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Reporting Developments Through November 22, 2000

In This Issue . . .

LIBEL	PAGE
7th Cir. Affirms Summary Judgment for Media in <i>Desnick</i>	1
FL Fed. Ct. Dismisses Libel By Implication Claim	6
PA Workers' Comp Hearing Subject to Fair Report Privilege	18
PA Refuses Libel Time Limit for Commercial Disparagement	7
D.C. Ct. on Broad Protection for Opinion	9
SDNY: Republisher May Rely on Reputable Translation	12
SDNY Dismisses Libel Case: "Militant" Is "Noble, Not Nutty"	13
CA Anti-SLAPP Law Applied to Financial Journalism	15
TX Parole Officer is Public Official, TX Ct. of Appeals Rules	17
VA Jury Awards Dr. \$2.5 Mil. v. WJLA-TV	17
INTERNET	
IL Dist. Ct. Finds Sect. 230 of CDA Extends to Web Hosting, PA: Preliminary Showing on Merits Required For Revealing Identity of Judge's On-Line Critic	19 21
NEWSGATHERING	
MA High Ct. Strengthens Access to Civil Documents	27
OK Judge Grants Media Access to FBI Phone Tapes	29
NEWS & UPDATES	
Supreme Court Grants Cert in Punitive Damage Challenge	23
CO Ct. Orders Limited Disclosure of Book Store Purchases	25
Clinton Vetoes "Official Secrets Act"	26
8th Circuit. Rules Candidate May Use C-SPAN Footage	28
LDRC Celebrates 20 Years	31
LDRC Institute High School Education Project	33
Updates	
MO Judge Reverses Tony Twist's \$24.5 Mil. Publicity Verdict	4
Author Seeks Set-Aside of \$11 Million Libel Judgment	18
Sup. Ct. Grants Cert in <i>Tasini</i> , Will Review Computer Archives	23
CDCAL Final Judgment in <i>Free Republic</i> Case	24
CA Access Decision Now Available in <i>Media Law Reporter</i>	24
<i>Forum Non Conveniens</i> Motions Denied in <i>Chiquita</i>	30
A Need for Balance: Copyright and New Technologies	31

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more on P. 33

ABC v. Desnick: 7th Circuit Affirms Grant of Summary Judgment for Media Defendants

By Michael M. Conway and Mary Kay Martire

On the basis that no reasonable jury could find that a network investigative report was broadcast with actual malice, the United States Court of Appeals for the Seventh Circuit on October 27 affirmed summary judgment in favor of American Broadcasting Companies, Inc., correspondent Sam Donaldson and producer Jon Entine on the libel claim brought by a cataract surgery center based upon a 1993 *PrimeTime Live* show. *Desnick v. ABC*, No. 99-3715, 2000 US App. LEXIS 27038 (7th Cir. 2000). Writing for a unanimous panel, Chief Judge Richard A. Posner found that the district court correctly concluded that plaintiff J.H. Desnick, M.D., Eye Services, Ltd., an admitted public figure, could not establish that ABC acted recklessly.

Five years ago, the Court affirmed the dismissal of various news-gathering tort and fraud claims arising from ABC's undercover investigation of a high-volume cataract surgery center which performed Medicare-reimbursed surgery on elderly patients. *J. H. Desnick, M.*

(Continued on page 2)

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ABC v. Desnick: Court of Appeals Affirms Grant of Summary Judgment

(Continued from page 1)

D., Eye Services, Ltd. v. ABC, 44 F.3d 1345 (7th Cir. 1995), but allowed a single defamation claim to proceed. See *LibelLetter*, January 1995 at 1.

Subsequently, the district court granted summary judgment on the defamation claim against the clinic and partial summary judgment against the two physician-plaintiffs, who were not public figures, on their claims for presumed and punitive damages. The district court allowed these individuals to proceed on their claim for actual damages. After this remaining claim of the individual plaintiffs was settled, the clinic appealed.

Plaintiff alleged that it was defamed by an allegation in the broadcast by a former employee that a diagnostic machine, known as an autorefractor, had been rigged by clinic technicians to produce false symptoms of a cataract so as to justify surgery.

After years of discovery, U.S. District Judge John Nordberg in Chicago granted summary judgment against the clinic, finding an absence of actual malice.

On appeal, the clinic argued that ABC and its editorial employees had acted recklessly. Among other arguments, the clinic argued that (1) the outtakes of an interview between Donaldson and Paddy Kalish (the ex-employee) showed that the autorefractor could not be rigged, (2) Kalish was the single source of the allegation and he lacked credibility, (3) the US Attorney had refused to prosecute a whistleblower suit brought by Kalish because Kalish could not be the centerpiece of a credible case and (4) ABC was on notice that Kalish had been successfully sued for libel based upon the autorefractor charge made to a local CBS affiliate a few years earlier.

Judge Posner found each of these grounds insufficient to establish the element of “recklessness” necessary for a finding of actual malice under the *New York Times* standard. Before turning to the specific allegations, Judge Posner focused particular attention on the meaning of the “actual malice” standard, stating that “[t]his is a term of legal art that means not what it seems to

mean but that the defendant either knew that the defamatory statement (here, the accusation of tampering with the auto-refractor) was false or was recklessly indifferent to whether it was true or false.”

After concluding that there was no evidence that ABC knew of the falsity of the allegedly defamatory statement, the Court focused its attention on whether there was evidence that ABC was recklessly indifferent to the truth or falsity of its allegations. Citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) and judicial authority regarding criminal liability for mail fraud based

[T]he standard of recklessness in a libel action was analogous to the criminal sense of recklessness, rather than the standard of recklessness applied in other tort cases

upon “reckless indifference,” Judge Posner explained that the standard of recklessness in a libel action was analogous to the criminal sense of recklessness, rather than the standard of recklessness applied in other tort cases, where the term “sometimes denotes little more

than gross negligence.”

Negligence, the standard in defamation suits brought by private rather than public figures, does not require proof of a state of mind at all, but only that the defendants failed to exercise the care that a reasonable person in his position would have exercised. The contrast with recklessness in the strong sense in which the term is used to denote the standard in constitutional, mail-fraud, and public-figure defamation cases is stark. “Reckless conduct [in a public-figure defamation case] is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.”

(Quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968))

(Continued on page 3)

ABC v. Desnick: Court of Appeals Affirms Grant of Summary Judgment

(Continued from page 2)

After articulating the applicable standard, the Court reviewed the evidence in the record and rejected the clinic's claim that ABC acted recklessly in publishing the autorefractor allegations. At the clinic's request, the Court reviewed the outtakes of Donaldson's interview with Kalish, which showed that Kalish and the technician assisting him needed several attempts to degrade Donaldson's vision sufficiently to "fail" the glare test, thus establishing one of the criteria for Medicare-reimbursable cataract surgery.

The Court concluded that this was not evidence of recklessness, reasoning that Kalish might have experienced difficulty rigging the machine because he did not do the tampering himself but merely had observed it. The Court also noted that the accusation of tampering was corroborated by the facts that ABC's investigation of the Desnick clinic turned up "evidence of unneeded surgery, alteration of patients' records to show they needed cataract surgery when they didn't, diagnoses by clinic surgeons of cataract in testers (ABC "undercover agents") with normal eyesight, and statements by former employees of the clinic that almost everyone failed the glare test."

The Court explained that the U.S. Attorney had refused to join Kalish's whistleblower suit against the clinic not because he thought Kalish was lying but "because he thought Kalish might not be believed, having worked for the clinic for two years and having participated in the clinic's unethical practices." Judge Posner emphasized that the fact that Kalish might not be credible enough to have a good chance of persuading a jury did not mean that he was not credible enough to be a source for a news story.

Noting that "many a criminal conviction has rested entirely on the testimony of coconspirators despite the requirement in a criminal case of proof beyond a reasonable doubt," the Court concluded that "a fortiori a broadcaster is entitled to repose confidence in a conspirator unless the circumstances create in the broadcaster's mind

a belief that there is a high probability that the conspirator is lying."

The Court stated that "potentially the best fact" plaintiff was that ABC allegedly had failed to properly investigate a state court lawsuit filed by the clinic against Kalish over a prior broadcast by a local CBS affiliate, in which similar tampering allegations were made. The clinic obtained a summary judgment in the lawsuit when Kalish failed to timely respond to requests for admissions.

The Court concluded that this argument was fatally flawed, however, emphasizing the additional concept that there was no evidence indicating that, had ABC investigated the lawsuit further, it would have learned any additional information casting additional doubt on Kalish's truthfulness.

Judge Posner analogized a libel plaintiff's burden to the "duty of a party who complains about the exclusion of testimony to show by an offer of proof that the testimony would have been helpful." Therefore, the Court concluded, that had ABC looked at the state court file this "would have brought to light nothing that would have cast any doubt on Kalish's truthfulness. The only aspect of the defendants' conduct that might be considered reckless was also, so far as the record discloses, harmless."

On November 13, 2000, Plaintiff filed a Petition for Panel Rehearing with the Court of Appeals, arguing that when the record is viewed in the clinic's favor, as it should be on a motion for summary judgment, a question of fact exists with respect to whether Defendants acted with actual malice.

On November 21, the Court of Appeals denied the clinic's Petition for Rehearing.

Defendants are represented in the litigation by Alan N. Braverman, Henry S. Hoberman and Jean E. Zoeller of the ABC, Inc. Legal Department and Michael M. Conway and Mary Kay Martire of Hopkins & Sutter, Chicago, Illinois.

[T]he fact that Kalish might not be credible enough to have a good chance of persuading a jury did not mean that he was not credible enough to be a source for a news story.

UPDATE: Trial Judge Reverses \$24.5 Million Verdict for Hockey Player

Twist Claimed Comic Book Creator Used His Name For Mob Character

By Joseph E. Martineau

The July issue of the LDRC *LibelLetter* (p. 27) reported on a \$24.5 million jury verdict returned on July 5, 2000 for misappropriation of name and likeness against comic book creator Todd McFarlane, over the use of a professional hockey player's name (Tony Twist) for a character in *Spawn* comic books. *Doe vs. TCI of Missouri, Inc. et al.*, No. 972-9415, Div. 3 (Circuit Court for the Twenty Second Judicial Circuit, St. Louis City, Missouri). Since the facts of the case and the proceedings at trial were discussed at length in the previous LDRC *LibelLetter*, they will not be repeated at length here. The magnanimity of the verdict and the potential chill to creative expression prompted considerable concern and scrutiny of the case.

JNOV Granted

On October 31, 2000, Missouri Circuit Judge Robert Dierker, who had presided over the two-week trial of the case, issued a 21 page Memorandum, Order and Judgment setting aside the verdict. The trial court also entered a judgment notwithstanding the verdict. In so doing, the trial court held that the plaintiff failed to make a submissible case on his misappropriation claims because he failed to prove that McFarlane used the name intending to harm the plaintiff or intending to derive a commercial advantage.

The trial court also conditionally granted defense motions for a new trial based on errors of law in allowing certain expert testimony and in instructing the jury.

Lest those rulings on issues of law be disturbed on appeal, the trial court also granted a new trial based on a finding that the verdict was against the manifest weight of the evidence. Because Missouri law allows wide discretion to a trial court to grant a new trial on the grounds that the verdict is against the weight of the evidence, this makes it unlikely that the verdict would ever be reinstated. Accordingly, it seems that the worst

case scenario for McFarlane would be a new trial. The plaintiff has promised an appeal.

Knowing Use of Name Not Enough

In rejecting the verdict, the trial court noted its agreement with the jury insofar as it concluded that in 1995 McFarlane knowingly began using the name Tony Twist, a then-“obscure hockey player with the also-ran Quebec Nordiques.” The court rejected McFarlane's testimony that he had not knowingly used the name, saying it “begg[ar]ed credibility,” given “McFarlane's avid interest in hockey, his penchant for giving other fictional characters the names of professional hockey players, and his own published admission that many characters in the comic book were named after members of the Quebec Nordiques hockey team....”

Despite McFarlane's knowing use of the hockey player's name, however, the court found that the plaintiff failed to prove that in using the name, McFarlane intended to capitalize on the plaintiff's alleged market recognition or that he intended to cause him financial harm. The court also ruled that the plaintiff failed to prove that McFarlane, in fact, derived any pecuniary advantage from the use of the name. These elements — either (i) an intent to use the name for commercial advantage and a resulting commercial advantage or (ii) an intent to cause injury to the commercial value of the plaintiff's name and proof of actual injury — were required elements of any misappropriation of name claim “outside the purely commercial or advertising context,” the court said.

