



# LIBELLETTER

November 1997

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## Matusevitch: British Libel Judgment Unenforceable

By Laura R. Handman and Robert D. Balin

It all began in February 1984 with an op-ed column published in the London-based *Daily Telegraph* and written by a Soviet emigre turned English citizen, Vladimir Telnikoff. The column provoked a heated letter to the editor, also published in the *Daily Telegraph*, by fellow Soviet emigre Vladimir Matusevitch, an American citizen by birth, then living in London. A libel suit in England followed and ultimately a plaintiff's verdict was rendered for Telnikoff. Thirteen and a half years later, after a circuitous route which included stops in the House of Lords and the D.C. Circuit, Maryland's highest court has finally spoken. With flags waving to the strains of fife and

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## Fourth Circuit Panel Reverses Judgment for Hit Man Publisher

By Seth Berlin

On November 10, 1997, the United States Court of Appeals for the Fourth Circuit, in a remarkable 65-page opinion, reversed a lower court order granting summary judgment in two wrongful death actions brought against publisher Paladin Enterprises, Inc. ("Paladin"). *Rice v. Paladin Enterprises, Inc.*, \_\_ F.3d \_\_, 1997 WL 702330 (4th Cir. Nov. 10, 1997). In two of its most significant aspects, the panel's opinion (1) substantially reformulated the holding of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and the multitude of cases applying it, to protect only a narrowly-defined category of "abstract advocacy," and (2) found that First Amendment protections may permissibly hinge upon the intent of the speaker, thereby potentially chilling a wide variety of speech that could subject speakers to

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## THANK YOU JIM GROSSBERG!

Jim Grossberg has served this year as President of the Defense Counsel Section and its Executive Committee. He served a number of years prior to that on the Executive Committee. Consistent with the rotation of officers and members of the DCS Executive Committee, he is stepping down at the end of this year, making way for Laura Handman to take over as President.

On behalf of myself and this entire organization, I want to thank Jim for his wonderful service to LDRC. For all of you who know Jim, you know that he is one of the smartest and, at the same time, warmest, most up-beat people in the media bar (and probably the bar generally). Working with Jim is a particular pleasure because of his wealth of ideas, his genuine common sense, his knowledge of the issues and the practice of media law, and his surely-it-can-be-done attitude. Jim will remain a participant in the DCS Executive Committee as President-emeritus so it is not as yet a total farewell. Thank goodness.

With all of our thanks, Jim.

---Sandy Baron

## AND THANK YOU PETER CANFIELD!

Peter Canfield, representing Cox Enterprises, is stepping down at the end of this year after more than five years on the LDRC Executive Committee. Peter was part of the Executive Committee when I joined LDRC as Executive Director and he has served on that body through the transition to our current administration. He was assigned the task of developing the newsletter, now the *LDRC LibelLetter*, and he has chaired the *LDRC LibelLetter* Committee since its inception.

We all owe Peter enormous thanks for the work that he has done on behalf of this organization. He has been a superb member of the Executive Committee, combining intelligence, common sense, humor and a soft-spoken (yet most persuasive) manner to this body. Peter's contributions to the deliberations and decision-making have been invaluable and he will genuinely be missed from the Executive Committee.

But, it would be foolish to let anyone that good go too far. Peter has been enlisted to remain as Chair of the *LDRC LibelLetter* Committee for at least the near term. And I hope to always be able to call upon Peter for advice and ideas. Thank you again, Peter.

--- Sandy Baron

## Mary Ann Werner Elected Member of LDRC Executive Committee

## Susan Grogan Faller Elected Member of the DCS Executive Committee

Mary Ann Werner, Vice President and Counsel of The Washington Post, was elected at the LDRC Annual Meeting on November 12 to serve for a two-year term as LDRC's newest Executive Committee member. She is taking over the slot on the five-person committee from Peter Canfield. We are delighted to welcome her to the Executive Committee, which oversees LDRC's administration, reviewing its projects, policies, and finances on a monthly basis.

Other current members of LDRC's Executive Committee are: Robin Bierstedt (Time, Inc.), Robert Hawley, Chair (The Hearst Corporation), Susanna Lowy (CBS Inc.), and Kenneth Vittor (The McGraw-Hill Companies).

Susan Grogan Faller, partner at Frost & Jacobs, Cincinnati, Ohio, was elected treasurer of the LDRC Defense Counsel Section and a member of its Executive Committee at the DCS Annual Meeting and Breakfast on Thursday, November 13. Susan was most recently Chair of the LDRC Pre-

Publication/Pre-Trial Committee.

The Defense Counsel Section Executive Committee, which meets monthly, is made up of four officers of the Section and the past president, who assumes the title of emeritus. This committee oversees the operation of the DCS activities and committees and serves to further guide LDRC in its choice of projects, services, policies and practices. The president of the DCS sits ex-officio on the LDRC Executive Committee. Each member of the DCS Executive Committee serves one year in each of the four officer positions (president, vice president, secretary and treasurer).

Susan Grogan Faller takes the place of Tom Kelley, Faegre & Benson, Denver, Colorado, who moves up into the position of secretary, while Thomas Leatherbury, Vinson & Elkins, L.L.P., Dallas, Texas, moves to vice president. Laura Handman, Lankenau Kovner Kurtz & Outten, L.L.P., New York, will assume the presidency of the DCS.

## Matusevitch

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drum, the Maryland Court of Appeals answered a certified question from the D.C. Circuit that recognition of the English libel judgment against Matusevitch would be repugnant to the public policy of Maryland. The decision is noteworthy, not only as the first appellate level court to reach this conclusion, but also for the history lesson the Court offers, drawing a stark distinction between centuries of British hostility toward freedom of the press and the "major departure from English law and policy concerning free speech and freedom of the press" signaled by the Declaration of Independence and the Bill of Rights. *Telnikoff v. Mastusevitch*, Misc No. 3, at 24 (Nov. 10, 1997).

### The Op Ed and Response

To recap the lengthy history of this case, Telnikoff had complained in his op-ed column that the BBC's Russian Service had on its staff too many "Russian-speaking National minorities" and too few of "those who associate themselves ethnically, spiritually or religiously with Russian people." This prompted Matusevitch, a journalist for Radio Free Europe/Radio Liberty, to write in a letter to the editor that Telnikoff was demanding that the BBC's Russian Service "switch from *professional testing* to a *blood test*" and that Telnikoff was "stressing his racist recipe by claiming that no matter how high the standards of integrity 'of ethnically alien' people Russian staff might be, they should be dismissed."

When Telnikoff sued in England, Matusevitch prevailed at the first two judicial levels, the courts finding that his letter to the editor was "fair comment," i.e., that the reference to Telnikoff advocating a blood test was "in a metaphysical sense" and that the reference to dismissal of employees was simply taking Telnikoff's views to "the logical outcome." On appeal to the House of Lords, however, Lord Keith of Kinkel reversed, ordering that a jury determine whether the letter was comment or fact based on examination of Matusevitch's letter by itself without regard to Telnikoff's op-ed piece to which the letter was responding. The Lords did affirm the finding that Matusevitch did not act with malice which, under British law, would have defeated the defense of fair comment, had it been established. At the subsequent trial, the jury returned a verdict of 240,000 pounds, finding that the letter conveyed the "facts" that Telnikoff had made statements of racial hatred and was a

racialist. These defamatory statements were presumed to be false and, for procedural reasons, Matusevitch could not offer a defense of truth.

### Plaintiff Seeks U.S. Enforcement

Telnikoff sought to enforce his English libel judgment in state court in Maryland, where Matusevitch was now living. In response, Matusevitch commenced a federal action under 42 U.S.C. § 1983. Telnikoff, based on diversity jurisdiction, counter-claimed for enforcement under Maryland law. Judge Urbina of the federal district court for D.C. found that the British judgment was repugnant to the public policy of both Maryland and the U.S. and that enforcement would violate the First and Fourteenth Amendments. After argument on appeal, presumably to avoid the federal issues, the D.C. Circuit certified the following question to the Maryland Court of Appeals (which is Maryland's highest court):

"Would recognition of Telnikoff's foreign judgment be repugnant to the public policy of Maryland?"

The Maryland Court, in a 6 to 1 decision, answered the question – resoundingly – in the affirmative.

### Maryland Rejects Comity

The Court looked to principles of comity, both federal and state, the latter codified in the Maryland Uniform Foreign-Money Judgments Act (the "Act"). As a general rule, comity requires that foreign judgments ordinarily be accorded "deference." However, under both the Act as well as common law, recognition and enforcement will be denied if a foreign judgment is "inconsistent with the public policies of the forum state." *Matusevitch* at 13 (citing federal and Maryland authorities declining to enforce foreign judgments).

In ascertaining Maryland's non-constitutional public policy, the Court nonetheless looked to federal and Maryland constitutional authority for guidance. First, the Court traced the British history of control of the press, beginning in the reign of Henry VIII, and maintained for centuries through licensing, taxation and prosecution for seditious libel. With the adoption of the Bill of Rights:

"Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices."

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*Matusevitch* at 25, quoting *Bridges v. California*, 314 U.S. 252, 264-65 (1941).

Dating its first protection of the press back to 1639, Maryland adopted a very strong free press clause: "That the liberty of the press ought to be inviolably preserved." The Court cites as an early example of protection of the press, the curious case of the banished publisher William Goddard. When Goddard, in 1777, would not reveal the author of an anonymous satiric article critical of the Whig point of view with regard to the British offer of peace, he was banished by the Whig Club from Baltimore. That was reversed by the General Assembly as a violation of the Maryland Constitution. He then published another tract in which 'he dusted the salt and pepper of derisive irony over the wounds of his opponents.' *Matusevitch* at 28 (citation omitted). Again the sentence of banishment, again reversed, with officials required to apologize and the Governor instructed to provide protection. The Court also noted that Maryland was the first state to adopt a shield law.

Turning to the present day, the Court delivered a lengthy bill of particulars as to how:

Maryland defamation law is totally different from English defamation law in virtually every significant respect. Moreover, the differences are rooted in historic and fundamental public policy differences concerning freedom of the press and speech.

*Matusevitch* at 42.

The Court's list of differences included:

- - plaintiff has the burden of proving falsity under Maryland law whether or not the statement involves a matter of public concern or the suit is against a media or non-media defendant, citing *Jacron Sales Co. v. Sindorf*, 276 Md. 580 (1976), *whereas* a defendant must prove truth and risk aggravated damages if he fails under British law;

- - plaintiff must establish, at a minimum, negligence under Maryland law *whereas* British law imposes strict liability for mistakes;

- - there are no presumed or punitive damages unless plaintiff establishes actual malice under Maryland law *whereas*, under British law, such a showing is not required and damages are awarded as one sum without

distinction between compensatory and punitive;

- - plaintiff must prove actual malice to overcome a conditional privilege under Maryland law *whereas* under English law, privileges can be overcome by a showing of ill will;

- - under Maryland law, determination of whether a statement is fact or opinion is reached by viewing the language in context and is not defeated by malice *whereas*, under British law, defendant must prove fair comment, the defense is defeated by a showing of malice and the statement is not evaluated in the context of the matter to which it is responding.

### *Maryland/UK Law Contrasted*

In this case, these differences were dispositive. Despite the finding affirmed by even Lord Keith that *Matusevitch* had not acted with actual malice, Telnikoff was able to prevail in England since the question of fault was irrelevant. Falsity was presumed. The language in suit was examined in isolation, without regard to Telnikoff's column to which it was responding; as a result, the language was taken as a statement of fact that Telnikoff had actually advocated an ethnic blood test for hiring and had actually advocated dismissal on ethnic grounds. By contrast, the Court noted that, in Maryland, the letter to the editor would have been viewed in the context of the op-ed column to which it was replying and, "as a matter of law, be treated as 'rhetorical hyperbole' in the course of rebuttal during a vigorous public debate." *Matusevitch*, at 43.

Concerned that recognition of English libel judgments "could well lead to wholesale circumvention" of these principles of American (and Maryland) libel law, the majority noted with growing alarm the increasing propensity of libel plaintiffs, including U.S. residents, to choose an English forum to avoid U.S. constitutional burdens. *The dissent* (Chasanow, J.) expressed the exact opposite concern - namely, that Maryland would become "a safe haven for foreign libel judgment debtors." *Matusevitch*, dissent at 23.

### *A Dissenter*

As a threshold matter, the dissent is critical of the D.C. Circuit's decision to certify the question as a matter of Maryland law, stating that the First Amendment and federal princi-

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ples of comity and uniform treatment of foreign judgments should control, and urging the Maryland Court to decline to answer the certified question. *In dicta*, the dissent sees Maryland public policy as favoring recognition of foreign judgments, particularly as between one British resident against another for false statements in a letter labeling him anti-Semitic. In a tone decidedly hostile to current First Amendment jurisprudence, the dissent notes that, for centuries until 1964 and *New York Times v. Sullivan*, our libel law was the same as Britain's and was not viewed as in violation of the federal or state constitutions. In language that could have particular appeal in certain quarters, the dissent notes:

It was not the Maryland Constitution, the Maryland Legislature, public outcry, or Maryland public policy that caused Maryland to abandon its adherence to the English common law in 1964. It was the Supreme Court construing the First Amendment to the United States Constitution that made us jettison the same English common law of libel that we now find so offensive.

*Matusevitch* dissent at 14.

In addition to the relatively recent vintage of these First Amendment protections, the dissent stresses that the instant action was brought by a British resident, the controversy, viewed most narrowly, involved employment practices of the BBC, and the suit was against a non-media defendant who was not U.S. based. These distinctions led the dissent to distinguish *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Co. 1992), which the dissent endorses. In that case, a New York court refused to enforce a British libel judgment obtained by a British resident against a U.S.-based publisher whose wire service story and newspaper were distributed in England.

Significantly, the dissent recognizes that there are circumstances when courts might properly decline to enforce foreign libel judgments, such as when the judgment is against a U.S. publisher which publishes here and abroad, or when it is obtained by a U.S. public figure in a lawsuit brought in a foreign forum which does not require plaintiff to prove fault. Thus, there is unanimity on the Court that enforcement of foreign judgements should be declined in what *amici* have always identified as the most compelling circumstance.

With the advent of the Internet and satellite communications, the national borders stressed by the dissent are, however,

quickly disappearing in the new world of global communications. In this case, for example, in 1984 when the letter was published, the *Daily Telegraph* had a minimal distribution in the U.S. Now, it is available over the Internet to literally millions of readers in the U.S. with the click of a mouse. Access to information for U.S. readers is thus directly affected by British libel laws. Moreover, the First Amendment protects the interests of all speakers, not just media, and their audiences as well. Finally, the dissent does not address the first principle of comity that turns, not on the location of the parties or the locus of the dispute, but on whether U.S. courts are being asked to lend their enforcement authority and their judicial imprimatur to a judgment repugnant to fundamental principles in this country.

### *Decision Could Have Wider Effect*

The majority decision is sufficiently broad that virtually every British libel judgment is likely to be found repugnant to Maryland public policy. Even if the defendant has assets in the overseas forum which may be subject to enforcement, this decision may provide significant support for a motion of transfer *non conveniens* in lawsuits against U.S. publishers and/or those brought by U.S. plaintiffs in Britain. It also may help to tip the balance in favor of the application of U.S. law in choice of law questions. Finally, and perhaps most significantly, it provides substantial ammunition for those seeking to reform the British libel law to be consistent with the growing number of former British colonies, such as Australia, India and Canada, which have been moving toward adopting U.S.-style protections.

The case returns to the D.C. Circuit which will presumably enter a judgment consistent with the Maryland Court's response. There is a chance that, if the case continues in its present posture, as a claim under Section 1983 for violation of federal constitutional rights, the Court may not be able to avoid the federal questions.

The *amici*, led by The New York Times Company and joined by many leading broadcasters, publishers, trade associations and international human rights groups, participated in the trial court and in both appellate courts, in which *amici* were permitted to argue. The authors of this article, from the firm of Lankenau Kovner Kurtz & Outten, LLP, represented *amici*. *Matusevitch* has been represented *pro bono* by Arnon Siegel, formerly of Davis Polk Wardwell and now of Wilmer Cutler & Pickering.

## Morgan-Foretich -- The Last Chapter?

By Paul R. Taskier

On November 29, 1992, ABC broadcast its Sunday Night Movie, "A Mother's Right: The Elizabeth Morgan Story," a made-for-television movie, produced by The Landsburg Company. The docudrama related, from the perspective of Elizabeth Morgan, the history and dramatic elements of the much-published controversy of the late 1980's between plastic surgeon Elizabeth Morgan and her ex-husband, oral surgeon and dentist, Eric Foretich. The Morgan-Foretich controversy involved charges and counter-charges of child sexual abuse of the couple's only child, Hilary, and accusations by Foretich's prior wife, that he had similarly abused Hilary's older half-sister. There were numerous other lurid accusations between and among the parties.

