Pryke is the owner and publisher of several local California newspapers, including the *Hesperia Resorter*, the *Apple Valley News*, and the *Adelanto Bulletin*. In 1999 and 2000, the newspapers published a series of articles about plaintiff Nancy Bohl, a psychologist and owner of a company that provided counseling services to San Bernadino law enforcement officers. Bohl's company provided services under contract with San Bernadino County. She developed a personal relationship with County Sheriff Gary Penrod, whom she later married.

The articles, published under headlines such as "Sleeping with Penrod Pays Off" and "Sheriff Penrod Spies on Deputies," accused Bohl of various crimes and misconduct, such as sleeping with the sheriff to obtain contracts, overbilling the county, and disclosing confidential patient information to the sheriff and other law enforcement officials.

Bohl and her company sued in September 2000, naming as defendants the various newspapers, several editors and reporters and "John Doe" defendants. Nearly one year later Pryke was identified as "John Doe 1" by plaintiffs.

Following delays because of changes in defense counsel and several unsuccessful attempts at mediation, in 2003 plaintiffs moved for terminating sanctions against Pryke for his refusal to answer interrogatories about the source(s) for the articles. Although Pryke's counsel agreed to provide the information rather than be de-

faulted, the trial court granted plaintiffs' motion, stating that defendant had "thumbed his nose" at the court. The court struck Pryke's answer, his pending anti-SLAPP motion and entered a default judgment against him.

Claims against other defendants were dismissed, clearing the way for a damages hearing in 2005 where Superior Court Judge Christopher J. Warner awarded plaintiff \$2 million in compensatory damages and \$1 million in punitive damages. See *MLRC MediaLawLetter* Oct. 2005 at 19.

Court of Appeals Ruling

After reviewing the facts and procedural history of the case at great length, the court found that "the relevant facts in this case fail to support the trial court's decision to issue terminating sanctions."

Pryke had a legitimate argument as to why he was not required to reveal the information, namely, the California reporter's shield law....Moreover, the trial court had yet to rule on the anti-SLAPP motion. Given the procedural status of the case, Pryke, with Plaintiffs' agreement, attempted to resolve the matter through mediation.... Although Plaintiffs would characterize Pryke's actions as brazen violations of the court's discovery order, there is a strong argument that they amounted to no more than the use of legitimate means for a reporter to protect his or her sources.

The court also noted that defense counsel had volunteered to provide the requested discover. Thus the default judgment suggested "an intent to punish Pryke, not accomplish the objects of discovery."

The court reversed the order striking Pryke's answer and entering a default judgment with directions to the trial court to consider whether the imposition of other sanctions against Pryke is warranted.

Pryke and the newspapers are represented by Stanley W. Hodge of Victorville, California. Plaintiff is represented by John Rowell of Cheong, Denove, Rowell & Bennett LLP in Los Angeles.

Newspaper Wins Summary Judgment in Anti-Drug Activist's Libel Claim Over Reports, Cartoon on DUI Arrest

By Christina LaRosa, Eric Dorkin, and Charles D. Tobin

A police officer's quote calling an Indiana anti-drug leader "the most obnoxious drunken female I have ever arrested," and a cartoon depicting the woman in a jail cell with O.J. Simpson, will not support a libel claim over the newspaper's coverage of her arrest, prosecution, and acquittal on a DUI charge. *Filippo v. Lee Publications, Inc.*, No. 2:05 CV 64, 2007 WL 1297013 (N.D. Ind. April 30, 2007).

Judge James T. Moody, of the U.S. District Court for the Northern District of Indiana, awarded summary judgment to *The Times*, the Lee Enterprises newspaper serving the Northwest Indiana and suburban Chicago areas. The court has also ordered the parties to brief the issue of whether, as the newspaper has requested, defense expenses are recoverable under the state's "anti-SLAPP" statute.

Summary Judgment Ruling

In its summary judgment ruling, the court held that plaintiff, Lita Filippo—former vice-chair of the Partnership for a Drug-Free Lake County, a quasi-public agency that educates youth about the dangers of drugs and alcohol—had failed to establish actual malice for news reports on her 2003 drunk

driving arrest. The court further held that the editorials and cartoons the newspaper published were protected opinion.

Filippo, who had pleaded not guilty to the DUI charge, was acquitted a year later after a jury trial. She served notice of intent to sue the county and the police, but she never brought the action, suing only *The Times*.

Judge Moody's decision identified "the most hotly disputed" in the lawsuit as the coverage of the arresting officer's description of Filippo the night he stopped her in traffic after she had left a bar.

According to the officer, Filippo threatened the his job, warned him to safeguard her jewelry because it was worth more than his annual salary, refused to take a breathalyzer test, and was belligerent to officers at the police station while she was in lockup.

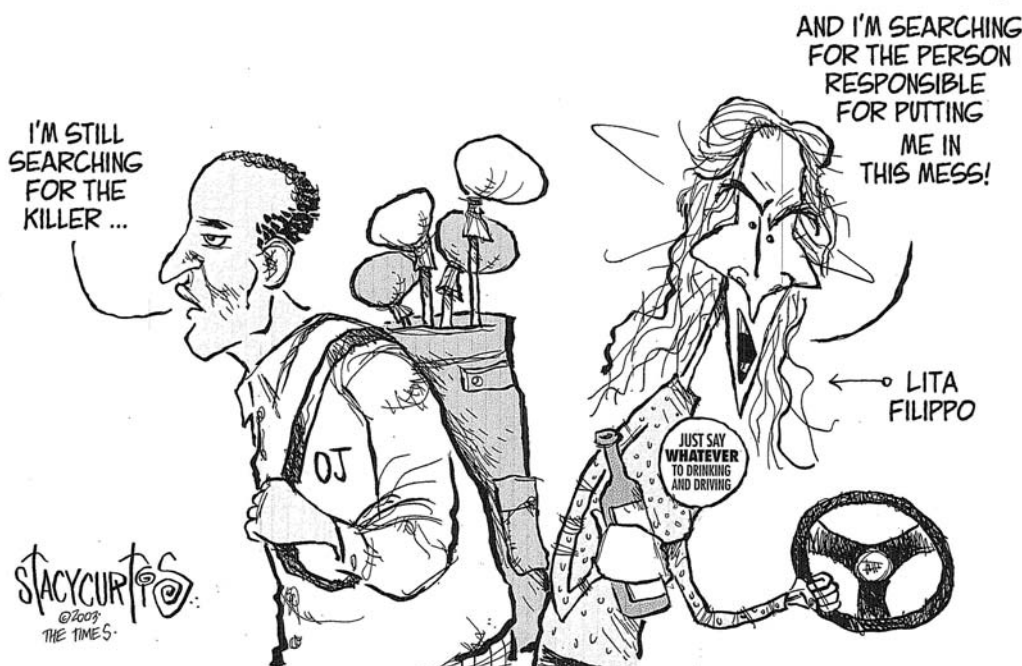
In her libel lawsuit, Filippo alleged that the newspaper publicized the DUI charge in order to boost the county sheriff's efforts to replace the Partnership for a Drug-Free Lake County with another organization controlled by him. The Partnership board consisted of members mostly appointed by the previous sheriff. In his ruling, Judge Moody noted that Filippo alleged the entire DUI arrest was a "set up."

The judge applied the actual malice standard, which, in Indiana, protects journalism touching on matters of public

concern. The court did not reach the issue of whether Filippo, as the newspaper also argued, was a public official or a public figure. After reviewing Indiana precedent, he held that the two articles, two editorials, two editorial cartoons, and letter to the editor that Filippo challenged clearly involved matters of public concern.

[T]he leadership of local drug and alcohol education efforts is of

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Newspaper Wins Summary Judgment in Anti-Drug Activist's Libel Claim Over Reports, Cartoon on DUI Arrest

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public interest to the Lake County community. This is particularly the case because the Partnership deals with local youth ... Further, if college football and stock car racing have been labeled 'matters of public interest,' it seems clearly appropriate to apply the concept to something as grim and potentially perilous to the community as drunk driving.

The court rejected Filippo's argument that an alleged violation of journalism ethics constituted actual malice. Filippo cited to the arresting officer's testimony in the criminal DUI case. There, the officer said that he did not know that his captain had put him on a speakerphone with a reporter present when the officer told the captain that Filippo was the "most obnoxious drunken female I have ever arrested" (the reporter disputed this account, testifying that he even asked the officer questions during that discussion).

Filippo also cited to the newspaper editor's testimony in the libel case that, under certain circumstances, a reporter's clandestine quoting of sources could violate the newspaper's ethics policy and render the source's information suspect.

The court, however, held that even if it credits the officer's testimony, "evidence of an extreme departure from professional journalistic standards, without more, cannot provide a sufficient basis for finding actual malice." As for the editor, the court held that his testimony "is not clear and convincing evidence from which a fact-finder could conclude that [he] subjectively entertained doubts *in this situation*." (emphasis by the court).

The court also rejected Filippo's claims relating to an editorial calling for her resignation from the Partnership, explaining that, in addition to the fact that she had no evidence of actual malice, "it is not defamatory to publish the true fact of an arrest."

Because the editorial made clear that Filippo's criminal case had not yet been resolved, the court held, no one would construe the editorial as reporting that Filippo was, if fact, guilty. Rather, "a reasonable reader would view [the editorial] as a call for plaintiff's resignation based on the fact that she, a local community anti-drug activist, was arrested for driving under the influence of alcohol."

Also notable was the court's conclusion that an editorial cartoon, published as commentary on Filippo's threat to sue

the county, was non-actionable opinion. The cartoon depicted O.J. Simpson in a jail cell toting a golf bag and saying, "I'm still searching for the killer..."

Filippo was depicted back-to-back with him, wearing a button that reads, "Just say whatever to drinking and driving," holding a steering wheel and a bottle of wine, and saying, "And I'm searching for the person responsible for putting me in this mess!"

Filippo argued that the cartoon falsely stated as fact that she had a "cavalier" attitude about the DUI charge. The court, however, concluded that, "there is no way to objectively verify or test the truth or falsity of whether plaintiff possessed a cavalier attitude toward drinking and driving."

Moreover, the court rejected the argument that the cartoon falsely implied that she was guilty, noting that an editorial on the same page made clear that Filippo merely had been arrested.

Anti-SLAPP Statute

The court invited *The Times* and Filippo to submit argument on whether the newspaper may recover its legal fees under the state's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, which permits fee awards to prevailing defendants in lawsuits arising out of free speech activities. Ind. Code 34-7-7-7 (2007). Judge Moody has not yet ruled on that issue.

Also pending before the district court is Filippo's objection to a magistrate judge's December 2006 recommendation of sanctions against Filippo and her lawyer. See *MLRC MediaLawLetter* Dec. 2006 at 21.

The magistrate judge found that Filippo lied in a deposition and evasively answered interrogatories to purposely conceal a previous DUI arrest and another alcohol-related incident. He has recommended legal fees against plaintiff and her lawyer, and that the lawyer be reported for possible disciplinary proceedings by the state bar.

Charles D. Tobin of the Washington, D.C. office of Holland & Knight LLP, and Eric Dorkin and Christina LaRosa of the firm's Chicago office, represent Lee Publications, Inc. in this matter. Mark Van Der Molen, of the Law Offices of Mark Van Der Molen, Merrillville, IN, represents the plaintiff Lita Filippo.

Newspaper Article Did Not Cost Funny Cide The Triple Crown

By **Sanford L. Bohrer and Scott D. Ponce**

The owners of the thoroughbred racehorse Funny Cide – who won the 2003 Kentucky Derby and Preakness Stakes, but finished third in the Belmont Stakes, the third race of the coveted “Triple Crown” – cannot sue *The Miami Herald* for causing the horse not to win the Triple Crown, a Florida appellate court has ruled. *Funny Cide Ventures, LLC et al. v. The Miami Herald Publishing Co. et al.*, 2007 WL 1426986 (Fla. 4th DCA May 16, 2007) (Farmer, Stone, May, JJ.).

The Fourth District Court of Appeal in West Palm Beach held that it was not “legally foreseeable” that an allegedly defamatory article published in *The Miami Herald* three weeks before the 2003 Belmont Stakes would cause Funny Cide to finish third in the Belmont, and any claim to the contrary “cannot be countenanced in the law.”

Background

On May 3, 2003, Funny Cide won the Kentucky Derby in the tenth fastest time ever. An article published in *The Miami Herald* one week after the race reported that the stewards in charge



of the Derby were meeting with the attorney for the Kentucky Racing Commission in response to a photograph that appeared to show a dark area in the winning jockey's hand as he crossed the finish line aboard Funny Cide. Two days after the article was published, the stewards concluded their investigation and publicly cleared the jockey of any wrongdoing.

On May 17, 2003 – one week after the article was published – Funny Cide won the Preakness Stakes by a huge margin, and then traveled to New York for the Belmont Stakes and a chance at the Triple Crown, which no horse has won since Affirmed in 1978. On the day of the Belmont Stakes, rains caused the track to be muddy and Funny Cide finished third.

Following their run at the Triple Crown, the owners wrote a book chronicling their experiences. In the book, which the owners and jockey reviewed for accuracy prior to publication, they wrote that Funny Cide did not win the Belmont because he could not handle the muddy track and the horse was “rank,” meaning that he was too eager to run.

The owners of Funny Cide (and the marketing rights to Funny Cide) sued, alleging that the article in *The Miami Herald* disparaged their property, Funny Cide, and caused them to lose unidentified business opportunities. When asked in written discovery requests to identify the business opportunities they lost, the owners identified none, and instead said the article caused them to lose the \$1 million purse that goes to the winner of the Belmont Stakes and the \$5 million bonus that is awarded to a Triple Crown winner.

At his deposition, the owners' managing partner explained this theory, testifying that as a result of the article the jockey pushed Funny Cide too hard in the Preakness in an attempt to vindicate himself, and because he pushed the horse too hard and won by too much in the Preakness, Funny Cide did not have enough energy during the Belmont Stakes (which was run two weeks after the Preakness) and wound up finished third.

Court Rulings

The trial court granted *The Miami Herald's* motion for summary judgment, finding no causation between an article in a newspaper and a third place finish in a horse race. The appellate court agreed and affirmed, writing in a unanimous opinion:

[D]espite the novelty and creativity of the allegations, it cannot be said that the loss of the Belmont and Triple Crown was a direct and immediate result of the *Herald* article. Simply put, it was not legally foreseeable that the article would cause the jockey to over-ride the horse in the Preakness, sapping the horse of its strength, and resulting in a third-place finish in the Belmont. Those damages are too tenuous and this claim cannot be countenanced in the law.

Sanford L. Bohrer and Scott D. Ponce of Holland & Knight LLP in Miami represented The Miami Herald before the trial and appellate courts.

Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

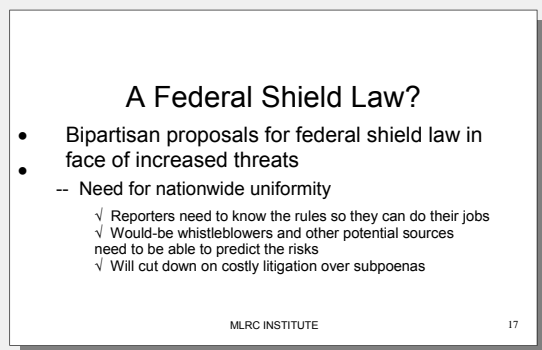
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

Maherin Gangat
Staff Attorney
Media Law Resource Center
(212) 337-0200, ext. 214
mgangat@medialaw.org



Suggestion for background reading:
Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.