The court held that the witnesses the plaintiff had offered to try to establish that McFarlane derived a commercial advantage — Rocky Arceneaux (a sports agent) and Brian Till (a university marketing professor) — failed to do so. According to the court, while

(Continued on page 5)

***[Plaintiff] failed to prove that
McFarlane used the name intending to
harm the plaintiff or intending to
derive a commercial advantage.***

Twist Verdict – Update

(Continued from page 4)

these so-called experts established that the plaintiff's name had value, they did not show that McFarlane derived any commercial advantage from using the name. In other words, there was no evidence that anyone bought *Spawn* because a character in it had the same name as the plaintiff.

In any event, the court characterized the opinions of Arceneaux and Till as nothing more than “junk economics” and “exercises in speculation,” a position asserted by McFarlane both before and during the trial. Additionally, while plaintiff offered evidence of commercial harm in the form of a lost endorsement contract, even accepting that evidence (about which the court remarked “the Court is fain to observe that it has seldom seem less credible evidence”), plaintiff failed to show that McFarlane used the name for this purpose.

The court's ruling is not altogether grounds for rejoicing.

Rejects “Knee-Jerk” First Amendment

The court's ruling is a resounding victory for McFarlane, and ought to provide significant relief to authors and the entertainment media. However, it is not altogether grounds for rejoicing.

Significantly, the court continued to reject what it irreverently characterized as the “knee-jerk First Amendment rationale” of cases such as *Parks v. Laface Records*, 76 F.Supp.2d 775 (E.D.Mich 1999)(holding that the “right of publicity ... does not authorize a celebrity to prevent the use of her name in an expressive work protected by the First Amendment.”); and *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.Rptr. 2d 305, 307-08 (Cal.App. 1997)(holding that “[p]opular entertainment is entitled to the same constitutional protection as the exposition of political ideas.”). See also *Gugleilmi v. Spelling-Goldberg Productions*, 160 Cal.Rptr. 352, 357 (Cal. 1979)(Bird, C.J. concurring)(“It is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories.”); 2 J.T. McCarthy, *The Rights of Publicity and Privacy*, §8.9 [A](1996)(“The vast majority of relevant cases ... reach the conclusion that the fictional use of human identity is

not actionable as either invasion of privacy by ‘appropriation’ or infringement of the Right of Publicity”).

As such, the holding seemingly allows a Right of Publicity claim against the author of a fictional work where there is evidence that the celebrity's name was used either (i) for the purpose of seeking, and with directly resulting, commercial gain, or (ii) for the purpose of causing, and with resulting, harm to the celebrity. It stands to reason, however, that in many cases where an author uses the name of a celebrity in an expressive work of fiction, he is doing so, at least partially, for the purpose of attracting attention to the work and inducing people to purchase it. If that happens and if it can be proven, then under the court's holding, the celebrity might be able to successfully sue the author.

Likewise, some authors may intentionally make a buffoon of a celebrity, hoping to cause some harm to the celebrity. If that harm follows, the author may find himself liable. Yet, such liability, absent constitutionally-required proof that the celebrity was libeled, would seem to be at odds with the United States Supreme Court's holding in *Hustler Magazine v. Falwell*, 485 U. S. 46 (1988). Indeed, restricting speech on the basis of the intent of the speaker, whether under a misappropriation theory or otherwise, is fraught with constitutional problems.

Disregards Common Law Limits

Moreover, the court's holding continued to disregard not only established First Amendment principles, but also widely recognized common law restrictions on the misappropriation tort. The tort was never intended to apply to purely expressive works of entertainment or fiction. See, e.g., Restatement (Third) of Unfair Competition, §46(1995)(person's identity must be “used for purposes of trade”); Restatement (Third) of Unfair Competition, §47 (1995)(“use ‘for purposes of trade’ does not ordinarily include the use of a person's identity

(Continued on page 6)

Twist Verdict – Update

(Continued from page 5)

in ... *entertainment*, works of fiction ... or in advertising that is incidental to such uses.”) (emphasis added). See also *People ex rel. Maggio v. Charles Scribner & Sons*, 130 N.Y.S.2d 514 (1954); *Newton v. Thomason*, 22 F.3d 1455, 1461 (9th Cir. 1994); *Rogers v. Grimaldi, MGM/UA*, 875 F.2d 994, 1004-05 (2d Cir. 1989).

As noted above, the plaintiff has promised to appeal. Given the vast body of law rejecting claims for misappropriation based on expressive works of entertainment or fiction, the outcome is not likely to change. Hopefully, however, the appellate court will reject the awkward and intent-conditioned rationale of the trial court, and instead adopt an approach similar to that in the cases cited above. Where name, likeness or identity are used in works that have little or no utility independent of expression, whether that expression is news, information, parody, entertainment, art or music, it is free from claims of infringement of the Right of Publicity both on constitutional and common law grounds.

Joseph E. Martineau is a member of Lewis, Rice & Fingersh in St. Louis, Missouri.

Libel by Implication Claim Dismissed on Motion to Dismiss

U.S. News and World Report recently won a motion to dismiss in a libel by implication claim brought in the Southern District of Florida federal district court. *Rubin v. U.S. News and World Report*, Case No. 00-1386-CIV (S.D.Fl. 9/29/00).

The plaintiff is a gold refiner in Miami and the suit arose out of an investigative piece entitled “The Golden Age of Crime: Why International Drug Traffickers are Invading the Global Gold Trade.” Plaintiff was pictured in the article and quoted discussing how the jewelry industry has a dual economy, one on and one off the books, and how he could have come to

handle gold that was smuggled out of Peru as part of a tax fraud scheme by smugglers.

Plaintiff argued that the quotations from him in the article, admittedly accurate, implied that he “is or has been involved in money laundering’ and other criminal activities.” After receiving a retraction demand, *U.S. News and World Report* ran a clarification stating that the defamatory implications Ruben alleged were not intended. Ruben sued nonetheless.

U.S. News and World Report argued in its motion to dismiss that the article taken as a whole was not reasonably susceptible to the defamatory implication Ruben alleged and that there was no affirmative evidence within the text of the article that the implication was intended or endorsed – a requirement that a number of courts have applied on motions to dismiss in implication cases. See, e.g., *White v. Fraternal Order of Police*, 909 F. 2d 512 (D.C. Cir. 1990); *Chapin v. Knight-Ridder*, 993 F. 2d 1087 (4th Cir. 1993).

Federal District Court Judge Ungaro-Benages granted defendants’ motion. She agreed that neither the plaintiff’s quotes standing alone nor the article as a whole implied that plaintiff was involved in illegal activities. To the contrary, the court noted, plaintiff was associated in the article with industry experts, including U.S. Customs agents, a government official, an analyst and another refiner. The court concluded that plaintiff’s interpretation was tortured, at best. The fact that the quotations used in the article were accurate was weighed as well, in favor of finding for the defendants.

The plaintiff has moved for reconsideration of the court’s dismissal with prejudice, asking to be allowed to amend the complaint to add an affidavit of a potential customer who read article and understood it to contain the implications alleged by the plaintiff.

Defendants are being represented by Laura Handman and Richard L. Cys of Davis Wright Tremaine, LLP, Washington D.C. and Jerry Budney of Greenberg Traurig, LLP. Plaintiff is being represented by Barry Langberg and Deborah Drooz, now of Stroock Stroock & Levan in Los Angeles.

Pennsylvania Superior Court Rejects Libel Statute of Limitations For Commercial Disparagement Claim

By David Strassburger

The difficulties courts and litigants face when attempting to distinguish libel and commercial disparagement once again became apparent this September when an intermediate appellate court in Pennsylvania refused to apply the libel statute of limitations to a claim of commercial disparagement. The case, *Pro Golf Manuf., Inc. v. Tribune Review Newspaper Co.*, 2000 Pa. Super. 273, 2000 WL 1281149, 2000 Pa. Super. LEXIS 2580 (Pa. Super. Sept. 12, 2000), did not announce a *per se* rule, but instead requires a case-by-case analysis of the “gravamen” of the action to determine whether the claim is really defamation masked as commercial disparagement.

False Fact About the Business Location

The plaintiff in *Pro Golf* owned a golf club repair business. According to the complaint, a newspaper published articles stating that the building in which plaintiff operated his business was scheduled for demolition when, in fact, the building was never scheduled for demolition and was never demolished. Plaintiff claimed that the business had suffered pecuniary loss “in that the business has lost customers who have read or heard of the false statements and has been deprived of income which it otherwise would have earned.” *Id.* at *5. The complaint did not allege injury to business reputation. Suit was filed more than one year, but less than two years, after the allegedly offending articles were published.

The newspaper filed an answer and asserted the statute of limitations as an affirmative defense. In Pennsylvania, actions for libel are governed by a one-year statute of limitations. 42 Pa.C.S.A. § 5523(1). However, actions to recover damages for injury to property are governed by a two-year statute of limitations, unless the action sued upon is “subject to another limitations specified in this subchapter.” 42 Pa.C.S.A. § 5524(7).

The Court of Common Pleas granted the newspaper’s motion for judgment on the pleadings, that the one-year period governing libel actions also applied to commercial disparagement claims. *Pro Golf* appealed

to the Superior Court, which reversed.

Superior Court Reverses

The Superior Court noted that the issue was one of first impression in Pennsylvania. *Pro Golf*, 2000 WL 1281149 at *1. It also noted that other jurisdictions were divided. *Id.* at *3. Ultimately, the Court relied upon three factors to support its decision to reject the one-year period in that case.

First, the Court explained that the tort of commercial disparagement protects one’s economic interest against pecuniary loss, whereas an action for defamation is primarily concerned with protecting the plaintiff’s reputation from injury. The Court believed this distinction was important when considering which statute of limitations to apply. *Id.* at *2.

Second, the Court emphasized the requirement imposed on a commercial disparagement plaintiff to prove actual pecuniary loss. According to the Court, this factor weighed in favor of a longer statute of limitations because the plaintiff “may be unable to demonstrate the existence or full extent of the pecuniary loss caused by the disparagement until well after publication.” *Id.* at *4.

What is Gist of Claim

Finally, the Court looked to the gravamen of *Pro Golf*’s cause of action. Although the Court concluded that a two-year statute of limitations, as a general matter, should apply to commercial disparagement claims, the Court also noted that a plaintiff should not receive the benefit of a longer statute of limitations if the essence of his suit was defamation. The Court quoted with approval the following passage from its prior decision in *Evans v. Philadelphia Newspapers, Inc.*, 601 A.2d 330, 333 (Pa. Super. 1991), in which the plaintiff stated claims for libel and interference with a contract:

In a situation such as this, however, where the underlying wrong which the complaint alleges is defamation by publication of a libelous report, and the claim of injury set out in each count

(Continued on page 8)

PA Ct. Refuses to Apply Statute of Limitations

(Continued from page 7)

springs from the act of publication, the Appellants should not be able to circumvent the statute of limitations by merely terming the claim tortious interference when in essence it is one of defamation, subject to a one year limitation of action. In such a situation, we will look to the gravamen of the action, not to the label applied to it by plaintiffs.

Pro Golf, 2000 WL 1281149 at *5. The *Pro Golf* Court then applied *Evans* and determined that, in fact, the gist of *Pro Golf*'s action was not libel. The statement that the building housing the plaintiff's business would be demolished "in no way impugned or questioned the reputation of appellant, appellant's products or appellant's services." *Id.* Likewise, the complaint sought only lost profits and did not demand compensation for any non-pecuniary injury. *Id.* Accordingly, the Court applied the longer statute of limitations because it concluded the action was not libel in commercial disparagement's clothing.

Never Considered Legislative Intent

Pro Golf is problematic because of its approach to the problem it faced. At bottom, the question of which statute of limitations to apply is one of statutory interpretation, yet the Court never considered whether the Legislature intended the one-year statute of limitations to apply to actions for commercial disparagement.

For example, the Court acknowledged that commercial disparagement is often called trade libel, but never considered whether the Legislature, when referring to libel, meant to include commercial disparagement within that definition. That interpretation certainly seems reasonable in light of the fact that the three torts enumerated in the one year statute of limitations — libel, slander, and invasion of privacy — are all publication torts. If the common thread is harm directly caused by a false publication, then it would seem that the Legislature intended the one-year period to cover commercial disparagement.

This interpretation of legislative intent is supported by the history of the statute. The predecessor to 42 Pa. C.S.A. § 5523(1) was the Act of 1713, 12 P.S. § 31,

which required the plaintiff to bring "an action upon the case for words" within one year of the "words spoken." There is no question that an action for commercial disparagement springs from the old action upon the case for words. *Restatement (Second) of Torts* § 623A cmt. g (1977). Nor is there any indication that the Legislature intended to change the limitations period when it modernized the statutory language to eliminate reference to common law writs.