### *Morgan Jailed/Her Daughter Hidden*

National attention to the dispute began when Morgan was held in contempt of court by the presiding Superior Court judge after he ordered her to provide Hilary to Foretich for a six-week unsupervised summer visit in 1987. Morgan, who had contended in court and on repeated emergency appeals that Foretich was sexually abusing the child, and that the child was in physical and psychological danger, refused and sent the child, with her maternal grandparents, on a multi-nation odyssey, ending in Christchurch, New Zealand.

Morgan, in the meantime, was confined to the D.C. Jail, where she steadfastly refused to comply with the court's orders, contending in court and in a national media blitz that her duty as a mother required her to keep her child safe, and that she was willing to endure another 13 years of confinement -- until Hilary's majority -- if that was what was required to protect her. Foretich responded with a media blitz of his own, holding rallies and press conferences, appearing on television talk shows and local and national news, including stints on home base on The Phil Donahue Show, Larry King Live, Night Line and others.

After two years in jail, following mounting public pressure and a campaign on Capitol Hill for a private bill, Congress passed, and President Bush signed, a bill that had the effect of freeing Morgan from jail for civil contempt. Shortly thereafter, as a result of immigration background checks in the U.S. by New Zealand authorities, Hilary's whereabouts were dis-

covered. Foretich flew to New Zealand, followed shortly thereafter by Morgan, and the New Zealand Family Court awarded custody to Morgan on the basis that the child believed that Foretich had abused her, and that it was in the child's best interests to remain in New Zealand with her mother and maternal grandmother.

### *A Saga of Lawsuits*

The controversy spawned numerous lawsuits, including the longest-running family law action in the local Superior Court, a parallel action in Virginia state court dealing with Hilary's older half-sister, a federal trial on child abuse charges brought by Morgan in the Eastern District of Virginia, with a defamation counterclaim by Foretich, a defamation action in D.C. Superior Court brought by Foretich against People Magazine on TV, an action by Foretich and his parents against Glamour magazine in federal court in the District of Columbia, an action by Foretich against the Morgan family and the expert witnesses who testified against Foretich in the Virginia federal case (also brought in D.C. federal court), a defamation case against The Lifetime Channel and the BBC brought by Foretich in the U.S. District Court for the District of Columbia, and a defamation action against CBS and Connie Chung brought by Foretich in the U.S. District Court for the District of Columbia.

On November 29, 1993, the last day before expiration of the statute of limitations, Foretich filed identical defamation actions in state court in Virginia and in D.C. Superior Court against ABC and the producers of the ABC broadcast docudrama. Both actions were removed, and the Virginia action transferred to D.C., where the two cases were consolidated before the Hon. Harold H. Greene. Judge Greene had prior experience with Foretich as a plaintiff, in Foretich's case against the Morgan family and Morgan-side expert witnesses, and in Foretich's suit against CBS and Connie Chung for an interview of Foretich by Chung. The Foretich suit against CBS and Chung was then still pending.

The producers were dismissed early in the case for lack of personal jurisdiction in the District of Columbia. After litigation spanning almost two years, in which Foretich was subjected to numerous court orders requiring him to cooperate in discovery, including a threat by the presiding magistrate judge

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that the sanction of dismissal was an option in light of Foretich's refusals to comply with discovery, Foretich filed a new action, against ABC and the dismissed producers in federal court in New Hampshire. This suit, which also added the docudrama's research consultant, a New Hampshire resident, was within the three-year New Hampshire statute of limitations by a few days. Foretich then sought to transfer the D.C. case, in which discovery had been completed, to New Hampshire, ostensibly to begin all over again in a more hospitable forum. In the meantime, ABC had filed its summary judgment papers in the D.C. action. The New Hampshire court stayed its action until a summary judgment ruling in the D.C. action, and the D.C. court denied the transfer motion.

On October 16, 1997, summary judgment was granted by Judge Greene. *Foretich v. ABC et al.*, Civ. Ac. Nos. 93-2620 and 94-0037. *Slip op.* (D.C. Cir. Oct. 17, 1997). He found that Foretich was a limited purpose public figure under *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980). The Court first found that the Morgan-Foretich controversy was a public controversy, rejecting Foretich's contentions under *Time v. Firestone*, 424 U.S. 448 (1976), that the dispute was essentially private and did not rise to the level of a public dispute. Quoting *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099, 1102 (D.D.C. 1991) (the *Glamour* magazine case), the Court held that "the Foretich-Morgan dispute 'engendered discussion on issues of public concern, including child abuse, women's rights, the intrusion of the state into private affairs, and the limits of punishment for contempt of court.'" *Foretich, Slip op.* at 10.

### **Foretich Found A Public Figure**

The Court also found that Foretich assumed a proactive role in the publicity of the dispute, and citing "innumerable statements to the printed press, on television programs and radio programs," the Court rejected Foretich's claim that his involvement in the public activity was purely defensive. *Id.* at 12. Reciting the scope of Foretich's self-characterized involvement as spanning commentary on "missing and exploited children in general," to comments on the Woody Allen-Mia Farrow custody dispute, to discussions of "what he called the 'national epidemic' of false allegations of sexual abuse in child custody cases," and noting that Foretich also authorized issuance of a 237-page package of materials describing his position about the controversy to more than 50 media entities in

1992, the Court concluded that Foretich assumed the requisite "special prominence" not only in his custody dispute, "but also generally in public questions concerning parents' rights." *Id.* at 15.

### **No Actual Malice**

Because Foretich offered no direct evidence of actual malice by ABC, the Court analyzed three types of circumstantial evidence argued by Foretich: evidence that the story was (1) fabricated, (2) so inherently implausible that only a reckless person would have broadcast it, or (3) based wholly on a source that the defendant had obvious reasons to doubt, such as an unverified anonymous telephone call.

Foretich claimed that the story was fabricated by Morgan, that ABC did not interview him for the docudrama and ignored his objections, and that ABC ignored the existence of certain pro-Foretich information such that ABC thereby did not properly investigate both sides of the controversy. The Court made short shrift of Foretich's contentions, finding that ABC did investigate the controversy, did go to original source materials, did do research beyond that provided by the producers' research consultant and did analyze Foretich's objections to the movie. The Court also found that ABC's omission of an interview does not support a finding of actual malice ("Indeed, where the publisher can expect denial from a party, it is not required to contact that party."). *Id.* at 20-21.

As to Foretich's charges that ABC relied on inherently improbable evidence, the Court found that Foretich missed the mark: "ABC simply depicted the story as it unfolded in the courtroom and in the press. Therefore, it is simply inaccurate to say that ABC relied on inherently improbable evidence in making" the docudrama. *Id.* at 22. The Court further relied on ABC's extensive fact-checking review in verifying the events in the movie "against court transcripts and documents, press interviews, doctors' reports and other sources." *Id.*

The Court also rejected Foretich's contention that ABC relied on a dubious source, referring to Robert Trebilcock, the docudrama's research consultant and an investigative reporter who had covered the story for years and had co-authored a draft book with Morgan. Citing to the fact that "ABC continuously double-checked Trebilcock's (the docudrama's research consultant and an investigative reporter) information against the supporting documents and [that it] required Trebilcock to produce primary sources when facts were in dispute," the

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Court held that ABC had "no reason to doubt [Trebilcock's] credibility, his veracity or his talents as an experienced journalist." *Id.* at 24.

Foretich's final arguments were also rejected by the Court. The Court dismissed Foretich's claim that actual malice could be presumed because ABC expected economic gain from the docudrama despite its harm to Foretich's reputation.

In sum, Judge Greene found that Foretich was a limited purpose public figure involved in a public controversy, that there was no direct evidence of actual malice by ABC, and that none of Foretich's claims of actual malice by circumstantial evidence were sustainable under a record that showed close factual review and analysis of the whole controversy by ABC prior to the broadcast. The time to appeal the judgment has elapsed, and Foretich, in exchange for avoiding a bill of costs, has agreed to dismiss his parallel action in New Hampshire with prejudice as against ABC, the producers and Trebilcock. Absent new broadcasts or publications about the Morgan-Foretich controversy which lack close factual review, the D.C. court's ruling could be the last chapter in the Morgan-Foretich defamation cottage industry.

*Paul R. Taskier is a partner at Dickstein Shapiro Morin and Oshinsky, LLP in Washington, DC which represented Capital Cities/ABC Inc. and all other defendants.*

## **New Decision Published in MMAR v. Dow Jones: Punitive Damage Award Against Dow Jones Set Aside If Reversed, Award Will Be Reduced**

On November 6, 1997, United States District Judge Ewing Werlein, Jr. issued his second post-trial opinion in *MMAR Group, Inc. v. Dow Jones & Co.*, upholding \$22.7 million in compensatory damages against Dow Jones and an additional \$20,000 in punitive damages from *Wall Street Journal* reporter Laura Jereski. As in his earlier opinion, issued May 27, 1997, Judge Werlein ordered that the \$200 million punitive award against Dow Jones be set aside, but provided for the first time that, in the event of a reversal of his decision setting aside the punitive damage award, MMAR would have to either accept remittitur to \$45 million or face a retrial on the issue of punitive damages. *MMAR Group, Inc. v. Dow Jones & Co., Inc.*, No. H-95-1262

(S.D. Tex., November 6, 1997), see *LDRC LibelLetter*, June 1997 at 4.

### ***Liability and Compensatory Damages Affirmed***

As in his previous opinion, Judge Werlein spent little time addressing the jury's verdict on liability. Rather, the court, citing *Gross v. Black & Decker Inc.*, 695 F.2d 858 (5th Cir. 1983), made clear that it would afford "great deference" to the jury findings. Plaintiff was held a private figure and negligence was the standard for liability. Accordingly, the court continued to find that "[o]n each of the five statements that the jury found were false and defamatory and that Defendants were negligent in publishing, the Court finds that there was substantial evidence of such quality and weight that reasonable and fair minded persons in the exercise of impartial judgment might reach different conclusions with respect to the libel and the negligence of Defendants."

On the issue of compensatory damages, Dow Jones presented two main arguments: "first, that 'there is no evidence linking any of the five statements directly to any damages to MMAR,' and second, that if 'Plaintiff has shown that it suffered some harm for which it is entitled to compensation, that harm was at most \$1.5 or \$1.65 million.'"

In support of its first contention, Dow Jones argued that "MMAR was a doomed business, which failed not as a result of publication of the Article, but rather as a result of a suit LASERS [the Louisiana State Employees' Retirement System] filed against it and an impending NASD investigation."

Judge Werlein, however, noted the evidence introduced by MMAR at trial was "legally sufficient evidence that the five false and defamatory statements in the Article were a proximate cause of MMAR's business failure." The evidence included: the testimony of MMAR representatives who stated that the business failure was directly attributable to the article; evidence from a former customer, who was experienced and knowledgeable in the securities industry, who testified that the challenged statements would make MMAR's customers less likely to do business with MMAR; evidence of The Wall Street Journal's preeminence as a source of business news in the United States; and of the precipitous loss of business in the twenty-one days immediately following publication of the article.

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### **No Proximate Cause For Damages Argued**

In support of its second argument, Dow Jones contended "that there was not evidence directly attributing the \$22.7 million in damages only to the false and defamatory statements as distinguished from other portions of the Article that were constitutionally protected."

The court rejected this argument, as well, stating that the testimony of a former customer and experienced securities trader and the sudden decline in MMAR's business just after publication "must be viewed at least as some corroborating evidence of the damages caused by the libel." As for the amount of damages, the court pointed out that "[t]he major point of difference between MMAR and Defendants on the damage question seems really not to have been in how to show that the libel caused customers not to do business with MMAR, but in whether the false and defamatory statements actually caused MMAR to fail, or merely lose profits."

With MMAR arguing that the company's demise resulted in \$32 to \$42 million in damages and Dow Jones contending that libelous statements caused only a loss of profits in the range of \$1.5 to \$1.65 million, Judge Werlein held that, "[t]he jury's finding of \$22.7 million in damages, was within the range of testimony at trial and is supported by legally sufficient evidence."

### **Punitive Damage Award Against Reporter Stands**

Judge Werlein also affirmed the \$20,000 punitive damage award against *Journal* reporter Laura Jereski. Citing the evidence of discrepancies "between what she was or was not told and what she wrote," and the "enmity" that developed between Jereski and MMAR during the course of her investigation, which included a letter written by MMAR's lawyers to the *Journal's* in-house counsel expressing concern over Jereski's reporting practices, Judge Werlein found that "a reasonable juror might have inferred that Ms. Jereski was motivated to retaliate against MMAR, with the pen as her weapon."

Citing *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992), for the proposition that "[t]he presence of a motive to publish a false statement is a proper evidentiary consider-

ation in a case such as this," Judge Werlein concluded that "there was substantial evidence from which a reasonable juror might find with convincing clarity that Ms. Jereski acted with actual malice."

### **Punitive Damage Award Against Dow Jones Set Aside**

In contrast, Judge Werlein found that there was not sufficient evidence to support the \$200 million punitive damage award the jury returned against Dow Jones. While the court singled out four Dow Jones employees — attorney Stuart Karle, deputy managing editor Byron Calame, Jereski's supervising editor Gay Miller, and reporter Jonathan Clements — who were involved to some extent in the preparation and publication of Jereski's article, the court found that MMAR failed to prove that any of them had acted with actual malice.

Rather, the court found that there was no evidence that Karle had an editorial function, that Calame "was not involved in Ms. Jereski's development of the Article," that while Miller had edited the early drafts of Jereski's article, she was away on vacation as the article moved closer to publication, and that Clements, to whom Miller handed over her editorial duties, did not act with actual malice because he failed to ask Jereski about statements in the article or the reliability of her sources.

In addition, Judge Werlein reiterated his earlier finding that Dow Jones could not be found liable simply on the basis of respondeat superior. Rather, under Texas law, the court stated that "an employer may not be held vicariously liable for punitive damages 'unless it either authorizes, participates in, or ratifies the employees conduct giving rise to such damages.'" Quoting *Embrey v. Holly*, 442 A.2d 966 (Md. 1982), citing *Gulf C.&S.F. Ry. Co. v. Reed*, 80 Tex. 362, 15 S.W. 1105 (1891).

Rejecting MMAR's arguments that Jereski was an unfit journalist such that Dow Jones had been reckless in employing her, and that the *Journal's* failure to retract satisfied Texas's stringent standard for vicarious liability, the court held instead that "the facts and inferences point so strongly and overwhelmingly in favor of Defendant Dow Jones on the propositions (1) that neither Dow Jones nor a managerial agent of Dow Jones knowingly autho-

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rized Ms. Jereski to publish false and defamatory statements about MMAR; (2) that Ms. Jereski was not unfit to work as a journalist and that Dow Jones was not reckless in employing or in retaining her as a journalist during the times material to this case; (3) that Ms. Jereski was not herself employed in a managerial capacity, and (4) that neither Dow Jones nor any managerial agent of Dow Jones ever knowingly ratified or approved Ms. Jereski's writing of false and defamatory statements about MMAR, that reasonable persons could not arrive at a contrary verdict."

### ***If Reversed, Award Will Be Reduced to \$45 Million***

Addressing Dow Jones's motion for a new trial, the court came to an interesting decision by granting a conditional new trial on punitive damages in the event that the court's decision throwing out the punitive award is reversed on appeal.

Citing *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996), the court found that while "the verdict was not the result of jury passion and prejudice," the jury "must have been overwhelmingly influenced by Dow Jones's \$2 billion in annual revenues and \$4.2 billion in market capitalization, only portions of which are attributable to its ownership and publication of the *Journal*." The court then noted that "[j]urors are always challenged by plaintiffs' attorneys to set punitive awards sufficiently high to 'send a message' and to cause the tortfeasor's wrongful conduct to be noticed at the highest corporate levels. In this instance, however, the jury simply went too far, and it appears, blindly based its verdict solely in proportion to Dow Jones's balance sheet without also taking into consideration the actual damages sustained by MMAR and the relative degree of reprehensibility of Dow Jones's conduct."

Thus, Judge Werlein concluded that "[t]he magnitude of the award, and its clear excessiveness, therefore persuades this Court conditionally to grant Defendants' Motion for New Trial on the punitive damage claim unless Plaintiff should file an acceptance of remittitur in the amount of \$155 million if this Court's judgment denying Plaintiff's punitive damages claim is vacated or reversed."

## **Nevada Supreme Court Adopts Fair Report Privilege**

By Charles D. Tobin

The Nevada Supreme Court has, for the first time, adopted the fair report privilege, in upholding dismissal of a libel lawsuit brought by a man convicted of trafficking in Native American artifacts. *Mortensen v. Gannett Co., Inc., et al.*, slip op., no. 27724 (Nevada Supreme Court Oct. 1, 1997).