“Veggie Libel” Bill Defeated In California

By Eric M. Stahl

A legislative fad of the 1990s enjoyed a brief revival in California recently, as the state Assembly considered, and ultimately rejected, an agricultural disparagement statute. The bill was defeated on May 1 by a 7-2 vote in the Assembly Judiciary Committee.

The bill, A.B. 698, would have provided an agricultural producer with a cause of action against the first person who knowingly disseminated false and unprivileged information impugning the safety of that grower's specific product. According to the legislative history, the bill was introduced in response to an incident in which the Taco Bell restaurant chain incorrectly identified the grower of green onions implicated in an E. coli outbreak.

Agricultural disparagement – or “veggie libel” – bills enjoyed brief notoriety in the 1990s. The first ones were passed in the wake of the controversy surrounding the 1989 “60 Minutes” broadcast about health concerns related to Alar, a chemical growth regulator sprayed on apples. The broadcast led to a temporary but severe drop in apple sales.

A class of Washington apple growers brought a disparagement suit against CBS, which ultimately was dismissed on summary judgment on the ground that the plaintiffs could not establish the falsity of the broadcast. *See Auvil v. CBS “60 Minutes,”* 836 F. Supp. 740 (E.D. Wash. 1993), *aff’d*, 67 F.3d 816 (9th Cir. 1995).

The incident also spurred legislation. Between 1991 and 1997, 13 states passed statutes making it a tort (and, in Colorado, a crime) to disseminate disparaging information about agricultural products. But in the last 10 years, no agricultural disparagement statute has been enacted. The California legislature last debated such a bill in 1995.

The veggie libel laws have been criticized as special interest legislation aimed at chilling scientific and public policy debate about food safety. The enacted statutes also raise a host of constitutional concerns. Some permit liability or punitive damages without a showing of actual malice. Most presume the falsity of any information not based on “reliable, scientific facts,” or some similar formulation; some require defendants to convince a factfinder of the scientific “reliability” of their assertions.

The laws provided a cause of action for any producer of the generic product at issue, without regard for whether the allegedly disparaging statements were “of and concerning” plaintiff or its specific products.

The proposed California statute actually avoided some of these constitutional pitfalls. The bill required a showing of actual malice, and provided that plaintiff bear the burden as to each element of the tort. It also would have provided a claim only if “the disparagement clearly concerns the product specifically produced by the plaintiff, and is not applicable to the product as it is generally produced.”

Indeed, one of the criticisms offered by opponents of the bill was that it added nothing to existing legal protections against false statements, and instead would serve only to intimidate those who might raise health or safety concerns about food products.

In addition, the California bill, like all of the veggie libel legislation, is constitutionally suspect because it violates the principle of viewpoint neutrality in government regulation of speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The laws restrict not disparaging speech generally, but only speech that disparages agricultural products – and it entitles the agricultural industry to dispute health and safety concerns about its products by the usual rules of free expression, while saddling critics with potential liability if they cannot prove the scientific reliability of their statements.

The California bill also would have made constitutionally questionable distinctions based on the identity of the speakers. The bill contained an exemption for health or safety concerns raised “by an employee of the producer of that product.” Presumably this exemption was a recognition of the threat to free speech, and to the public health, if those close to the food production process faced liability for speaking out about threats they may witness. But others equally involved in food production, such as contractors and employees for packagers or distributors, enjoyed no such protection.

Eric M. Stahl is a partner with Davis Wright Tremaine LLP in Seattle.

Web Links Not a Republication; But Change to Website Header May Constitute New Publication

In a non-media case growing out of a soured business relationship, a California federal court addressed two interesting questions about the application of the single publication rule to the Internet. *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, No. 02 CV 2258, 2007 WL 935703 (S.D. Cal. March 7, 2007) (Miller, J.).

At issue were allegedly libelous statements made after the unhappy dissolution of a business agreement between plaintiff, a manufacturer of printer inks, and the defendant retailer.

After the business relationship ended, defendant allegedly posted a number of statements on the Internet criticizing plaintiff and its product. Plaintiff sued for both libel and trade libel.

One of plaintiff's claims was that a hyperlink created by defendant to a website containing criticism of plaintiff constituted an actionable republication of an alleged defamatory statement. The district court rejected the argument. It first reaffirmed that the single publication rule applies to publication on the Internet. See *Traditional Cat Ass'n v. Gilbreath*, 118 Cal. App. 4th 392 (2004). And it then noted that plaintiff cited no authority for the argument that a hyperlink constituted a republication. The court reasoned that "such linking is more reasonably akin to the publication of additional copies of the same edition of a book, which is a situation that does not trigger the republication rule." *Sundance*, 2007 WL 935703 at *7.

The plaintiff also argued that a change to a web page heading constituted republication. One of the allegedly defamatory statements first appeared on a web page with the heading "Piezography BW" (the brand name of an ink for fine photography printing). The web page was later modified with the header "Piezography Bwicc" which the defendant said reflected a new product called "BW ICC."

The court stated that changing a header on the web page "may create a genuine issue of fact as to whether the statements were republished," but found that plaintiff had not produced enough evidence to show that such republication occurred within the applicable statute of limitations.

Defendants are represented by Arnold E. Sklar, Ropers Majeski Kohn & Bentley, of Los Angeles, California. Plaintiffs are represented by Philip H. Dyson, of La Mesa, California.

Ninth Circuit Reinstates Housing Discrimination Lawsuit Against Roommate Website

Divided Court Rejects § 230 Defense for User Created Profiles

In an interesting decision this month, the Ninth Circuit, in a divided opinion, reinstated a housing discrimination lawsuit against a roommate matching website, holding that it was not entitled to immunity under § 230 for user profiles created through online questions and prompts. *Fair Housing Council v. Roommate.com LLC*, No. Civ. 04-56916, 2007 WL 1412650 (9th Cir. May 15, 2007) (Kozinski, Reinhardt, Ikuta, JJ.).

The Ninth Circuit had previously considered the issue of immunity for user-generated profiles in *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119 (9th Cir.2003) (Thomas, Paez, Reed, JJ.), where a different panel of the Court unanimously held that a dating website could not be held treated as the creator of a fabricated user profile. Although the false profile was created by responses to the website's detailed online questions and prompts, the Court held that the website was not the creator of the resulting content. "Matchmaker cannot be considered an 'information content provider' under the statute," the Court concluded, "because no profile has any content until a user actively creates it." The issue therefore appeared to be settled.

Judge Kozinski, though, disagreed, holding that Roommate.com was not entitled to immunity for its user profiles because it created "new information" by categorizing and presenting user created information. Judge Reinhardt agreed and would have further treated Roommate.com as the creator of all portions of the user-created profiles, including personal essays written by users. Judge Ikuta wrote a separate opinion, curiously labeled as a concur-

rence, in which she dissented from the Court's holding, stating that *Carafano* was binding precedent.

The defendant will seek rehearing.

Background

Roommate.com, LLC ("Roommate") operates an online roommate matching website at www.roommates.com. The website helps individuals find roommates based on their descriptions of themselves and their roommate preferences. Users respond to a series of online questions by choosing from answers in drop-down and select-a-box menus.

The questionnaire asks users for information about themselves and their roommate preferences based on such characteristics as age, sex and whether children will live in the household. Users can then provide "Additional Comments" in an open-ended essay prompt.

Users can search for compatible roommates and send "roommail" messages to other mem-

bers. Roommate also sends email newsletters to members seeking housing, listing compatible members who have places to rent out.

In 2003, the Fair Housing Council of San Fernando Valley and Fair Housing Council of San Diego sued Roommate for violation of the preferential advertising provision of the Fair Housing Act ("FHA"), which makes it unlawful

To make, print, or publish, or cause to be made, printed, or published any notice, statement, or ad-

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Ninth Circuit Reinstates Housing Discrimination Lawsuit Against Roommate Website

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vertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any preference, limitation, or discrimination.

42 U.S.C. § 3604(c).

Plaintiffs also alleged violation of the parallel California statute, the Fair Housing and Employment Act, Cal. Govt. Code § 12955, and for alleged violation of the state Unruh Civil Rights Act, Cal. Civ. Code § 51, and unfair business practices statute, Cal. Bus. & Prof. Code § 17200, and for negligence.

Plaintiffs claimed that Roommate violated federal and state housing laws by asking users their sex, their sexual preference, and whether they lived or would live with children. Plaintiffs also complained about statements made by users in the “Additional Comments” essay portion of their profiles. For example some of the essays include statements such as: “looking for an ASIAN FEMALE OR EURO GIRL”; “I’m looking for a straight Christian male”; “I am not looking for freaks, geeks, prostitutes (male or female), druggies, pet cobras, drama, black muslims or mortgage brokers”; and “Here is free rent for the right woman ... I would prefer to have a Hispanic female roommate so she can make me fluent in Spanish or an Asian female roommate just because I love Asian females.”

Plaintiffs also complained about user created nicknames such as “ChristianGrl,” “Asianpride,” “Whiteboy80,” “Latina22,” and “Blackboi.”

District Court Decision

After the parties engaged in discovery they brought cross-motions for summary judgment. Roommate argued that plaintiffs’ claims over the user profiles were barred by the § 230 of the Communications Decency Act, which states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

Roommate also argued that plaintiffs’ claims were barred by the First Amendment on the grounds that users of the site have a constitutionally protected right of intimate association, and regulation of speech exercising that right runs afoul of the First Amendment by punishing speech based on content and – even if viewed as commercial speech – does not meet the requirements of *Central Hudson*.

The district court granted summary judgment to Roommate on the FHA claims on § 230 grounds without addressing the First Amendment defenses. And the court dismissed the state law claims without prejudice. See 2004 WL 3799488, 33 Media L. Rep. 1636 (C.D.Cal. Sep 30, 2004) (Anderson, J.).

The district court first held that the FHA was not among the types of laws specifically exempted from the scope of the CDA. Thus § 230 shielded Roommate from liability to the extent that plaintiffs were seeking to make Roommate liable for the content provided by its users.

The district court then held that the complained of content was created by users, notwithstanding that the user profiles were created in response to Roommate’s online prompts and questions, relying on *Carafano*. There the Court unanimously affirmed dismissal of invasion of privacy, defamation and negligence claims against Matchmaker.com over a fabricated dating profile which was generated by a user’s responses to detailed online questions and prompts.

The Ninth Circuit reasoned that Matchmaker.com could not be liable for the profile “because no profile has any content until a user actively creates it... the fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a ‘developer’ of the ‘underlying misinformation.’” *Carafano*, 339 F.3d at 1124.

Confronted with a very similar situation the district court in Roommate not surprisingly held that “*Carafano* compels the conclusion that Roommate cannot be liable for violating the FHA arising out of the nicknames chosen by its users, the free-form comments provided by the users, or the users’ responses to the multiple choice questionnaire.”

Ninth Circuit Decision

Judge Kozinski first discussed *Carafano*, suggesting it could be limited to unique facts where a “prankster” provided

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Ninth Circuit Reinstates Housing Discrimination Lawsuit Against Roommate Website

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information that was not solicited by the operator of the website. He then went on to surmise in dicta that *Carafano* would not control where defamatory, private or otherwise tortious or unlawful information was provided by users in direct response to questions and prompts from the operator of the website.

Imagine, for example, www.harrassthem.com with the slogan “Don’t Get Mad, Get Even.” A visitor to this website would be encouraged to provide private, sensitive and/or defamatory information about others – all to be posted online for a fee. To post the information, the individual would be invited to answer questions about the target’s name, addresses, phone numbers, social security number, credit cards, bank accounts, mother’s maiden name, sexual orientation, drinking habits and the like. In addition, the website would encourage the poster to provide dirt on the victim, with instructions that the information need not be confirmed, but could be based on rumor, conjecture or fabrication.

By providing a forum designed to publish sensitive and defamatory information, and suggesting the type of information that might be disclosed to best harass and endanger the targets, this website operator might well be held responsible for creating and developing the tortious information. *Carafano* did not consider whether the CDA protected such websites, and we do not read that opinion as granting CDA immunity to those who actively encourage, solicit and profit from the tortious and unlawful communications of others.

But there was no need to answer these questions about the “outer limits” of § 230 immunity because, Judge Kozinski concluded, Roommate was responsible, in part, for creating new information by channeling and sorting user information.

According to Judge Kozinski, Roommate created new information by: 1) allowing members to search and obtain the profiles of members with compatible preferences; and 2) sending room-seekers email notifications of listings that matched their profiles.

Roommate’s “search mechanism and email notifications mean that it is neither a passive pass-through of information

provided by others nor merely a facilitator of expression by individuals.”

Section 230, however, did immunize Roommate from liability for comments written by users in the “Additional Comments” portion of their profiles – the section of the profile where users are asked to personalize their profile “by writing a paragraph or two describing yourself and what you are looking for in a roommate.”

This open-ended question “does not prompt, encourage or solicit any of the inflammatory information provided by some of its members” and the information provided is not used to “limit or channel access to listings.”

Concurrence & Dissent

Judge Reinhardt largely agreed with Kozinski, but would have treated Roommate as the creator of the entire user profile, including the “Additional Comments” section which is presented to other users as a whole. “There is no justification,” he wrote, “for slicing and dicing into separate parts the material that Roommate elicits and then channels as an integral part of one package of information to the particular customers to whom it selectively distributes that package.”

Judge Ikuta, a former law clerk to Judge Kozinski, essentially dissented from the holding on § 230 – though she labeled her separate opinion a concurrence. *Carafano* was binding precedent, according to her opinion. And unless a website provides “the essential published content it is not an information content provider.”

Timothy L. Alger of Quinn Emanuel Urquhart Oliver & Hedges, LLP in Los Angeles represents defendant Roommates.com, LLC in this case. Patrick J. Carome, Samir Jain and C. Colin Rushing, Wilmer Cutler Pickering Hale & Dorr, LLP, Washington, D.C., filed an amicus brief in support of defendant on behalf of Amazon.com, Inc., America Online, Inc., Ebay Inc., Google Inc., Tribune Company, Yahoo! Inc., Netchoice and United States Internet Service Provider Association. Plaintiffs are represented by Gary Rhoades, Rhoades & Al-Mansour, Los Angeles; Michael Evans, Costa Mesa; and Christopher Brancart, Brancart & Brancart, Pescadero, CA.

Perfect 10 Scores A Not-So-Perfect Rating By The Ninth Circuit

Court Vacates Preliminary Injunction Over Google Thumbnails

By Kent Raygor

On May 16, 2007, the Ninth Circuit ruled in two very closely-watched cases, *Perfect 10, Inc. v. Google Inc.* and *Perfect 10, Inc. v. Amazon.com, Inc.*, that involved the potential liability of search engine companies for (1) providing copyrighted images to users, and (2) linking to third-party websites where infringing images might be found. See 2007 WL 1428632 (9th Cir. 2007) (Ikuta, Hawkins, Holcomb Hall, JJ.).

The Ninth Circuit vacated a preliminary injunction barring Google from displaying thumbnail copies of Perfect 10's nude models in Google search results.