Perhaps most troubling is the Court's reliance upon the plaintiff's need to prove special damages when opting against the shorter statute of limitations. Regardless of the policy concerns raised in the decision, slander has always been subject to a one-year statute of limitations, and most slander plaintiffs must prove special damages in order to recover in Pennsylvania. *Agriss v. Roadway Exp., Inc.*, 483 A.2d 456, 469-70 (Pa. Super. 1984). The distinction drawn by the Court is illusory. Had the Legislature been concerned with the plaintiff's ability to prove special damages, it would not have forced all slander plaintiffs to sue within one year.

Narrow Holding

Newspapers and other speakers can find some solace in the narrow scope of the Court's holding. Pennsylvania still will not tolerate plaintiffs manipulating defamation claims in order to benefit from the longer statute of limitations generally applicable to tort actions. In this respect, *Pro Golf* was a difficult test case for newspapers because the allegedly false statement was as far removed from a statement injurious to reputation as one could imagine. Nevertheless, the common thread running through the torts of libel, slander, and invasion of privacy is the immediate harm caused by a false or unwelcome publication. That thread should have tied *Pro Golf*'s claim to the one-year statute of limitations. The Superior Court's contrary conclusion represents a suspect determination of legislative intent.

David Strassburger is counsel to Tribune-Review Publishing Company and an associate at the law firm of Strassburger McKenna Gutnick & Potter, P.C. in Pittsburgh, Pennsylvania.

District of Columbia Embraces Protection for Comment

Also Urges Use of Summary Judgment

By Stuart F. Pierson

In ringing phrases more frequently proclaimed by its federal colleagues, the District of Columbia Court of Appeals has taken one of its rare opportunities to confirm that individual journalists commenting on matters of public concern in the Nation's Capital are constitutionally protected from retaliatory litigation. *Guilford Transportation Industries, Inc. v. Wilner*.¹

If the First Amendment's guarantees of freedom of speech and of the press are to ensure that these rights are meaningful not simply on paper, but also in the practical context of their exercise, then a newspaper Op-Ed column discussing a subject of public interest must surely be accorded a high level of protection, lest the expression of critical opinions be chilled.²

"Because of the compelling First Amendment interest at stake, we regard summary judgment as a useful method of disposing of constitutional libel actions where appropriate."³

In a society which regards freedom of the press as a core value, a newspaper columnist must surely have the right to question the qualifications of the would-be privatizers, as well as their motivations and business acumen, without fear of retaliatory litigation.⁴

Column on "Tempestuous Past"

The case arose in July 1997 from publication a month earlier of a column by Frank Wilner on the opinion page of *The Journal of Commerce*. Prompted by announcement of a proposal to privatize Amtrak's Northeast Corridor, Wilner's column, entitled "Guilford's tempestuous past," reviewed the widely publicized and controversial sixteen-year history of the New England railroad owned by Timothy Mellon and David Fink. Guilford, Mellon and Fink responded by suing Wilner in D.C. Superior Court for defamation. No claims were made against *The Journal of Commerce*.⁵

Guilford's past had, indeed, been tempestuous. Virtu-

ally from the date of its establishment in the early 1980s, it had experienced a myriad of bitter and protracted labor disputes, safety episodes, contentious disputes with federal regulators, and litigation with Amtrak over the quality of its track. Public commentary had been sharp, characterizing Guilford as a "maverick," "The Black Sheep Railroad," "mastermind [of] a complex web of leasing agreements between its properties to get itself a unique, flexible and relatively inexpensive labor contract."

It was said to have a "troubled history," a "long sad story" of labor relations, and a "long legacy of litigation." Some had observed that "[a]llegations of political and financial machinations have surrounded Guilford," that "[b]eing the target of criticism is not unfamiliar ground for the Guilford company," and that it had "dragg[ed] the [I.C.C.] through the courts and delay[ed] implementation of its rulings."

Commentators were only slightly less charitable to Mellon, calling him the "reclusive" "scion of the Pittsburgh banking family," and a "flaming liberal." Fink was described as "Guilford's pugnacious president," with a "combative, provocative management style," who by his "aggressive, unyielding tactics" had caused Guilford's labor troubles.

Initial Motion Denied

Wilner was a highly regarded commentator in the railroad field who had published four books and a consistent flow of articles for over 25 years. Never having been the subject of a defamation claim, he was to learn over the following three and a half years that the strength of his substantive defenses provided little effective protection from an avalanche of aggressive litigation.

Guilford's choice of forum promoted its apparent purpose to use litigation to punish Wilner for his views. Visibly exhausted from his heavy docket late on a Friday afternoon in December 1997, the Superior Court judge initially assigned to the case addressed Wilner's motion to dismiss for lack of defamatory content by briefly picking through a few Post-It notes in the court jacket. Contrary to the submitted authorities and Wilner's argument, the judge consid-

(Continued on page 10)

D.C. Embraces Protection for Comment

(Continued from page 9)

ered the motion as a routine delaying tactic, denying it with the observation that he could not see any reason to keep the case from going forward. With little comment, he then denied without prejudice Wilner's motion for summary judgment, which was based primarily on the public record and the wire-service defense.⁶

Wilner then endured two years of discovery under a new judge's standard schedule, unable to move for summary judgment until the plaintiffs had probed the farthest reaches of arguable relevance — with inquiries into such patently irrelevant subjects as Wilner's prior consulting arrangements with other railroads. When discovery was finally concluded, the second judge, who has since moved to the U.S. District Court, got it right.

Court 2 Gets it Right

Following extensive briefing and oral argument, Judge Ellen Huvelle granted Wilner's second motion for summary judgment, citing extensively authorities from the Supreme Court, the D.C. Circuit, the local courts, and state and federal courts around the country. Acknowledging the First Amendment implications of the case, Judge Huvelle emphasized the chilling effect on a journalist forced to defend a defamation claim. Holding that a challenged publication must be considered in its entire context,⁷ she concluded, that, even if Wilner's column could be read to imply that Guilford was hostile to labor, such an assertion would not be actionable because it is not provably false. Nor could Wilner's other views be the source of liability, for:

. . . in cases involving opinion on matters of public concern, the writer is immune from [a] defamation action unless [the] plaintiff can show that the statement is so obviously false that no reasonable person could find that the review's characterizations were supportable interpretations of the underlying facts.⁸

Judge Huvelle dispatched Mellon and Fink's challenge to Wilner's characterizing them as "reclusive" and "antiestablishment" with the observation that such language was merely "interpretative expression or subjective impression," and that:

"[e]valuative statements of taste and belief can never provide the basis for a defamation suit be-

cause such statements are incapable of being proved false."⁹

Affirmed on Appeal

Predictably, the Guilford plaintiffs appealed. In a 54-page opinion drawing comprehensively from Supreme Court, D.C. Circuit and its own authorities, the Court of Appeals addressed the definition of defamatory content, libel by implication, constitutional protection for opinions on matters of public interest, the supportable interpretation doctrine, the use of hyperbolic and provocative language, the chill imposed by litigation, the importance of summary procedures, affidavits on issues of defamatory implication, and the law-of-the-case doctrine.

Taking its lead from a 34-year old D.C. Circuit case, the court considered Guilford's appeal with the recognition that "[i]n the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate."¹⁰ It then affirmed the trial court's statement of D.C. common law that actionable defamation must be more than merely unpleasant or offensive; "the language must make the plaintiff appear 'odious, infamous or ridiculous,'"¹¹ nor will the courts "indulge far-fetched interpretations."¹²

The court held that the constitutional principles animating the D.C. Circuit's plurality opinion in *Ollman v. Evans*¹³ remain good law after *Milkovich*,¹⁴ the court focused on the context of Wilner's column:

Readers expect that columnists will make strong statements, sometimes framed in a polemical manner that would hardly be considered balanced or fair elsewhere in the paper.¹⁵

Affirming again Judge Huvelle's statement of D.C. common law,¹⁶ and accepting the assumption that the gist of the column asserted that the plaintiffs were hostile to labor, the court agreed that such an assertion cannot be actionable because it is not provably false. Addressing Guilford's contention of implied defamation, it agreed with Judge Huvelle:

The challenged language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or

(Continued on page 11)

D.C. Embraces Protection for Comment

(Continued from page 10)

endorses the inference.¹⁷

Rejects Expert on Implication

Noting that the critical historical facts underlying the column are not disputed and that Wilner had never mentioned the Railway Labor Act or implied that they had violated any law, the court rejected the plaintiffs' argument that Wilner had implied that they had violated the statute. The court struggled to this conclusion, however, in the face of the plaintiffs' submission of an affidavit of a professor asserting that Wilner's statement of facts and opinion amounted to a charge of statutory violation to those knowledgeable about railroad regulation. The court finally arrived at the conclusion that the affidavit was not probative on the legal issue of whether the column was libelous. Moreover, on the question of what some "unidentified railroader" would take from the column, the court concluded that such a conclusion on the legal questions of statutory meaning and attributable implication¹⁸ was "not a proper subject of expert testimony."¹⁹

Nor could Wilner's apparent sympathy to labor render his column defamatory, given its statement of undisputed facts, its commentary on a matter of public interest, and its obvious opinion context. His personal descriptions of Mellon and Fink are also immune from liability as they were merely "the quintessential kind of commentary — provocative, perhaps, by hardly libelous — which is entitled to protection under the First Amendment."¹⁹

Concluding its opinion with a quotation from Justice Holmes' dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("the ultimate good desired is better reached by free trade ideas"), the court admonished its trial judges on the fundamental lesson it its decision:

The plaintiffs have the means to respond to critical Op-Ed columns, and under our Constitution they may not be denied the opportunity to do so. At the same time, the right of the Frank Wilners of the world to have their say must also be preserved.²⁰

While it is never certain that lower courts will follow the directions of their superiors, particularly where the trial judges are overburdened by routine municipal dockets, it now seems more likely that journalists attacked for their views in D.C. Superior Court will be afforded the practical protection of early disposition.

¹ A.2d ___, 2000 WL 1511754 (D.C., October 12, 2000)

² (Citing *Ollman v. Evans*, 750 F. 2d 970, 986 (1984), cert. denied, 471 U.S. 1127 (1980).

³ Quoting *Nadar v. Toledano*, 408 A.2d 31, 44 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980).

⁴ 2000 WL 1511754, slip at 15.

⁵ Wilner's removal to federal court was remanded when Fink asserted that his unstated damages would be less than \$75,000.

⁶ On appeal following the second judge's grant of summary judgment, the plaintiff argued that the second ruling violated the law of the case rule. The Court of Appeals, laboring more than seems necessary, rejected the argument on the ground that, regardless of the putative effect of the first ruling, the second ruling would be affirmed because it was correct.

⁷ *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir.) cert. denied, 513 U.S. 875 (1994) ("Moldea II").

⁸ Citing *Washington v. Smith*, 80 F. 3d 555, 557 (D.C. Cir. 1996).

⁹ Citing and Quoting *Liberty Lobby, Inc. v. Dow Jones & Co.* 838 F.2d 1287, cert. denied, 488 U.S. 825 (1988).

¹⁰ Quoting *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) cert. denied, 385 U.S. 1011 (1967); also relying extensively on *Moldea II*.

¹¹ Quoting *Johnson v. Johnson Pub. Co.*, 271 A.2d 696, 697 (D.C. 1970).

¹² Citing, *inter alia*, 8 S. Speiser, C. Krause & Gans, *The American Law of Torts* § 29:37 (1991).

¹³ 750 F.2d 970, 986 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985).

¹⁴ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1127 (1990).

¹⁵ Quoting *Ollman v. Evans*, 750 F.2d at 986.

¹⁶ Citing, *inter alia*, 8 S. Speiser, C. Krause & Gans, *The American Law of Torts* § 29:37 (1991); *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. 1990).

¹⁷ Quoting *Chapin v. Night-Ridder*, 993 F.2d 1087, 1092-93 (4th Cir. 1993); and citing *White v. Fraternal Order of Police*, 909 F.2d at 520.

¹⁸ Ironically, after the case was briefed in the Court of Appeals, other courts held that Guilford had violated the Railway Labor Act.

¹⁹ 2000 WL 1511754, slip at 15

²⁰ 2000 WL 1511754, slip at 15

Stuart F. Pierson of Troutman Sanders LLP in Washington, D.C. was Wilner's first counsel and remained in the case through discovery and withdrew as the motion for summary judgment was being finalized. Counsel succeeding him were Ed Hickey and Michael Martinez of Thompson, Hine & Florry, and amici were represented by Laura Handman of Davis Wright Tremaine. The plaintiffs were represented by John Forniciari of Ross & Hardies.

Right to Rely on Translation of Reputable Foreign Entity

On August 30, Judge Naomi Reice Buchwald of the Southern District of New York held, in *Fabry v. Meridian VAT Reclaim* (99 Civ. 5149, 99 Civ. 5150, 2000 US Dist. LEXIS 5092 (Oct. 10, 2000)), that a defendant who republishes an accurate translation of a work originally published by a reputable foreign entity is entitled to rely on both the original publisher's research and the accuracy of the translation. Under these particular circumstances, a defendant republisher is protected by a qualified privilege and cannot be held liable in a defamation action.