The Court this past month held several newspaper and wire service articles, some of which described plaintiff James Mortensen as a "grave robber," were legally privileged, substantially accurate accounts of Mortensen's 1992 criminal conviction of misdemeanor charges under the federal Archaeological Resources Protection Act of 1979.

Federal Bureau of Land Management (BLM) officials had charged that in a sting operation, Mortensen offered to sell undercover officers Native American cordage and baskets taken from federally protected land on Falcon Hill, Nevada. After making the sale, Mortensen took undercover agents to the site, and he then was arrested, according to court records. Examination of the site later revealed it was a Lovelock Indian burial ground dating back 2,000 years.

Initially, prosecutors had charged Mortensen with a felony count of looting the burial ground in addition to selling the artifacts. Mortensen, however, later negotiated a plea bargain to misdemeanor sale charges only. Mortensen, during his plea hearing, said he had not known the land was protected, and he disputed that it was an ancient cemetery. He was sentenced in October 1992 to probation, community service and restitution. Mortensen was the first person in Nevada ever convicted under the federal Act.

Immediately following the conviction, the BLM and the federal prosecutor each issued a press release recounting the undercover operation and identifying the site as a burial ground. The prosecutor's press release also said Mortensen's arrest was part of a crackdown against trespass on property still held sacred by Native Americans:

"We intend to shut down the illicit market in Indian

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artifacts in the Pacific Northwest, including the unsavory business of selling prehistoric human remains and associated burial artifacts. Additional cases are under investigation and are pending prosecution[.]”

After the press releases, *USA TODAY*, the Associated Press and a number of Nevada newspapers, including the *Reno Gazette-Journal* and the *Las Vegas Review-Journal*, reported on the criminal proceedings and press releases. The articles quoted this portion of the prosecutor’s release and also quoted officials as calling Mortensen a “grave robber, “looter” and “robber.”

In his libel lawsuit, Mortensen complained that the articles made it appear as if he had been convicted of removing the artifacts in addition to selling them. He also complained that portions of the article, including the passages labeling him a “grave robber” and referring to “prehistoric human remains,” falsely stated that remains were among the items he sold.

In 1995, Nevada District Court Judge Steven R. Kosach granted the defendants’ motions to dismiss Mortensen’s lawsuit. The court ruled the articles were substantially accurate and legally privileged. The judge also found that Mortensen’s conviction rendered him “libel proof” for purposes of publicity about his activities as a merchant of artifacts. *Mortensen v. Gannett Co., Inc.*, 24 Med.L.Rptr. 1190 (Nevada District Court 1995).

On October 1, the Nevada Supreme Court affirmed the dismissal on grounds of privilege and substantial truth. After reviewing criminal court records of Mortensen’s plea bargain, the Supreme Court held the characterization of Mortensen as a “robber” and “looter” were “truthful, albeit colloquial, descriptions of the conduct leading to Mortensen’s conviction.”

Addressing Mortensen’s contention that he did not remove artifacts from a burial site, and that the term “grave robber” therefore was false, the Nevada Supreme Court held the newspapers were entitled to rely on the press releases.

Even if Mortensen is correct, the newspapers which printed this characterization did so in reliance on two press releases distributed by the Bureau of Land Management and the U.S. Attorney’s Office. These [articles] are privileged as fair and accurate abridgments of these reports.

As its sole authority for the privilege, the Supreme Court

quoted in full the *Restatement (Second) of Torts*, § 611 (1977).

Finally, the Nevada Supreme Court disagreed with Mortensen’s contention that the articles suggested he had engaged in the sale of human remains. The Court noted that the articles’ references to human remains concerned federal enforcement efforts against others, not Mortensen, and were included in the coverage “as a related newsworthy topic discussing additional enforcement efforts of the BLM.” It ordered dismissal of Mortensen’s appeal.

The Supreme Court did not reach the issue of the District Court’s finding that Mortensen was libel-proof.

James W. Hardesty, Esq., Hardesty & Bader, Reno, NV and Charles D. Tobin, Assistant General Counsel, Gannett Co., Inc., Arlington, VA, represented the *Reno Gazette-Journal* and *USA TODAY*. Mr. Hardesty also represented the AP, along with Richard N. Winfield, Esq. and David E. McCraw, Esq., Rogers & Wells, New York, NY. Kevin D. Doty, Esq., Lionel Sawyer & Collins, Las Vegas, NV, represented the *Las Vegas Review-Journal* and *Nevada Appeal*, *Mason Valley News*, *Fernley Leader*, *Dayton Courier*, *Love-lock Review-Miner* and the *Humbolt Sun*.

#### Recently Published:

*More Speech, Not Less: Communications Law in the Information Age* by Mark Sableman (277 pages Southern Illinois University Press 1997).

In a series of essays using case studies and practical examples, Mark Sableman’s new book explores a wide range of topics, including basic principles of First Amendment law, newsgathering, censorship, libel, privacy, copyright, advertising, broadcasting and the Internet, and electronic information. Sableman’s essays offer not only an interesting guide to existing law and legal trends, but also thought provoking commentary on the interplay of interests competing in our crowded information age.

Mark Sableman is with the DCS firm of Thompson Coburn in St. Louis, MO.

## Time Wins Summary Judgment on Libel Claims of Former Reuters Russian Photo Chief

### *Internet Postings Boost His Public Figure Status*

By Robin Bierstedt

The United States Court for Washington, D.C. has granted summary judgment to Time Inc. on plaintiff's libel claims in *Ellis v. Time Inc.* The case was brought by Richard Ellis, formerly Reuters' chief photographer in Moscow. Ellis claimed he was libeled by statements in a "letter from the editor" in TIME magazine, and in an e-mail message to TIME's editorial staff. The court ruled that Ellis was a limited purpose public figure, and that TIME had not acted with "actual malice." The court also dismissed plaintiff's claim under English libel law (based on the publication of the statements in Britain), saying that application of English law would violate the First Amendment.

The origin of the lawsuit is a TIME article (June 21, 1993) about the worldwide rise in child prostitution. The article was illustrated by photographs of a Russian pimp and two boy prostitutes taken by a freelance Russian photographer. Following publication of the article, Ellis posted a series of messages on CompuServe, in the National Press Photographers Association discussion group, in which he noted his concerns for ethical journalism and denounced the pictures as "Fakery in photojournalism."

Ellis and other Reuters employees then met with Sasha, the man portrayed as the pimp in Time's photographs. Sasha surreptitiously recorded the conversation and gave the audiotape to TIME. TIME then published a page-long "From the Managing Editor" letter signed by Jim Gaines, which said in part as follows:

On the tape. . . Ellis and associated are plainly heard beseeching Sasha to say the pictures were staged, holding out the prospect that if he did so TIME would have to pay him "very good money. \$20,000." . . .

At every turn of the conversation, despite Ellis' attempts alternately to frighten and entice him into recanting, Sash insisted that the pictures and the people in them were what they appeared to be — as he insists to this day.

Why would Reuters' Ellis — who claimed to be acting in the interest of journalism — attempt to induce someone to change his story for money? . . .

Two months later TIME published a statement saying that the freelance Russian photographer admitted that some of the pictures were staged for effect, and that one of the boys denied to the others that he was engaged in prostitution. In an e-mail message to the staff a few days earlier, Gaines said Ellis was not vindicated by this information, because "Ellis never contacted us with his suspicions, and his attempts to get the pimp to change his story for the promise of money from TIME is one of the tawdrier events I've witnessed in my years in journalism."

The court held that Ellis was a limited purpose public figure because he played a major role in a public controversy. He posted his message "for discussion on a CompuServe forum for journalists, and the targeted journalists, predictably, publicized the story." The court said that a person who posts a message on an electronic bulletin board is not by definition a limited purpose public figure, but that "in this unusual case, the message was disseminated far beyond the Internet."

Ellis spoke directly with reporters writing stories about the controversy. And he put himself in the controversy by his meetings with Sasha.

On the issue of "actual malice" and the editor's letter, the court found that Gaines' interpretation of the meeting was a "fair characterization" and not inconsistent with the transcript he relied upon. Quoting the Supreme Court in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 518 (1991) (in turn quoting *Time Inc. v. Pape*, 401 U.S. 279, 285 (1971)), the court said it would take into account, "the difficult choices that confront an author who departs from direct quotation and offers his own interpretation of an ambiguous source." The court also held that "actual malice" was not established by minor errors, Gaines' anger at Ellis, the omission of information, or the alleged failure to investigate an earlier meeting.

Regarding the internal e-mail to TIME's staff, the court

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concluded that Gaines' statement that the incident was, "one of the tawdrier events I've witnessed," was non-actionable opinion.

The court denied TIME's motion for summary judgment on Ellis' claim that TIME tortiously interfered with the business relationship between Ellis and Reuters. The claim is based on Ellis' allegation that Reuters, a supplier of photographs to TIME, fired Ellis as a direct result of pressure from TIME. The court held, however, that Gaines' statements may not form the basis for this claim.

*Robin Bierstedt is Vice President & Deputy General Counsel of Time Inc. Time Inc. was represented by Paul G. Gardephe and David B. Wolf, Associate General Counsel/Litigation Counsels of Time Inc.*

## Rambo Goes to Federal Court . . . and Loses

By Gayle Chatilo Sproul

The United States District Court for the Eastern District of New York has granted summary judgment to NBC in a libel case arising from a DATELINE broadcast entitled "Rambo Goes to Reykjavik," which told the tale of plaintiffs' ill-fated attempt to "rescue" two children caught up in an international custody dispute. *Corporate Training Unlimited, Inc. v. National Broadcasting Company*, 93-CV-4756 (RJD) (E.D.N.Y. Oct. 17, 1997). Among the rulings: plaintiff has to prove that defendants intended any implications plaintiff claims are defamatory.

The broadcast focused on the covert attempt by a father and a famous team of hired child "rescuers" to bring his American-born daughter and her half-sister back to the United States from Iceland, where they had been taken illegally by their mother. The upshot of the mission was that the father, Brian Grayson, was arrested, convicted and jailed in Iceland for kidnapping; the man who led the band of rescuers, plaintiff Donald Feeney, was also arrested, convicted and jailed in Iceland for kidnapping; the \$40,000 paid to the Feeneys by Mr.

Grayson's mother to finance the mission was lost; and the little girls that were the object of the mission were left with their mother, Erna Eyjolfssdottir, in Iceland.

Plaintiffs concocted an elaborate ruse to separate the girls from their mother. They posed as an advance production team for a new Sylvester Stallone film to be produced in Iceland. They convinced the girls' mother that they wished to use her home as a location for the film and then hired her to help them scout locations. Then they invited her to Switzerland to meet the director of the film and to bring her two daughters with her. She brought only one daughter, so the plan to snatch the girls in Switzerland was dropped. Meanwhile, back in Iceland, word of the upcoming film leaked out and became front page news. They rushed back to Iceland to finish the job.

The team convinced Ms. Eyjolfssdottir to move into a Reykjavik hotel with her daughters. They spent an evening with her, plying her with alcohol. Early the next morning they swept the girls out of a room they occupied adjoining their mother's. Plaintiff Judy Feeney managed to get one of the girls to Luxembourg. She was detained there briefly and the young girl was sent home to her mother in Iceland. In Iceland, Don Feeney, now accompanied by Brian Grayson and his daughter, were stopped at the Reykjavik airport as they were about to board a plane. Feeney and Grayson were arrested for kidnapping and Grayson's daughter was returned to her mother.

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***"[P]laintiffs are not legally entitled to be portrayed in the light they would understandably prefer."***

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Now in the United States, Judy Feeney attempted to drum up media attention in the hope that it would force Icelandic officials to free her husband, who at this point had been convicted along with Grayson and was awaiting his appeal in jail. DATELINE producer Rhonda Schwartz, who had been following the exploits of the Feeneys and their corporate alter ego, Corporate Training Unlimited, went to Iceland several times to observe the trials and appeals. There she met Brian Grayson and his new wife, Ginger. The Graysons expressed their regret at having been involved in the debacle, their suspicions about the Feeneys and their wish that things had gone differently, all in videotaped interviews.

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The broadcast described the underlying custody battle that gave rise to the botched mission, the mission, the despair of the Graysons and plaintiffs' past exploits, including Don Feeney's departure from the Army's Delta Force "for less than satisfactory service -- what Feeney calls some 'minor financial improprieties.'"

Plaintiffs sued, alleging that nearly every sentence in the broadcast defamed them. In addition to statements, plaintiffs based their suit on numerous implications that they claimed arose from the broadcast. At the outset of the case, NBC filed a motion to dismiss, which was denied. 868 F. Supp. 501 (E.D.N.Y. 1994).

In granting NBC's motion for summary judgment, the court dealt with the allegedly defamatory statements and implications in categories and found in every instance that the limited purpose public figure plaintiffs had either failed to make a sufficient showing of falsity or actual malice. The following points from the opinion may be of particular interest to practitioners.

1. *There must be evidence that defendants intended to make the implications that plaintiffs claim are defamatory.* Plaintiffs claimed that the broadcast implied that Don Feeney had been dishonorably discharged from the Army. NBC's witnesses testified in depositions that they had attempted to learn the facts of his discharge from the military, but were unable to do so and that they did not know at the time of the broadcast whether or not Feeney had been honorably discharged. The producer and correspondent stated in affidavits that they had not intended to imply in the script that Feeney had received a dishonorable discharge. The court noted that "there is no evidence that the NBC employees responsible for the Broadcast were aware of that implication when the broadcast was aired." Slip. op. At 17 (emphasis in original).

2. *The substance of an allegedly defamatory quoted remark was true, regardless of whether it was said to defendants or to a third party.* NBC stated in the broadcast that Feeney had "call[ed]" the reason for his premature departure from the military "some minor

financial improprieties." The producer of the piece testified that he had said this to her when she interviewed him in an Icelandic jail. Feeney denied it. But discovery revealed that Feeney had made this statement to others. Brian Grayson testified that Feeney told him that he had committed "financial improprieties" in the military and Feeney later confirmed Grayson's testimony in his own deposition. In addition, Feeney had signed a request for a discharge that included a plea of guilty to charges brought against him under the Uniform Code of Military Justice that could be described as charges of financial impropriety. The court found these facts sufficient to conclude that the quoted statement had been made and that its gist was substantially true. Apparently, it was not material to the court's analysis that the statement was made to someone other than NBC, only that it was made and its content was substantially true.

3. *The court accepted the subsidiary meaning doctrine.* Plaintiffs claimed that NBC implied they had given Ms. Eyjolfsdottir sleeping pills in an attempt to keep her from learning they had made off with her daughters until it was too late. However, the court noted: "Even if such an implication reasonably did arise, it would be no more damning than the much clearer implication that plaintiffs attempted to get Erna drunk to facilitate their 'rescue' of her children," an implication about which plaintiffs did not complain. Slip op. at 23 (citing *Church of Scientology Int'l v. Time Warner, Inc.*, 932 F. Supp. 589, 593-95 (S.D.N.Y. 1996)).

Perhaps not surprisingly, the court notes that "[p]laintiffs fundamental problem with the broadcast is that, in their view, it should have portrayed the mission in a more favorable light. . . ."

Correctly, the court finds that as long as the facts reported are not false and/or not broadcast with actual malice, "plaintiffs are not legally entitled to be portrayed in the light they would understandably prefer."

*Gayle Chatilo Sproul was a general attorney at NBC and represented NBC in this matter. She is editor of the LDRC BULLETIN.*

## Fourth Circuit Affirms Internet Immunity for America Online

Holding that "§ 230 [of the Communications Decency Act ("CDA")] . . . plainly immunizes computer service providers like AOL from liability for information that originates with third parties," the United States Court of Appeals for the Fourth Circuit has affirmed America Online's ("AOL") motion for judgment on the pleadings pursuant to Rule 12 (c), Fed.R.Civ.P., on a claim that the service provider was negligent for not removing material which it knew or should have known was of a defamatory character. *Zeran v. America Online Inc.*, No. 97-1523 (4th Cir., Nov. 12, 1997), see *LDRC Libel-Letter*, April 1997 at 1.

The case arose as the result of a malicious hoax at the expense of the plaintiff, Kenneth Zeran. Zeran's name and phone number were used in a series of notices posted on an AOL bulletin board advertising t-shirts and other items with slogans glorifying the bombing of the Alfred P. Murrah Building in Oklahoma City, Oklahoma. Readers of the posting were invited to call "Ken" at Zeran's telephone number.

Following the initial April 25, 1995 posting, Zeran began receiving a flood of phone calls, at one point allegedly receiving one call approximately every two minutes, most of which were derogatory and some of which included death threats. AOL removed the initial posting and terminated the account responsible for the posting following Zeran's demand, only to have the posting replaced the next day through another account with new slogans and a notice that some of the t-shirts from the prior day's posting had sold out. In fact, AOL terminated three accounts in response to the postings, but additional postings continued to appear through May 1, 1995.