The Ninth Circuit's opinion is very complex, and is very much tied to the particular facts presented by these two cases. In addition, it is an appeal of the granting of a preliminary injunction, and not on the final merits after a trial, so the case will likely continue and be the subject of future decisions and commentary.

Although not a total victory, the search engine industry came out ahead in a decision that helps define the limits of liability of search engines for (1) posting copyrighted images as part of their search services, and (2) linking to third-party websites where one can find the infringing images.

The Court refined the tests for fair use in the search engine context, made it harder for plaintiffs to make a case of direct infringement against search engine companies, and articulated a new test for establishing contributory liability in such cases. If Perfect 10, and copyright owners generally, got anything from this decision, it is likely in the Court's ruling on Perfect 10's contributory and vicarious liability claims.

Background

Perfect 10 markets copyrighted images of nude models. It sells a magazine containing the images, operates a subscription website where members can view them, and licenses a third party to sell reduced-size images for use on cell phones. In the *Google* case, Perfect 10 argued that Google violates its copyrights by providing thumbnail im-

ages to users, linking to infringing sites where full-sized images can be found, and encouraging and inducing others to infringe Perfect 10's rights. The *Amazon.com* suit arose from an agreement between Amazon.com and Google whereby Google provided image search results to Amazon.com users that included thumbnails of Perfect 10 images.

Google has a search tool called "Google Image Search" that indexes third-party websites and images stored in them. In response to a user's search request, Google provides small, low-resolution thumbnails of full-sized images stored on third-party computers. When a user clicks on the thumbnail image in Google's search results, Google's software instructs the user's computer to open a window where text and graphics from Google, including the thumbnail image, appear, and provides a computer address that tells the user's computer where a full-sized version of the image can be found on a third-party website.

The user's computer can then download that full-size image from that third-party website and it will appear in the bottom section of the window on the user's screen. This is called "in-line linking." Google does not store the full-size images and does not communicate them to the user. Google simply provides the instructions that direct the user's computer to the third-party website where it can get the image.

In the course of its website searching and indexing activities, Google's software stores webpage content in its cache (computer memory). This is done to facilitate Google's search engine's organization and indexing of web pages. The information stored reflects the webpage as it appeared at the time Google indexed the page, but does not store any images from the third-party webpages.

Google also generates revenue through a program called "AdSense." A website owner can register as a Google AdSense partner, which allows Google to place content-relevant advertising on a user's screen when his or her computer accesses particular websites. Perfect 10 argued that if an AdSense partner infringes a Perfect 10 copyright, then Google benefits because it received revenue from the AdSense partner.

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Perfect 10 Scores A Not-So-Perfect Rating By The Ninth Circuit

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District Court Proceedings

Perfect 10 sought a preliminary injunction barring Google and Amazon.com from copying, distributing, displaying or otherwise infringing, or contributing to the infringement of, the copyrights in Perfect 10's photographs, and from linking to websites that provide full-size versions of those photographs. The District Court enjoined Google from displaying the thumbnail versions of Perfect 10's images, but did not enjoin Google from linking to third-party websites that displayed full-size versions, nor did it enjoin Amazon.com from giving users access to information provided by Google. Both Perfect 10 and Google appealed.

Ninth Circuit Decision

The District Court's injunction against Google's use of the thumbnails generated a lot of press and commentary when it was issued, and caused a lot of hand-wringing from search engine companies and ISPs over the chilling effect such an injunction would have on their activities and on innovations by them and others in the cyberspace world. The Ninth Circuit has now given them cause for a sigh of relief, and has vacated that injunction.

The Ninth Circuit's opinion is complex, but also very focused on the particular facts presented by the dispute raised in these two cases. So, it will remain to be seen just how it might be applied for precedential effect in other contexts. But the Court took the opportunity to clarify some of the infringement tests articulated in previous cases; heightened the importance of fair use, the safe harbor provisions of the DIGITAL MILLENNIUM COPYRIGHT ACT ("DMCA"), and other defenses raised in opposition to a preliminary injunction request.

It also made it much more difficult to assert a case of direct infringement against search engine companies; and raised the specter of the potential for increased liability under theories of secondary liability for contributory and vicarious infringement. Overall, this was a moderately good win for the search engine and ISP industries.

Burden On The Party Seeking An Injunction

At several points in the opinion, the Ninth Circuit pointed out that Perfect 10 had failed to introduce evidence showing that it was likely to prevail on the merits of a particular claim or

element. With that in mind, it articulated exactly what burden a party who is seeking a preliminary injunction must meet.

Google asserted two primary defenses: (1) its use of the images was protected by the doctrine of fair use, as codified in 17 U.S.C. § 107; and (2) any liability it might have was limited by the safe harbor provisions in Section 512 of the DMCA.

The Ninth Circuit noted a conflict of authority as to whether a party that bears the burden of showing a likelihood of success on the merits in order to obtain a preliminary injunction also bears the burden of demonstrating a likelihood of success in overcoming a fair use defense.

The Court held that the party seeking the injunction bears *both* burdens: "In order to demonstrate its likely success on the merits, the moving party must necessarily demonstrate it will overcome defenses raised by the non-moving party." In the copyright context, this means that Perfect 10 had the burden of showing that it would overcome Google's fair use and DMCA defenses, making it more difficult for a plaintiff to obtain a preliminary injunction.

Direct Infringement

Perfect 10 asserted that Google directly infringed the *display* and *distribution* rights in the photographs (17 U.S.C. §§ 106(3) and (5)). The Ninth Circuit affirmed the District Court's finding that found that Perfect 10 had made a *prima facie* case of direct infringement of the *display* right arising from Google's use of the *thumbnail* images, but reversed the District Court's finding that Google would not prevail on its *fair use defense*. In other words, the Ninth Circuit, while agreeing that a direct infringement finding was likely, held that Google would likely prevail on a fair use defense, thereby shielding it from any liability.

As to Google's links to the *full-size images*, the Ninth Circuit affirmed the District Court's finding that Perfect 10 was *not* likely to prevail in showing direct infringement of either the display or distribution right.

The Display Right

The thumbnail images: The Ninth Circuit stated that the issue of when a computer displays a copyrighted work for purposes of 17 U.S.C. §§ 106(5) was a matter of first impression in the Circuit. It found that "a person displays a photographic image

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Perfect 10 Scores A Not-So-Perfect Rating By The Ninth Circuit

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by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer's memory." There was no dispute that Google's computers stored thumbnail versions of Perfect 10's copyrighted images and communicated those images to Google's users. Therefore, Perfect 10 stated a *prima facie* case of direct infringement of the display right for the thumbnail images.

The full-sized images: The full-sized images were treated very differently. Because Google never stores or displays copies of them, and instead merely links to third-party websites where they can be found, the Court confirmed that Google cannot be guilty of direct infringement of the display right. Merely providing HTML instructions to a user's computer directing that computer to a third-party website that stores the image is not equivalent to showing a copy. Although it might lead to *contributory* infringement liability, as explained in more detail below, it is not enough to constitute *direct* infringement liability.

An open issue: In what could signal a fruitful area for future activity by litigants and the courts, the Ninth Circuit pointedly noted that Google *actively* initiates and controls the storage and communication of the thumbnail images. But it expressly left open the question of whether there would be infringement if someone who merely *passively* owns and manages an Internet bulletin board or similar system is guilty of direct infringement of the display and distribution rights when the users of the bulletin board post infringing works.

The Distribution Right

The Ninth Circuit then held that Google also does not infringe the distribution right by linking to the full-size images because it never actually disseminates a copy. The Court rejected Perfect 10's argument, based on *Hotaling v. Church of Jesus of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), and *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), that merely making images "available" violates the distribution right. Unlike the defendant in *Hotaling*, Google does not own a collection of Perfect 10 full-size images, and unlike the defendant in

Napster, Google does not deliver the Perfect 10 full-size images to the computers of people using Google's search engine; it merely indexes them.

Google's Fair Use Defense

Returning to the Court's finding that Perfect 10 had stated a *prima facie* case of direct infringement of the display right arising from its use of the thumbnails, the Ninth Circuit then held that Google nevertheless was likely to win on its fair use defense, and thereby shield itself from any liability for direct infringement. It then vacated the District Court's injunction.

Before going through a detailed examination of the four fair use factors set forth in 17 U.S.C. § 107, the Court reiterated at some length the public policy behind the fair use doctrine. It was that public policy that primarily informed its decision on Google's fair use defense.

The Court noted that the primary purpose behind the fair use doctrine is to encourage the development of new ideas that build on earlier ideas. It noted that courts are required to avoid a rigid application of the copyright laws when doing so would stifle the very creativity the law is designed to foster. Rather, the courts must be flexible in applying a fair use analysis, and must do so with the goal of serving the public interest.

In its fair use analysis, the Court heavily relied on its earlier decision in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), where it held that an Internet search engine's use of thumbnail images of a photographer's work, provided in response to user search queries, was a fair use, based on the transformative nature of a search engine and its benefit to the public, and the fact that providing the thumbnails did not harm the photographer's market for his images. In going through the four fair use factors, the Court found the situation presented by Google's use of the thumbnail images to be very similar.

(1) The purpose and character of the use

The Court stated that the central purpose of this inquiry is to determine whether and to what extent the new work is transformative: "A work is 'transformative' when it does not 'merely supersede the objects of the original creation' but rather 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or

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message.” If the new work supersedes the use of the original, then it is likely not a fair use.

The Court rejected Perfect 10’s argument that providing access to infringing websites cannot be deemed transformative and is inherently not fair use. It found that Google operates a comprehensive search engine that only incidentally indexes infringing websites. That does not amount to an abuse of the good faith and fair dealing underpinnings of the fair use doctrine.

It also found that Google’s use of thumbnails is “highly transformative”. A search engine transforms an image into a pointer directing a user to a source of information. It provides a social benefit by incorporating an original work into a new work, namely an electronic reference tool.

This is true even though Google incorporates an entire Perfect 10 image in the search engine results, because the copy serves a different function than the original work.

The District Court had discounted the transformative nature of Google’s use because Google’s thumbnails might supersede Perfect 10’s ability to sell its reduced-size images for use on cell phones, and because Google’s use was commercial in the sense that it might have led users to Google AdSense partners whose websites contained infringing images. The Ninth Circuit weighed these concerns against Google’s transformation of the thumbnails into a comprehensive search engine use and the extent to which Google’s search engine promotes the purposes of copyright and serves the public interest.

It found that the two concerns raised by Perfect 10 did not override the highly transformative nature of Google’s use: “[W]e conclude that the transformative nature of Google’s use is more significant than any incidental superseding use or the minor commercial aspects of Google’s search engine and website.” The Court found that the District Court erred in determining this factor in favor of Perfect 10.

(2) *The nature of the copyrighted work.*

The Court recognized that authors have a significant right to determine when and where to first publish their work, but exhaust that right when the work is first published in *any* medium.

Here, Perfect 10 had previously made the images available on the Internet to subscribers. It therefore was no longer entitled to enhanced protection available for an unpublished work. As a result, this factor only weighed slightly in favor of Perfect 10.

(3) *The amount and substantiality of the portion used.*

Relying on *Arriba*, the Court held that the use of the entire photograph was reasonable in light of the purpose of a search engine. It is necessary to copy the entire image in order to allow users to recognize the image and decide whether to pursue more information about it or the originating website. This factor was neutral and did not favor either party.

(4) *The effect of the use on the market.*

The Court held that even if the intended use of an image is for commercial gain, a presumption of a likelihood of market harm does not arise when a work is transformative because market substitution is at least less certain and market harm may not be so readily inferred. Without that presumption, Perfect 10 could not prove market harm because it did not introduce any evidence that Google’s thumbnails would harm Perfect 10’s market for full-size images, nor any evidence that Google users had downloaded thumbnail images for cell phone use. Therefore, the harm to Perfect 10’s market was hypothetical. This factor was neutral and did not favor either party.

Weighing all of the factors against the purposes of copyright, the Court found that Google provides a significant benefit to the public, and has put the images to a fundamentally different use than the use intended by Perfect 10. Because Perfect 10 is unlikely to be able to overcome Google’s fair use defense, the Court vacated the injunction against Google’s use of the thumbnails.

Contributory Or Vicarious Liability

The Ninth Circuit raised the stakes for potential increased liability for contributory and vicarious infringement. A requirement for liability under either theory is direct in-

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fringement by a third party. It was undisputed that third-party websites directly infringed by reproducing, displaying, and distributing unauthorized copies of Perfect 10 images.

The Court, however, rejected Perfect 10's arguments that (1) Google's search engine users directly infringed by storing full-size infringing images on their computers, finding that Perfect 10 failed to provide evidence to support this claim, and (2) users who link to infringing websites automatically make cache copies of full-size images, finding that such local caching was a fair use. The Court then refined the tests for determining whether there could be liability for contributing to or profiting from and failing to stop such direct infringement in the search engine context.

Contributory Liability

The Court focused on two types of contributory liability described in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005): (1) actively *encouraging* or *inducing* direct infringement by third parties through specific acts; and (2) *distributing a product* that distributees use to infringe copyrights, if the product is *not capable of "substantial" or "commercially significant" non-infringing uses*. The Court first addressed the second type and held that Google could not be held liable for contributory infringement solely because the design of its search engine might facilitate infringement, nor because Google did not develop technology that would enable its search engine to automatically avoid infringing images.

Turning to the first type of contributory liability, the Court stated that Google could not be guilty of *inducing* infringement as it had not promoted its service as a way to infringe copyrights. As to *actively encouraging infringement*, the Court focused on the *intent* requirement.

Intent can be imputed. Under *Grokster*, "an actor may be contributorily liable for intentionally encouraging direct infringement if the actor knowingly takes steps that are substantially certain to result in such direct infringement." The Court carefully examined *Grokster*, *Napster*, and *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 12361 (N.D. Cal. 1995),

to refine the test in the cyberspace context, and announced the following:

"[A] computer system operator can be held contributorily liable if it 'has *actual* knowledge that *specific* infringing material is available using its system', and can 'take simple measures to prevent further damage' to copyrighted works, yet continues to provide access to infringing works." (Citations omitted.)

The Court found that Google *could* be contributorily liable if it had knowledge that infringing images were available using its search engine and could have taken simple measures to prevent further damage to Perfect 10's copyrighted works, yet failed to take such steps. It remanded to the District Court for further proceedings directed at the adequacy of Perfect 10's notices to Google and Google's responses, and a determination of whether there were reasonable and feasible means for Google to refrain from providing access to infringing images.

Vicarious Liability

One infringes vicariously by profiting from direct infringement by third parties while declining to exercise a right to stop or limit it. The Court stated that, to succeed on a claim for vicarious liability, "a plaintiff must establish that the defendant exercises the requisite control over the direct infringer and that the defendant derives a direct financial benefit from the direct infringement."

As to the *control* element, the Court stated that "a defendant exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so." Therefore, in order to prevail Perfect 10 had to demonstrate that it was likely to establish that Google has the right and ability to stop or limit the infringing activities of third-party websites, and that Google derives a direct financial benefit from such activities. The Court found that Perfect 10 had not met that burden.

Google's DMCA Defense

The Court noted that the limitations on liability in Title II of the DMCA, 17 U.S.C. § 512, protect direct infringers,

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as well as secondary infringers under contributory and vicarious liability theories. The parties disputed whether Perfect 10's DMCA notices were adequate. The Court remanded back to the District Court to determine whether Perfect 10 could overcome Google's DMCA defense.