Judge Buchwald, following this reasoning, granted defendant Meridian's motion for partial summary judgment on Fabry's claim that the defendant's republication of three French articles and two translations of those articles had defamed him.

Articles Re-Used by Competitor

The case, which is still pending, involves plaintiff Michael Fabry, the managing director of ITS Fabry, Inc. and defendant Meridian. Both parties are in the value-added tax reclaim business. Fabry's complaint stems from Meridian's distribution of three articles originally published by the French newspaper *La Voix du Nord*, and English translations of two of those articles. According to the transcript of the summary judgment hearing, these articles, published in April 1995, document the police custody of Fabry and the investigation of his group.

The articles came to Meridian's attention when a partner at Price Waterhouse in France forwarded a copy of them to Meridian's UK head. The UK executive then had two of the articles translated by Meridian's regular translation service and forwarded the three original articles and the two translations to Meridian's president in the United States. She, in turn, sent a letter and a copy of the articles and translations to at least fifteen of Fabry's clients. Fabry subsequently brought this action.

Relied on N.Y. Law

As a preliminary matter, Judge Buchwald held that the standard developed by the New York Court of Appeals for determining whether a published statement is

defamatory applies to the case at bar:

First, courts 'must give the disputed language a fair reading in the context of the publication as a whole'... Second, courts are not to 'strain to interpret such writings in their mildest and most inoffensive sense to hold them nonlibelous'... Finally, 'the words are to be construed not with the close precision expected from lawyers and judges but as they would be read and understood by the public to which they are addressed'

Next, the court found that Fabry is a private figure but that his statements are matters of public concern. New York law allows such a plaintiff to recover only if he can prove the defendant published those statements in a grossly irresponsible manner. With regard to republication, a defendant is entitled to rely on the accuracy of the original work unless the plaintiff can show that the defendant had or should have had reason to question that work's accuracy or its author's methods or integrity.

No Reason to Doubt

The court noted that *La Voix Du Nord* is a credible French paper and Meridian had no reason to doubt the accuracy of the articles. Further, Defendant does not have a duty to investigate the accuracy of those articles itself. Finally, the translations were made by a reputable company whose reputation and credentials Plaintiff does not challenge.

The Court went on to state that the slight disagreements over the accuracy of the translations do not rise to the level of defamation. Further, the differences between Fabry's and Meridian's translations are matters of opinion protected by New York law.

Judge Buchwald then granted Meridian's motion for summary judgment against Fabry's defamation claim and the conspiracy claim he had submitted in his amended complaint. She has recessed in order to allow Fabry's counsel an opportunity to submit further grounds on which the remaining claims (which include tortious interference) could go forward.

Thomas Mehrstens of Downing, Mehrstens & Peck, P.C., New York, represents the defendant.

SDNY Says “Militant” Is “Noble, Not Nutty”

By Charles D. Tobin

Citing to the use of the word to describe the valiant crusades of many historical figures, a federal district court in New York has turned aside a libel claim arising out of a headline that called the plaintiff “militant.”

Judge Colleen McMahon of the United States District Court for the Southern District of New York, on November 2 granted the *Poughkeepsie Journal's* Fed.R.Civ.Pro. 12(b)(6) motion to dismiss. *Idema v. Wager, et al.*, No. 99 CV 09382 (CM), 2000 U.S. Dist. LEXIS 16288 (S.D.N.Y. Nov. 2, 2000). The court reaffirmed a trial judge's obligations to carefully examine attenuated connotations that are pleaded in libel complaints and to consider the entire context of an alleged defamation.

Article on Plaintiff's Suit Against Town

The lawsuit arose out of a 1999 article, published under the headline “Militant Sues Red Hook.” The headline accompanied an article reporting on a separate lawsuit that libel plaintiff J. Keith Idema had filed against the town of Red Hook.

Idema, a former U.S. Army Green Beret, had operated a weapons-training facility that taught hostage-rescue techniques to police and the military. Following a favorable “60 Minutes” broadcast about the facility, municipal officials voted to shut it down, alleging that Idema had not obtained the proper operating permits. Idema sued the town, then brought a separate action against the newspaper for its story about the filing of the lawsuit against the municipality.

Headline at Issue

Idema's libel lawsuit, which was brought on behalf of himself and the company that owned the fa-

cility, did not contest the accuracy of the *Poughkeepsie Journal's* article about the Red Hook litigation. Instead, in his complaint and papers opposing the newspaper's motion to dismiss, Idema forcefully argued that he was defamed by the use of the term “militant” in the headline.

Citing to a litany of newspaper headlines using “militant” to report on terrorism, Idema contended that the word “means many things to many people; all of them bad.” As commonly used in the press, Idema argued, “militant” connotes “members of those organizations with a primary goal of toppling the United States Government with and by means of violent behavior, assassination, and acts of supreme

violence.” Memorandum of Law in Opposition to Defendants' Rule 12(b)(6) Motion, at 18-19. He repeatedly asserted that calling

him “militant” also was tantamount to calling him a Communist.

Idema argued that the headline was libelous especially when applied to him:

[I]n my eyes, and in the views of the people in the community in which I operate and work, a militant is a violent radical who murders innocent people . . . the worst category of individuals in existence on this planet.”

Supporting Affidavit of J. Keith Idema (filed in opposition to the Motion to Dismiss), at ¶¶12, 13. He demanded \$15 million in compensatory and punitive damages.

Plaintiff's Definition Stains Credulity

The *Poughkeepsie Journal* argued that Idema's construction of the word “militant” “strains credulity as well as the English language[.]” Memorandum of Law in Support Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice, at 18. The news-

(Continued on page 14)

Plaintiff did not contest the accuracy of the newspaper's article, but the use of the term “militant” in the headline.

SDNY Says “Militant” Is “Noble, not Nutty”

(Continued from page 13)

paper also urged that, contrary to Idema’s argument, the headline should not be read in isolation from the article’s text. When read together, the newspaper argued, the publication was privileged under New York Civil Rights Law §74 as a “fair and true report of [a] judicial proceeding” and the headline was a “fair and true headnote of the statement published.”

Judge McMahon’s 12-page opinion adopted the newspaper’s analysis. Looking first at “militant” alone, she found that the whether used as a noun or an adjective, the word

has many meanings and shades of meaning, ranging from the religious (“the Church Militant” a term used to refer to Christians who are currently alive and, presumably, fighting the forces of evil in the name of Jesus), to the political (“Militant Civil Rights Activist” referring to those who fight with soldierly zeal to combat for the cause of equal rights). Susan B. Anthony, Martin Luther King, Jr., and Mother Teresa have each been called “militant” in the service of their respective causes, yet society regards them as noble, not nutty.

Idema v. Wager, slip op. at 5. She outright rejected Idema’s argument that “militant” suggests “any design to overthrow the Government.” She noted that the word is “far less precise than the phrase ‘fellow traveler of fascism,’ ” which the Second Circuit held non-actionable in *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976). Judge McMahon concluded that the average reader would more likely view the word “as an opinion about plaintiff, rather than as a fact.” *Id.*

Flamm Inapplicable

In this regard, she also turned aside Idema’s citation to the recent Second Circuit decision *Flamm v. American Association of University Women*, 201 F.3d 144 (2d Cir. 2000), in which the court held a reference to an attorney as an “ambulance chaser”

was actionable. Unlike that phrase, which “as applied to an attorney cannot be read without a negative inference,” Judge McMahon held “the use of the word ‘militant’ to describe this Plaintiff carries no clear inference at all.” *Idema v. Wager*, slip op. at 5.

Turning to a contextual analysis, Judge McMahon observed that the article clearly described Idema’s business as an “anti-terrorist training facility,” and the newspaper also recounted that CBS had described the facility “as the most professional organization of its kind.” Judge McMahon held that in this overall context, a reasonable reader — whom she distinguished from “an overly sensitive Idema” — would not associate a “militant” with “only fringe, lunatic elements in society.” *Id.*

Finally, on the libel claim, the court held that the article was a substantially accurate account of a local court proceeding. Although she noted that “the word ‘militant’ probably did not exist anywhere in the written record of the judicial proceedings[,]” any confusion:

would be resolved for the reader by perusing the article, which nowhere describes Idema as a Communist or as someone on the lunatic fringes of society who seeks to overthrow the Government.

Id. at 8. The court held the article and headline together were protected by N.Y. Civil Rights Law §74.

Idema also alleged claims for civil conspiracy, intentional infliction of emotional distress, and violation of civil rights. Judge McMahon briefly analyzed and rejected each of these claims as insufficient under the facts Idema had alleged or vitiated by the same precedent as the libel claim. *Id.* at 8-11. She dismissed the entire lawsuit with prejudice.

James E. Nelson of Van DeWater & Van DeWater, Poughkeepsie, N.Y., and Charles D. Tobin, in-house counsel at Gannett Co., Inc., defended the Poughkeepsie Journal.

California Anti-SLAPP Applied to Financial Journalism

Court Finds Plaintiff's Corporate Activities Contribute to Finding Of "Public Issue"

By Charles J. Glasser, Jr.

The defense argued "public issue plus free speech equals Anti-SLAPP protection" under California's C.C.P. Section 425.16 (the "Anti-SLAPP law"). On Nov. 9, 2000 Judge Paul Boland of the California Superior Court in Los Angeles applied that formula to the previously untested area of financial journalism when he entered an order striking a \$500 million libel complaint under that state's Anti-SLAPP law in *Hitsgalore.com v. Bloomberg L.P.*, No. BC228991.

Factual Background

At the heart of the case were two articles written by Bloomberg investigative reporter David Evans, who covers small cap and penny-stock markets. In early May 1999, Bloomberg published two articles headlined "Hitsgalore Fails to Disclose Founders' Fraud." Although not disclosed in Plaintiff's 1999 SEC filings, Evans learned that Dorian Reed, the founder and Chief Technology Officer of Hitsgalore.Com, had previously been the target of a 1998 lawsuit by the Federal Trade Commission, which successfully obtained an injunction banning Reed from further fraudulent internet-related activity. At that time, Hitsgalore was a privately held company not subject to SEC reporting requirements. Hitsgalore then performed a "shell merger" by which it merged into SCI, Inc., which was subject to SEC reporting regulations. In the merger agreement, Hitsgalore had represented to the SEC — and by extension to the investing public — that no lawsuits or adjudicatory findings had been asserted against Hitsgalore or its officers.

Falsity Turned on Highly Technical Defamatory Meaning

Hitsgalore complained that Bloomberg's report was false, because it implied that the new incarnation of Hitsgalore had "intentionally lied to the SEC about Reed's past." Plaintiff's theory of falsity was a complicated argument: Because Reed was associated with the earlier, non-reporting company, and was not a director of the "new" company at the time of the filing, SCI —

which confusingly changed its name to Hitsgalore — was not required to disclose Reed's past, even though after the merger Reed had re-joined the merged company as its CEO. (Got all that?)

On the morning that the sued-upon articles were published, the approximately 49 million shares of outstanding Hitsgalore stock traded at approximately \$20 per share, and on the day of the revelations, the stock closed at less than \$5 a share. Plaintiff alleged that the Articles' defamatory meaning resulted in a loss to Hitsgalore of a market capitalization of close to \$500 million dollars.

Defense' Theme: "What Chutzpah!"

The highly-technical nature of the alleged falsity, combined with Reed's shady past — it was later learned that Reed had also served time in federal prison for credit card and wire fraud — gave Bloomberg the two themes of the case. First, the shell merger was characterized by defense as a highly convoluted "shell game." Here, the plaintiff's own pleadings were the best weapon against it. The complaint's factual allegations explaining the shell merger were downright byzantine, loaded with unnecessary detail and obscure references to SEC regulations outside of the experience of most state court judges. Thus, the subtext of defense theory was that even if the articles' implication was technically false, it was a understandable mistake, surely a far cry from knowing falsity or reckless disregard. Second, the court was constantly reminded that this was a "chutzpah" complaint: Hitsgalore was asking the court to believe that the reasonable reader wouldn't mind investing with a convicted con man, but would shun someone who failed to meet highly technical SEC regulations. Even if technically erroneous, Bloomberg reminded the court, Hitsgalore should not be rewarded for hiding Reed's past from an unsuspecting public.

The Initial Motion

In early July, Bloomberg filed a Motion to Strike

(Continued on page 16)

Ca. Anti-Slapp Applied to Financial Journalism

(Continued from page 15)

under California's C.C.P. Section 425.16, arguing that the articles fit easily into several of the enumerated examples of speech protected under the law. The genesis of the articles, for example, were Plaintiff's SEC filings, which should be considered a document or application under government review.