On May 1, however, further attention was called to the postings when a broadcaster at radio station KRXO in Oklahoma City read the slogans on the air and encouraged listeners to call "Ken" to register their "disgust and disapproval." It was not until two weeks later that the calls dropped to approximately fifteen per day, despite the fact that an Oklahoma City newspaper published a front page article exposing the hoax and KRXO broadcast an apology.

Zeran sued AOL in April 1996 in the United States District Court for the Western District of Oklahoma claiming that the service provider "was negligent in failing to respond adequately to the bogus notices on its bulletin board after being made aware of their malicious and fraudulent nature."

AOL successfully moved to transfer the suit to the Eastern District of Virginia, and after answering the complaint on De-

ember 13, 1996, AOL moved for judgment on the pleadings pursuant to Rule 12 (c), Fed.R.Civ.P. The district court subsequently granted AOL's motion to dismiss, holding that "the CDA preempts a negligence cause of action against an interactive computer service provider arising from that provider's distribution of allegedly defamatory material provided via its electronic bulletin board." *Zeran v. America Online Inc.*, 25 Media L. Rep. 1609, 1619 (E.D. Va. Mar. 21, 1997).

On appeal, Zeran argued that § 230 of the CDA, "leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services." Slip op. at 1. Zeran also reargued his contention that § 230 does not apply because his claims arose from AOL's alleged negligence prior to the CDA's enactment. Following the decision of the district court, the Fourth Circuit rejected both of Zeran's arguments.

### *Publisher v. Distributor Liability*

The Fourth Circuit began its discussion by looking at the "dual purposes" served by § 230 of the CDA which provides that:

No provider or user of an interactive computer service provider shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230 (c)(2).

In addition to citing Congress' intent "to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision," the court also, in terms echoing the U.S. Supreme Court's decision in *ACLU v. Reno*, 117 S. Ct. 2329 (1997), stated that it was also Congress' intent "to maintain the robust nature of Internet communication and, accordingly to keep government interference in the medium to a minimum." Slip op. at 5.

While Zeran apparently conceded that § 230 immunizes publishers from liability for defamatory statements posted on the Internet, he continued to argue that § 230 does not preempt claims based upon distributor liability. According to Zeran, therefore, because interactive computer service providers like AOL are normally considered to be distributors, AOL could be held liable if it acquired knowledge of the defamatory statements' existence. Further, Zeran contended that because he provided AOL with sufficient notice of the defamatory state-

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ments he should be permitted to proceed with his claims.

Examining Zeran's argument, the court rejected the contention that the term "distributor" carries a legally distinct meaning from the term "publisher." According to the court, "[b]ecause the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability." Slip op. at 8. Further, the court clarified that "[p]ublication does not only describe the choice by an author to include certain information," and noted that "both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party — each alleged by Zeran here under a negligence label — constitute publication." Slip op. at 8. Thus, the court concludes, "AOL falls squarely within [the] traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity." Slip op. at 9.

Addressing Zeran's contention that decisions like *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) and *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), recognize a legal distinction between publishers and distributors, the court agreed that "mere conduits or distributors, are subject to a different standard of liability." Slip op. at 9. "But," the court continued, "this distinction signifies only that different standards of liability may be applied *within* the larger publisher category, depending upon the specific type of publisher concerned." Slip op. at 9 (emphasis in original).

The court also rejected Zeran's claim that "interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes," by stating that Zeran "fails . . . to understand the practical implications of notice liability in the interactive computer service context." Slip op. at 10. According to the court, notice liability would defeat the dual purposes — maintaining the robust nature of Internet communication and removing the disincentives to self-regulation — advanced by § 230 of the CDA.

First, the court noted that "[i]f computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement — from any party, concerning any message." Slip op. at 10. Due to the "sheer number" of postings on interactive computer services, investigating each notification "would create an impossible burden." Slip op. at 10. Notice

liability would therefore have a chilling effect on the freedom of Internet speech, "[b]ecause service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not." Slip op. at 10-11.

In addition, the court stated that "notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services," because "[a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability." Slip op. at 11.

Further, the court noted that "notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits." Slip op. at 11. The court reasoned that, "[w]henver one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability." Slip op. at 11.

### *Retroactivity of §230*

Addressing Zeran's argument that § 230 does not apply because his claims arose before the statute's enactment, the court held that "§ 230 applies by its plain terms to complaints brought after the CDA became effective." The court also noted its doubt as to whether "a retroactivity issue is even presented here." Slip op. at 13. According to the court, because "§ 230 is addressed only to the bringing of a cause of action . . . [and] Zeran did not file his complaint until over two months after § 230's immunity became effective . . . the statute's application in this litigation is in fact prospective." Slip op. at 13.

The court continued to state that even if the case implicated "the application of a federal statute to pre-enactment events," the result would not change as "Congress clearly expressed its intent that the statute apply to any complaint instituted after its effective date, regardless of when the relevant conduct giving rise to the claims occurred." Slip op. at 14.



## Website And Limited Sale of *Paris Match* Insufficient for Libel Jurisdiction

By Rex S. Heinke and Michelle H. Tremain

Finding that the distribution of an allegedly defamatory article in California and the operation of a web site are not sufficient to establish personal jurisdiction over the French owner and publisher of *Paris Match* in California, United States District Court Judge William J. Rea recently dismissed illusionist David Copperfield's defamation claim against those defendants. *Copperfield v. Cogedipresse, et al.*, No. CV 97-6357 WJR (AIX) (C.D. Cal.).

*Paris Match* published an article in its July 17, 1997 issue concerning Copperfield's relationship with model Claudia Schiffer. Copperfield brought suit against the owner and publisher of the magazine, two distributors, and a source for the article, alleging that the article falsely stated

***Subjecting the website operator to jurisdiction everywhere messages can be received "would imply that entities must somehow restrict who receives internet material."***

that Copperfield and Schiffer "have perpetuated a fraud on the public by pretending to be romantically involved, and that Ms. Schiffer is actually just an employee . . .," and seeking damages in excess of \$30 million.

Immediately upon removal from the California Superior Court, the owner and publisher filed motions to dismiss the complaint against them for lack of personal jurisdiction and *forum non conveniens*. At the first hearing on the motions, the Court granted a continuance to allow Copperfield to engage in limited discovery on the issue of jurisdiction. At the second hearing on the motions, the motion to dismiss for lack of personal jurisdiction was granted, and Judge Rea ruled that he therefore need not decide the *forum non conveniens* motion.

In his ruling, Judge Rea initially outlined the legal standards for asserting both general and specific jurisdiction over a nonresident defendant, and explained that California's long-arm statute authorizes the exercise of personal jurisdiction so long as it is consistent with the due process clause.

Judge Rea then turned to Copperfield's assertion that the court had jurisdiction over Cogedipresse, S.A.R.L. and Hachette Filipacchi Associes ("Cogedipresse") primarily because Cogedipresse maintains an English-language web site, and because the allegedly defamatory issue was sold in

California.

Regarding the operation of the web site, the court cited *Bensusan Restaurant Corporation v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996) *aff'd*, \_\_\_ F.3d \_\_\_, 1997 WL 560048 (2d Cir. 1997), in holding that an Internet web site "is a presence only in the jurisdiction or jurisdictions where the web site is created and where it is maintained or placed on a host computer." Judge Rea reasoned that subjecting the operator of a web site to jurisdiction everywhere in the world the messages are received "would imply that entities with web sites must somehow restrict who receives Internet material." Such a restriction, however, the court stated, "would no doubt have the effect of limiting the range of the Internet so severely that it would no longer be a world wide interconnection of computers, and would limit the free exchange of ideas that such an interconnection makes possible."

In addition, subjecting Cogedipresse to jurisdiction in California based on an international web site "is inconsistent with the Supreme Court's admonition that '[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state.'" (citing *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987) (O'Connor, J.) (plurality opinion)). The *Paris Match* web site is operated and maintained in Paris, France.

The Court further held that exercising jurisdiction on the basis of the *Paris Match* web site would also be improper under a line of cases that evaluate the propriety of asserting jurisdiction on the basis of a web site based on the degree of interactivity of the web site. The court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Penn. 1997), identified three categories of web sites. Judge Rea stated that the first category consists of those web sites through which the web site proprietor and its customers enter into contracts "that involve the knowing and repeated transmission of computer files over the Internet . . . . In such situations, some courts have held that jurisdiction over the defendant is proper." (citing *Zippo*, 952 F. Supp. at 1124). Web sites

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that allow the user to exchange information with the host computer are considered to be in the second category, where jurisdiction "is determined by examining the level of interactivity and the commercial nature of the exchange of information on the web site. *Id.* (citing *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996))." Finally, web sites that "merely provide information or advertisements to users" are in the third category where there is usually no jurisdiction.

Turning to the *Paris Match* web site, Judge Rea determined that because the site allowed for some interaction between the user and the host computer, it belonged to the second category of web sites. The interactive portions of the site consist of the "'forum,' which provides a bulletin board where users can post messages, and 'scoops,' which allows people to send e-mails to *Paris Match* in France." On the other hand, the commercial aspects of the web site "are subscription offers and advertisements for back issues," which are not interactive with California subscribers. The Court therefore concluded that it could not assert jurisdiction over Cogedipresse based on the *Paris Match* web site.

### **Modest Hard Copy Distribution Insufficient**

Judge Rea then addressed the distribution of the article in California as a basis for asserting jurisdiction. He stated that in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), the Supreme Court held that "where a publisher circulates 10,000 to 15,000 magazines per month in a state, it should reasonably anticipate answering for the truth of its publications there." However, over 1,050,000 copies of the offending issue of *Paris Match* were distributed worldwide, of which a few more than 1,000 were sold in California. Judge Rea therefore held that "the relative number of copies of this particular issue of *Paris Match* distributed in California is not sufficient to invoke personal jurisdiction over Cogedipresse."

Judge Rea went on to state that "distribution of a publication in itself is not enough to establish specific jurisdiction in defamation cases," citing an earlier opinion of his, *Naxos Resources (U.S.A.) Ltd. v. Southam Inc.*, 24 Media L. Rep. 2265, 1996 WL 635387 (C.D. Cal. 1996). Rather, under *Calder v. Jones*, 465 U.S. 783, 789 (1984), "a plaintiff must demonstrate that the forum state 'is the focal point both of the story and of the harm suffered.'"

Regarding the *Paris Match* article, Judge Rea reasoned that

[i]n this case, the Court does not conclude that the alleged defamation was primarily directed at plaintiffs in California or that Defendants knew or intended that the brunt of the injury caused by the defamation would be felt in California. The alleged defamation was contained in an article published in France in a French magazine, written in the French language, investigated by French reporters, and with a circulation primarily to readers in France. The article concerned a relationship between Plaintiff, a resident of Nevada, and Ms. Schiffer, a resident of Monaco. It relates events taking place in Nevada, Thailand, Germany, and France. Therefore, California cannot be considered the focal point of either the story or of the harm suffered.

Copperfield plans to appeal to the Ninth Circuit.

*Rex S. Heinke and Michelle H. Tremain of Gibson, Dunn & Crutcher LLP, Los Angeles, California represented Cogedipresse, S.A.R.L. and Hachette Filipacchi Associes.*

## **Advertising Over Web Not Enough for General Jurisdiction in New Jersey**

The U.S. District Court of New Jersey ruled that it could not exercise general jurisdiction over an Italian hotel whose only contact with the state is an Internet site used to advertise. *Weber v. Jolly Hotels*, No. CIV a 96-2582 (D. N.J. Sept. 12, 1997). In making its ruling, the court said that passive Web sites, i.e., those used only for advertising, are analogous to advertisements in national magazines. As such, the sites do not provide the continuous and substantial contacts necessary for a forum state to exercise personal jurisdiction without violating due process. *Weber v. Jolly Hotels*, No. CIV a 96-2582, slip op. at 5 (D. N.J. Sept. 12, 1997). Additionally, the court ruled, "advertising on the Internet is not tantamount to directing activity at or to purposefully availing oneself of a particular forum." *Id.* at 6.

Plaintiff, a New Jersey resident, sued the Italian hotel after falling and injuring herself during her stay in Italy. She alleged that the hotel knew or should have known

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about the dangerous condition on its premises. In its analysis of the hotel's motion to dismiss for lack of personal jurisdiction, the court noted that the hotel does no business in New Jersey. As in *Copperfield* (above on p. 17), the court broke into three categories the types of cases in which Internet sites have been used to find personal jurisdiction. The first category, the court said, "includes cases where defendants actively do business on the Internet. In those instances, personal jurisdiction is found because defendants 'enter [] into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet.'" *Id.* at 5 quoting *Zippo Manuf. Co. v Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D.Pa. 1996).

The second category, said the court, "deals with situations 'where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.'" *Weber v. Jolly Hotels*, No. CIV a 96-2582, slip op. at 5 quoting *Zippo Manuf. Co.*, 952 F. Supp. at 1124.

The last category, into which the defendant's site fell, is those "sites that merely provide information or advertisement to users." *Weber v. Jolly Hotels*, No. CIV a 96-2582, slip op. at 5.

"District courts do not exercise jurisdiction in the latter cases because 'a finding of jurisdiction based on an Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law.'" *Id.* quoting *Hearst Corp. v. Goldberger*, 1997 WL 97097 at \*10 (S.D.N.Y. Feb. 27, 1997).

The court also rejected the argument that it could exercise specific jurisdiction over the Italian hotel but transferred the case to New York, where defendant has a hotel operating subsidiary, for a determination as to whether it had jurisdiction.

## Ninth Circuit Grants Prior Restraint: Union Banner Proclaiming "This Medical Facility is Full of Rats" Enjoined

### *Kozinski Dissents*

By Rex S. Heinke and Heather L. Wayland

On September 8, 1997, the Ninth Circuit affirmed a preliminary injunction prohibiting a labor union from continuing its manner of displaying a banner which read: "THIS MEDICAL FACILITY IS FULL OF RATS. CARPENTERS L.U. 1506 HAS A DISPUTE WITH BEST INT. FOR FAILING TO PAY PREVAILING WAGES TO ITS WORKERS." The Ninth Circuit found (2-1) that the union's use of the term "rats," -- a labor term referring to an employer who fails to pay the prevailing wage -- although not literally false, was in context "fraudulent, deceptive, and intended to mislead members of the general public into believing that the Hospital suffered from a sanitation problem." *San Antonio Community Hospital v. Southern California District of Carpenters et al.*, No. 96-56124, 1997 WL 573103 (9th Cir. Sept. 8, 1997).

San Antonio Community Hospital alleged that the union's banner was defamatory, interfered with its prospective economic advantage and contractual rights, and violated Section 303 of the Labor Management Relations Act ("LMRA") (29 U.S.C. Section 187). Because the LMRA preempted the interference claims and only authorized monetary relief for LMRA's violations, the defamation claim was the sole basis for the Ninth Circuit's decision to affirm the prior restraint.

Three aspects of the Court's opinion are particularly striking. First, it marks the first Ninth Circuit decision to affirm an injunction against union speech concerning an ongoing labor dispute. Such injunctions are rare because, under the Norris-LaGuardia Act ("NLA"), 29 U.S.C. Sections 101-105, the federal courts are generally denied jurisdiction to issue any preliminary injunction that would prevent union members from "[g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving

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fraud or violence." 29 U.S.C. Section 104(e).

The Ninth Circuit overcame this federal anti-injunction statute through unprecedented reliance on a broadly construed "fraud" exception. Inferring fraudulent intent from the banner's effect of misleading "most--if not all--readers," the Court held that the union's banner was not merely inflammatory rhetoric but an "unprotected fraudulent misrepresentation of fact," and therefore, that the NLA did not deprive the district court of jurisdiction to enjoin its display. *San Antonio Community Hospital*, 1997 WL 573103 at \*6.

Second, the Ninth Circuit decision appears to mark the first case to affirm a preliminary injunction against speech covered by *New York Times v. Sullivan*, 376 U.S. 254 (1964). That is, the majority's finding of "probable success on the merits"

came notwithstanding its express recognition that actual malice represented the requisite level of fault. Beyond the mere absence of precedent, this holding may implicitly dilute the force of the *Sullivan* requirement itself. In a biting dissent, Judge Kozinski accuses the majority of condoning an unconstitutional prior restraint by affirming "an interlocutory injunction based upon a 'reasonable probability' of malice [which] is, by hypothesis, not based on 'actual malice.'" *San Antonio Community Hospital*, 1997 WL 573103 at \*10.

Third, the decision is noteworthy for the remarkably meager evidence to support the Court's finding of "substantial and irreparable injury." Beyond the hospital's conclusory allegations of reputational harm and an adverse impact on its fundraising ability, the evidence consisted of little more than that (1) the hospital staff was forced to spend significant time and resources in explaining to patients and fellow employees that there was, in fact, no rodent problem, and (2) maternity ward admissions were declining at the same time that the union was displaying its banner. According to the dissent, this "statistically significant" decline in maternity admissions had in fact commenced several months before the union began displaying its banner. *Id.* at \*9. Further, the hospital could not point to a single instance of a person being deterred from either donating money or becoming a patient as a result of the banner. Finally, the

Court's emphasis on the expense of counterspeech--"time away from [the hospital staff's] ordinary administrative and medical care duties"--appeared critical to the Court's holding because there was no evidence to show that the staff's explanations were in any way ineffective in alleviating the expressed concerns.