Amazon.com

The Ninth Circuit confirmed that Perfect 10 had failed to show a likelihood of success in establishing any liability on Amazon.com's part for direct or vicarious infringement, for essentially the same reasons Perfect 10 would not likely prevail against Google, with the exception that Amazon.com was further removed from any direct infringement liability because it did not index and store the thumbnails, and only linked to Google's database that contained those images.

Like Google, however, Amazon.com *might* be liable for contributory infringement, but the District had failed to

consider whether Amazon.com had actual knowledge that specific infringing material is available using its system, whether it could have taken simple measures to prevent further damage to copyrighted works yet continued to provide access to infringing works, and whether Amazon.com could assert a DMCA defense. The Court remanded for further consideration on these points.

Overall score: Perfect 10: 3; Search Engines: 7.

Kent R. Raygor is a partner with Sheppard Mullin Richter & Hampton LLP in Los Angeles (Century City). Google was represented by Andrew P. Bridges and Jennifer A. Golinveaux and Gene C. Schaerr, Winston & Strawn LLP. Amazon was represented by Townsend and Townsend and Crew LLP, San Francisco, CA. Perfect 10 was represented Mitchell, Silberberg & Knupp LLP, Los Angeles; Berman, Mausner & Resser, Los Angeles; and Daniel J. Cooper, Perfect 10, Inc.



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Ninth Circuit Clarifies Sweep of Digital Millennium Copyright Act and CDA

By Jay M. Spillane and Raphael Cung

Recently the Ninth Circuit clarified the scope of both the Digital Millennium Copyright Act (“DMCA”), and Section 230 of the Communications Decency Act in *Perfect 10, Inc. v. CCBill, LLC*, 481 F.3d 751 (9th Cir. 2007) (Reinhardt, Kozinski, M. Smith, Jr., JJ.).

Perfect 10, the owner of print and online adult entertainment, sued CCBill, a payment processing company, and CWIE, a web hosting company. It claimed that CCBill and CWIE were secondarily liable for copyright infringement arising from the display of Perfect 10’s copyrighted content on websites maintained by defendants’ clients.

Perfect 10’s claims were largely rejected. Significantly, the Ninth Circuit held:

- For purposes of initial eligibility for the DMCA’s § 512 safe harbor provisions, only DMCA-compliant notifications need be considered in assessing a service provider’s actual knowledge of alleged infringing activity.
- The safe harbor for transitory digital network communications, 17 U.S.C. § 512(a), applied to CCBill’s automated payment processing transactions.
- The exception to CDA immunity for laws “pertaining to intellectual property” was limited to federal intellectual property laws, and thus the trial court erred in failing to apply CDA immunity to Perfect 10’s state law right of publicity claim.

Background

Perfect 10 is the publisher of *Perfect 10* adult print magazine, and the owner of its associated website, www.perfect10.com. Perfect 10 owns thousands of images of models, many of whom have assigned their rights of publicity to Perfect 10. CCBill provides the technology by which consumers can make on-line credit card payments to purchase subscriptions or memberships to websites. CWIE provides web-hosting and connectivity services to website owners.

Before the litigation, Perfect 10 sent letters and emails to CCBill and CWIE asserting that their clients were infringing Perfect 10’s copyrights, engaging in unfair competition, and violating Perfect 10’s rights of publicity.

Perfect 10 also alleged that CCBill and CWIE were ignoring “red flags” of infringing activity, including websites such as “illegal.net” and “stolencelebritypics.com,” as well as so-called “password-hacking” websites, which supposedly provide user names and passwords to access secure pages of adult websites.

Perfect 10 filed claims against CCBill, CWIE, and other parties in federal court, asserting claims for copyright and trademark infringement, unfair competition, violation of rights of publicity, and related theories. The district court bifurcated the proceedings, with the first phase devoted to defenses under the DMCA and CDA. CCBill and CWIE moved for summary judgment under those statutes.

Section II of the DMCA is the Online Copyright Infringement Liability Limitation Act (the “OCILLA”). It provides safe harbors against money damages liability for alleged copyright infringement arising from: (a) “transitory digital network communications”; (b) “system caching”; (c) “information residing on system or networks at the direction of users”; and (d) “information location tools.” 17 U.S.C. §§ 512(a)-(d).

CCBill claimed entitlement to the safe harbor of Section 512(a) on the grounds that its alleged liability arose from automated online transitory communications. CCBill asserted that those communications were initiated by third-party consumers and processed payment data and transmitted user name and password information between the consumers and CCBill’s website clients. CCBill also asserted that to the extent its alleged liability was based upon hypertext links sent to consumers confirming their transactions and inviting them to begin viewing the websites to which they had subscribed, it was also protected under Section 512(d).

CWIE, as a website hosting company, claimed entitlement to the safe harbors of Section 512(c).

In response to those assertions, Perfect 10 claimed that Section 512(a) was limited to “backbone” providers who acted as a “conduit” for the transmission of infringing information, a category into which CCBill supposedly did not fit. And while Perfect 10 conceded that CWIE conducted Section 512(c) functions, it claimed CWIE ignored actual and constructive knowledge of infringing activity.

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CCBill and CWIE further contended they were immune from Perfect 10's state law claims under Section 230(c)(1) of the CDA. Perfect 10 countered that its state law claims were "intellectual property" claims, or at least involved intellectual property, and thus were excepted from CDA immunity under Section 230(e)(2).

District Court Ruling

The District Court granted summary judgment in favor of CCBill and CWIE on most claims. *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077 (C.D. Cal. 2004), *rev'd in part & aff'd in part*, 481 F.3d 751 (9th Cir. 2007).

First, the District Court held that both CCBill and CWIE met the initial requirements for DMCA eligibility, 17 U.S.C. § 512(i). The Court ruled that Perfect 10's notices of infringement did not meet DMCA requirements and should therefore be ignored for purposes of actual knowledge. It also ruled that notices of alleged infringement from third-parties were irrelevant for Section 512(i) purposes. Additionally, the District Court rejected Perfect 10's arguments that the alleged "red flags" imparted constructive knowledge of infringement to CCBill or CWIE.

The district court then ruled that CCBill "provided connections" between consumers and client websites containing allegedly infringing images through automated transitory online communications, and thus, was eligible for the safe harbor of Section 512(a).

With respect to CWIE, since it had received no DMCA-compliant notifications of infringement, and there were no "red flags" of infringement, the District Court held CWIE was entitled to the safe harbor of Section 512(c).

Finally, the District Court agreed that CCBill and CWIE were being treated as the publisher or speaker of third party information content, and that the immunity granted by the CDA potentially applied to Perfect 10's state law claims.

However, the District Court refused to apply CDA immunity to Perfect 10's right of publicity claim based upon *Comedy III Prods. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 399, 106 Cal. Rptr. 2d 126, 135 (2001), in which the California Supreme Court had stated that "[t]he District Court thus ruled that Perfect 10's state right of publicity claim 'pertained to intellectual property' within the meaning of Section 230(e)(2), and therefore survived summary judgment.

Ninth Circuit Decision

The Ninth Circuit first considered whether CCBill and CWIE met the threshold eligibility for the safe harbors provided under the OCCILA provisions of the DMCA. Specifically, the limitations on liability provided under the safe harbors of Section 512(a)-(d) apply "only if the service provider":

"has adopted and *reasonably implemented* ... a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers"; and

"accommodates and does not interfere with standard technical measures" (defined in turn as "technical measures that are used by copyright owners to identify or protect copyrighted works ...").

17 U.S.C. § 512(i)(1)-(2) (emphasis added.)

The DMCA itself does not define what the phrase "reasonably implemented" means. Accordingly, the Ninth Circuit held in *CCBill* that "a service provider 'implements' a policy if it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if [the service provider] does not actively prevent copyright owners from collecting information needed to issue such notifications." And, "implementation is reasonable if, under 'appropriate circumstances,' the service provider terminates users who repeatedly or blatantly infringe copyright." 481 F.3d at 758-59.¹

Implementation

Perfect 10 urged that CCBill and CWIE had failed to implement a DMCA policy by supposedly failing to keep track of repeatedly infringing webmasters. CCBill and CWIE maintained a "DMCA log" that, while not perfect, recorded complaints about allegedly infringing material and the outcome of those complaints. The Ninth Circuit found that CCBill and CWIE reasonably tracked claims of infringement engaged in by their website clients.

Reasonableness

Perfect 10 also contended that CCBill and CWIE failed to terminate alleged repeat infringers. The Ninth Circuit exam-

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ined this contention with respect to: (a) Perfect 10's notices of alleged infringements; (b) third-party notices; and (c) apparent infringing activity.

The Ninth Circuit affirmed the holding below that since Perfect 10's notifications of alleged infringement did not substantially comply with DMCA notification requirements, they could not provide actual knowledge of infringement. In particular, it held that Perfect 10 had failed to substantially comply with all six of the DMCA's requirements for notification of alleged infringements, 17 U.S.C. § 512(c)(3).²

While Perfect 10 had complied with some of the six requirements, it had made no attempt to comply with others, including the requirement of declaration under penalty of perjury that the complaining party is authorized to represent the copyright holder and that he has a good faith belief that the claimed use is infringing. Thus, "knowledge of infringement may not be imputed to CCBill or CWIE based on Perfect 10's communications."

The Court did find, however, that the District Court had erred in failing to consider, for purposes of safe harbor eligibility, how CCBill and CWIE had responded to notices of infringement by *third-parties*. The Ninth Circuit reasoned that since a service provider's overall DMCA policy was at issue, not just its practice toward one particular copyright holder, a remand was warranted so the District Court can determine whether those third-party notices provided CCBill and CWIE the requisite knowledge of infringement to take action against alleged repeat infringers.

At the same time, the Court rejected Perfect 10's claim that CCBill and CWIE were "aware of facts or circumstances from which infringing activity is apparent," 17 U.S.C. § 512(c)(1)(A)(ii), or "red flags" of infringement. The Court found that website names such as "illegal.net" and "stolencelebritypics.com" may reflect an attempt to "increase the salacious appeal" of the site rather than an admission of infringing activity.

It also disagreed that so-called "password-hacking" sites, which supposedly provide active user names and passwords for secure websites, reflected "red flags" of infringement. The Court reasoned that the sites could be a

hoax, out of date, a promotion, or an attempt to collect information from unsuspecting users. As such, the Court declined to impose "investigative duties" upon CCBill or CWIE in the face of this information.

Technical Measures

Aside from whether the service provider has reasonably implemented a policy for terminating repeat infringers, the other threshold requirement is that it has not interfered with "standard technical measures" "used by copyright owners to identify or protect copyrighted works." 17 U.S.C. §§ 512(i)(1)(B), 512(i)(2).

Perfect 10 argued that CCBill did interfere with standard technical measures by allegedly rejecting Perfect 10's credit cards when it sought to purchase access to the websites of CCBill's clients to determine whether they contained its copyrighted images. CCBill contended that those credit cards had been declined because they were used for numerous website subscriptions followed soon thereafter by cancellations, resulting in costly "charge backs."

Based on an insufficient record, the Court remanded to the District Court to determine whether access to a website constitutes a "standard technical measure," and if so, whether CCBill interfered such measures.

Safe-Harbors

The Ninth Circuit proceeded to analyze whether CCBill and CWIE met the requirements for the safe harbor categories they claimed; namely Section (a) for "transitory digital network communications"; Section (c) for "information residing on systems or networks at direction of users"; and Section (d) for "information location tools." 17 U.S.C. §§ 512(a), (c), (d).

For purposes of Section (a), a qualified service provider must be one that "offer[s] the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing ..." *Id.* § 512(k)(1).

The Ninth Circuit affirmed the lower court's rejection of Perfect 10's argument that Section 512(a) was limited to "backbone" service providers serving as "conduits" for

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the transmission of infringing material. The Court held that “[t]here is no requirement in the statute that the communications must themselves be infringing,” and that “Section 512(a) provides a broad grant of immunity to service providers whose connection with the material is transient.”

However, the Court believed the record did not reflect whether CCBill’s payments to its account holders are “digital communications” within the meaning of Section 512(a). Thus, the Ninth Circuit remanded this question to the District Court for further consideration. (On April 12, 2007, CCBill petitioned the Ninth Circuit for a rehearing of this ruling, or a rehearing en banc, on grounds that, among other things, whether CCBill’s payment to its account holders constituted “digital communications” was not an issue previously raised by the parties at any stage in the litigation.)

With respect to the application of Section 512(d), for “information location tools,” the Ninth Circuit held that even assuming the hyperlink CCBill supplied in the confirming email to consumers could be deemed an information location tool, the safe harbor in subsection (d) was available “only for ‘infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity.’” (emphasis in original.)

The Court did not read Perfect 10’s complaint as seeking to impose liability on CCBill due to the hyperlink. The Court therefore ruled that even if CCBill were entitled to the safe harbor of Section 512(d) for providing a hyperlink, CCBill’s other business services would not be covered by that safe harbor.

Finally, the Court held that CWIE qualified for the safe harbor of Section 512(c), applicable to alleged claims of infringement “for storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” The Court had already found that Perfect 10’s notices to CWIE did not provide CWIE with knowledge or awareness within Section 512(c) (1)(A). Thus, the remaining question was whether CWIE “receive[d] financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”

The Court interpreted “direct financial benefit” to mean whether “the infringing inactivity constitutes a draw for subscribers, not just an added benefit.” It concluded Perfect 10 had failed to show that allegedly infringing activity on websites hosted by CWIE was a “draw.” The Court also cited legislative history stating that “receiving a one-time set-up fee and flat, periodic payments for service from a person engaging in infringing activities would not constitute receiving a ‘financial benefit directly attributable to the infringing activity[.]’” suggesting that because CWIE’s service met that description, it cannot be deemed to receive “financial benefit directly attributable” to any copyright infringement by its clients.

The Ninth Circuit concluded that if on remand, the District Court found that CWIE met the threshold requirements of Section 512(i), CWIE would be entitled to safe harbor protection under section 512(c). 481 F.3d at 767.

CDA § 230

With respect to the Communications Decency Act, the Court held that the statute “establish[ed] [a] broad ‘federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.’” That immunity is limited by only Section 230(e)(2) thereof, which provides that the CDA shall not “limit or expand any law pertaining to intellectual property.”

Thus, the Court construed the term “intellectual property” in Section 230(e)(2) to mean only “*federal* intellectual property.” (emphasis added).

Ramifications

The CCBill opinion affords Internet service providers greater certainty and defenses when faced with claims of secondary liability for the content of third-parties. In the ongoing struggle between content owners and service providers, Perfect 10 had staked out an aggressive position, asserting that generalized contentions of widespread infringement should be sufficient to impose the burden on service providers to police their clients’ content. The Ninth Circuit rejected Perfect 10’s attempt to pin an “Internet police” badge on CCBill and CWIE.

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The *CCBill* opinion should have wide import in several respects.

First, service providers need not respond to notices of infringement from content owners that do not comply substantially with *all six* of the notification elements set forth in Section 512(c)(3) of the DMCA. Service providers could face liability from their own clients for denying services based upon false or unsubstantiated infringement claims. Thus, content owners must provide the information required by the DMCA, including sufficiently detailed identification of the claimed infringements and an affirmation of good faith belief in the claim under penalty of perjury, before any burden will shift to service providers to seek a response from their clients.