Substantively, Bloomberg raised a number of traditional libel defenses, including substantial truth, and because of the highly technical nature of the SEC filings, an opinion defense based on *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725 (9th Cir. 1999) and *Dial-A-Car Inc. v. Transportation, Inc.*, 132 F.3d 743 D. C. Cir. (1998). Those cases hold that an interpretation of unsettled, complicated or ambiguous governmental regulations are not capable of verifiable falsity, and must be deemed protected opinion as a matter of law.

In order to have the requisite fault standard be measured by actual malice, Bloomberg argued that Hitsgalore's active pursuit of the media spotlight, huge advertising and public relations budget, and extensive willingness to be interviewed about its viability as an investment vehicle made it a limited-purpose public figure under California law. Finally, Bloomberg argued that even in the event of falsity and liability, the demand for retraction was not timely issued under California law, and thus Plaintiff was limited to special damages. In turn, drops in stock prices on the secondary market are not the out-of-pocket, liquidated and verifiable losses which qualify as special damages.

The Initial Motion is Denied, But...

Prior to oral argument, the Court issued a Tentative Ruling on July 10, 2000, which narrowly read the Anti-SLAPP law, and denied the motion to strike. The Court held that SEC filings were merely informational and not necessarily an "application under review by a governmental agency." Moreover, the Court found because the Articles were published on Bloomberg's web page which is privately owned, the statements did not arise from a "public forum."

However, at oral argument, defense raised the point that it was the undisclosed FTC judgement against Reed which was at the heart of the story. Citing a long list of

constitutional cases defining "public interest" and "public concern," defense argued that by definition, any and every time a government agency seeks judicial relief, it does so in the public interest.

A week after oral argument, the Court, citing *Church of Scientology v. Wollersheim*, 42 Cal.App. 4th 628 (1996), held that California law has treated "possible investment scams" as matters of public concern within the Anti-SLAPP law's protection. However, because the Court was unable to find evidence in the record that a sufficient number of citizens were affected by Hitsgalore's disclosure problems, Bloomberg's motion would be denied without prejudice.

The Renewed Motion: Corporate Activity As Public Concern

Taking the Court's cue, defense filed a Renewed Motion to Strike, narrowly addressing the Court's search for numerosity of affected citizens as evidence of public concern. Defense submitted records from the securities clearinghouses showing that more than 2,000 shareholders had a vested interest in Hitsgalore at the time that the articles were published. In response, Hitsgalore ignored that evidence, and instead raised textual arguments that only the four examples of speech enumerated in Section 425.16(e) deserve application of the statute. Defense countered that the enumerated examples are preceded by the word "includes," which has been read as a term of enlargement, not limitation.

Agreeing at the second oral argument, the Court issued another tentative ruling on Oct. 20, 2000. That ruling looked to evidence of the plaintiff's corporate activities as supporting the public concern nexus. Aside from the number of affected shareholders, the Court took note of Plaintiff's aggressive campaign to sell securities to new investors, the fact that a large number of shares — 49 million — had been issued, and the significant value of the public float, totaling more than \$1 billion. Thus, held the Court, "information regarding the completeness of Plaintiff's SEC filings had the potential of impacting the lives of a large number of investors and potential investors . . . accordingly, the allegedly defamatory articles

(Continued on page 17)

Ca. Anti-Slapp Applied to Financial Journalism

(Continued from page 16)

addressed a ‘public issue’ and plaintiff’s complaint . . . falls within the ambit of the Anti-SLAPP statute.” *Slip Op. at 8.*

As hoped, once the burden shifting provisions of the Anti-SLAPP law applied, the case was much easier for the defense. The Court found that the plaintiff’s failure to show falsity of the express actual statements in the articles meant that the Complaint could not succeed. In addition, the Court held that Hitsgalore’s extensive publicity and press release campaign made it a limited purpose public figure, and thus actual malice was the appropriate fault standard. In this regard, the Court found that because Bloomberg’s reporter had checked his facts with a Hitsgalore executive prior to publication, and the “admitted complexity of the SEC disclosure requirements,” “plaintiff does not genuinely attempt to make a prima facie showing that defendants acted with actual malice, much less by clear and convincing evidence.” *Slip Op. at 10.* The Tentative Ruling was adopted and entered as the Court’s Final Ruling on Nov. 9, 2000, and in addition to striking the Complaint, the Court awarded attorney’s fees to Bloomberg in an amount to be determined at a later date. Hitsgalore has announced that it plans to appeal.

Bloomberg L.P. was represented by partners Richard L. Klein and Thomas H. Golden and associate Charles Glasser of Willkie Farr & Gallagher in New York City. Bloomberg’s local counsel in Los Angeles was Richard Schirtzer of Quinn Emanuel Urquhart & Oliver. The plaintiff was represented by Daniel Becka of Schoeppl & Burke, P.A., Boca Raton, Florida.

Parole Officer is a Public Official

A Texas Court of Appeals, with obvious analytical ease, upheld a trial court judgment that a parole officer was a public official for purposes of her libel suit against a local television station, two of its newsanchors, and a Texas Department of Criminal Justice spokesperson. *Taylor v. Bosby*, Cause No. 01-00-00173-CV (Tex. App., Eastland, Oct. 26, 2000). The appellate court also upheld a decision granting summary judgment to the

defendants.

The defendants broadcast a story on plaintiff’s relationship with one of the parolees under her supervision, a violation of Texas Department of Criminal Justice regulations. The story also said that she had been implicated in a series of burglaries by the parolee, and that she was under arrest at the time of the broadcast.

UPDATE

Doctor Wins \$2.5 Million

A Virginia jury has awarded a doctor \$2.5 million after finding that he was libeled by a November 1997 story aired by WJLA-TV in Washington, D.C. The jury also ruled that the station had misused the doctor’s likeness. *Levin v. WJLA-TV*, No. 175329 (Va. Cir. Ct., Fairfax Cty. jury verdict Nov. 20, 2000).

The news story focused on Vienna, Va. orthopedist Stephen Levin, who treated patients for sacroiliac pain and muscle spasms by manipulating muscles and ligaments on their pelvic floors. The story referred to Levin as the “Dirty Doc,” and promotional spots for the program said, “News 7 goes undercover to expose the intimate violation of women at the hands of their doctor.”

The report used footage from a hidden camera worn by a WJLA producer during an examination by Dr. Levin.

In the suit, Levin claimed that his treatment method was medically recognized as proper.

During discovery, WJLA sought peer-review records from local hospitals regarding Levin’s techniques. The hospitals resisted, citing Virginia’s statute shielding peer review documents in malpractice cases. See Virginia Code § 8.01-581.17. The Virginia Supreme Court eventually ruled that the peer-review documents were not subject to discovery in any legal proceeding. *HCA Health Services of Virginia v. Levin*, 260 Va. 215, 530 S.E.2d 417, 28 Media L. Rep. 1925 (2000). See LibelLetter (June 2000), p. 11.

David Branson, attorney for WJLA, told *The Washington Post* that the television station would appeal.

The plaintiff is represented by Kerrie Hook of Collier Shannon Scott, PLLC, Washington, D.C.

UPDATE**Author Seeks Setting Aside of \$11 Million Judgment**

Attorney, author and civil rights activist William Pepper says that he will ask a judge to set aside an \$11 million libel judgment stemming from his book claiming that a former Green Beret led a plot to assassinate Martin Luther King Jr.

The defendant author filed an answer with the court, he did not respond to discovery requests or appear at the trial, and effectively defaulted. But in a letter to the editor of the Memphis, Tenn. *Commercial Appeal*, Pepper wrote that “[t]he judgment, on a technical default, was taken without my even being notified of the hearing.

“Accordingly,” the letter continued, “I am instructing local counsel to file a motion to set aside the judgment.”

The lawsuit stemmed from Pepper’s 1995 book, “Orders to Kill: The Truth Behind the Murder of Martin Luther King,” in which he alleged that King was killed by a Mafia hit man hired by the U.S. government, and that Green Beret supply sergeant Billy R. Eidson led a sniper team which served as a backup in case the “hit” was unsuccessful. Pepper’s book also stated that Eidson had been killed after King’s death to keep the story secret.

A 1998 paperback edition of the book removed Eidson’s name from the text identifying him as leader of the assassination team, but did not remove him from the book’s index.

It turned out that Eidson was still alive and living in Costa Rica. He was informed about the book by the Special Forces Association, a group for former “Green Berets,” and filed a \$15 million libel suit against Pepper and the publishers of his book in state court in Charleston, South Carolina.

The publishers of the two editions of Pepper’s book, Carroll & Graf Publishers Inc. and Warner Books, Inc., both settled with Eidson in June 1999 for undisclosed amounts. Both companies also issued statements retracting the allegations in the book.

Based on the LDRC’s annual studies of libel trials and damage awards, the case is one of only 17 libel cases nationwide since 1980 in which damage awards have exceeded \$10 million. It is also the second of these cases in the past two years in which an award over \$10 million entered in a case where the defendant defaulted. *See Konanykhine v. Izvestia*, No. 97-1139 (Va. Cir. Ct. Dec. 13, 1999); *LibelLetter*, January 2000 at 28.

Worker’s Comp Hearing Subject to Fair Report Privilege

A Pennsylvania appellate court has held that (1) a workers compensation hearing constitutes a governmental proceeding, the reporting on which is subject to the fair report privilege; and (2) a public plaintiff in such an instance must show both actual and common law malice, the former in order to succeed in a libel claim and the latter to defeat a fair report privilege. *DeMary v. Latrobe Printing and Publishing Company*, No. 613 WDA 1999, 2000 PA Super 339 (11/9/00)

The appellate court ultimately reversed a dismissal of the complaint in this action, however, because, among other reasons, it concluded that the fair report privilege would not apply to statements made by a citizen 45 minutes after the meeting had adjourned, during what was alleged to be a “spontaneous congregation of citizens during a recess of the Board meeting.”

Derry Township Supervisor Louis DeMary and his wife sued over reports on several public meetings of the Board and a workers compensation hearing.

At trial, the Court of Common Pleas of Westmoreland County ruled that the “fair reporting privilege” applied to all of the events reported on by the BULLETIN, and granted the defendants’ motion to dismiss.

The DeMarys appealed. After an initial opinion reversing dismissal was withdrawn and reargument was granted, the Pennsylvania Superior Court again reversed the lower court. *DeMary v. Latrobe Printing & Publ’g Co.*, 2000 PA Super 339, 2000 Pa. Super. LEXIS 3051 (2000).

In reversing, the court held that the trial court had improperly concluded that the newspaper had not “embellished or exaggerated” what happened at the meetings, a question of fact which should have been presented to a jury. But the court also rejected a claim made by the plaintiffs that the fair report privilege does not apply to workers’ compensation hearings. “[T]he DeMarys do not articulate why there is a purportedly diminished interest in workers’ compensation hearings,” the court wrote. “These hearings are the seeds of the substantive case law that impacts upon the thousands of our Commonwealth’s citizens that are affected by workers’ compensation laws. Thus, we conclude that because a workers’ compensation hearing constitutes a government proceeding, the fair report privilege applies to an article that reports thereon.”

Section 230 Protection Extends to Web Hosting

By Laurin H. Mills and Leslie Paul Machado

A recent decision by the United States District Court for the Northern District of Illinois extends the protections afforded by Section 230 of the Communications Decency Act of 1996 to Internet Service Providers ("ISPs") who provide Web-hosting services. The decision in *John Does 1 through 30 v. Franco Productions, et al.*, 2000 U.S. Dist. LEXIS 8645 (N. D. Ill. June 21, 2000) (Kocoras, J.) establishes, for the first time, that ISPs who "host" a Web site are not liable for material posted on Web sites by the ISP's customers.

The service of leasing space on a Web server is known in the industry as "Web hosting" or "site hosting." Because Web hosting allows companies to focus on their product, instead of concentrating on creating and maintaining a Web site, the number of companies turning to ISPs for Web hosting continues to increase. According to a recent survey, between 1998 and 1999, the percentage of companies outsourcing their Web hosting needs jumped from 43 percent to 73 percent. See *More Companies Outsourcing Web Hosting*, available at http://cyberatlas.internet.com/big_picture/hardware/article/0,1323,5921_169461,00.html.

CDA Provisions

When Congress passed Communications Decency Act of 1996 ("CDA"), it declared that "[i]t is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Under the CDA, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

Every court addressing Section 230 has held that ISP's are immune from liability for content developed by others. In virtually all cases, however, the

defendant was a passive conduit for the offensive material - usually providing a bulletin board where the message was posted by a third party. *John Does 1 through 30*, however, addressed an entirely different situation — one where the ISP did more than provide a bulletin board — it actually hosted the Web site on its network.