The majority attempts to "emphasize the narrowness of its opinion." The preliminary injunction was restricted in scope and, for example, did not mandate removal of the original sign: The union responded to the injunction by supplementing its original display with an additional banner

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**The Ninth Circuit decision appears to mark the first case to affirm a preliminary injunction against speech covered by *New York Times v. Sullivan***

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which clarified that "BEST INTERIORS IS THE RAT CONTRACTOR," and the Court expressly found that the injunction did not require more.

Judge Kozinski disagreed with that characterization, however. As he points out in dissent, the scope of the preliminary injunction was not as narrow as it seemed: To require near-perfect clarity is to restrict opportunities for "ambiguity and flamboyance . . . at the heart of political expression," and in the instant case, to "sap[] the message of its vigor." *Id.* The scope of the injunction would not justify relaxation of the traditional requirements of "probable success" and "irreparable injury" in any event, and this is particularly so where the preliminary injunction concerns labor speech. *Id.*

"Since labor speech enjoys even greater protection than ordinary speech, today's opinion will provide plausible support to those who seek prior restraints against allegedly defamatory newspaper and magazine articles, as well as television programs, plays and movies." *Id.* at \*10.

In light of the decision, Judge Kozinski concludes that "[g]etting a preliminary injunction against speech offensive to public officials and other VIPs may not be all that hard." *Id.*

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## Ninth Circuit Reverses on CNN Ride-Along

### *Media Liable as Government Actors Under Bivens*

In a decision with substantial negative implications for all news media, the Ninth Circuit held recently that media members who filmed and recorded sound as federal agents searched plaintiffs' ranch acted jointly with the government, and hence "under color of law," sufficient to be judged liable for violating the plaintiffs' civil rights under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Berger v. Cable News Network*, No 96-35266 (9th Cir. November 13, 1997).

The Ninth Circuit decision reversed the trial court's grant of summary judgment, reinstating plaintiffs' civil rights claims against the media defendants and federal agents from the United States Fish and Wildlife Service. In addition, the circuit court reversed and remanded the judgment in favor of the media appellees on the plaintiffs' state law claims for trespass and intentional infliction of emotional distress. The circuit court did affirm the district court's dismissal of plaintiffs' Federal Wiretap Statute complaint and plaintiffs' conversion claim; the circuit court also affirmed the district court's refusal to grant an injunction barring future broadcast of the video and sound gathered during the search.

#### **Background**

Paul and Erma Berger, owners of a 75,000 acre ranch in Montana, filed suit after agents from the Fish and Wildlife Service, with a crew from CNN in tow, searched their ranch in January of 1993 looking for evidence that Mr. Berger had illegally shot or poisoned wildlife. As a result of the search, Mr. Berger was tried and convicted of a misdemeanor count of using a pesticide in a manner inconsistent with its labeling, viz., using the pesticide to poison wildlife. He was acquitted of three felony counts.

The Bergers sued over the search, making two contentions: first, that the federal agents violated their Fourth Amendment rights by permitting CNN's cameras to film the search and by assisting the media in their search for dramatic material; second, that CNN acted sufficiently in concert with the federal agents to be held accountable for that violation as government actors.

CNN had entered into a written agreement with the Assistant United States Attorney in charge of authorizing CNN to accompany the agents on the execution of the search warrant. The

agreement stated that CNN was to have complete control over its footage, subject to an embargo until any of the following conditions were met: a jury was empaneled and instructed not to view television reports about the case; the defendant agreed to a trial by judge; the judge accepted a plea bargain; the government decided not to bring charges. In order to report the story, CNN mounted cameras inside and outside of government vehicles so that every move of the federal agents would be documented. CNN also wired one of the special agents with a hidden CNN microphone that continuously transmitted live audio to the CNN technical crew.

The district court dismissed plaintiffs' civil rights claims, ruling that the federal agents were entitled to qualified immunity because there was, at the time of the episode, no clearly established law protecting individuals from the commercial recording of a search of their residences. The district court also held that the Bergers were collaterally estopped from litigating the reasonableness of the search because the same issues had been decided against Mr. Berger at his criminal trial. Last, the district court rejected the Bergers' claim that the media had become government actors for purposes of *Bivens* liability.

#### **Collateral Estoppel**

In making its own ruling, the Ninth Circuit began by reversing the collateral estoppel holding. The circuit court held that "[b]ecause the magistrate judge in the criminal case was not presented with the specific issues raised in this action, the district court erred in holding that the Bergers' *Bivens* action was barred." *Berger v. CNN*, No. 96-35266, slip op. at 13720 (9th Cir. November 13, 1997). At issue in this case, said the Ninth Circuit, is not whether the warrant itself was valid, which was the issue at the criminal stage, but "whether the search was unreasonable because of the media's involvement in the search." *Id.*

#### **The Bivens Claim**

Next, the Ninth Circuit reversed the grant of partial immunity for the federal agents involved in the search, saying "[t]he Bergers contend that the resulting search violated their Fourth Amendment rights against unreasonable search and seizures.

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We hold that they are correct and that the federal officers are not entitled to qualified immunity.” *Id.* at 13721. In making this ruling, the court focused on the fact that the search “stands out as one that at all times was intended to serve a major purpose other than law enforcement.” *Id.* It was, in the words of the court, a “commercial television/law enforcement enterprise.” *Id.* The court concluded that the search was jointly planned by law enforcement officials and the media so that CNN could get interesting material for its commercial programming and the federal agency could get good press. The parties even memorialized their agreement in a contract. Yet, said the court, the federal agents did not disclose the contract, the planned press presence, or the media’s purpose when they applied for the search warrant. “The Fourth Amendment to our Constitution protects against unreasonable searches and warrants that are obtained under false pretenses,” said the court. *Id.*

The court went on to find that the agents could not reasonably have believed that their conduct violated no clearly established federal statutory or constitutional rights. *Id.* at 13722. “We find even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.” *Id.* at 13723.

The court then distinguished this case from ride-alongs where the media are invited to record or photograph the law enforcement activity, saying that in those cases “media representatives were viewed as playing a passive role, as observers, rather than as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here.” *Id.* at 13724.

The court rejected the defense claim that the plaintiffs’ privacy rights could not have been violated because their cameras shot footage only from the open fields or that they shot footage only of structures in which the Bergers had no expectation of privacy. The court found evidence in the record that the Bergers did have a reasonable expectation of privacy in some of the places that were filmed and, moreover, that the open fields doctrine does not immunize the defendants in this case because the filming had “no law enforcement purpose.” *Id.* at 13725.

The court also rejected the “invited informer” defense. Defendants had asserted that the federal agent who wore a mi-

crophone that transmitted live to the media conversations between law enforcement agents and the Bergers that took place in the Berger home, did not violate the Bergers’ privacy rights because the Bergers consented to his presence and to his being party to the conversations, and they took the chance that he was bugged. The court said that this doctrine offers protection only when the government-placed informer is being used for legitimate law enforcement purposes. *Id.* at 13727.

### ***The Media as Government Actors***

The Ninth Circuit then addressed the final issue concerning the Bergers’ *Bivens* claim: whether the media appellees may be held liable even though they were not agents or employees of the federal government. “Private parties may be held liable. . . if they are deemed to have acted under color of law.” *Berger v. CNN*, No 96-35266, slip op. at 13729 citing *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). The court turned to the “joint action” test in making its decision. Private actors can be considered government actors if they are willful participants in joint action with the government or its agents. The Supreme Court has said that the joint action test is “satisfied when the plaintiff is able to establish an agreement, or conspiracy between a government actor and a private party.” *Berger v. CNN*, No 96-35266, slip op. at 13730. “In this case,” the court went on to say, “we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute -- the execution of a search warrant -- for the mutual benefit of both the private interests of the media and the government officials’ interest in publicity.” *Id.* at 13730-13731. “This satisfies the joint action test,” concluded the court. *Id.* at 13731.

### ***State Claims and Federal Wiretap Statute Violation***

On two state claims, the court reversed and remanded. First, on the issue of trespass against the media appellees, the court rejected the district court’s holding that the Bergers had no possessory interest in the ranch at the time of the search because the government agents had temporary possession and control of the ranch. This rationale is rejected, said the court, because taking control of the ranch did not give the officers the right to invite third parties on the premises for reasons unrelated to law enforcement. Since the officers invited the media

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on for newsgathering purposes, the media may have been guilty of trespass. *Id.* at 13734.

On the second state claim, the court reinstated the Bergers' case for intentional infliction of emotional distress. The district court dismissed this claim, saying that since none of the appellees' acts were unlawful, emotional distress could not have been a reasonably foreseeable consequence of their actions. *Id.* at 13736. "In light of our holding that the Bergers have alleged a claim of interference with both their privacy and their property interests, we also remand this claim to the district court for reconsideration upon a fully developed record." *Id.*

The Ninth Circuit did leave part of the district court's decision intact. It upheld the decision that the media appellees did not violate the *Federal Wiretap Act*. It held that since the media participants were effectively federal agents, the conversations that they intercepted surreptitiously fell under the exception for conversations recorded by persons acting under color of law. *Id.* at 13733.

The court also upheld the district court's dismissal of the Bergers' conversion claim. The Bergers sued the media appellees for conversion on the basis of the media's capture of their images and voices. The court held that the Bergers' images and sounds are intangible, and intangible property interests are not subject to conversion. *Id.* at 13735.

### ***Injunction Denied***

Finally, the Ninth Circuit denied the Bergers' request for an injunction preventing the media appellees from further broadcast of any or all parts of the video and sound gathered during the search. Likening the request to a prior restraint, the court said "[e]ven though the Bergers have alleged triable claims for damages arising out of the manner in which the media appellees obtained the material, such allegations are not sufficient to support the imposition of an injunction." *Id.* at 13737.

The media defendants were represented by P. Cameron Devore of Davis Wright Tremaine in Seattle, WA.

## **Louisiana Newspapers Seek *En Banc* Review of Fifth Circuit Ban on Post-Verdict Juror Interviews**

By Jack M. Weiss and Amy L. Neuhardt

A panel of the Fifth Circuit has affirmed an order issued by a district court prohibiting news organizations, in the absence of a "special order" issued by the district court, from conducting post-verdict interviews of jurors regarding any aspect of the jury's "deliberations." *United States v. Cleveland*, No. 97-30756 (5th Cir. October 29, 1997). According to the panel opinion, the district court's order is a permissible restraint on speech in part because it does not apply to the jurors themselves, but applies only to those who would interview them. The jurors remain free to speak, on their own initiative, about any aspect of their jury service, including the jury's "deliberations."

On November 12, 1997, the *Times-Picayune Publishing Corporation*, *Capital City Press* (which publishes *The Advocate* of Baton Rouge) and two reporters ("the Newspapers") filed a Suggestion for Rehearing *En Banc*, which currently is pending before the full court. In their petition, the Newspapers argue that the restriction is a prior restraint. Taking aim at the order's application only to press -- not juror -- speech, the Newspapers argue that no court "ever before has sustained such a direct and broadly-defined -- albeit bizarre -- restriction on press speech." The Newspapers further argue that the panel's opinion cannot be reconciled with long-standing First Amendment precedent in the Fifth Circuit and other jurisdictions, and is wholly out of step with the widespread practice throughout the rest of the nation, where post-verdict juror interviews are routinely conducted in cases of public interest.

### ***A State Racketeer Trial***

In the underlying criminal litigation, six defendants, including two former Louisiana State Senators, were prosecuted for racketeering and related offenses in connection with allegedly illegal efforts to secure the passage of certain video poker legislation and the defeat of other video poker legislation in the Louisiana legislature. The defendants' trial began in May of 1997, and continued for approximately six weeks. The jurors deliberated for eight days before return-

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ing a verdict on June 27, 1997. The jury convicted four defendants, including one former state senator, on some counts and acquitted them on others, but acquitted two defendants, including the other former state senator, on all counts.

During a post-verdict address to jurors given in open court on June 27, the district court ordered that: "I . . . instruct you that, absent a special order by me, no juror may be interviewed by anyone concerning the deliberations of the jury." ("the Jury Order") The district court issued the Jury Order *sua sponte*, without conducting a hearing, without making any supportive findings of fact, and without elaborating on the meaning of the term "deliberations" or on the intended scope of the order generally.

The Newspapers moved to intervene and to modify the order. They argued that the Jury Order was vague, in particular that without elaboration from the court jurors might interpret the order as barring discussion of their own "deliberations," i.e., thinking, about the case. The Newspapers also argued that, regardless of its construction, the prohibition on voluntary jury interviews, including interviews limited to a juror's own role in formal "deliberations," and the district court's requirement that any party desiring to conduct an interview first seek a "special order," were contrary to longstanding First Amendment precedent in the Fifth Circuit and other jurisdictions, including the Fifth Circuit's leading decision in *In re The Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982).

On July 22, 1997, without holding a hearing on the Newspapers' motions, the district court issued an eighteen page opinion granting the Motion to Intervene, but denying the Motion to Modify in its entirety. The district court determined that the Jury Order was neither contrary to *Express-News*, nor vague.

The Newspapers quickly sought emergency review in the Fifth Circuit, and were granted an expedited appeal. The Reporters Committee for Freedom of the Press, The Freedom of Information Foundation of Texas, Inc., the Society of Professional Journalists and The American Society of Newspaper editors filed an *amicus* brief in support of the Newspapers. Neither the district court nor any party to the underlying criminal case filed a brief or otherwise appeared.

The case was argued on October 6 before a panel consist-

ing of Judges Duhe, DeMoss and Garwood. Little of the oral argument focused on the merits of the Newspapers' First Amendment contentions. Instead, the panel primarily was concerned about the threshold issues of ripeness and standing, including the "willing speaker" theory of standing. The Newspapers were given leave to file a post-argument letter-brief on those issues.

### ***Fifth Circuit Panel Finds No Constitutional Problem***

On October 29, 1997, the panel issued an eight-page opinion written by Judge DeMoss which affirmed the district court's July 22 opinion and upheld the Jury Order without modification. The panel found that the Newspapers' First Amendment right to gather news was not compromised by the Jury Order, and that (despite a lengthy explanation of the scope and meaning of the Jury Order) it was not unconstitutionally vague.

The panel first addressed the applicability of *Express-News*. There, the Fifth Circuit, per Judge Alvin B. Rubin, struck down a local rule that provided that "no person shall 'interview. . . any juror, relative, friend, or associate thereof . . . with respect to the deliberations or verdict of the jury in any action, except upon leave of court granted upon good cause shown,'" and held that "a court rule cannot . . . restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice." The *Express-News* decision is consistent with similar decisions in the Third, Sixth, Ninth and Tenth Circuits regarding the constitutionality of restrictions on post-verdict juror interviews. The *Cleveland* panel found, however, that the order entered by the district court in this litigation "shares very little with the unconstitutional order entered in *Express-News*," and therefore could easily be distinguished.

The panel first determined that the Jury Order was appropriately limited in scope to survive First Amendment scrutiny, because, unlike the order invalidated in *Express-News*, the Jury Order does not prohibit communications with jurors' "relatives, friends and associates" and purportedly applies only to "deliberations of the jury," not to the verdict itself or to questions about a juror's general reactions to the trial. Similarly, the panel found that, although the blanket

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restriction contained in the Jury Order could in some cases be overbroad, it was appropriately tailored in this case because the underlying litigation was not a "run-of-the-mill criminal trial" and there was a "great amount of media coverage of the trial from start to finish." According to the panel, this consideration justified imposition of the order "without regard to the willingness of the jurors to be interviewed or the civility of the reporters seeking to conduct interviews."

Next, the panel declared that the Jury Order could survive First Amendment scrutiny because it restricts only the press from asking questions regarding "deliberations," but does not restrict juror speech on any subject:

[The Jury Order] does not purport to prevent jurors from speaking out on their own initiative. It thus does not raise the concern expressed in *Express-News* that an order limiting post-verdict interviews might implicitly sanction jurors' conversations with their relatives, friends and associates. A juror who wishes to do so may make a statement.

The panel did not address the Newspapers' argument that a restriction on the press' right to conduct interviews, even if paired with a restriction on juror speech (and *a fortiori* if directed at the press alone), is an impermissible prior restraint and cannot survive First Amendment scrutiny.

Finally, the panel held that the "special order" requirement of the Jury Order does not offend the First Amendment because (although that requirement provides no standard to guide a district court in evaluating a request for a juror interview) the "special order" requirement does not specifically require a would-be interviewer to demonstrate "good cause" to obtain leave to interview jurors regarding "deliberations."