Second, service providers should proactively use Section 512(a), which has been interpreted to afford “broad” safe harbors to service providers whose alleged liability arises from automated and transient transmission, routing, or provision of connections for information. The Ninth Circuit’s rejection of the requirement that such information be limited to the infringing works themselves should make the Section 512(a) safe harbor available to a wide variety of service providers.

Third, under the CDA, interactive service providers who receive information content from third-parties should enjoy broad immunity against all manner of alleged state law liability arising from such content. In sum, *CCBill* is an important decision and contributes materially to the evolving law of the Internet.

Jay M. Spillane is a partner in the Los Angeles litigation firm Spillane Shaeffer Aronoff Bandlow LLP. Raphael Cung is an associate of the firm. Mr. Spillane and the firm are representing CCBill and CWIE in Perfect 10, Inc. v. CCBill, LLC. Perfect 10 is represented by its General Counsel Daniel J. Cooper and Jeffrey N. Mausner, of Ber- man, Mausner & Resser, Los Angeles.

¹ In *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004), another District Court had set forth its own test for “reasonable implementation”: “whether the service provider has adopted a procedure for receiving infringement complaints and conveying those complaints to the alleged infringers, and if so, whether the service provider nevertheless “still tolerates flagrant or blatant infringement.” 351 F. Supp. 2d at 1102. It does not appear that any other courts have adopted that formulation, although the Ninth Circuit in *CCBill* cited *Corbis* as one of the decisions addressing “reasonable implementation.” 481 F.3d at 758.

² The six requirements for a valid DMCA notification are as follows: (1) a physical or electronic signature of a person authorized to act on behalf of the copyright owner; (2) identification of the copyrighted works allegedly infringed; (3) identification of the material that is allegedly infringing and is to be removed or disabled, with sufficient information to allow the service provider to locate it; (4) contact information for the complaining party; (5) a statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner; and (6) a statement under penalty of perjury that the information in the notification is accurate, and that the complaining party is authorized to act on behalf of the copyright owner. 17 U.S.C. § 512(c)(3)(i)-(vi).

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Scottish Court Rejects Attempt to Enjoin Broadcast of BBC Documentary *Public Interest Trumps Company's Privacy Rights*

By Rosalind McInnes

In April, the BBC successfully resisted an interim interdict (interlocutory injunction) application by Response Handling Ltd, a call centre company based in Scotland. *Response Handling Ltd. v. BBC* (Scottish Court of Sessions April 2007).

The call centre industry—businesses that provide help desk and other customer support to other companies—is a major employer in Scotland. The case concerned a documentary in the *Frontline Scotland* strand, called “*The Billion Pound Bank Robbery*,” which dealt with financial fraud.

The dispute turned on footage in the call centre shot by an undercover journalist, whose references had not been checked by the company, and showed how readily she was able to abstract customers’ financial data.

RHL argued that corporate bodies had a right to privacy. This was accepted by the court. However, the legal argument turned not upon Article 8 of the European Convention on Human Rights, which is the backbone of most UK privacy applications, but rather on Article 1 of the First Protocol, which protects the right to property. According to the company, information about their methods of training, work environment, employment practices, etc, was all confidential and proprietary.

The BBC countered that the information was not truly confidential at all: anyone would know that a company might require two references for a new employee, run a three-week training and induction program, prohibit the use of mobile phones and so on.

Court Ruling

The Court of Session Judge, Lord Bracadale, accepted the information was confidential, that RHL had a right under Article 1 of the First Protocol to the peaceful enjoyment of their possessions, including “intellectual property such as their work systems, procedures and employment protocols,” the right to preserve their confidential information and to privacy and the right to expect employees to abide by their contract.

The contract in this case included a standard confidentiality clause, as well as the specific obligation not to talk to the media. However, he said that the kind of material was not highly confidential or sensitive.

The BBC program, on the other hand, was of “considerable public interest,” since most people had bank accounts and credit cards and would, from time to time, be in touch with call centres.

RHL had said, pre-litigation, that if their name was removed from the program, they would take no action to attempt to stop broadcast. In court, they continued to argue that there was “no need” to name them. The judge also suggested that not naming was “a possible pragmatic way of resolving the case.”

Ultimately, however, he said, “The BBC declined to take that course for various reasons. They prefer to rely on the principle of freedom of expression to publish all the details of the story and submit that it is for the pursuers to demonstrate a legal basis why the BBC cannot tell the whole story. . . . In my opinion the BBC are entitled to take this approach. . . .”

Under S12 of the Human Rights Act 1998, a British court should not prevent the broadcast of a program unless the claimant can show that it would be “likely” to succeed after evidence was heard. It was settled by the House of Lords in the case of *Cream Holdings v Banerjee* (2005) 1 AC 253 that “likely” will, in the absence of unusual circumstances, mean “more likely than not.”

Lord Bracadale, in the *RHL* case, held that the call centre company had failed to convince him that it was “likely” so to succeed. He also added that, even if he had been deciding on the normal Scottish interim interdict test, which is simply that “the balance of convenience” determines the winner, he still would have decided in favour of the BBC.

Rosalind M M McInnes is an in-house lawyer with BBC Scotland.

Washington State Enacts Shield Law:

Bill Died in 2006 Legislative Session, but Returns to Success in 2007

By Bruce E. H. Johnson

On April 27, 2007, Washington Governor Christine Gregoire signed the Washington reporter shield law ([HB 1366](#)), thus making the state the 33rd (plus the District of Columbia) to enact a state law protecting the news media from subpoenas and compulsory disclosure orders. Prior to the law, the state had recognized, by common law, a qualified confidential source privilege, but there were no published state cases addressing the scope of privilege for reporters' notes and work-product.

The 2007 law, significantly, expands existing federal constitutional and state law protections and thus provides for an absolute privilege for confidential source information in the possession of the news media in all civil and criminal proceedings—thus joining Alabama, Arizona, D.C., Indiana, Kentucky, Maryland, Michigan, Montana, Nebraska, Nevada, New York, and Pennsylvania in granting such protections.

A similar bill, proposed by Washington Attorney General Rob McKenna (and which was promoted as Attorney General Request Legislation, bringing the weight of his office behind the attempt), had failed at the close of the 2006 legislature (discussed in greater detail in an article by this author in the May 2006 *MediaLawLetter*). As Rowland Thompson, executive director of Allied Daily Newspapers and the chief lobbyist for the legislation, noted:

Opposition to the bill came from two sources that were diametrically opposed to each other and to the bill. USAA Insurance opposed reporter shield legislation anywhere it might appear in the country as a result of a problem they had with a television station in their headquarters city of San Antonio. The Society of Professional Journalists opposed the bill because they sought absolute protection for all work product, outtakes and unpublished material. There was also some distress in the Democratic camp in helping a Republican Attorney General pass a request bill that was viewed as helping his political future against Democratic Governor Gregoire.

The USAA opposition was a major hurdle for the bill's proponents, with significant opposition fueled by the company funds. According to Thompson, "USAA Insurance retained the Seattle law firm of Carney Badley Spellman on a very large retainer to have their two most experienced and effective gov-

ernment affairs partners stop the bill. Allying themselves with senators from both the Democratic and Republican caucuses they were able to cast enough doubt and confusion to be successful."

In January 2007, the shield bill was again introduced, promoted by Democrats Sen. Adam Kline, the Chairman of the Judiciary Committee, in the Senate and Rep. Lynn Kessler, the Majority Leader, in the House. Also pushing for the legislation were King County (Seattle) Prosecutor Norm Maleng; Dan Satterberg, his chief deputy; Assistant Attorney General Greg Overstreet, who assisted McKenna's on open-government matters; and Rep. Jay Rodne, who helped promote Republican support. The stars were aligned this time for the bill's supporters, who also included David Zeeck, executive editor of the *Tacoma News Tribune* (a McClatchy newspaper); Ken Bunting, associate publisher of the *Seattle Post-Intelligencer* (owned by Hearst); and Mark Allen, president of the Washington State Association of Broadcasters.

The bill was largely the same as in 2006, but opposition had disappeared because the USAA funding was gone. Other factors were also at work, as Thompson observed:

In 2007 the same scenario unfolded, but with some major differences. There had been a Democratic landslide in the 2006 elections giving Democrats large majorities in both houses and, in essence, reshuffling the deck significantly. In addition, proponents and legislative sponsors of the bill had extracted support or, at least acquiescence, from many of 2006's opponents to the bill. But most importantly, USAA Insurance had installed a new general counsel who took a dim view of the large expenditures associated with their quixotic national challenge to reporters shield legislation and Carney Badley was no longer retained. McKenna removed the partisan angle by not re-requesting the bill in 2007.

The bill appeared to sail easily through the legislature in 2007, but it was the effect of not having highly paid and organized opposition, the interim building of support by proponents and McKenna and Maleng's ability to hold the prosecutors neutral from the background since McKenna was no longer the most publicly visible proponent of the bill.

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Washington State Enacts Shield Law

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The final bill passed the Washington State Legislature with only six Senators and one Representative voting no out of a total of 147 legislators.

The shield law goes into effect on July 22, 2007. As noted, its protection for confidential source information (defined as the “identity of a source of any news or information or any information that would tend to identify the source where such source has a reasonable expectation of confidentiality”) is absolute, in any proceedings before any “judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process.”

The Washington statute also provides for a qualified privilege for journalists’ notes and other work-product (any “news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public”), which requires the proponent of disclosure to prove, by clear and convincing evidence, that there is either “reasonable grounds to believe that a crime has occurred” (for criminal matters) or “that there is a prima facie cause of action” (for civil matters) and that:

- (i) The news or information is highly material and relevant;
- (ii) The news or information is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto;
- (iii) The party seeking such news or information has exhausted all reasonable and available means to obtain it from alternative sources; and
- (iv) There is a compelling public interest in the disclosure. A court may consider whether or not the news or information was obtained from a confidential source in evaluating the public interest in disclosure.

Publication or dissemination by the news media of any news or information is not deemed to be a waiver of the statutory protections.

Bloggers and internet journalism are expressly protected by the new provisions, assuming certain factors are met. The shield law contains a very broad definition of “news media” encompassing “any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution” and any “person who is or has been an employee, agent, or independent contractor” of any such entity “who is or has been

engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity.” (The 2006 bill had contained a slightly different “news media” definition, which one State Senator complained would allow his daughter to blog on her Myspace.com page and then claim to be a member of the media; the new language was designed, in Thompson’s words, to reflect “a seriousness of purpose” as a basis for distinguishing journalistic-type activities from other forms of communication.)

Finally, a note of special interest to non-Washingtonians: the Legislature enacted this law with full knowledge that it could be cited in support of a federal reporter’s privilege.

Indeed, the original 2006 bill, promoted by McKenna, had been prompted by the 2005 jailing of *New York Times* reporter Judith Miller. As McKenna noted recently, “We were just one court decision away from sources being revealed or a reporter going to jail.” And, in testimony before the State Senate Judiciary Committee on September 26, 2006, the author of this article testified as follows:

[E]nactment of this privilege will promote the development and creation of an adequate federal shield law – and thus remedy one of the major attacks on freedom of press principles today. ...Because Rule 501 of the Federal Rules of Evidence directs the federal courts to “continue the evolutionary development” of federal evidentiary privilege rules in light of “reason and experience”, then any “consensus” shown by state privilege laws (as the U.S. Supreme Court held a decade ago in *Jaffee v. Richmond*) will result in similar federal recognition. The *Jaffee* court, in adopting a federal psychotherapist-patient privilege, noted that “the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of [a particular] privilege” and that, where such a consensus exists, continued failure to recognize such a privilege in the federal courts would “frustrate the purposes of the state legislation that was enacted” to meet the goals of the privilege. By enacting this privilege statute, therefore, Washington State can do its part to halt the repeated jailings of reporters by overzealous federal judges.

Bruce Johnson, a partner in the Seattle office of Davis Wright Tremaine LLP, was a draftsman of, and one of the major proponents for, the new Washington shield law.

Florida Death-Row Inmate Denied Testimony of Reporters to Support Constitutional Challenge to Lethal Injection Law

By **Judith M. Mercier** and **Suzanne M. Judas**

A death-row inmate seeking to advance an argument of cruel and unusual punishment is not entitled to the testimony of reporters who witnessed another execution, a Florida state court judge has ruled. *Florida v. Lightbourne*, (Fla. Cir. Ct. May 11, 2007) (Carven, J.).

On May 11, 2007, a circuit court in Ocala quashed subpoenas issued to reporters who had witnessed a 2006 execution by lethal injection. Counsel for a death-row inmate subpoenaed the reporters to testify and disclose their notes at a hearing to determine whether Florida's process for lethal injections is flawed and unconstitutional.

The subpoenaed reporters were from *The Associated Press*, *The Miami Herald*, the *St. Petersburg Times*, and the *Gainesville Sun*. Arguing that the reporters were protected by a journalist's privilege, attorneys for the reporters moved to quash the subpoenas.

Background

Angel Diaz was executed in Florida by lethal injection on December 13, 2006. It took a second dose of the lethal chemicals and 34 minutes before Diaz was pronounced dead—twice as long as usual. According to the published accounts, during the 34 minutes before he was pronounced dead, Diaz continued to move and grimace, blink, lick his lips, attempt to mouth words, and turn his head.

Following the execution, Florida temporarily halted executions, and then-Governor Jeb Bush appointed a commission to examine the state's lethal injection process. That commission issued its final report on March 1, 2007, stating that it was "unable to resolve conflicting accounts of the observations of Diaz during the execution process, including movement of the body, facial movements and verbal comments."

By statute, 12 citizens selected by the warden, along with a qualified physician, are required to witness an execution in Florida. Florida law also permits the presence of counsel for the convicted person along with the convicted person's minister. Pursuant to rules Florida Department of Corrections rules, 12 representatives of the news media may also be present. All of these witnesses observe the execution through a window adjacent to the execution room.

Following Diaz's execution, attorneys for 71 death-row inmates asked the Florida Supreme Court to declare Florida's

process for lethal injections flawed and unconstitutional as cruel and unusual punishment. The Court refused to rule on the issue, instead issuing an order requiring a trial court in Ocala to review the constitutional claims of just one death-row inmate, Ian Lightbourne, who has been on death row since 1981 for the murder of Nancy O'Farrell, the daughter of a prominent horse breeder in Ocala. Lightbourne's attorney subpoenaed the reporters.

Hearing on Motions to Quash

The reporters all moved to quash under Florida's statutory journalists' privilege. In 1998 the Florida legislature, codifying the common law privilege that had previously existed in Florida, enacted the statute, which provides "professional journalists" with a qualified privilege not to disclose information obtained while actively gathering news unless the subpoenaing party can make a "clear and specific showing" that:

- (a) the information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;
- (b) the information cannot be obtained from alternative sources; and
- (c) a compelling interest exists for requiring disclosure of the information.

FLORIDA STATUTES § 90.5015.

At the hearing on the motions to quash the subpoenas, Lightbourne's attorney admitted that she had identified at least three witnesses who were not journalists who had observed the execution from the same vantage point as the journalists.

However, the reporters' observations of the execution, according to Lightbourne's attorney, were more independent and unbiased than these other witnesses to the execution. Therefore, she argued, the statute's three part test had been met and overcome by Lightbourne's compelling need for the reporters' unbiased testimony.