Locker Room Taped & Sold

In *John Does 1 through 30*, the First Amended Complaint was brought on behalf of unnamed intercollegiate male wrestling, football and squash athletes at several universities in the Midwest. It alleged that the athletes were videotaped in various stages of undress while using locker room facilities, and that these videotapes were made without their knowledge using hidden cameras. These videotapes were then sold on the Web. Along with suing the companies allegedly responsible for making the videotapes, Plaintiffs sued PSINet Inc. and GTE, alleging that they operated "the servers for or otherwise host the World Wide Web sites of the Defendants named in Counts I and II."

The Defendants moved to dismiss the First Amended Complaint, arguing it was barred by Section 230. They argued they were entitled to Section 230 immunity because they met all three elements required for protection: (1) they are interactive computer services; (2) the information was provided by another information content provider; and (3) holding them liable would treat them as the publisher or speaker. In a Decision dated April 20, 2000, the United States District Court for the Northern District of Illinois agreed with the ISP's position, dismissing Plaintiffs' Complaint.

Web Hosts as Content Providers?

Following dismissal of their First Amended Complaint, Plaintiffs filed a Third Amended Complaint. The Third Amended Complaint focused on the ISP's "Web hosting" activities, arguing that PSINet and

(Continued on page 20)

Section 230 Protection Extends to Web Hosting

(Continued from page 19)

GTE provided “technical support” and “editorial oversight” to the web sites to such a degree as to make them “information content providers” subject to liability.

PSINet and GTE thereafter collectively filed a Motion to Dismiss, arguing that the new theories, which only sought to circumvent the immunity provisions of Section 230, failed because PSINet and GTE were completely immune from such attempts. In an Opinion dated June 21, 2000, the Court agreed. *John Does 1 through 30 v. Franco Productions, et al.*, 2000 U.S. Dist. LEXIS 8645 (N.D. Ill. June 21, 2000) (Kocoras, J.).

Liability Barred by §230

In its Decision, the Court rejected Plaintiffs’ argument that it was only seeking to hold the ISPs liable for “knowingly failing to restrict content.” The Court held that by seeking to hold PSINet and GTE liable for their decision not to restrict content, Plaintiffs sought to hold the ISPs liable as publishers — a result barred by Section 230.

The Court also rejected Plaintiffs’ attempt to impose liability for the ISPs Web hosting functions:

The Court reiterates its previous holding finding GTE, and now similarly PSINet, service providers whose immunity or status as service providers under the CDA is not vitiated because of their web hosting activities, whether viewed in combination with their roles as service providers or in isolation.

Id. at *13-14.

Plaintiffs simply allege that GTE and PSINet, as web hosts, provided a medium through which others could sell or offer for sale the videotapes at issue. However, by offering web hosting services which enable someone to create a web page, GTE and PSINet are not magically rendered the creators of those web pages.

Id. at *15.

The Court’s ruling is important because it clearly and unequivocally held that ISPs are entitled to Section 230 protection for Web hosting activities. In reaching this conclusion, the Court acknowledged three important factors: (1) ISPs engaged in Web hosting are unable to review all the pages they host, and if they were held liable for content on those pages, might decide not to host the sites, with a resulting overall chilling effect; (2) Congress intended to confer broad immunity on ISPs even when they have knowledge of the defamatory or offensive Web site or posting; and (3) minimal participation by an ISP in a Web site, including “technical support” or “editorial oversight,” is insufficient to transform an ISP into an “information content provider” and remove the Section 230 immunity.

A contrary decision would have arrested the rapid development of Web hosting, a significant growth area for businesses and ISP’s. Imposing liability on ISP’s would have made it prohibitively expensive and burdensome to engage in hosting activities, with a resulting chilling effect, as companies decided that the potential liability was too great to continue hosting Web sites. The Court properly weighed these concerns in extending Section 230 protection to companies that engage in Web hosting.

If you would like to discuss this article, the Court’s decision, or its implications, please contact Laurin H. Mills (lmills@nixonpeabody) or Les Machado (lmachado@nixonpeabody.com) of Nixon Peabody’s Washington office (202-585-8336).

LDRC would like to thank interns — Eli Freedberg, Benjamin N. Cardozo School of Law, Class of 2002 and Peter Wilner, Benjamin N. Cardozo School of Law, Class of 2002 — for their contributions to this month’s *LDRC LibelLetter*.

Preliminary Showing on Merits Required For Revealing Identity of On-Line Critic

In order to uncover the identity of Internet poster(s) accused of libeling public officials, *New York Times v. Sullivan* and its progeny require the plaintiff to make a preliminary showing of the merit of the case, a Pennsylvania court judge has ruled. And even after the plaintiff met this burden, the judge ruled that while the attorneys for the plaintiff may obtain the identities of the defendant(s), he also asked the parties to prepare proposed confidentiality orders which would prevent the identity of author(s) from becoming public until the case comes to trial. *Melvin v. Doe*, No. G.D. 99-10264 (Pa.Ct.Common Pleas, Allegheny Cty., *opinion and order dated* Nov. 15, 2000).

The suit was over items posted on a web site hosted by America On-line, "Grant Street 1999," which focused on local politics in Allegheny County, Pennsylvania. (Many county offices are located on Grant Street in Pittsburgh.)

In January 1999, the site alleged that Judge Joan Orié Melvin had improperly lobbied Pennsylvania Governor Tom Ridge to get a fellow attorney appointed as a judge of the Court of Common Pleas. The site also alleged that this behavior was a violation of the judicial code of ethics.

Judge Melvin initially filed suit in Virginia against the unnamed author(s) of the site, seeking \$500,000 in damages for libel. As part of the suit, her lawyers sought a subpoena to force America Online to reveal the identity of the author(s).¹ The suit was filed in Virginia because AOL's offices and computers are located there.

In June 1999, Loudon County Circuit Court Judge Thomas Horne dismissed the case for lack of jurisdiction. *Melvin v. Doe*, No. 21942 (Va. Cir. Ct., Loudon Cty., dismissed June 24, 1999). See *LibelLetter*, July 1999 at 24.

After Melvin complained about the site, AOL removed it from its servers. The site then relocated to another Internet hosting service. (As of this writing, the site was still online at <http://www.crosswinds.net/~grants99>, but its content had not been updated since December 1999.)

Melvin then filed notice of her intention to file a new suit in Pennsylvania, and asked Allegheny County Judge R. Stanton Wettick Jr. for a new subpoena to determine the author(s). Wettick refused to issue the order until Melvin filed suit, which she did on Oct. 9, 1999.

Attorneys for the web site's author(s) then asked for a protective order to shield the identity of their clients until they

could argue for dismissal of the case. Wettick issued an order staying discovery of the identity of the author(s) while the defendant's motion for summary judgment was argued.

Wettick rejected the motion on Nov. 15. At the same time, he also lifted his order staying discovery, ruling that America Online had to disclose the author's identity to Judge Melvin's attorneys.

Wettick wrote that the identity of the web site author(s) was relevant because "the jury, in deciding whether plaintiff has met her burden of proving that the statements are false, needs to know the identity of the persons who made the publication. For example, it would make a significant difference to the jury whether John Doe is a prisoner whom plaintiff sentenced to a twenty year jail term or a member of the Governor's staff."

"However, case law does not extend First Amendment protections to anonymous speech that is defamatory, if untrue."

He rejected the defense argument that the anonymity of an unnamed political speaker is protected by the First Amendment. "Federal case law protects anonymity for political speech that is not actionably false,"

Wettick wrote. "However, case law does not extend First Amendment protections to anonymous speech that is defamatory, if untrue."

He agreed with the defense argument that allowing discovery of the identity of anonymous Internet posters would chill free speech in this new medium, but interpreted existing law as requiring disclosure nevertheless.

Although Wettick ruled that AOL must reveal the identity of the poster(s), he asked the parties to prepare proposed confidentiality orders which would prevent the identity from becoming public until the case comes to trial.

Attorneys for the American Civil Liberties Union who represented the site poster(s) praised Judge Wettick for protecting the identity of their client(s) until ruling on their motion to dismiss. "We agree that if the statements are truly defamatory, the names should come out," ACLU attorney Ann Beeson told the *Philadelphia Legal Intelligencer*.

Among the attorneys representing the anonymous poster(s) was Ronald Barber of Strassburger, McKenna, Gutnick & Potter in Pittsburgh. Judge Melvin was represented by her brother, John Orié, of Orié & Zivic and Robert O. Lampl of Pittsburgh, Pennsylvania.

¹ While the web site's author(s) are unknown, *Pittsburgh Post-Gazette* columnist Dennis Roddy wrote in January 1999 that he had interviewed the creator of the site, who was a single, low-level Allegheny County employee. "I check everything out," Roddy quoted the web site author as saying. "Everything I publish is true. It may be controversial, but it's true." The court took no notice of this revelation.

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UPDATES

Unpublished CA Access Decision Now Available In *Media Law Reporter*

Broughton v. Mediacopy, No. A. 088571 (Cal. Ct. App. July 11, 2000), an unpublished decision by the California Court of Appeals affirming a superior court order that unsealed a civil court file sealed completely three years earlier as part of a settlement between the parties, is now available in the *Media Law Reporter* (28 Med. L. Rptr. 2435). *Broughton* rejected the argument that a media organization may not move to unseal court files that had been previously sealed unless it showed new law or new facts undermine the sealing order, as required for motion for reconsideration (See *LibelLetter*, October 2000, p. 27).

The *San Francisco Examiner* moved to unseal the file, previously sealed pursuant to a settlement agreement resolving the case. The plaintiff alleged racial harassment, wrongful discharge, and infliction of emotional distress against Mediacopy, a San Francisco-based company. The settlement was reached post-trial, after a California jury awarded the plaintiff \$200,000 in damages.

Mediacopy's petition for review in the California Supreme Court was denied on October 18.

ultimately numbering in the thousands, from the *LA Times* and *Washington Post* (and other publications) appeared along with comments and critiques from those who subscribed to defendants' sites. The court also assessed Free Republic and James C. Robinson jointly the sum of \$1 million in statutory damages.

Defendants argued that their use of the plaintiffs' material constituted a fair use, a defense the United States District Court in Los Angeles (Central District of California) rejected, along with a First Amendment defense.

The permanent injunction bars the defendants in very broad terms from operating a site, bulletin board, listserv, and/or user group that in any way itself or by encouraging others posts, republishes or distributes any of the plaintiffs' copyrighted works absent plaintiffs' permission.

Plaintiffs were represented by Rex Heinke, Greines, Martin, Stein & Richland, LLP, Los Angeles, California. Defendants were represented by Brian L. Buckley, Los Angeles.

Final Judgment in *Free Republic* Case

A permanent injunction has been issued against Free Republic, Electronic Orchard and James C. Robinson in the suit against them brought by the *Los Angeles Times*, the *Washington Post* Company and *Washingtonpost*. Newsweek Interactive Company barring them from posting (and encouraging others to post) on their web site articles from the plaintiffs' web sites. *Los Angeles Times v. Free Republic*, Case No. 98-7840 MMM(AJWx)(CD Cal. 11/14/00) See *LDRC LibelLetter*, November 1999 at 25. Defendants operate a web site on which whole articles,

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UPDATES

Supreme Court Grants Cert in Punitive Damage Challenge

In a case coming out of Oregon, the Supreme Court has agreed to look at the legal standard to be applied in appellate review of punitive damage awards. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 99-2035, 2000US. LEXIS 6599 (10/10/00). The defendant has challenged the award of punitive, its proportionality and fairness. The 9th Circuit Federal Court of Appeals, in an unpublished opinion, held that the district court had not abused its discretion in declining to reduce a punitive damage award given by a jury in a trademark, unfair competition, and false advertising dispute. Cooper Industries, defendant below and petitioner at the Supreme Court, has argued that the standard of review should be higher and that the Supreme Court should impose consistency between the Circuits on the issue.

ter, October 1999, at 47. In April of 2000, the 2nd Circuit Court of Appeals denied *The New York Times'* request for reconsideration of the ruling. See *LibelLetter*, April 2000, at 18. On August 4, 2000, *The New York Times* filed the petition for certiorari with the U.S. Supreme Court.

The Second Circuit's decision in *Tasini* sparked a wave of similar litigation, including the recently filed cases of *Posner et al. v. Gale Group, Inc. et al.*; *Authors Guild, Inc. et al. v. Dialog Corp. et al.*; and *Laney v. Dow Jones & Co. et al.* See *LibelLetter*, October 2000, at 37.