The panel acknowledged that "a strict standard" applies to restrictions on post-verdict interviews of jurors in criminal cases. The panel emphasized however, that "the application of that rule must be tempered . . . by the recognition that members of the press, in common

with all others, are free to report whatever takes place in open court, but enjoy no special, First Amendment right of access to matters not available to the public at large." Accordingly, the panel concluded that the Jury Order was "an appropriate measure taken to address the danger . . . that compromises of the secrecy of jury deliberations present to our criminal justice system's reliance on jury determinations."

### *En Banc Sought*

In their Suggestion for Rehearing *En Banc*, the Newspapers argue that a prohibition on "interviews" concerning specified subject matter is a content-based prior restraint, which carries a heavy presumption of unconstitutionality. The Newspapers emphasize that the Jury Order as interpreted by the *Cleveland* court is even more objectionable than a typical prior restraint because it forbids press interviews concerning "deliberations," but permits jurors to make statements on their own initiative about any topic. Thus, the order is wholly ineffective at achieving its claimed purpose -- preventing harm to the deliberative process -- and therefore is constitutionally defective. See *Smith v. Daily Mail*, 443 U.S. 97, 99 S. Ct. 2667 (1979).

Moreover, the Newspapers argue that the direct restraint against the press upheld by the panel opinion is not only overbroad but also unworkable. According to the panel opinion, although the press can be prohibited from making any inquiry regarding jury deliberations, the press is allowed to ask jurors about their "general reactions," and jurors are free to make "statements" "on their own initiative" about any topic. The panel opinion will leave the press guessing about whether a particular question or response thereto constitutes a prohibited "interview" concerning "deliberations," a permissible comment regarding "general reactions" or an "own initiative" "statement" made by a juror.

The Newspapers also argue that the "special order" requirement of the Jury Order turns the First Amendment on its head by mandating that those wishing to exercise their rights of free speech first justify doing so, rather than placing the onus on those seeking to limit First Amendment freedoms to demonstrate that the con-

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templated limitations are appropriate.

Finally, the Newspapers argue that the panel's efforts to distinguish the Jury Order from that struck down in *Express-News* are superficial, and that the panel has effectively overruled *Express-News*. The Newspapers note that the panel opinion conflicts with the decisions of every other circuit court to have ruled on restrictions on post-verdict juror interviews, and that its interpretation of the extent of the press' rights to conduct juror interviews cannot be squared with this longstanding First Amendment precedent.

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## Louisiana Court Rejects Civil Fair Trial Protective Orders Aimed at CBS

By Jack M. Weiss and Mark B. Holton

The Louisiana Supreme Court has declined to review a district court's decision refusing to enter protective orders sealing all discovery, including videotaped depositions, in a high-visibility environmental mass tort action pending in Lafourche Parish, Louisiana. *Friloux v. Campbell Wells Corporation*, 97-cc-2418. The decision is significant because it followed an evidentiary hearing at which the tort defendants, including Exxon Corporation ("Exxon"), sought to show that civil jury selection would be tainted if the protective orders were not entered.

The trial court heard, yet rejected, purported expert testimony offered by Exxon in support of its motions for protective order. #75524 (La. D. Ct. Lafourche Parish 7/15/97) Other evidence offered at the hearing indicated that a) plaintiffs' counsel had disseminated virtually all discovery in the case, including videotaped depositions, to a CBS investigative reports unit; and b) plaintiffs' counsel allegedly had acknowledged to an Exxon lawyer that he had disseminated the materials to CBS for the purpose of influencing prospective jurors.

The toxic tort action was filed in April, 1994 by approximately 300 residents of Grand Bois, Louisiana. The defen-

dants are Campbell Wells Corporation ("CWC"), which operated an oil field waste treatment facility located near Grand Bois, and Exxon, which shipped oil field waste to be treated at the facility. The plaintiffs, who live in close proximity to the facility, claim that they have suffered injury as a result of the waste treatment activities conducted at the location.

Discovery began in October of 1994. With a few limited exceptions, no protective order restricting the dissemination or use of discovery materials was entered. Plaintiffs in the Grand Bois litigation gave a CBS investigative reports unit access to nearly all discovery taken in the matter through approximately May of 1997. Apart from CBS' coverage, the case has attracted extensive local news coverage. The Grand Bois facility also was the subject of committee hearings during the 1997 session of the Louisiana Legislature.

In May 1997, Exxon and CWC filed various motions for protective orders to "seal" (*i.e.*, prevent the dissemination of) essentially all discovery (past and future) taken in the case. The defendants also asked that an order be entered "enforcing" Louisiana Rule of Professional Conduct 3.6(a), which prohibits a lawyer from making extrajudicial statements likely to be republished or rebroadcast by a news media organization if the statements "will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

CBS intervened in the case to oppose the defendants' motions, which also were opposed by the plaintiffs. The primary ground asserted in support of the motions was that, according to the defendants, CBS planned to air its anticipated report on Grand Bois near the time of the scheduled trial date (then set for January of 1998) and that the defendants' right to a fair trial would be prejudiced by the broadcast. As additional grounds for entry of their proposed orders, the defendants later invoked unspecified rights of privacy and the possibility that deponents would be intimidated by the prospect that their deposition testimony might be widely disseminated.

CBS opposed the motions on the principal grounds that: 1) the defendants had not shown "good cause" for entry of the proposed protective orders, as required by the Louisiana Code of Civil Procedure; and 2) entry of the defendants' proposed orders would violate CBS' First Amendment rights of access to discovery as articulated in *Plaquemines Parish Comm'n Council v. Delta Development Co., Inc.*, 472 So. 2d 560 (La. 1984). Interpreting and applying the United States Supreme Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S.

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20 (1984), the Louisiana Supreme Court held in *Plaquemines Parish* that, at least in cases of substantial public interest, a protective order restricting the dissemination of discovery materials to third-parties may be entered only if the order serves an important and legitimate government interest and is no broader than necessary to protect that interest. 472 So. 2d at 568. CBS argued that neither good cause nor the First Amendment standards were satisfied because:

1. The defendants offered only speculation concerning the purported content, broadcast date and effect of any CBS program related to the Grand Bois litigation;
2. The defendants themselves, particularly CWC, had engaged in a media campaign to influence public opinion regarding the Grand Bois litigation;
3. Significant publicity relating to the litigation and to the facility would continue even if the protective orders were entered, and would render the orders ineffective;
4. The defendants' failure to seek protective order relief for almost three years meant that entry now of their proposed orders would not be effective in protecting any interest asserted in support of the orders; and
5. Numerous alternatives to entry of the protective orders (e.g., change of venue, *voir dire*, continuance of the trial) existed to protect whatever competing interests were at stake.

CBS also argued that the defendants' proposed orders did or could have other consequences violative of CBS' First Amendment rights. Specifically, the defendants' request to "seal" even discovery that already had been disseminated appeared calculated to provide the basis for a subsequent motion to "enforce" the sealing orders by enjoining CBS from broadcasting or making other use of the discovery materials already in its possession. CBS argued that a backward-looking "protective order," then, would operate as a thinly-disguised prior restraint. Further, the request to "enforce" Louisiana Rule of Professional Conduct 3.6(a) against plaintiffs' counsel was tantamount to a request for entry of an unconstitutional gag order.

The trial court held an evidentiary hearing on the defendants' motions on June 19, 1997. CWC and Exxon called, among other witnesses, a former local television advertising salesperson as a purported media expert to testify with respect to the likely viewership in Louisiana of CBS's anticipated Grand Bois program, and with respect to the "credibility" of Ed Bradley, the CBS correspondent expected to appear on the show. The district court however, excluded the former ad salesperson's testimony because she had reviewed and relied upon Nielsen data not available for cross-examination. Exxon had identified another purported expert, a psychologist, to testify with respect to the likely "impact" on viewers of the anticipated CBS program, but did not call this witness.

At the conclusion of the hearing, the district court denied the defendants' motions. The court ruled that the defendants had not demonstrated good cause for entry of their proposed orders, because the defendants had failed to show that any discovery materials provided to CBS actually would be used in a CBS news program about the Grand Bois site which would be broadcast prior to trial. In addition, the court ruled that entry of the defendants' proposed orders would violate CBS' First Amendment rights because 1) alternatives to the orders (e.g., change of venue and *voir dire*) existed; 2) entry of the orders would trigger protracted discovery litigation as the parties attempted to prove or disprove that CBS' possession or use of particular discovery material violated the orders; and 3) the request for the orders was motivated, at least in part, by CWC's public relations concerns rather than the desire to protect fair trial rights. The court then entered a narrow protective order not contested by CBS, limiting attendance at depositions to the parties, attorneys and their staff and sealing the deposition of any witness who invoked his or her right to read and sign the deposition for the duration of the reading and signing process (at most, thirty days).

Exxon and CWC filed supervisory writ applications with the Louisiana First Circuit Court of Appeal, and later the Louisiana Supreme Court, seeking review of the district court's decision. Both courts denied the writ applications without opinion.

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## Missouri Recognizes a Qualified Privilege For a Reporter's Confidential Sources in a Libel Case

By Joseph E. Martineau

Missouri seemed to be one of the last holdouts in clearly adopting an evidentiary privilege for reporters. On October 28, 1997, however, the Missouri Court of Appeals for the Western District, in Kansas City, confronted the issue and ruled that a "reporter's shield privilege" protects reporters from being required to divulge the identity of confidential sources. *State ex rel. Classic III Inc. and Carl Danbury, Relators, Pulitzer Publishing Company, and Missouri Press Association, Amicus Curiae v. Hon. William Ely, Respondent*, WD 53850 (Oct. 28, 1997).

### *The Uncertainty of Prior Missouri Holdings*

Prior to *Classic III*, the only reported Missouri state court decision had refused to recognize the privilege. However, the issue arose in the limited context of a grand jury subpoena seeking non-confidential video "out takes" depicting a person confirming involvement in criminal acts. *CBS, Inc. v. Campbell*, 645 S.W.2d 30 (Mo.App.E.D. 1982). Relying on *Branzburg*, the *CBS* court held that the public interest in a grand jury proceeding often outweighed First Amendment interests. At the same time, however, the court noted "a greater willingness" to protect the news media in cases involving civil and criminal trials. *Id.* at 32. The court stressed that it was "[f]ully cognizant of the importance of a free and independent press" and "emphasized" that its opinion was "limited to the facts as presented in this case." *Id.* at 33.

Federal courts sitting in Missouri had recognized the privilege. In *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), the Eighth Circuit Court of Appeals, sitting in St. Louis, and considering a libel case based upon Missouri law, recognized a constitutional privilege, saying that at a minimum the court must weigh the importance and necessity of the testimony against the journalist's privilege assertion and the public interest in preserving confidentiality of journalist's sources. United States District Courts sitting in St. Louis and Kansas City had recognized a qualified reporter's privilege in connection with civil claims in which the reporter was not a party. *Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 583 F. Supp. 427 (E.D.Mo.

1984); *Whitney v. O'Hara*, 11 Med.L.Rptr. 1608 (W.D.Mo. 1985). The District Court rulings each held that confidentiality, while important to the balancing process, was not required for the privilege to be available.

Not surprisingly, reporters faced with subpoenas argued that this case law supported the state's recognition of the privilege, while parties seeking information from reporters argued the exact opposite. The holding in *Classic III* clearly recognizes a privilege in libel cases involving confidential sources, and adds significant ammunition to media claims of privilege in other contexts.

### *The Classic III Holding*

*Classic III* was the publisher of a monthly magazine for truckers. It published an article reporting that two owner-operator trucking associations were under investigation for fraudulent insurance practices. In preparing the article, the writer and an editor had discussions with sources who were promised confidentiality; after publication, the editor had discussions with sources who also asked for confidentiality.

During discovery in the libel case, the plaintiff/trucking associations sought disclosure of these confidential sources, which was ordered by the trial court after holding that the "shield privilege invoked does not apply because the privilege is not recognized in Missouri."

Because appeal did not lie from such a discovery order, the defendants pursued a writ of prohibition against the trial judge, which was accepted by the appellate court. The Pulitzer Publishing Company (*St. Louis Post-Dispatch*) and the Missouri Press Association were granted leave to intervene as amicus curiae.

In its opinion (which is not yet final), the appellate court noted that most jurisdictions had recognized a qualified privilege for journalists in civil cases, and that in the context of libel cases most courts had adhered to a rule requiring the court to weigh: (1) exhaustion of alternative sources; (2) the importance of preserving confidentiality; (3) the importance of the information to the plaintiff's case; and (4) whether the plaintiff had made a prima facie case of defamation. This is the test which the court adopted for Missouri courts to apply

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in libel cases involving confidential sources which were not directly relied upon in the publication.

The court noted that the plaintiffs did not dispute the journalists' assertions that the sources were confidential and not relied upon. In cases where such matters were disputed, the court posited that an evidentiary hearing would be required. In considering the balancing test, the court held that the plaintiffs had not shown sufficient importance of the information to their case when balanced against the public interest in preserving confidentiality.

Although the court did not discuss other contexts in which privilege assertions might come up (e.g. non-confidential information, criminal cases, civil cases where the reporter is a third party), the court's broad discussion of authorities not involving libel cases and not involving confidential sources supports arguments that the court was merely limiting its holding to the facts at hand, and that it was not intending to define the reaches of the privilege.

A copy of the opinion is available from the LDRC.

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LDRC has available a transcript of *The Future of the First Amendment*, a panel moderated by P. Cameron DeVore at this year's Biennial Conference in Reston, Virginia. Participants in the panel were:

Professor Lillian R. BeVier,  
University of Virginia Law School;

Professor Vincent Blasi, Columbia Law School;

Professor Burt Neuborne,  
New York University School of Law.

The NAA will be sending a copy of this transcript to anyone who attended the Conference. If you did not attend, however, and wish a copy, you may request it from LDRC.

## Wendt v. Host: The Ninth Circuit Continues Its Pro-Celebrity Stance on Common Law Right of Publicity

### Again, The Robot Loses

By Amy Hogue

Reversing summary judgment for the defendants, the Ninth Circuit found triable issues of fact in right of publicity and Lanham Act counts alleged by actors, George Wendt and John Katzenberger. Wendt and Katzenberger portrayed the two likable bar flies, "Norm" and "Cliff" on the Paramount television series, "Cheers." They complained that Host International, Inc., which bought a license from Paramount for "Cheers" airport bars, infringed their rights by displaying two animatronic characters ("robots"), named "Hank" and "Bob," seated at each bar. United States District Judge Manual Real first granted summary judgment to Host by finding, as a matter of law, that copyright law preempted the actors' claims to rights in the characters they portrayed. In *Wendt v. Host*, 50 F.3d 18 (9th Cir. 1995), the Ninth Circuit reversed, because "the question here is whether the three dimensional animatronic figures are sufficiently similar to plaintiffs to constitute their likenesses." *Wendt v. Host*, 125 F.3d 806 (1997).

The District court responded to reversal "by viewing both the robotics and the live persons of Mr. Wendt and Mr. Katzenberger, [and granting a second summary judgment because] there is [no] similarity at all . . . except that one of the robots, like one of the plaintiffs, is heavier than the other . . . . The facial features are totally different." The Ninth Circuit rejected this finding and rejected Paramount's argument that as copyright owner of the "Cheers" television series, Paramount, rather than the actors, own all rights to portray the "Norm" and "Cliff" characters. *Wendt v. Host*, 125 F.3d 806 (1997).

*Wendt* is the second Ninth Circuit case in favor of a celebrity and against a robot. In *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992), *cert denied*, 113 S.Ct. 2443

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(1993), the Ninth Circuit reversed the trial court's determination that Samsung's magazine advertisement depicting a blond-wigged, gold-metallic, letter-turning robot (captioned "Longest Running Game Show 2012 A.D.") did not violate Vanna White's right of publicity because the "hostess" was obviously a robot rather than Ms. White or any other person. Reversing the District Court, the Ninth Circuit found triable issues whether the robot evoked White's identity.

Indeed, the *Wendt* decision is the Ninth Circuit's fourth decision reversing a Los Angeles trial court's effort to dismiss a right of publicity case on summary judgment. In *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), cert. denied sub nom *Young Rubican, Inc. v. Midler*, the Ninth Circuit reversed Ford's summary judgment and issued a decision that first "recognized" California's common law right of publicity. In *Midler*, a sound-alike vocalist performed Midler's signature song, "Do You Want to Dance," in background music for a Ford television commercial. Although California's statutory right of publicity, Cal. Civ. Code § 3344, only protects a celebrity's actual voice, the Ninth Circuit found the deliberate imitation performed by Midler's former back-up singer was actionable at common law.