The judge disagreed, quashing the subpoenas on the basis that Lightbourne's attorneys had failed to seek out and exhaust all alternate sources, and had therefore failed to make the requisite showing to defeat application of Florida's journalist privilege statute.

Suzanne M. Judas and Judith M. Mercier, Holland & Knight, LLP, represented the Associated Press reporter; Susan T. Bunch, Thomas & LoCicero PL, represented the Gainesville Sun reporter; and Alison Steele, Rahdert, Steele, Bole & Reynolds, P.A., represented the St. Petersburg Times reporter.

Arizona Supreme Court Orders In Camera Review To Determine Access to Email Records

Court Must Determine What Constitutes a Public Record

By David J. Bodney

Last month the Arizona Supreme Court unanimously concluded that government officials cannot simply pronounce their email communications “personal” and therefore beyond the reach of the Arizona Public Records Law. *Griffis v. Pinal County*, No. CV-06-0312-PR, 2007 WL 1224881 (Ariz. April 25, 2007).

Arizona’s highest court ruled that a judge must be allowed to inspect such records in camera to determine whether they constitute “public records.” The supreme court placed the burden of proving that the email messages are “purely private” on the public official who would have them withheld.

Background

The case involved 90 email messages sent and received on the government’s computer system by Stanley Griffis, the former Pinal County Manager. *The Arizona Republic* had requested access to all email messages generated or received by Griffis on the County’s computer system from October 1 to December 2, 2005. Though the County produced over 700 emails, it withheld 120 that Griffis characterized as “personal.”

At the time of *The Republic*’s request, Griffis was under investigation by Pinal County for purchasing \$21,000 in sniper rifles and ammunition with County funds. The County Sheriff had questioned Griffis’ purchases, and Sheriff’s deputies seized most of the rifles from a vehicle at Griffis’ residence. The Pinal County Board of Supervisors initiated the investigation, and Griffis left office a few months later. Shortly after leaving office, he went on an African hunting safari.

The County notified Griffis of its intention to release the 120 “personal” email records to *The Republic*, but gave Griffis an opportunity to take legal steps to protect the records from disclosure. At an ex parte hearing, Griffis obtained a preliminary injunction to block release of the 120 emails that he considered personal.

Phoenix Newspapers, Inc. (“PNI”), publisher of *The Arizona Republic*, moved to intervene and dissolve the injunction, and the County joined PNI’s efforts. After redacting a privi-

lege log created by the County, Griffis voluntarily disclosed 30 of the 120 email records at issue.

The trial court concluded that the 90 remaining email records were subject to inspection under A.R.S. § 39-121 *et seq.* (the “Arizona Public Records Law”), but that personally-identifying information—such as social security, bank account and credit card numbers—should be redacted. Griffis opposed in camera review, arguing that the remaining 90 emails fell entirely outside of the ambit of the Arizona Public Records Law.

The Arizona Court of Appeals reversed the trial court’s judgment, rejected the lower court’s conclusion that the records were “presumptively” open to public inspection, and held that personal emails are *not* subject to disclosure under the Arizona Public Records Law. Like the trial court, the Court of Appeals had conducted no in camera review of the disputed email records.

Supreme Court Ruling

PNI petitioned the Arizona Supreme Court for review of the appellate court’s decision. The newspaper emphasized the importance of public access to records concerning a public official under investigation for public corruption. PNI argued that the email records were presumptively open to public inspection, and that the court should remand the case for in camera review to determine whether any information should be redacted before their release.

The Arizona Supreme Court found that PNI had met its duty of raising a “substantial question” as to whether the 90 withheld email messages were “public records.” *Griffis*, 2007 WL 1224881, at *4, ¶ 16. The supreme court found that the “threshold showing needed to raise a ‘substantial question’ about a document’s status must be relatively low.” *Id.*

Indeed, the court held that PNI had met its burden merely “by showing that a government agency or public official withheld documents generated or maintained on a government-owned computer on the grounds that those

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Arizona Supreme Court Orders In Camera Review To Determine Access to Email Records

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documents are personal or private.” *Id.* Having raised a substantial question, PNI was entitled to seek in camera inspection “of any withheld documents to determine whether they possessed the requisite nexus with official duties that is required of all public records.” *Id.*

The term “public record” is not defined by Arizona statute. Still, the supreme court confirmed that public records should be defined broadly, creating a “strong presumption” in favor of public access. *Id.* at *2, *3, ¶¶ 8, 12. It recognized, however, that the law’s broad definition of public records “is not unlimited.” *Id.* at *2, ¶ 10.

At several points in the opinion, the court noted that the definition excludes records of a “purely private or personal nature.” *Id.* Hence, the court found that

“only those documents having a ‘substantial nexus’ with a government agency’s activities qualify as public records.” *Id.*

The court concluded that the categorization of a document as a “public record” requires “a content-driven” and “fact-specific” inquiry.” *Id.* at *2, *4, ¶¶ 10, 15. It rejected “mere possession of a document by a public officer or agency” as determinative. *Id.* at *3, ¶ 11. It gave short shrift to the “expenditure of public funds” as a dispositive factor. Rather, the Court adopted a “nature and purpose” test to determine whether a document meets the definition of “public record.”

The Arizona Supreme Court adopted a “two-step” process to decide whether the Arizona Public Records Law requires disclosure. Step one involves a determination of whether the document is a public record. The Court concluded that in camera review of the records is a permissible means of determining whether they possess the “requisite nexus with official duties” to compel production. *Id.* at *4, ¶ 16.

“The party claiming that the disputed documents are not public records bears the burden of establishing its claim,” the Arizona Supreme Court ruled. *Id.* at *4, ¶ 16. As Chief Justice McGregor noted in the en banc decision, in camera review “reinforces this Court’s previous holding that the courts, rather than government officials, are the final arbiter of what qualifies as a public record.” *Id.* at *4, ¶ 15. Once a court concludes that the documents qualify as public records, the court may redact information if “privacy interests, confidentiality, or the best

interests of the state outweigh the public’s right of access to documents that have already been categorized as public records.” *Id.* at *4, ¶ 16, fn. 8.

At bottom, the supreme court reversed the court of appeals, vacated its opinion and remanded the case “to permit the Superior Court to review the contents of the disputed emails in camera to determine whether they are subject to public records. Law.” *Id.* at *4, ¶ 17.

Shortly before the Arizona Supreme Court issued its Opinion, Griffis pled guilty to six felonies involving public corruption and self dealing, including charges of fraudulent schemes and artifices, tax fraud and theft. Griffis admitted that he took \$426,800 from a private bank account that he opened, illegally, to collect fees from home builders, construction companies,

investment companies and developers that were earmarked to fund road construction in rapidly-growing areas of Pinal County.

Griffis agreed to repay \$639,035 for funds he embezzled from the County and for the costs of the investigation into his performance in office. On May

10, 2007, he was sentenced to three and a half years in prison. On remand, PNI has asked the trial court to conduct its in camera review with Griffis’ malfeasance in office in mind—and to hold Griffis tightly to his burden of proving the emails “purely personal.”

David J. Bodney, a partner in the Phoenix Office of Steptoe & Johnson LLP, and Peter Kozinets and Chris Moeser, also of the firm, represented PNI in this matter. The Reporters Committee for Freedom of the Press led an amici curiae effort in support of PNI’s position.

In camera review “reinforces this Court’s previous holding that the courts, rather than government officials, are the final arbiter of what qualifies as a public record.”

Any developments you think other MLRC members should know about?

Call us, or send us a note.

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Massachusetts High Court Restricts Access to Jury List in Murder Trial

Juror Safety Outweighs Right of Access

Last month the Massachusetts Supreme Judicial Court upheld a trial court's decision to withhold from the press the identity of jurors who had served on a murder trial, finding that "considerations of juror safety warranted impoundment of the jury list." *Commonwealth v. Silva*, 448 Mass. 701, 708 (2007) (Marshall, C.J., Greaney, Ireland, Spina, Cowin & Cordy, JJ).

Background

In the underlying murder trial, Manuel Silva was charged with first degree murder and conspiracy. The prosecution argued that Silva was a member of a street gang and that he shot and killed a member of a rival gang. During trial, the victim's girlfriend, who was scheduled to testify as the prosecution's principal witness, was shot at while she was in her car. She was unharmed. In addition, the trial judge excused one empanelled juror who "had become so fearful of the circumstances surrounding the case that she could not fairly continue." *Id.* at 702. Finally, after the jury returned a not guilty verdict, someone fired at least eleven shots at the house of the defendant's mother, injuring a bystander.

Before the verdict, *The Standard-Times* newspaper filed a motion requesting access to the name and address list of the jurors, to be received post-verdict. *The Standard-Times* argued that it had a First Amendment and common law right of access to the list as judicial records. The state and defendant did not take a position on the issue.

The trial court denied the newspaper's motion, citing "genuine concern" about juror safety.

Supreme Judicial Court Decision

Affirming under an abuse of discretion standard, the court first noted that "while other key participants in a high-profiled criminal trial involving dangerous offenders – the prosecutor, the defense attorney, and the judge – have all willingly accepted any attendant publicity and risks, the jurors have not." *Id.* at 708.

In this case, the court found that individuals on either side of the case were attacked over the course of the proceeding. Given these events, the trial judge was not required to hold an evidentiary hearing on the issue of juror safety.

Furthermore, the court noted that *The Standard-Times* sought the juror list in order to "investigate the role that fear of retaliation may have played in their verdict." *Id.* at 709. The newspaper, therefore, was acknowledging the safety concerns surrounding the trial.

Finally, although *The Standard-Times* cited cases showing a right of access to judicial records, "it goes without saying that no case has been called to our attention in which a public right to juror information was held to override a legitimate concern for juror safety." *Id.* at 709.

The Standard-Times was represented by Anthony C. Savastano. Peter J. Caruso & Peter J. Caruso, II, submitted an amicus curiae brief for the Massachusetts Newspaper Publishers Association.

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International Developments in Libel, Privacy, Newsgathering and New Media Law

LEGISLATIVE UPDATE

Media Issues Garner Hill Interest in the Beginning of the 110th Congress

Kathleen A. Kirby & Shawn A. Bone

Media issues have long been favorite issues on Capitol Hill, and the 110th Congress is no exception. Although few bills have made it beyond introduction, the current Congress is shaping up to be one where media matters remain at the forefront.

Significant Congressional attention has been focused on media policy concerns, including the federal shield law, FOIA/open government, advertising restrictions, the DTV conversion, white spaces, disaster recovery, and violent programming on television.

Each of these issues is ripe for legislative action on the Hill as the 110th Congress moves into the summer and fall.

Federal Shield Legislation

- A renewed effort to pass a federal shield law began on May 2, 2007, with the introduction of companion legislation in the House and Senate, called “The Free Flow of Information Act of 2007.” The new bills, to some extent, mirror the legislation introduced in the 109th Congress.
- The House version of the legislation, H.R. 2102, was introduced by Representatives Rick Boucher (D-VA), John Conyers (D-MI), John Yarmuth (D-KY), Mike Pence (R-IN), Greg Walden (R-OR), and Howard Coble (R-NC). Senators Christopher Dodd (D-CT), Mary Landrieu (D-LA), Richard Lugar (R-IN), Pete Domenici (R-NM), and Lindsey Graham (R-SC) have introduced an identical bill in the Senate, S. 1267. The legislation:
 - Provides journalists with a qualified privilege as to sources and information. The bill would require journalists to testify at the request of criminal prosecutors, criminal defendants and civil litigants who have shown by a preponderance of the evidence that they have met the various tests for compelled disclosure. The balancing tests are based on the Department of Justice’s guidelines for subpoenaing reporters that have been in place for over 30 years.
- Establishes that a confidential source’s identity can be compelled if disclosure is necessary to prevent “imminent and actual harm” to national security, to prevent “imminent death or significant bodily harm” or to identify a person who has disclosed significant trade secrets or certain financial or medical information in violation of current law.
- Protects information that may reveal journalists’ confidential sources when that information is held by telephone companies, Internet service providers and other communications providers.
- Defines the scope of persons covered by these standards.

- The House bill has been referred to the House Judiciary Committee, where it awaits further consideration. The Senate bill is in the hands of the Senate Judiciary Committee, where it too awaits discussion by the Committee.

FOIA/Open Government

- Several Senators and Representatives have reintroduced legislation in the 110th Congress that would reform the nation’s FOIA system after efforts in previous Congresses faltered. The bills attempt to ensure increased access to government documents and information through the FOIA process.
- H.R. 1309, the “Freedom of Information Act Amendments of 2007,” has quickly progressed through the House this session. The bill, sponsored by Representatives Williams Lacey Clay (D-MO), Todd Platts (R-PA), and Henry Waxman, made its way through the House Committee on Oversight and Government Reform on March 12, and was passed by the House on March 14. The bill now awaits action by the Senate. The House and Senate are also considering the “OPEN Government Act of 2007,” H.R. 1326 (introduced by Representative Lamar Smith (R-TX)) and S. 849 (introduced by Senators Patrick Leahy (D-VT) and John Cornyn (R-TX)). In general terms, these bills would, among other things, do the following:

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- Expand the definition of “news media” for purposes of document duplication fee waivers;
 - Increase the opportunity for a FOIA requester to recover his or her attorneys fees if that requester must go to court to obtain documents from a federal agency;
 - Tighten the rules with respect to the 20-day deadline for responding to a FOIA request;
 - Create a tracking system for FOIA requests; and
 - Establish a new Office of Government Information Services to oversee the FOIA process.
- Representative Brad Sherman (D-CA) has introduced the “Faster FOIA Act of 2007,” similar to a bill of the same name he introduced with Representative Smith in the last Congress. The bill would establish an advisory commission on FOIA processing delays. No Senate companion has been introduced at this point, and the bill is awaiting action by the House Oversight and Government Reform Committee.

Advertising Issues

- As part of a larger package of reforms to the operations of the Food and Drug Administration, the Senate has recently explored the need to place restrictions on the ability of drug companies to advertise drugs directly to consumers. These efforts bore witness to a clash between Senator Ted Kennedy (D-MA) and Senator Pat Roberts (R-KS) over the ability of the FDA to serve as an editor for direct-to-consumer (DTC) drug advertisements.
- The Senate Health, Education, Labor, and Pension Committee marked up and reported S. 1082 on April 24, which includes a series of restrictions on drug advertisements. The bill empowers the Food and Drug Administration/the Department of Health and Human Services to assume an editorial role over ads for certain drugs. It also gives them the authority, in certain circumstances, to require the advertisements to include mandatory disclosures about a drug, as well as to put in place a moratorium on advertising for a certain drug or class of drugs for up to 2 years if other advertising restrictions are found to be inadequate.