Supreme Court Grants Cert in *Tasini*

On November 6, the U.S. Supreme Court agreed to hear *The New York Times'* appeal of *Tasini v. New York Times et al.* The Justices will decide if a publisher's reproduction and distribution of its entire periodical not only in print, but also electronically, is privileged under Copyright Act, or if it instead infringes upon copyrights held by contributing freelance authors (No. 00-201).

In *Tasini*, the Second Circuit reversed a federal district court decision, ruling that Section 201(c) of the Copyright Act does not allow newspaper and magazine publishers to put writings by freelancers on electronic databases (such as NEXIS) and CD ROMs that include the entire issue of the publication, in absence of the express written consent from the writer. The court found that the electronic databases and CDROMs were not within the revision exception for "collective works" under the default rules of the Copyright Act. See *LibelLet-*

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Colorado Court Orders Limited Disclosure of Bookstore's Customer Purchase Records

By Daniel Mach

In 1998, Independent Counsel Kenneth Starr sent shockwaves throughout the First Amendment community when he subpoenaed several Washington, DC bookstores seeking information on Monica Lewinsky's book purchases. Two years later, Starr's broad use of the government's investigatory powers cannot be dismissed merely as an unusual byproduct of an extraordinary situation. Rather, law enforcement officials have been increasingly willing to use subpoenas and search warrants to delve into the confidential reading habits of bookstore patrons.

In a recent illustration of this disturbing trend, police in Denver, Colorado served a search warrant on the venerable Tattered Cover bookstore in April, seeking customer purchase information in connection with a drug investigation. On October 20, a state district court narrowed the scope of the warrant on First Amendment grounds, but ordered the bookstore to disclose the contents of a shipping envelope that police had removed from the trash of a suspected drug dealer. *Tattered Cover, Inc. v. City of Thornton*, Case No. 00 CV 1761 (Dist. Ct., City and County of Denver, Colo., Oct. 20, 2000).

Recognizing bookstore patrons' fundamental right to receive information "without government intrusion or observation," the court subjected the search warrant to "exacting scrutiny" using a four-part balancing test similar to that employed by the federal district court in the Lewinsky case. See *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 Media L. Rep. (BNA) 1599 (D.D.C. 1998). Under that test – which substantially parallels the analysis used in traditional reporter's privilege cases – the court weighed the government's interest in the requested information, the nexus between that information and the government's investigation, the availability of the information from other sources, and the extent of the government's exposure of other constitutionally protected

matters. After a full evidentiary hearing, the court allowed the "minimal but necessary intrusion" into the purchasing records associated with a single bookstore envelope found near the scene of the crime. The court nonetheless rejected the government's broader request for information on all purchases made by one particular suspect within a one-month period.

Concerned over the potential chilling effect of the compelled production of sensitive customer records, the Tattered Cover is appealing the ruling to the extent it requires disclosure of information pertaining to the single customer invoice. The appeal may resonate well beyond the confines of this case, as government officials

[L]aw enforcement officials have been increasingly willing to use subpoenas and search warrants to delve into the confidential reading habits of bookstore patrons.

nationwide continue to use similar investigatory techniques to pry into the reading habits of bookstore customers. In Overland Park, Kansas, for example, a Borders bookstore recently received a government subpoena for customer purchase records in connection

with a criminal investigation. Borders has moved to quash the subpoena on First Amendment grounds.

Daniel Mach is an attorney in the Washington, D.C. office of Jenner & Block, which filed an amicus brief in this case on behalf of various free speech, library, and industry organizations.

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Clinton Vetoes “Official Secrets Act”

Next Congress Likely to Address Issue

After an intense lobbying campaign and debate within the Administration, on Nov. 4 President Clinton vetoed a budget bill which included a section to impose criminal penalties on the disclosure of “properly classified” information by current or former government employees. House Rpt. 106_969, Conference Report on H.R. 4392, Intelligence Authorization Act for Fiscal Year 2001 (H.R. 4392), sec. 304 (2000).

“As President,” Clinton wrote in his veto message, “it is my obligation to protect not only our Government’s vital information from improper disclosure, but also to protect the rights of citizens to receive the information necessary for democracy to work.”

The provision, which originated in closed meetings of the Senate Intelligence Committee, would have made federal government employees and former government employees who disclosed or attempted to disclose “properly classified” information subject to a fine and/or imprisonment for up to three years.

Under current law, release of classified information was a felony only if the government proves that national security was harmed.

The President vetoed the measure after an intense lobbying effort by various First Amendment groups, led by the Newspaper Association of America. There were also articles and editorials in newspapers across the country, and top officials of the NAA, *The New York Times*, *The Washington Post*, and CNN held a conference call with White House Chief of Staff John Podesta and sent a follow-up letter to the President.

Congressional supporters of the provision, who say that it is necessary to stem leaks of classified information, vowed to introduce a revised version of the legislation when the new Congress convenes next year. There are also likely to be public hearings on the new version. It seems unlikely that the provision will be addressed during a “lame duck” session scheduled for early December.

The vetoed bill also included a provision sponsored by Sen. Daniel Moynihan (D-N.Y.), which

would have required government agencies to submit annual plans for de-classification of data, and report on their progress in instituting these plans. The legislation also would have established a nine-member board to “make recommendations to the President regarding proposed initiatives to identify, collect, and review for de-classification classified records and materials of extraordinary public interest.” House Rpt. 106_969, sec. 701, *et. seq.*

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Massachusetts Supreme Judicial Court Incorporates First Amendment Standards into Common Law Right of Access to Civil Documents

Press Seeks Domestic Abuse Papers After Spouse Murder

By Elizabeth A. Ritvo and Jeffrey P. Hermes

In *The Boston Herald, Inc. v. Richard J. Sharpe*, No. SJC-08371, issued November 8, 2000, the Massachusetts Supreme Judicial Court strengthened the right of access to judicial records in civil cases by applying in the civil context the First Amendment standard for access to criminal judicial records. Similarly, the decision incorporates First Amendment standards in balancing countervailing privacy and Sixth Amendment interests.

Civil Affidavits Sought

The appellee, Dr. Richard Sharpe, was arrested and charged with the murder of his wife, Karen Sharpe, following a highly-publicized manhunt. The murder occurred a short time after Dr. Sharpe had filed for divorce and Ms. Sharpe had initiated a separate civil abuse prevention proceeding pursuant Mass. Gen. Laws c. 209A in the Essex County Probate and Family Court. The probate court issued and then continued a restraining order against Dr. Sharpe in the c. 209A proceeding, relying in part on three affidavits filed by Karen Sharpe. The affidavits were filed under a blanket impoundment order, and were sealed along with the rest of the abuse prevention and divorce files (which were treated as a single file by the court). Karen Sharpe was shot to death two months after the restraining order was issued.

Following Karen Sharpe's death, the *Boston Herald* and two other media intervenors moved to vacate the blanket impoundment order. Dr. Sharpe opposed these motions, arguing that the release of the file would impair his Sixth Amendment right to a fair trial and violate his privacy interests. The probate court granted the media's motions, noting the extensive publicity that the Sharpe case had already received. On appeal by Dr. Sharpe, a single justice of the Massachusetts Appeals Court held that the entire file *except* for the three affidavits should be released. The media appealed the portion of the Appeals Court's decision sealing the affidavits, and the single justice of the Supreme Judicial Court ordered that

the three affidavits should be released with the rest of the file. Dr. Sharpe then appealed to the full panel of the SJC. Each court stayed its order unsealing the documents to allow appellate review.

Massachusetts Supreme Court Release

The SJC affirmed the single justice's decision and directed the trial court to enter judgment releasing the three affidavits with the rest of the file. In determining that there was a common law right of access to the affidavits, the Court relied upon the test used to determine whether there is a First Amendment right of access to criminal judicial records: whether the proceedings in question have "an historic tradition of openness," and whether public access plays "a significant role in the functioning of the particular process in question," quoting *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 8 (1986). The Court determined that "[t]he public interest in access to judicial records concerning domestic violence is at least as strong" as the right of access in criminal cases.

In balancing this "strong public interest" against Dr. Sharpe's alleged Sixth Amendment and privacy interests, the Court held Dr. Sharpe to the First Amendment standard established by the Supreme Court in *Press-Enterprise*:

The Supreme Court of the United States has established a three-pronged test to determine whether an order of closure comports with the constitutional presumption of access to criminal proceedings and records. The burden falls on the party seeking closure to demonstrate that (1) there exists a substantial probability that permitting access to court records will prejudice his fair trial rights; (2) closure will be effective in protecting those rights, and that the order of closure is narrowly tailored to prevent potential prejudice; and (3) there are no reasonable alternatives to closure. See *Press-*

(Continued on page 28)

MA Ct. Incorporates First Amendment Standards

(Continued from page 27)

Enterprise Co. v. Superior Ct., 478 U.S. 1, 14-15 (1986). *The uniform rules [of impoundment procedure] require a judge to take into account essentially the same factors in the 'good cause' analysis: the competing rights of the parties and alternatives to impoundment.* (emphasis added).

The Court further confirmed that allegations of Sixth Amendment rights do not trump First Amendment or even common law rights of access, quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976):

“Pretrial publicity that may be occasioned by the release of the affidavits does not ... necessarily trump the principle of publicity: ‘[P]retrial publicity — even pervasive, adverse publicity — does not inevitably lead to an unfair trial.’”

The Court then held that (1) impoundment would not be effective in this case, because of substantial previous publicity concerning Karen Sharpe’s murder, and (2) there were reasonable alternatives to impoundment, because methods such as jury voir dire, change of venue and explicit jury instructions were available to counter any alleged prejudice from pretrial publicity.

Analyzing Dr. Sharpe’s privacy interests, the Court relied on case law involving the tort of invasion of privacy. It held that where there was a legitimate public concern with the proceeding at issue, the release of the sealed affidavits did not invade any privacy rights of Dr. Sharpe.

The *Sharpe* decision provides further protection of public access rights in both civil and criminal matters. Parties who seek to enforce impoundment orders in civil cases will have to satisfy First Amendment standards. Given the Court’s review of the many alternatives to impoundment and the many highly publicized cases where impartial juries were impaneled, parties in criminal matters will face an increased burden to demonstrate that impoundment is necessary to protect their 6th Amendment rights.

Elizabeth A. Ritvo and Jeffrey P. Hermes of Brown, Rudnick, Freed & Gesmer, Boston, Massachusetts, were

counsel for media intervenor The Boston Herald in The Boston Herald, Inc. v. Sharpe.

Appeals Court Rules Candidate May Use C-SPAN Footage

The U.S. Court of Appeals, 8th Circuit, effectively ruled that a Republican candidate for the House of Representatives, William Federer, could continue to use footage from C-SPAN in his campaign ads, so long as the cable network is not identified as the source of the film. *National Cable Satellite Corporation v. Federer for Congress Committee and William J. Federer*, U.S. District Court, Eastern District of Missouri, Civil Action No.: 00CV-1725 CAS.

On November 2, upon emergency appeal by Federer, the court stayed a portion of the district court’s order which had enjoined the candidate from running the television appeal with only eight days remaining in his campaign.

Federer, who ran against Minority Leader Richard Gephardt (D-Mo.), used footage in his campaign advertisement of Gephardt talking at a National Gay and Lesbian Task Force dinner. In its suit against Federer, C-SPAN alleged copyright and trademark violations.

The lower court order prevented the campaign both from using any footage from C-SPAN and also from using any of the network’s trademarks or logos in its ads. The lower court rejected Federer’s argument that the news footage was a “fair use,” noting that every second of the 30-second commercial contained C-SPAN material.

The appellate court’s ruling stayed the part of the ruling that prevented the use of footage, but upheld the portion of the ruling that forbade the use of the trademarks or logos. Thus, the result of the appellate ruling was that the campaign could use the television clips if there were no identifications of C-SPAN as the source.

After the appellate court’s ruling, Federer continued to run the ads in local markets, without the identifying C-SPAN marks such as voice-over and logo. Ultimately, Federer lost his bid for Representative to the incumbent Gephardt.

Oklahoma Judge Grants Media Access to FBI Tapes of Telephone Calls Used to Obtain Bribery Conviction

By Jon Epstein

On October 19, 2000, the day after Oklahoma's former Deputy Health Commissioner Brent Van Meter and nursing home owner Jim Smart were convicted in a highly publicized bribery case, Judge Ralph Thompson of the United States District Court for the Western District of Oklahoma granted the media access to 15 audiotapes which were played to the jury. *United States of America v. Van Meter*, Case No. CR-00-67-T (W.D. Okla., October 19, 2000). In its motion to obtain access to the tapes, the New York Times Company and its television station KFOR-TV ("KFOR") argued that pursuant to common law and constitutional law, the news media are entitled to obtain copies of the tapes so that they may report accurately to the public on the crucial evidence. The government did not object to the motion; however, both defendants argued that the tapes should not be disclosed because of the confidentiality provisions of Title III of the Omnibus Crime Control and Safe Streets Act ("Title III"), 18 U.S.C. §2510 *et seq.*

Title III Issue

The defendants argued that the tapes were made pursuant to an authorized wire tap of phone conversations and that Title III required that the intercepted communications be sealed even though Title III allowed the government to use the intercepted communications in open court. *See National Broadcasting Co. v. United States*, 735 F.2d 51 (2nd Cir. 1984). However, KFOR argued and Judge Thompson agreed that the Title III sealing requirements no longer apply after the tapes are admitted into evidence. *United States v. Dorfman*, 690 F.2d 1230, 1233 (7th Cir. 1982); *United States v. Rosenthal*, 763 F.2d 1291 (7th Cir. 1985).