In addition to reversing Ford's and Samsung's motions for summary judgment, the Ninth Circuit reversed District Court Judge Irving Hill's grant of summary judgment to General Motors in *Kareem Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996). The Ninth Circuit concluded that Oldsmobile's reference to the NCAA's three time selection of Lew Alcindor as Most Outstanding Player was actionable under the Lanham Act and common law right of publicity even though plaintiff affirmatively abandoned his birth name more than twenty years earlier, filing papers in Cook County, Illinois to change his name to Kareem Abdul-

Jabbar. General Motors, which was an official NCAA Corporate Sponsor during the 1993 NCAA tournament, argued that like any other trademark, a name is presumptively abandoned under the Lanham Act after two years of non-use. The Ninth Circuit disagreed, concluding that abandonment is not an available defense in a name case under the Lanham Act.

The Ninth Circuit's reversal in each of these cases is in contrast to its deference to District Court judges who find, in copyright cases, that no reasonable jury would find substantial similarity between two copyrighted works. Under copyright law, a dramatic character is not generally protected unless it is a cartoon character or a cartoon-like character whose well-defined characteristics surpass the personality of any actor portraying it. To merely evoke a copyrighted character's identity would most certainly be a "fair use" under copyright law. The Ninth Circuit has plainly expanded an actor/celebrity's monopoly over his or her identity well beyond the copyright owner's monopoly over its characters.

On the other hand, at least when "newsworthy" speech is involved, the Ninth Circuit has rebuffed publicity claims. In *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 301 (9th Cir. 1992), the Ninth Circuit affirmed District Judge William J. Rea's grant of summary judgment to publishers of *Star* and *USA Today*, rejecting Lanham Act and right of publicity claims based on a "900" pay-per-call popularity contest asking readers to select the sexiest or most popular member of the New Kids on the Block rock band. Despite the publishers' profits on the "900" number, the Ninth Circuit agreed that the exception for use in connection with news and public affairs precluded any actionable claim.

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## International Roundup

### ENGLAND:

#### *Dow Jones Obtains Split Decision On Copyright and Confidence Claims*

Dow Jones Telerate Limited recently obtained a split decision in a breach of confidence and copyright case in the Chancery Division of the High Court of Justice in England. *PCR Limited v. Dow Jones Telerate Limited*, Case No. CH 1996 P. No. 5849 (High Court of Justice, Chancery Division, Nov. 14, 1997). Plaintiff, a London-based commodities research company, sued Dow Jones Telerate Limited, seeking the identity of its confidential source, for damages and an injunction for breach of copyright and breach of confidence. The complaint arose because a Dow Jones reporter used information from copyrighted reports published by the commodities research firm to write three articles that described how the reports had moved the cocoa commodity market.

Plaintiff PCR is one of two companies that, in 1996, collected data and made reports and forecasts in relation to the cocoa crops for the Ivory Coast, Ghana, Nigeria, and the Province of Bahia in Brazil. Normally, PCR published 20 or so reports per year. It employed staff in West Africa to collect the necessary information and transmit it to London. The plaintiff distributed reports to subscribers who paid a substantial fee, and made clear to them that the reports were to be kept confidential for at least 48 hours following distribution.

Although PCR's customers knew that the reports were to be kept confidential, Judge Timothy Lloyd rejected the breach of confidence claim, finding credible the Dow Jones reporter's testimony that she did not know that the information contained in the reports was confidential. The court rejected plaintiff's assertion that it had informed the reporter of the confidential status of the reports.

The court then found, however, that Dow Jones had violated plaintiff's copyright. The judge ruled that on three instances the Dow Jones reporter had copied a

"substantial part" of plaintiff's reports. The copying included not only quoting but paraphrasing plaintiff's materials. On the first instance, the court found that the reporter had written an article about a PCR report that summarized most of the report's contents, including rounded figures of cocoa plant podcounts, a measure used to forecast the outcome of the current crop. In the second instance, the reporter wrote about the same PCR report, this time with it in front of her. She made direct and explicit quotations from the report and included the average podcounts per tree exactly rather than as rounded figures. In the third instance, the reporter quoted liberally from another PCR report, reporting both the current PCR podcounts and average PCR podcounts from 1994 and 1996, which she set out in a table at the end of the article.

After finding liability for copyright violations, the judge rejected defendant's defense of fair dealing (analogous, but not identical, to the U.S. concept of fair use), saying, as a "matter of impression," that the reporter had taken more material from the copyrighted work than was "reasonable or appropriate." Though the judge acknowledged the importance of news reporting, he rejected the defendant's defense that the articles served the public interest, saying that the legal protections offered by copyright cannot be set aside because of the need for transparency in futures markets that fair and detailed reporting provides.

In a passage that might be seen as giving direction to the media in the future, the judge criticized Dow Jones for not having a sufficiently rigorous procedure in place for advising reporters how to treat copyrighted material in articles.

Judge Lloyd rejected plaintiff's request for an injunction barring Dow Jones from further breaches of plaintiff's copyrighted work. The judge then ordered full legal costs to be paid by the defendant, which usually means 70 percent of actual costs. The plaintiff introduced no evidence of damages at the trial, but the judge provided that it can seek a hearing on the matter

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if it chooses.

## FRANCE:

### ***Judge Orders Book Passages Removed; Publisher Pulls Book***

Faced with an order to excise passages in a book that linked a former defense minister to murder, a French publisher withdrew the controversial book from publication, according to an AP report. As reported in the *LibelLetter* last month, on October 13 a Paris judge halted sales of the book *The Yann Piat Affair, Assassins at the Heart of Power*, after Marseille Mayor and a former minister of urban affairs, Jean-Claude Gaudin, filed a \$1.7 million defamation suit alleging that the book falsely incriminates him in the 1994 assassination of the French Parliament member Yann Piat. Without using names, the book implies that Gaudin and former Defense Minister Francois Leotard were responsible for Ms. Piat's murder by a motorcycle gunman. The court called upon the authors to prove their allegations.

One of the authors of the book, Andre Rougeot, refused to reveal the military intelligence source who provided incriminating information for her book, despite the judge's order. The court then ruled that the defendants had failed to prove that the book's allegations are true or that they had adequately investigated the charges, according to an AP report. Faced with the author's silence, the court ordered that certain controversial passages be removed or that the publisher pay a fine of \$830 for each uncensored book sold. The publisher pulled the book.

## ISRAEL:

### ***Sharon Loses Libel Suit***

Ariel Sharon, a former defense minister and the current infrastructures minister of Israel, lost the libel suit that he had brought against an Israeli newspaper for reporting that he had deceived the late Prime Minister Menachem Begin about the planned scope of Israel's 1982 attack on Lebanon. Sharon sued over a 1991 article in the

Haaretz daily that said that Sharon misled then-Prime Minister Menachem Begin about his plans for the military to attack deep into Lebanon's borders rather than simply carry out a limited strike, according to an article in the *Washington Post*. According to the *Post*, the district court judge in Tel Aviv, Moshe Talgam, said that Sharon had tried to receive approval for his full-scale attack on Lebanon beforehand, and he had failed. "Despite this, he made all the preparations for this plan," said the judge. The judge went on: "I compare [Sharon] to a doctor who believes that the patient is in need of comprehensive surgery, but he does not get the approval of the patient." Sharon vowed that he would appeal the decision to the Supreme Court of Israel.

## SINGAPORE:

### ***Appeals Court Cuts Award to Prime Minister***

Earlier this month, Singapore's appeals court cut by almost half the damages awarded to Singapore's Prime Minister Goh Chok Tong in a libel case that he brought against an opposition party leader, according to an AP report. In its 77-page opinion, the court slashed the award from more than \$5 million to less than \$3 million.

Prime Minister's Goh and ten of his colleagues sued Tang Liang Hong, an unsuccessful candidate for the left-leaning Worker Party in the election, after Tang filed a police report against them. According to the AP, in the police report Tang accused the plaintiffs of lying during the campaign for election when they called him an "anti-Christian Chinese chauvinist." Though the judges rejected the argument that the defendant's speech was thoroughly political, the decision said that the "totality of the awards . . . has become overblown and is hugely disproportionate to the aggregate harm and injury caused," according to an AP report.

Still before the court of appeals is Prime Minister Goh's appeal of a libel judgment that he won against Joshua Jeyaretnam, another opposition leader. As reported in last month's *LDRC LibelLetter*, Goh appealed his victory in that case, saying that the \$12,903 verdict that he won was only one tenth of the \$129,032 he had sought to recover.



## Fourth Circuit Panel Reverses Judgment for *Hit Man* Publisher

(Continued from page 1)

exhaustive discovery and jury trials.

The cases arise out of three 1993 contract murders in which, plaintiffs alleged, the murderer, James Perry, relied upon the Paladin publication, "Hit Man: A Technical Manual for Independent Contractors" ("*Hit Man*"), in committing the crimes. In September 1996, The Honorable Alexander Williams, Jr., of the United States District Court for the District of Maryland, granted summary judgment in favor of Paladin on the grounds that the publisher's book is protected by the First Amendment.

Before engaging in burdensome and intrusive discovery, Paladin sought an early disposition of the case by moving for summary judgment, on the ground that its publication was protected by the First Amendment, based on a series of stipulated facts that were agreed upon only for purposes of that motion. In those stipulations, plaintiffs conceded that Paladin intended its books to be used by authors seeking information for the purpose of writing books about crime and criminals, law enforcement officials, persons who enjoy reading accounts of crime for entertainment, persons who fantasize about committing crimes but do not thereafter commit them, and criminologists and others who study criminal methods. In addition, plaintiffs stipulated that Paladin had no knowledge that the purported purchaser of the book at issue planned to make use of the book to commit a crime.

Because the plaintiffs' allegations of intent would (even after discovery) likely have been resolved against Paladin as the party moving for summary judgment, Paladin postured its contention that a speaker's intent was irrelevant to First Amendment protection, as delineated by the *Brandenburg* line of cases, by stipulating that it "intended and had knowledge that [its] publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire."

In granting summary judgment, the district court applied *Brandenburg* and its progeny to hold that the First Amendment bars the imposition of liability because *Hit Man* was not directed to, nor was it likely to, incite imminent lawless action. The district court also rejected other arguments offered by the plaintiffs, including that the Court should recognize a new category of unprotected speech encompassing expression which arguably "aids or abets" murder and that *Brandenburg* only applies to political advocacy.

The presiding Fourth Circuit panel was comprised of

Judges William W. Wilkins, Jr., J. Michael Luttig, and Karen Williams. The Fourth Circuit's unanimous opinion, authored by Judge Luttig, held that

**As for *Brandenburg* itself, the panel's opinion limits the application of the "directed to and likely to incite imminent lawless action" test to speech which constitutes "abstract advocacy" - i.e., that which focuses on "political or social discourse."**

"speech . . . that constitutes criminal aiding and abetting does not enjoy

the protection of the First Amendment . . . at least where, as here, the defendant had the specific purpose of assisting and encouraging the commission of such conduct and the alleged assistance and encouragement take a form other than abstract advocacy." Slip op. at 18 (emphasis added).

Indeed, the court states that even when the speech is published to a wide audience, where a speaker acts with the purpose of disseminating information to criminals and would-be criminals, the First Amendment offers no protection.

The panel's opinion allows the application of First Amendment protections to turn on the speaker's intent, and even suggests in certain passages that such intent, by itself, might be a legally sufficient basis to strip speech of constitutional protection, without regard to whether the *Brandenburg* test is satisfied. *Id.* at 28-29. Thus, the Court chided Paladin for stipulating "in taunting defiance" to ill intent, *id.* at 62, even though both parties agreed that the purpose of the stipulation was to allow the trial court

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to focus on the purely legal question of whether its book is entitled to First Amendment protection under *Brandenburg*.

The Court, moreover, found that the text of the book and its distribution through a catalogue were sufficient, even in the absence of the stipulations, to establish Paladin's improper intent for these purposes. See Slip op. at 39 ("The unique text of *Hit Man* alone, boldly proselytizing and glamorizing the crime of murder and the "profession" of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual.").

### Limiting *Brandenburg*

As for *Brandenburg* itself, the panel's opinion limits the application of the "directed to and likely to incite imminent lawless action" test to speech which constitutes "abstract advocacy" – i.e., that which focuses on "political or social discourse." Slip op. at 41. In so limiting *Brandenburg*, which the panel dismisses as a "brief, *per curiam*" opinion, *id.* at 19, the panel ignores numerous cases which have applied the *Brandenburg* test to speech which quite expressly urges the violation of specific laws in specific ways.

In addition, in applying this reformulated version of *Brandenburg* to *Hit Man*, the panel ignored numerous passages throughout the book articulating the ideology of the writer that, because the American justice system is so inadequate, sometimes "a man must step outside the law and take matters into his own hands." Notwithstanding numerous such passages, the panel found that the publication did not constitute "abstract advocacy" requiring application of the *Brandenburg* test. See Slip op. at 40-41 (describing book as "devoid . . . of any political, social, entertainment, or other legitimate discourse").

The Court's conclusion in this regard ignores not only significant aspects of the book's text, but also the uncontroverted stipulations and record evidence that the book was used by readers for a number of lawful purposes, including entertainment, criminology, law enforcement, and fictional writing. In fact, despite the stipulations, the panel concludes that a jury could permissably find that (1) Paladin essentially distributed *Hit Man* only to murderers and would-be murderers; in effect no different than distributing it to one person

or a specific group who it knew to be interested in murder, and (2) that *Hit Man's* only genuine use was the unlawful one of facilitating murders, Slip op. at 40-41.

### The DOJ Report

Finally, the panel's decision also relies on a report issued by the United States Department of Justice, entitled a *Report on the Availability of Bombmaking Information, the Extent to Which its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May be Subject to Regulation Consistent with the First Amendment to the United States Constitution* (the "Report"), and submitted to the Court by the parties. The Report notes that, while the Constitution would not preclude criminal or civil liability when a person disseminated information to a third party intending that the third party will use it to commit a crime, the "First Amendment would impose substantial constraints on any attempt to proscribe indiscriminately the dissemination" of such information to a mass, undifferentiated audience. Moreover, the Report points out that the First Amendment precludes liability where, as in this case, the published information is lawfully obtained and is already in the public domain.

The panel cited the Report, however, in support of its holding that there may be a category of speech in which the *Brandenburg* test need not be applied, namely, "general publication of [dangerous] information, when the writer, publisher or seller of the information has the purpose of generally assisting unknown and unidentified readers in the commission of crime."

Paladin has filed a Petition for Rehearing and Suggestion for Rehearing In Banc. The Petition was supported by *amicus* briefs filed by the Maryland and National Capital Area chapters of the American Civil Liberties Union, the Thomas Jefferson Center for the Protection of Free Expression, and the Horror Writers Association.

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

## Barricade Books Seeking Amicus Support

Despite filing for bankruptcy, book publisher Barricade Books is pursuing an appeal to the Nevada Supreme Court of a \$3 million libel judgment in favor of casino operator Steve Wynn. The suit arose over a catalogue advertisement written by Barricade Books's publisher Lyle Stuart for the book *Running Scared: The Dangerous Times of Las Vegas Casino King Steve Wynn*, which detailed Wynn's alleged connections to the mafia. Lankenau Kovner Kurtz & Outten, LLP, have joined the case as defendants' counsel and are seeking amicus support for the appeal on the issue of the application of the fair report privilege to confidential preliminary investigative reports of foreign law enforcement bodies. Interested parties should contact Laura Handman of Lankenau Kovner Kurtz & Outten, LLP, 1155 Connecticut Avenue, N.W., Suite 700, Washington, DC 20036. Phone: 202.508.1138. Fax: 202.508.6699.

Meanwhile, according to Publishers Weekly, the bankruptcy filing has allowed Stuart to get the restraining order on his assets lifted and to continue publishing and shipping books. The suit itself has also apparently fueled "steady sales" of the book according to Stuart, with 30,000 copies in print after three printings, with a fourth likely.

## Concerned Journalists Meet

On November 6, a newly formed group called the Committee of Concerned Journalists convened the first of eight forums at which journalists and citizens will share their concerns about journalism and where it is headed. The forums will meet around the country; the first was held at Northwestern University's Law School. That forum asked the questions what is journalism and who is a journalist.

The Committee of Concerned Journalists was created at a meeting of journalists who assembled at the behest of the Nieman Foundation and the Project for Excellence in Journalism in June of 1997. The journalists convened to discuss their concerns about the direction of journalism, the changes in the technology and economics of journalism, and the growing animosity of the public toward journalists.

In the summer of 1997, the group authored a Statement of Concern and agreed to serve as a steering committee to direct an effort at engendering a period of national reflection about the purpose of journalism. Bill Kovach, Curator at the Nieman Foundation, has agreed to serve as the Committee's Chairman. The Committee's Statement of

Concern calls on journalists to "join as a community of professionals to clarify the purpose and principles that distinguish our profession from other forms of communication."