- During floor debate on the bill, however, Senators Kennedy and Roberts reached an accord to limit the scope of the advertising restrictions in the bill. The compromise language includes a procedure whereby the FDA would be permitted to pre-review DTC advertisements and offer comment on their content. The FDA would also be allowed, in limited circumstances, to direct drug companies to include certain mandatory disclosures in their advertisements. These more limited powers are backed up by the ability of the FDA to levy a fine on a company for airing a false or misleading DTC advertisement. The bill also includes language stating that DTC radio and television ads must present information regarding the name of a drug, the conditions of its use, and the major statement relating to side effects, contraindications, and effectiveness in “a clear and conspicuous (neutral) manner.”
- In the House, Representative Henry Waxman (D-CA) has introduced H.R. 1561, the “Enhancing Drug Safety and Innovation Act of 2007,” which was referred to the House Commerce Committee and has as a co-sponsor Representative Ed Markey (D-MA), the Chair of the Subcommittee on Telecommunications and the Internet. This bill contains provisions that mirror the original drug advertising restrictions in S. 1082, empowering the FDA to pre-screen drug advertisements for certain drugs, require the inclusion of certain mandatory disclosures, and place a moratorium on advertising for certain drugs that can last for up to 3 years after a drug has been approved.
- S. 1082, after it was amended, was passed by the Senate on May 9, 2007. The bill now awaits action by the House. H.R. 1561 is still awaiting Subcommittee action.

DTV Conversion

- H.R. 608, introduced by Representative Joe Barton (R-TX), would require broadcasters to supply the FCC with information concerning their community outreach efforts with respect to the upcoming digital television transition, currently scheduled for February 18, 2009. Although the bill does not impose any specific education requirements on broadcasters, broadcasters would have to report on

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LEGISLATIVE UPDATE

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whether they have run or plan to run any public service announcements with respect to the transition. Multichannel Video Program Distributors, on the other hand, would be required to include an insert in their monthly bills informing consumers of the upcoming transition and supplying them with the options they have available for receiving digital broadcast signals. The bill is currently awaiting action by the House Energy and Commerce Committee's Subcommittee on Telecommunications and the Internet.

- Although the Subcommittee has not moved any legislation with respect to the upcoming DTV conversion, it is currently engaged in a series of hearings on the digital future of the United States. Subcommittee Chairman Ed Markey has undertaken a wide-ranging examination of what the DTV transition will mean for consumers. The Telecommunications and the Internet Subcommittee has held hearings exploring the industry's reaction to the DTV conversion, and the future of digital video. The Subcommittee has also brought before it the full FCC and the head of NTIA to explore the government's role in the DTV transition. It is likely that this examination will continue as the DTV conversion date approaches.

White Spaces

- One of the leading issues in both the House and Senate over the early part of the 110th Congress has been access to broadband. Members of Congress have lamented the fact that the U.S. has fallen behind other industrialized nations in the deployment of advanced broadband networks, particularly in rural areas. This broadband decline has led to arguments that the government should be engaged in broadband deployment initiatives, likening broadband networks to the interstate highways of the 21st Century.
- With respect to broadcasters, this increased interest in broadband has led to the return of legislative proposals regarding unlicensed use of the broadcast white spaces, which are the television channels left vacant in a DMA to help prevent interference between the channels being used by the local broadcasters. Legislators are pitching these proposals as a way to open up additional spectrum for wireless broadband use, particularly now that the FCC has approved unlicensed use of this spectrum by fixed wireless devices. Broadcasters, however, are concerned that allow-

ing fixed and portable devices to use these white spaces could result in interference with their signals and news-gathering capabilities. Because these devices would be unlicensed and possibly portable, it would be difficult to pinpoint the site of interference, to determine what consumers have lost access to broadcast television transmissions, and to remedy any interference issues.

- Bills on the white spaces have appeared in both the House and the Senate:
 - S. 234, the "Wireless Innovation Act of 2007," introduced by Senator John Kerry (D-MA) and referred to the Senate Commerce Committee—Directs the Commission to issue a final order in its white spaces docket by October 1, 2007, which would permit licensed and unlicensed use of broadcast channels 2-51, inclusive, by fixed and portable devices as soon as practicably feasible but no later than Feb. 18, 2009. The bill also provides for field testing and certification of unlicensed devices, as well as providing for public comment on this testing as long as that comment period does not delay completion of the white spaces proceeding.
 - S. 337, the "White Spaces Act of 2007," introduced by Senator John Sununu (R-NH) and referred to the Senate Commerce Committee—Directs the Commission to issue a final order in its white spaces docket by October 1, 2007, which would permit licensed and unlicensed use of broadcast channels 2-51, inclusive, by fixed and portable devices as soon as practicably feasible but no later than Feb. 18, 2009. The bill also allows the Commission to set up a licensing scheme for the use of white spaces, as well as providing for field testing and certification of unlicensed devices.
 - H.R. 1320, the "Interference Protection for Existing Television Band Devices Act of 2007," introduced by Representative Bobby Rush (D-NY) and referred to the House Commerce Committee—Directs the FCC to allow unlicensed use of broadcast channels 2-51, inclusive, by fixed devices in rural areas only. The Commission can expand white spaces use to portable devices no sooner than 36 months after approving the first fixed unlicensed device. The Commission cannot permit white spaces use before Feb. 18, 2009, and it

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LEGISLATIVE UPDATE*(Continued from page 50)*

- must implement rules to protect wireless microphones and other such devices from interference.
- H.R. 1597, the “Wireless Innovation Act of 2007,” introduced by Representative Jay Inslee (D-WA) and referred to the House Commerce Committee—Directs the Commission to issue a final order in its white spaces docket by October 1, 2007, which would permit licensed and unlicensed use of broadcast channels 2-51, inclusive, by fixed and portable devices as soon as practicably feasible but no later than Feb. 18, 2009. The bill also provides for field testing and certification of unlicensed devices.
- Although use of the white spaces has been discussed in several hearings held by both the House Energy and Commerce Committee and the Senate Commerce Committee, none of the aforementioned bills have been taken up by either Committee.

Disaster Recovery and Homeland Security

- The exemplary service of broadcasters in the Gulf Coast Region immediately following Hurricanes Katrina and Rita solidified the role that broadcasters play in disaster recovery efforts. Recognizing that role, Senator Mary Landrieu (D-LA) has introduced legislation that would make broadcasters eligible for certain federal assistance following a disaster.
- S. 1223, the “First Response Broadcasters Act of 2007,” was introduced by the Senator with the support of Senators Tom Carper (D-DE), Mark Pryor (D-AR), and Ted Stevens (R-AK)). The bill designates local radio and television stations providing essential disaster-related programming as “first response broadcasters” and opens access to federal supplies of fuel, water and food. The bill would also protect broadcasters’ independently secured supplies from federal government seizure except in the direst cases of emergency need. Finally, the legislation directs FEMA to expedite access to the disaster area by broadcast engineers to restore transmitters and other key broadcast facilities and infrastructure. To better protect these critical-to-air facilities, the bill establishes a Broadcast Disaster Preparedness Matching Grant Program, providing

grants that could be used to protect, upgrade, or enhance facilities and infrastructure to better position stations to continue providing vital public information during a disaster.

- Representative Charlie Melacon (D-LA) has introduced a companion bill in the House, H.R. 2331, with the support of Representatives Dan Boren (D-OK) and Charles Pickering (R-MS).
- The Senate bill has been referred to the Senate Homeland Security and Governmental Affairs Committee. The House companion bill has been referred to the House Transportation Committee. Neither Committee has taken up the bill.

Violent Programming on Television

- On April 25, 2007, the FCC released its long-awaited report on violent television programming and its effect on children. The report concluded that Congress could take steps to regulate violence on television, both broadcast and MVPD, without violating the First Amendment. The FCC, however, eschewed defining what types of violent programming could be regulated, leaving that policy decision to Congress. The report suggested a number of means of regulating violent programming, however, including time shifting for broadcast violence and a la carte programming choice for violence on MVPD channels.
- Congress has been receptive to the report and its suggestions. Senator John Rockefeller, IV (D-WV), who has introduced legislation on television violence in past Congresses with the support of Senator Kay Bailey Hutchison (R-TX), has expressed an intention to introduce legislation in this Congress concerning television violence. It is expected that the legislation will be based, at least in part, on the recommendations made by the FCC in its violence report. The Senate Commerce Committee has indicated that it intends to hold a hearing on television violence in the near future, probably towards the end of June. The Rockefeller legislation may be a part of that hearing.

Kathleen A. Kirby and Shawn A. Bone are with Wiley Rein LLP in Washington, D.C.

Free Flow of Information Act of 2007 (Introduced in House)

110th CONGRESS
1st Session
H. R. 2102

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

IN THE HOUSE OF REPRESENTATIVES

May 2, 2007

Mr. BOUCHER (for himself, Mr. PENCE, Mr. CONYERS, Mr. COBLE, Mr. YARMUTH, and Mr. WALDEN of Oregon) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Free Flow of Information Act of 2007'.

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

(a) Conditions for Compelled Disclosure- In any proceeding or in connection with any issue arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information possessed by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person--

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document;

(2) that--

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person--

(i) there are reasonable grounds to believe that a crime has occurred; and

(ii) the testimony or document sought is essential to the investigation or prosecution or to the defense against the prosecution; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is essential to the successful completion of the matter;

(3) in the case that the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that--

(A) disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security with the objective to prevent such harm;

(B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively; or

- (C) disclosure of the identity of such a source is necessary to identify a person who has disclosed--
 - (i) a trade secret of significant value in violation of a State or Federal law;
 - (ii) individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), in violation of Federal law; or
 - (iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer in violation of Federal law; and
- (4) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.
- (b) Limitations on Content of Information- The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible--
 - (1) be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and
 - (2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.

SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

- (a) Conditions for Compelled Disclosure- With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.
- (b) Notice and Opportunity Provided to Covered Persons- A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)--
 - (1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and
 - (2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.
- (c) Exception to Notice Requirement- Notice under subsection (b)(1) may be delayed only if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.

SEC. 4. DEFINITIONS.

In this Act:

- (1) COMMUNICATIONS SERVICE PROVIDER- The term ‘communications service provider’--
 - (A) means any person that transmits information of the customer’s choosing by electronic means; and
 - (B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).
- (2) COVERED PERSON- The term ‘covered person’ means a person engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.
- (3) DOCUMENT- The term ‘document’ means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).
- (4) FEDERAL ENTITY- The term ‘Federal entity’ means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.
- (5) JOURNALISM- The term ‘journalism’ means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

Violence on Television:

Regulating Programming from Wile E. Coyote to Shakespeare

By Jeriane Timmerman

On Veteran's Day in 2004, ABC aired, unedited, Steven Spielberg's Academy Award winning motion picture *Saving Private Ryan*. Sixty-six ABC affiliates preempted *Ryan* due to fears that the film's strong language (including four letter words) would generate viewer complaints about perceived indecency, a Federal Communications Commission investigation, and perhaps fines for airing indecent programming—and consequently even delays or other difficulties at license renewal time.

Indeed, following the showing of *Ryan*, the American Family Association and others filed complaints at the Commission alleging that the ABC owned and affiliated stations airing the program had broadcast indecent and profane material in violation of federal statute and FCC regulations.

Although the FCC ultimately found *Ryan* not to be indecent and denied the complaints, television broadcasters in the future may have a new worry—restrictions based on violent content.

In 2004, 39 members of the House of Representatives requested the FCC to conduct an inquiry on violent television programming and its impact on children, and to produce a report to Congress on the subject.

On April 25, 2007, the FCC finally released this report, which recommends that Congress take action to regulate violent programming. *Violent Television Programming and its Impact on Children*, Report, FCC 07-50 (rel. April 25, 2007) (*FCC Report*).

This article summarizes the FCC's report and discusses some of the myriad constitutional and practical problems with regulating violent content on television. It also describes the legislation that will shortly be introduced to regulate violent programming on both broadcast and subscription television.

FCC Report and its Unanswered Questions

In its *Report*, the FCC found strong evidence that exposure to violence in the media can increase aggressive behavior in children, at least in the short term, and recommended that action should be taken to address violent programming. To that end, the FCC further found that:

- viewer-initiated blocking and program ratings (*e.g.*, the V-Chip) are of limited effectiveness in protecting children from violent content and do not fully serve the government's interests in promoting parental supervision and protecting the well-being of minors;
- further governmental action would serve these interests in protecting children and facilitating parental supervision and would be reasonably likely to be upheld as constitutional;
- Congress could develop an appropriate definition of excessively violent programming;
- Congress could implement a "time channeling" solution and/or mandate some other form of consumer choice in obtaining video programming, such as the provision by cable/satellite operators of video channels provided on family tiers or on a la carte basis.

The Report fails to offer a definition of "violence" or "excessively violent" programming.

A time channeling solution would restrict violent programming to hours when children are less likely to be in the viewing audience. Under the current indecency regime, the restricted programming may be aired only between 10:00 pm and 6:00 am.

The *FCC Report* raises a number of unanswered questions, and even Commissioners Jonathan Adelstein and Robert McDowell expressed dissatisfaction about the adequacy of the *Report's* legal and factual analyses. Most obviously, the *Report* fails to offer a definition of "violence" or "excessively violent" programming, even though Congress in its 2004 letter had asked the FCC to propose a definition.

Instead, the Commission merely says that Congress could develop an appropriate definition. As Commissioner Adelstein noted in his separate statement, the fact that the Commission is "not able to offer a definition" shows that "it does not appear to be as easy to define as some suggest."

Indeed, defined broadly, violence would include everything from Roadrunner cartoons to Shakespeare—not to mention sports and news reports of terrorism and the war in Iraq. Given the FCC's long-standing difficulties in defining

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Violence on Television

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indecentcy, as evidenced by a number of pending legal challenges at the Commission and in the courts, the agency's or Congress's ability to define violence so as to give fair guidance to programmers and withstand constitutional scrutiny must be questioned.

These definitional and related problems are in fact so severe all previous attempts by states and localities to regulate materials based solely on their violent content have been rejected as unconstitutional.

Attempts to restrict violent videotapes, trading cards, video games, books and magazines have all floundered, regardless of the manner in which the regulated violent content was defined. *See, e.g., Winters v. New York*, 333 U.S. 507 (1948); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

There is simply no "violence exception" to the First Amendment, and, as noted by Commissioner Adelstein, the *FCC Report* "diminishes the extent" to which courts have overturned efforts to regulate violent content.

Beyond these virtually insuperable definitional problems, the scientific basis for restricting violent media is shaky at best. Even FCC Chairman Kevin Martin in his statement acknowledged that "research on whether watching violent programming actually causes aggressive behavior" (let alone actual violent acts) by "children is inconclusive."

Moreover, certain research specifically relied upon by the FCC in its *Report* has been found by courts in several recent video game cases *not* to constitute substantial evidence of harm to minors. *See Kendrick*, 244 F.3d at 578-79; *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1069-70 (D. Minn. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1060-63 (N.D. Ill. 2005) (research of Dr. Craig Anderson). *See also Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 653 (E.D. Mich. 2006); *Blagojevich*, 404 F. Supp. at 1066-67, 1074 (MRI brain-mapping studies).

Reports by the Federal Trade Commission and the Surgeon General, which the *FCC Report* also relied upon, have further identified the unresolved problem of determining what

specific kinds of violent media content are actually harmful to minors.

In fact, there is essentially no available evidence showing which types of violent depictions (if any) may be more harmful than others and which types are not harmful at all. *See, e.g.,* Professor Jonathan Freedman, *Television Violence and Aggression: Setting the Record Straight* at 12 (Media Institute 2007); Harry T. Edwards and Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. Rev. 1487, 1553 (1995).

For example, some believe that violence in cartoons or in shows such as *The Three Stooges* is harmful because these programs present violence humorously and without obvious consequences, yet others believe that only "realistic" or "graphic" violence should be regulated. The government thus has no real idea whether it should restrict *Saving Private Ryan*, news reports of terrorism and the Iraq war, or Moe, Larry and Curly.