The Committee hopes to use the forums to send the message that journalists of all generations are concerned about the direction of their profession and that they are trying to clarify its purposes and principles. After each forum, the Committee will release an interim report; and at the conclusion, the group will release a final report that will attempt to define the enduring purposes of journalism, along with its principles, responsibilities, and aspirations.

In the months ahead, the Committee will sponsor forums on journalism neutrality; scandal, crime, and sensationalism; the competency of journalists; journalistic diversity; peer pressure and individual conduct; technology and change; and journalism's responsibility and the First Amendment. For more information on the dates and locations of the forums, contact the Committee's website at <http://www.journalism.org>.

## Minutes of LDRC Annual Meeting, November 12, 1997

### *Welcome and Report from the Chairman*

Bob Hawley, Chair of the Executive Committee, brought the meeting to order and welcomed the attendees. He thanked all of the members for their support over the past year. He stated that he thought it had been a productive year and that LDRC was looking forward to the many projects of 1998. While he indicated that Sandy Baron, executive director, would report on the specifics of LDRC's activities, he announced LDRC's plan to hold a conference in England tentatively scheduled for some point during the week of March 23, 1998. The conference would explore the problems of libel law and litigation in England for American publishers. It is still in the planning stage and LDRC welcomes input. One idea is to devote the first day to exploring the issues with an eye toward possible and realistic law reform; the second day will focus on the nuts and bolts of defending a libel action in England. The conference will take place in Oxford or London, or both, depending on the preferences of participants. The initial invitation to plan such a conference came from Cardozo Law Professor, Monroe Price and the media law institute with which he is associated at Oxford. LDRC will be working with Professor Price and the Oxford institute in planning the conference.

### *Executive Committee Elections: Mary Ann Werner Elected*

Bob Hawley explained that in recent years LDRC adopted staggered terms for members of the Executive Committee. And while no firm term limits had been imposed it was anticipated that most members would serve two, two-year terms. This tenure afforded LDRC the benefits of experienced Executive Committee members while allowing for regular turnover in the members. This year a single member — Peter Canfield — would step down and a new member be eligible for election. Bob will serve one more year as Chair. Peter was thanked for his countless contributions to LDRC. Peter will remain chair of the *LDRC Libelletter* committee and he was thanked for his many contributions to the development of this publication as well. Thereafter, Mary Ann Warner of the Washington Post was unani-

mously elected by voice vote to the Executive Committee for a two year term.

Bob Hawley continued with his report, noting that one of the executive committee's primary duties is to keep an eye on finances. He reported that LDRC's finances are in strong shape. In 1998 Sandy Baron will be paid for a four day week. Jim Borelli asked about the new 1998 expense item for insurance, and Sandy explained that LDRC will carry an E&O policy covering LDRC publications and meetings. Steve Bookshester asked how LDRC could increase its marketing and sales of the 50-State Surveys. Sandy reported that there was zero return from last year's purchase of new mailing lists, although each year more books are being sold. She suggested LDRC consider a marketing study or a glossier brochure. Dave Kohler and Robin Bierstedt suggested that their respective company's expertise in direct mailing may be helpful and both will look into whether that can benefit LDRC.

### *Executive Director's Report*

Sandy Baron began by thanking members for their financial support and their support in contributing to LDRC's many projects, including LDRC's brief bank, expert witness bank and jury instruction bank. She noted that LDRC fulfilled over two hundred and twenty-five requests for information from members, plus dozens of requests from journalists on the law, legal trends and specific cases. She also thanked Guylin Cummins and the expert witness committee for their work in expanding the expert witness bank, as well as Tom Kelly for his case reports, and counsel for their contributions to the *Libelletter*. She reviewed the 1997 LDRC Bulletins and noted that in 1998 the LDRC Bulletin will again include an updated Damages Survey and the Appellate Review Survey. LDRC's 50-State Privacy Survey was published in June and its Libel Survey in October. Both contained surveys of the law of Canada. Sandy thanked the Canadian preparers for tackling the difficult task of creating the new Canadian Surveys and stated that LDRC is interested in feedback.

Sandy reported that LDRC would like to publish the

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planned International Book this year, which is planned to be published in conjunction with the ABA Forum on Communications Law. She thanked Eric Rayman of Simon & Schuster for advising LDRC on a publishing contract with the ABA.

Sandy next asked the attendees to turn their attention to the draft Employment Law Survey, prepared by the Committee on Employment Law chaired by Blair Soyster. Containing outlines of law from six states, the draft may form the basis of a new LDRC book on the subject. Included with the draft survey was a questionnaire designed to gauge members' interest in such a book and Sandy asked attendees to give LDRC their comments on the usefulness of going forward with such a book.

Sandy also asked attendees for feedback on the biennial Libel Conference in Reston. Sandy reported that financially the conference is in the black. To keep up with the growth of the conference, Sandy asked attendees to consider other locations to hold the conference, such as Atlanta, Boston or Kansas City. The general consensus among attendees was to stay in the Washington, D.C. area.

Sandy next reviewed several other LDRC accomplishments in 1997, including the Complaint Study, prepared with the assistance of Media Professional Insurance and Employers Reinsurance; the Advertising and Commercial Speech Committee's Articles on Selected Topics; the Cyberspace Committee's Articles; the Tort Reform Committee's annual report on legislative developments (a copy of which was available at the meeting); and the Jury Instruction Committee's sample voir dire report. Sandy also thanked LDRC's staff for its work over the past year.

LDRC Staff Attorney John Maltbie announced that LDRC is online with a web site at [www.ldrc.com](http://www.ldrc.com). John asked members to visit the site and give comments. Also, John will send out information to members with regard to linking their sites to the LDRC site.

### **Membership and Fundraising**

The meeting concluded with Robin Bierstedt's report on the continuing efforts to bring in new members to LDRC, including reaching out to cable companies.

## **LDRC Honors Fred Friendly**

Four hundred fifty lawyers, journalists, and media representatives gathered to honor Fred W. Friendly at LDRC's Fifteenth Annual Dinner, which was held at the Waldorf Astoria on November 12. Mr. Friendly was this year's recipient of LDRC's *William J. Brennan, Jr. Defense of Freedom Award*. LDRC honored Mr. Friendly for his years of fine journalism work; what his Socratic seminars have done to bring the Constitution, particularly the First Amendment, to life; and what the seminars have done to bring journalists and members of the legal community into a constructive and amicable dialogue.

### **Justice Brennan Remembered**

The evening's festivities began with Floyd Abrams, Partner at Cahill Gordon & Reindel, paying tribute to Justice Brennan, who died this past July. Abrams recalled a man so pure in goodness and humility that he could charm even his ideological opponents, a man who made all with whom he came into contact feel better for having seen him. Abrams called Brennan a jurist with a "diamond-sharp" mind and then labeled Brennan "the most effective protector of the First Amendment of any justice in our history."

Abrams then told a story about how Brennan had refused to put pressure on the editors of *The Wall Street Journal* to publish a letter that Brennan had written to them correcting a potentially defamatory inaccuracy that had been printed about him. "[Brennan] was unwilling, even as to a personally wounding untruth of this sort, to do anything more than to write a letter to the editor and then await the decision of the editor about whether to print it. He was truly concerned that the press be robust, wide open, and uninhibited in its coverage of the Court. He had, in short, not only written New York Times against Sullivan, he had read it, and he lived it," said Abrams.

### **A Tribute to Fred Friendly**

Joseph A. Califano, Jr., Former Secretary of Health, Education and Welfare and the current Chairman and

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President of the National Center on Addiction and Substance Abuse at Columbia University, then spoke, spending some time sharing his own memories of Justice Brennan before moving on to praise Fred Friendly's life's work. Califano praised not only the seminars, but Friendly's work at CBS, including: his exposé that led to the downfall of Senator Joseph McCarthy; his production of "Harvest of Shame," the show that opened America's eyes to the plight of migrant workers; and a report that Friendly produced, three years before the Surgeon General's report on smoking and health, which blasted cigarettes and the tobacco industry because cigarettes were causing cancer. All three of these shows were done in collaboration with the legendary journalist Edward R. Murrow.

Califano then went on to highlight some of the great moments in the history of the Fred Friendly seminars, saying that through the seminars "Fred Friendly brings the Constitution to life for millions of Americans." After Mr. Califano's speech, LDRC played a retrospective video clip showing some highlights from Mr. Friendly's seminars and other famous works, including "Harvest of Shame."

### ***Ruth Friendly Accepts the Award***

Bob Hawley, Chair of the LDRC Executive Committee, then presented the Award to Ruth Friendly who told the crowd how grateful Mr. Friendly was for the award and that he had wanted to attend the dinner, but was too ill. Ruth Friendly told of sharing her husband through the years with the mistress of his work and his love of the Constitution. She talked also of a boat ride during which, while the boat was leaking and she feared for their safety, Mr. Friendly sat virtually oblivious, focused on thinking of a way to get lawyers, judges, and journalists to talk to each other rather than past each other, as they had been in the wake of the Watergate scandal. The two made it to shore safely, and the idea for the seminars was born.

Following the speeches was the night's main event: a "Fred Friendly" seminar, which was moderated by Harvard Law School Professor Charles Nesson. The panelists included Messrs. Abrams and Califano, who were joined by: Lyle Denniston, Reporter, *The Baltimore Sun*; Jerry

Nachman Former Editor-in-Chief, *New York Post* and Former VP/News, WCBS-TV; Dan Rather, Anchor and Managing Editor, CBS News; E.R. Shipp, Columnist for the *New York Daily News* and Assistant Professor at Columbia Journalism School; and John J. Walsh, Partner, Cadwalader, Wickersham & Taft, New York.

Nesson's hypothetical led the panelists to discuss journalistic ethics as they relate to newsgathering. Dan Rather was asked whether he would lie to get a story. Lyle Denniston denounced the practice of assuming an identity in order to get a story, but then said that he would have no trouble stealing documents for his story. While the panelists had fun with the hypothetical, it was clear that the style of the Friendly seminar had once again succeeded in making "an agony of decision-making so intense" that no panelist or audience member escaped without thinking.

In next month's *LibelLetter*, we will publish transcripts of the speeches of Floyd Abrams, Joe Califano, and Ruth Friendly.

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Robin Bierstedt; Peter Canfield;  
Susanna Lowy; Kenneth Vittor;  
James Crossberg (ex officio);

Executive Director: Sandra S. Baron

Staff Attorney: David V. Heller

Staff Attorney: John Maltbie

LDRC Fellow: John Margiotta

Staff Assistant: Melinda E. Griggs

**MINUTES — November 13, 1997  
ANNUAL MEETING OF DEFENSE COUNSEL SECTION**

**PRESIDENT'S REPORT**

DCS President Jim Grossberg welcomed the members. He extended a special thanks to DCS Committee Chairs and announced the three-year rotation system for Committee Chairs beginning in 1998. He also announced the formal split of the Pre-Publication/Pre-Trial Committee into separate Pre-Publication and Pre-Trial Committees. The Pre-Publication Committee will be chaired by Bob Nelson of Oklahoma City, and the Pre-Trial Committee will be chaired by Charity Kenyon of Sacramento.

Mr. Grossberg extended the thanks of all the DCS membership and the DCS Executive Committee to Sandy Baron for another wonderful, productive year.

**RATIFICATION OF BY-LAW AMENDMENT**

Mr. Grossberg presented the amendment to the DCS By-laws which reduces the term of each office from two years to one. The amendment was passed unanimously on a voice vote by a quorum of the membership.

**ELECTION OF TREASURER**

Following the procedures set out in the DCS By-laws, Susan Grogan Faller had been nominated for DCS Treasurer. No other nominations were received. Ms. Faller was elected by acclamation on a voice vote by a quorum of the membership.

**THANKS TO JIM GROSSBERG**

Ms. Baron and Ms. Laura Handman extended the thanks of the LDRC, the DCS membership, and the DCS Executive Committee to outgoing DCS President Jim Grossberg for his exemplary service on the Executive Committee.

**EXECUTIVE DIRECTOR'S REPORT**

Ms. Baron reviewed some of the accomplishments of the year before turning the meeting over to DCS Committee Chairs for their Committee Reports. Ms. Baron reported that LDRC had a very active, productive year, responding to over 225 requests for materials in 1997 and adding over 100 names to the expert witness bank. Ms. Baron reported that Gayle Sproul, the LDRC Bulletin editor, has plans to publish Damages and Appellate Review survey pieces in the coming year.

Ms. Baron reported with pleasure that the new Employment Law Committee had completed outlines for several major states. Those outlines were distributed at the Meeting. Ms. Baron invited the members to review these prototype outlines and comment on them.

Ms. Baron further reported that Eric Rayman of Simon & Schuster had volunteered his assistance with the needed contracts for a possible survey of foreign libel law that is still in progress. Ms. Baron is continuing to work with the ABA's Forum Committee on Communications Law on the details of this project.

Ms. Baron reminded the members of the Complaint Survey project which will give greater insight into who the plaintiffs are and what claims are being brought.

Ms. Baron also reported to the membership that LDRC has a new website at ldrc.com. John Maltbie is responsible for setting up and maintaining this site.

Finally, Ms. Baron extended her thanks to the LDRC staff for all of their hard work during the past year.

**COMMITTEE REPORTS**

**Advisory Committee on New Legal Developments - Lee Levine, Chair.**

Mr. Levine reported that this Committee had assumed responsibility for preparing analytical essays on various new developments for the Fall Bulletin. This Committee is functioning very smoothly and well, in part because its members communicate frequently by e-mail.

**Advertising and Commercial Speech - P. Cameron DeVore, Chair.**

Mr. DeVore reminded the membership of this Committee's publications during the preceding year and reported that the Committee is considering additional studies of developments under the Lanham Act and of Canadian law in this area.

**Conference and Education Committee - Terrence Adamson and Daniel Waggoner, Co-Chairs.**

Mr. Waggoner reported that the September Conference in  
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Reston appeared to be a great success. The sponsoring organizations are still in the process of gathering and reviewing evaluations and of finalizing the financial report. Mr. Waggoner noted the enthusiasm for the International Law session held immediately before the Conference. He also extended his thanks to the other sponsoring organizations, particularly NAA, which handled much of the work on conference logistics.

### ***Cyberspace Committee - Michael Kovaka, Chair.***

Mr. Kovaka announced that Steve Lieberman will assume the post of Committee Chair in 1998. Mr. Kovaka noted the Committee's publications over the past year and its contributions to the case law outline on personal jurisdiction. The DCS extends its great thanks to Mr. Kovaka for all of his efforts to get the Committee off to such a great start.

### ***Employment Law Committee - Margaret Blair Soyster, Chair.***

Ms. Soyster was not able to attend, but Ms. Baron delivered her report by distributing the prototype outlines referred to above.

### ***Expert Witness Committee - Guylyn Cummins, Chair.***

Jim Stewart, Vice-Chair, noted the Committee's work in greatly expanding the expert witness bank and the brief bank on expert related motions.

### ***International Law Committee - Kevin Goering and Richard Winfield, Co-Chairs.***

This Committee noted LDRC's participation in two conferences in Moscow over the past year and announced plans to hold a two-day conference in Oxford during the week of March 23.

### ***Jury Instruction Committee - Robert Raskopf, Chair.***

Mr. Raskopf noted the Committee's work in compiling voir dire questions (distributed at the September Conference) and the Committee's interest in conducting juror interviews.

### ***Libel Letter Committee - Peter Canfield, Chair.***

Mr. Canfield noted that the Committee was functioning efficiently and well. He invited contributions from the membership.

### ***Pre-Publication/Pre-Trial Committee - Susan Grogan Faller, Chair.***

Ms. Faller announced the Committee's Annual lunch meeting on November 13, 1997 at PLI's headquarters. She reported that the Committee was collecting opinions on the attorney's role in pre-publication review and materials for newsroom seminars. As previously announced, this extremely active committee is being divided into separate Pre-Publication and Pre-Trial Committees.

### ***Tort Reform Committee - Richard Rassel, Chair.***

Mr. Rassel distributed a valuable summary of state tort reform developments. He reported that the push for agricultural product disparagement (vegetable libel) laws seemed to be slowing. He also noted a retrenchment in tort reform measures in some states in which plaintiffs' lawyers have allied themselves with some members of the defense bar.

### ***Trial Techniques - David Bodney, Chair.***

Mr. Bodney extended his thanks to Tom Kelley for his biennial survey of major libel and privacy trials. Mr. Bodney further stated that the Committee was looking into the possibility of juror interviews and was also interested in studying the different types of evidence that bear on the award of punitive damages.

### ***Membership Committee - Richard Goehler, Esq.***

Mr. Goehler reported that DCS Membership has topped 200, but that some markets still had not been tapped. He encouraged all members to be on the look out for and to recruit new members.

Due to a work conflict, CBS *60 Minutes* producer Jonathan Wells was not able to attend.

The Meeting was adjourned after it was determined that there was no other new business to discuss.

*Thomas S. Leatherbury*  
Secretary