This lack of evidence only exacerbates the definitional problems discussed above, and will almost inevitably lead to a definition of violence that is imprecise and overbroad from both a practical and constitutional viewpoint. And time channeling itself appears a drastically overbroad response, given the clear infringement upon the rights of adults and the approximately two-thirds of American households that do not have any children under 18 years of age.

Even beyond these serious overbreadth problems, the constitutionality of directly regulating the content of television programming is also highly suspect because of the numerous and growing number of less restrictive alternatives.

Technologies such as VCRs, DVRs, PVRs, video on demand and computer downloads already allow viewers to watch programming whenever they want, and to prescreen and record programming for their children. The V-Chip and program ratings system and a variety of cable and satellite television controls today give parents unprecedented control over the programming viewed by their children. *See* Adam Thierer, *The Right Way to Regulate Violent TV* (Progress and Freedom Foundation, May 10, 2007) (discussing wide range of technologies and non-technical tools and methods for parental control of television programming).

Both Commissioner McDowell and Commissioner Adelstein criticized the *FCC Report* for failing to discuss the full range of tools now available enabling parents to control their children's television viewing.

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Violence on Television

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Especially in light of this plethora of less restrictive alternatives for empowering parents, an effort by the government, for the first time ever, to regulate programming due to its violent content seems both misguided and legally unsustainable. Commissioner Adelstein and Commissioner McDowell both opined that the *FCC Report* failed to grapple adequately with the constitutional issues raised by proposing to regulate violent material in broadcast and cable television programming.

The *Report* briefly cites *FCC v. Pacific Foundation*, 438 U.S. 726 (1978), to justify restricting violent content on broadcast television—a narrow 5-4 decision about indecency pre-dating the growth of cable/satellite television and radio and the development of the Internet, as well as all the parental control technologies described above. The *FCC Report* contained no legal analysis whatsoever of the constitutional authority to regulate non-broadcast subscription television services.

Proposed Legislation

Senator John Rockefeller of West Virginia will in the very near future introduce legislation designed to regulate both broadcast and cable/satellite television programming based on its violent content. Assuming that this legislation will be similar to legislation proposed by Senator Rockefeller in previous

years, the new legislation will likely direct the FCC to adopt measures to prevent the airing of “excessively violent” television programming during hours when children are reasonably likely to comprise a substantial portion of the viewing audience. Only premium and pay-per-view cable/satellite channels will be exempt.

The Senate Commerce Committee is expected to hold a hearing on Senator Rockefeller’s bill in late June. The *FCC Report* will likely give impetus to this legislation.

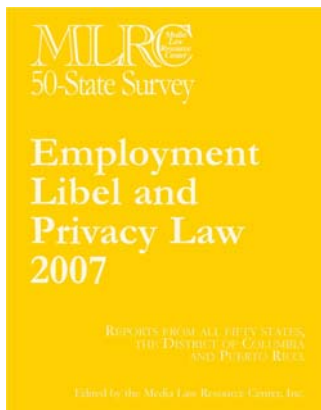
A Judicial Resolution?

Just how far will these efforts to regulate violent programming on broadcast and cable/satellite television ultimately go? Right now, it’s still unclear. If adopted, restrictions on violent programming would in all likelihood be challenged in court, where they would clearly fact an uphill battle. Such a judicial challenge—especially in conjunction with the pending court challenges against several of the FCC’s recent indecency decisions—may lead in the end to a reexamination by the Supreme Court of the level of protection afforded broadcasters under the First Amendment.

Jerianne Timmerman is Senior Vice President and Deputy General Counsel of the National Association of Broadcasters.



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ETHICS CORNER

Illuminating the Intersection Between the Litigation Privilege and the Right to Privacy

By Mark L. Tuft

The litigation privilege generally provides a complete defense for lawyers and their clients to all torts other than malicious prosecution for any communication made in the course of a judicial or quasi-judicial proceeding that bears some logical relationship to the matter.

The safe harbor afforded by the litigation privilege is broadly applied and is generally considered to be absolute. Virtually every jurisdiction that has considered the issue has concluded that the litigation privilege applies to claims for invasion of privacy.

Yet, citizens in some states, such as California and Washington, enjoy a constitutional right of privacy. Does the litigation privilege apply to a constitutionally based privacy cause of action and, if so, under what circumstances?

Consider the following:

Able represents Baker who is charged with the sexual battery of Susan. In the course of defending Baker, Able serves a pretrial subpoena for Susan's mental health records from the Healing Center, a mental health treatment facility. The Healing Center mistakenly sends Susan's mental health records directly to Able who, knowing the private and confidential nature of the documents, reads them and then transmits copies to his defense psychiatrist.

The records include several documents from another treatment facility that reveal that Susan was treated for a mild form of psychosis as a child. These documents are marked at the bottom "Confidential: Do Not Copy Without Specific Authorized Consent."

The Healing Center discovers its mistake and requests that all documents be returned. Able agrees to return the records to the Healing Center but does not reveal that copies were sent to the defense psychiatrist. The Healing Center then properly sends the documents called for by the subpoena to the court under seal. The records sent to the court do not include the confidential documents regarding Susan's treatment as a child since they are outside the scope of Able's subpoena.

The court grants Able's *ex parte* application for release of the records for use at trial. However, Able does not inform the court of the Healing Center's mistake or the fact that he sent copies of Susan's health records to his expert. At trial, the defense psychiatrist testifies based on the mental health records he received from Able. Able also uses the records regarding Susan's earlier treatment in cross-examining her at trial.

Susan sues Able for invasion of privacy under her state's constitution, which provides that privacy is an inalienable right. Able moves to dismiss Susan's complaint on the ground that the conduct alleged is absolutely protected from liability under the litigation privilege.

Does the litigation privilege apply to a constitutionally based privacy cause of action and, if so, under what circumstances?

Right to Privacy

Some states have codified the right to privacy. *See, e.g.,* Neb. Rev. Stat. § 20-204. Other states have constitutional provisions protecting privacy interests that are considered broader than those recognized by the federal constitution. *See, e.g.,* Cal. Const., Art. I, § 1; Wash. Const. Art. I, § 7. Susan appears to have a bona fide claim for invasion of privacy. Legally protected privacy interests extends to the details of a person's medical history. *Cutter v. Brownbridge*, 183 Cal.App.3d 836, 842 (1986). Susan has a reasonable expectation of privacy since she was not a party to the action.

Able's conduct can be construed as constituting a serious invasion of Susan's right of privacy. Therefore, the elements of a claim of invasion of privacy appear to be met. *See Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 39-40 (1994).

The Litigation Privilege

Able seems to have a good defense as well to Susan's claim under the litigation privilege. The litigation privilege generally applies to any communication in the

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course of a judicial or quasi-judicial proceeding to achieve the objects of the litigation even if the communication is made outside of court and no function of the court or its officers is involved. *Silberg v. Anderson*, 50 Cal.3d 205, 212 (1990); *Hawkins v. Harris*, 661 A.2d 284, 289 (N.J. 1995); *McGrew v. Heinold Commodities, Inc.* 497 N.E.2d 424, 432 (Ill. 1986); Restatement 2d of Torts, § 632F (1966).

The litigation privilege is recognized in virtually every jurisdiction as necessary to afford litigants and witnesses free access to the courts without fear of being sued for defamation or derivative torts.

The privilege encourages open channels of communication and zealous advocacy and promotes effective judicial proceedings by encouraging full communication with the courts. *Flatley v. Mauro*, 39 Cal.4th 299, 322 (2006). The privilege is applied broadly to further these purposes. The privilege applies regardless of the communicator's bad acts or motives, including malice, and extends even to civil actions based on unlawful conduct, including perjury. *Silberg v. Anderson*, *supra*, 50 Cal.3d at 216; *Wright v. Yurko*, 446 So.2d 1162, 1164 (1984); *Thomason v. Norman E. Lehrer P.C.*, 183 F.R.D. 161, 167 (D.N.J. 1998). Pre-lawsuit communications that satisfy these purposes also fall within the ambit of the privilege. *Aronson v. Kinsella*, 58 Cal.App.4th 254, 263 (1997).

There is ample authority that the litigation privilege applies as a bar to an invasion of privacy suit. *Hawkins v. Harris*, *supra*, 661 A.2d at 292; Restatement 2d Torts, §652F. But, Susan argues, her suit is not based on a garden variety invasion of privacy claim. Instead, she claims it is based on the invasion of a constitutionally protected right to privacy under her state's constitution.

Until recently, it was not clear whether a constitutional right to privacy outweighs the policies underlying judicial proceedings immunity. A few earlier cases in California held that a balancing of interests analysis applied where the litigation privilege is asserted as a defense to a claim based on the invasion of a constitutional right to privacy.

In *Jeffrey H. v. Imai, Tadlock & Keeney*, 85 Cal.App.4th 345, 360 (2000), for example, the court allowed a claim to be asserted against lawyers for violating an opposing party's

privacy in prior litigation by unnecessarily disclosing his HIV status.

The Privilege Prevails

The California Supreme Court recently answered the question in *Jacob B. v. County of Shasta*, 40 Cal.4th 948, 987 (2007) by deciding that the right to privacy recognized in California's constitution does not trump the litigation privilege. In that case, a juvenile who had been accused, but never prosecuted, of molesting his nephew sued the county and a supervisor in the county's crime victim restitution program for invasion of his constitutional right to privacy arising from the publication of a letter by the supervisor referring to the molestation accusation in a family law proceeding where the juvenile's right to visitation with members of his extended family was being litigated.

The California Supreme Court found that the letter fit squarely within the litigation privilege and applied the privilege to the constitutionally based privacy cause of action. The court acknowledged that normally a statutory provision that conflicts with the state constitution must yield to the constitutional right.

However, the court held that California's statutory litigation privilege under Civil Code § 47(b) can coexist with the constitutional right of privacy. The court reasoned that the constitutional right to privacy has never been absolute and must itself be balanced against other important interests, even interests that are not constitutionally based.

The court held that the policies favoring the expansive reach of the litigation privilege fall within the "other important interests" that must be balanced against the constitutional right of privacy and are sufficiently strong to trump a privacy claim based on the state's constitution. *Jacob B*, *supra*, 40 Cal.4th at 487-488.

Communicative v. Non-communicative Acts

The holding in *Jacobs B* does not completely resolve the issue whether Susan can prevail on her claim. The litigation privilege protects only publications and communications and does not bar recovery for tortious conduct that involves non-communicative acts.

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These rules serve as a reminder that zealous advocacy and a lawyer's responsibility to a client do not mean that a lawyer may disregard the rights of third persons.

ETHICS CORNER

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The distinction between communicative and non-communicative conduct has been a fertile source of litigation involving the application of the litigation privilege. On the one hand, pre-litigation solicitations of potential clients by attorneys in violation of state ethics rules precluding direct contact with prospective clients have been deemed communicative acts that are protected by the litigation privilege. *Rubin v. Green*, 4 Cal.4th 1187, 1195-1196 (1993).

Similarly, the testimonial use of the contents of an illegally overheard telephone conversation in violation of a state's criminal eavesdropping law is also subject to immunity under the privilege. *Ribas v. Clark*, 38 Cal.3d 355, 363-364 (1985).

On the other hand, a pre-litigation illegal recording of confidential telephone conversations has been held to be non-communicative and thus unprivileged. *Kimmel v. Goland*, 51 Cal.3d 202, 210-211 (1990). Eavesdropping on a telephone conversation has also been found to be outside the scope of the privilege. *Ribas v. Clark*, *supra*, 38 Cal.3d at 365.

These cases do not provide much help in determining whether Able's conduct was communicative or non-communicative. Able's reading of Susan's mental health records, which he knew were inadvertently sent by the Healing Center and which included documents that were marked confidential and not to be copied, appear to be non-communicative acts.

Courts are split on whether the mere act of reading confidential and privileged materials standing alone would be sufficient to support a constitutionally based claim for invasion of privacy. See *Susan S. v. Israels*, 55 Cal.App.4th 1290, 1301 (1997) (litigation privilege inapplicable to an attorney's unauthorized reading of confidential mental health records), and *Mansell v. Otto*, 108 Cal.App.4th 265, 279 (2003) (attorney's reading of confidential mental health records standing alone would not be a sufficient non-communicative act that would support a claim based on a constitutional right of privacy).

At the same time, the testimonial use of the records at trial clearly appears to fall within the judicial proceedings immunity. Sending the records to the expert and not informing the court of that fact or of the Healing Center's mistake is less clear.

In another recent case, the California Supreme Court shed light on how the distinction should be made in applying the privilege. *Rusheen v. Cohen*, 37 Cal.4th 1048 (2006). In that

case, a lawyer was sued for abuse of process based on the lawyer's post-judgment collection activities that included allegedly filing a false declaration of service.

The court held that determining whether the litigation privilege applies hinges on the gravamen of the action and whether the injury alleged resulted from an act that was communicative in its essential nature. The court clarified that if the gravamen of the action is communicative, the litigation privilege extends to non-communicative acts that are necessarily related to the communicative conduct. *Rusheen*, *supra*, 37 Cal.4th at 1065.

The court held in that case that the litigation privilege applied even though the attorney's conduct necessarily involved related acts that were not communicative in nature. In other words, unless it is demonstrated that an independent non-communicative, wrongful act is the gravamen of the action, the litigation privilege applies.

These recent cases help clarify the intersection between the litigation privilege and claims based on a constitutional right of privacy. The gravamen of Susan's claim involves more than just Able's reading of her mental health records and their dissemination to the defense expert. Her claim includes obtaining the records for use at trial and their use by the defense expert in testifying at trial and by Able in cross-examining Susan. The litigation privilege, at least in California, would likely bar Susan's constitutionally based claim for invasion of privacy.

Other Consequences

This does not mean that Able is entirely off the hook. The litigation privilege even as broadly applied is not without limits. For instance, the privilege does not protect against professional discipline for a lawyer's unethical conduct. *Hawkins v. Harris*, *supra*, 661 A.2d at 288; *Thomason v. Norman E. Lehrer P.C.*, *supra*, 183 F.R.D. at 167.

Under ABA Model Rule 4.4(a), a lawyer may not use methods of obtaining evidence that violate the legal rights of a third person. Furthermore, a lawyer who receives a document relating to the representation of a client and knows or reasonably should know that the document was inadvertently sent must promptly notify the sender. Model Rule 4.4(b).

The purpose of this rule is to permit the person who inadvertently sent the document to take protective measures.

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ETHICS CORNER

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Able may also have violated Model Rule 3.3(d) by failing to inform the court of all material facts known to Able that would enable the court to make an informed decision on his *ex parte* application for release of Susan's mental health records. Rule 3.3(d) provides:

In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The court has an affirmative responsibility to accord an absent party just consideration. Since the other side is not

always present and may not have an opportunity to make a presentation, the lawyer making the application has a duty to disclose material facts known to the lawyer that the lawyer reasonably believes are necessary for the court to make an informed decision. Model Rule 3.3, Comment [14].

Thus, even if the litigation privilege protects Able from Susan's constitutionally based invasion of privacy claim, he may be subject to court sanctions and possible discipline for obtaining access to her confidential records without authorization and in disregard of her rights. These rules serve as a reminder that zealous advocacy and a lawyer's responsibility to a client do not mean that a lawyer may disregard the rights of third persons.

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