Common Law Access in Balance

After concluding that the disclosure of the tapes is not prohibited by Title III, Judge Thompson then considered whether the tapes are otherwise available for copying by KFOR. KFOR argued that courtrooms,

especially in criminal proceedings, are presumptively open to the public and that such openness, in this day and time, necessarily means more than affording access "only to those who can squeeze in the door." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *United States v. Antar*, 38 F.3d 1348, 1360 (3rd Cir. 1994). In order to make what transpires in the courtroom fully public, the common law has long recognized the right to inspect and copy judicial records and documents admitted into evidence, including audiotapes. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). KFOR cited a series of cases arising out of the Abscam scandal in the late 1970's to further support the strong presumption of media access to audio and video materials used in public criminal trials.

Judge Thompson recognized this "strong presumption" in favor of the right to access; however, he also recognized that, where access is sought, the court must balance "the interests advanced by the parties in light of the public interest and the duty of the court." *Nixon* at 602. In evaluating requests for copies of audiotapes, the courts have generally considered whether disclosure will prejudice the defendant's right to a fair trial, the effect of disclosure on possible subsequent trials, and the possibility that disclosure will harm non-parties. *See, e.g., In re Application of National Broadcasting Company*, 635 F.2d 945, 952 (2nd Cir. 1980).

Risks Speculative to Nil

Judge Thompson noted that, as applied to the defendants in the *Van Meter* case, there was no risk of prejudice because the verdict was rendered the day before the request for disclosure could be resolved. He also determined that any speculative impact the disclosure might have on future trials is outweighed by the public's right to access. Moreover, he noted that the subject audiotapes included conversations only between the two defendants; therefore, there was no evidence of a risk of potential future prejudice to

(Continued on page 30)

Oklahoma Judge Grants Access to FBI Tapes

(Continued from page 29)

other individuals. Accordingly, he granted KFOR's request for copies of the tapes.

In the *Amadou Diallo* murder case, Judge Teresi denied the media's request for access to materials received in evidence because it "would pose a significant risk of impairing the integrity of the evidence and interfere with the orderly conduct of the trial." *People v. Boss* (Sup. Ct., Albany County, Feb. 17, 2000). Judge Thompson also considered those important factors; however, he determined that by allowing KFOR to obtain duplicates made by the FBI of the tapes which were actually admitted into evidence, the approved procedure would preserve the evidence and minimize the impact on judicial resources. He also noted that the arrangements to copy the tapes would not interfere with the conduct of the trial because it concluded the previous day.

Robert D. Nelon and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. in Oklahoma City, along with Adam Liptak, Senior Counsel for the New York Times, represented KFOR in this action.

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

Call us, send us an email or a note.

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Latest Chiquita Update: Gannett and Nixon Peabody's *Forum Non Conveniens* Motions Denied

One of Beaupre's Conspiracy Counts Dismissed

On October 12, a Superior Court in the District of Columbia separately denied motions to dismiss on the grounds of *forum non conveniens* by both Gannett (and certain of its employees) and the law firm of Nixon Peabody in the case brought by the former editor of the *Cincinnati Enquirer*, Larry Beaupre. *Beaupre v. Nixon Peabody LLP, et al.* (No. 00ca3020). The court also decided conflict of law questions regarding each count of the complaint. Since the plaintiff alleged conspiracy in two different counts based upon the same conduct by the parties, the court dismissed the count that the plaintiff brought under a Virginia conspiracy statute after it determined that the District of Columbia's law applied, and addressed only the non-statutory conspiracy count.

Beaupre's Claims

Larry Beaupre, former editor of the *Cincinnati Enquirer*, filed suit in Washington, D.C., on claims that included fraud, conspiracy to injure reputation, tortious interference, breach of contract and implied covenants, and attorney malpractice, against Gannett Co. Inc., owner of *The Cincinnati Enquirer*, Nixon Peabody (an outside counsel for Gannett on this matter), certain Gannett in-house counsel, Gannett Satellite, *The Cincinnati Enquirer*, and Cameron McWhirter (an *Enquirer* journalist who investigated Chiquita for the series). Beaupre's claims arise out of the defendants' responses to complaints by Chiquita Brands International about a series of stories on the company that appeared in the *Enquirer*. Chiquita Brands International's claims, the threatened civil litigation and the settlement entered into between Gannett and Chiquita, and the criminal investigation into the newsgathering and publication of the series form the backdrop to Beaupre's current litigation. (See *LDRC LibelLetter*, July 1998 at 16 for a discussion of Chiquita's claims regarding the series, and *LDRC LibelLetter*, June 2000 on Beaupre's complaint.)

Fear Less and Protect The First Amendment

By Martin Garbus

Authors, publishing houses, movie studios and record companies face the digital future with the fear that Napster-like infringements, and the relative ease with which they will operate once broadband comes into effect, will deprive the creators of books and movies of the monies and protections they are entitled to. That fear has been played upon by groups like the MPAA and RIAA, through lawsuits and publicity attacks in Congress and the public. To a large degree their claims to copyright protection and the remedies they seek mean putting aside the First Amendment considerations found in fair use. The trade organizations have made it seem as if it's all or nothing. This is not so.

Academic scholars and librarians who resisted the attempt to ban fair use lost when Congress considered the Digital Millennium Copyright Act, the DMCA, and have now lost again in a lower federal court. *Universal v. Reimerdes* 111 Fed. Supp. 2d 294 (S.D.N.Y. 2000). The suit involves the de-encryption of the code designed to protect DVDs from duplication. Judge Lewis Kaplan has said that in this case copyright protection and First Amendment requirements are contradictory and copyright comes out on top. The case is on appeal.

The law should not be permitted to stifle creativity; at the same time, the technology cannot be permitted to circumvent the law and permit wholesale copyright infringement. But copyright law, its enforcement, free speech issues and security systems designed to prevent any reproduction of the copyrighted work are inextricably tied together. As the courts tell us, what "fair use" is may depend on the intellectual property being considered.

Security Codes Not Secure

The RIAA and the MPAA know the ease with which security systems developed over years can be broken. In the DVD case before Judge Lewis Kaplan, a security system built over years, with millions of dollars, and endless

personnel, was easily broken by a 15-year-old boy with no special expertise. Napster was created by an 18-year-old without million-dollar technology.

Why is it so easy to break most security codes? It is no longer one computer trying to break a code. The personal computer sitting on your desk has more capability than the NASA computers which were in Baltimore 10-15 years ago. A person trained in computer technology can link up computers from Princeton, Berkeley, MIT and a myriad of other places connected to the Internet to harness their collective power to crack many security codes. It is the rare encryption code that is safe if, after a college closed and before it opened the next morning, someone turned all its computer power toward decryption of an encryption. Movie disks had a 41-bit encryption system called CSS. With new systems, ten or twenty times as powerful as 41-bit systems (the movie security system), 1000 bit systems can be broken.

Within the last month, the Secure Digital Music Initiative (SDMI) software, a security system developed over years, with millions of dollars, with the backing of major corporations and the RIAA, was broken. SDMI contained "watermarks," a different kind of security device from that used by the movie industry. The creators of the security system, having learned from previous serious failures such as the movie case, sent several of the systems out to see if they could be broken. They were, quickly and easily. This told the copyright holder a better system had to be devised.

Professor Ed Felten of Princeton, who testified in the DVD Encryption case, along with several others, announced that he and his colleagues had broken the code and said that within a month, they would put on paper or post on the Internet to show how it was broken. Developers of SDMI and other copyright holders will learn from the attempts to crack security systems how to create better security systems.

The law should not be permitted to stifle creativity; at the same time, the technology cannot be permitted to circumvent the law and permit wholesale copyright infringement.

(Continued on page 32)

Fear Less and Protect The First Amendment

(Continued from page 31)

Is There a Solution?

Given the fact that most security systems can be broken, how do we minimize the pirate's effect? There is a security system that gives each personal computer a separate identity code by affixing a piece of hardware to that computer. The intellectual property is then sent to those codes. If the code on the personal computer is broken, it can be changed by an Internet transmission so that the break time and copyright violation is minimal.

And, there are other current and future solutions. Copyright owners will have significantly more protection in a future world where content is distributed over the Internet, where each copy can be encrypted with a different key. There are security systems that identify when copies of intellectual property are made. A copyright holder can randomly check, by going into a chat or swap room or a Scour-like file transfer site, to see who the initial pirate is. Modern well-designed encryption systems, if the movie companies want to spend the extra money for security, can't be broken by any known brute-force attack. CSS was not an example of well-designed encryption system.

What the movie and record companies know is there are presently security systems, both operative, and others very nearly operative, that give them as much protection against piracy as they currently can have while at the same time protecting fair use.

There are several ways a movie or a book or a record or any other form of intellectual property can have a portion of its material "protected" while at the same time allowing a fair user to look at the movie, to listen to the record, to read that electronic book.

For example, there is a security system which, with the proper hardware and software, allows the viewer to freely watch the first fifteen minutes of the book as it "protects" the rest of the book from infringement. There are security systems that permit you to look at any five minutes (for example) from a book or Digital Video Disk (DVD) protected movie within the four hour book or movie you want.

When Jack Valenti and the MPAA went to court to stop videotaping of television movies, they said the VCR would have the same effect as leaving the Boston Strangler alone in a room of women. It was not so. Videos became big business. What copyright owners may need to develop, beyond the new generation of security systems and encryption devices, are business plans, the proper inducements and incentives and services, that bring those who would engage in copyright infringement into copyright compliance.

You need not diminish the First Amendment to protect copyright. They can live in harmony.

Martin Garbus is a partner in Frankfurt Garbus Kurnit Klein & Selz, New York, and represents the defendants in the Universal v. Reimerdes case.

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LDRC Celebrates 20 Years

The Libel Defense Resource Center celebrated 20 years of monitoring developments in libel, privacy and other areas of First Amendment law at its Annual Dinner on Nov. 13.

The dinner examined the topic “20 Years: Law, Lawsuits, Lawyers – Their Legacy for the News” with a panel of distinguished attorneys and journalists from the firms and companies which make up the organization, including ABCNEWS Chief Investigative Correspondent Brian Ross, *Seattle Times* Managing Editor Alex MacLeod, Village Voice Media CEO David Schneiderman, and media attorneys Floyd Abrams of Cahill Gordon & Reindel, P. Cameron DeVore and Victor A. Kovner of Davis Wright Tremaine.

Prior to the dinner, Media/Professional Insurance hosted a reception for those attending the dinner. In addition to these events, LDRC held its annual meeting and the group’s law firm members, the Defense Counsel Section, held its annual breakfast.

At the dinner, the panelists told of the changes that have occurred in the media and in First Amendment law over the past two decades.

“There was a period of time [in the early 1970s] when the public thought that we were doing, quote, God’s work,” Schneiderman said. “For whatever reason, it has changed. I think that’s a lot of negative feeling about the media.”

McCloud agreed. “I don’t blame the public for having a negative opinion of most of the media,” he said, “because most of the media is not very good.”

The journalists on the panel discussed the role that lawyers play in their day-to-day work, and related stories of how they have worked with attorneys to avoid and solve problems in the newsgathering process. They also were asked to mention any trends in media law which they see as future threats.

“I think the major threat to newsgathering and to the law is going to come from the generalized notion of personal privacy,” McCloud said. “[O]ver time, it [will] become more and more difficult to obtain any record in which a person is individually identifiable.”

Ross said that an emerging problem is how the laws of foreign countries apply to American broadcasts which

are seen in those nations. “If the signal of ABC is sold around the world, then what is the lowest common denominator?” he asked. “Do we stand firm and say we will essentially export the First Amendment or not?”

The panelists also discussed the impact of the unresolved presidential election on the media and journalism.

“After every election, there’s always a sort of dissatisfaction about how the media covered it,” Schneiderman observed. But he added that there were likely to be few changes in how the media handle elections, al-

(Continued on page 34)

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Did you miss the 2000:2 edition of the LDRC 2000 BULLETIN — **FAIR USE IN THE MEDIA: A DELICATE BALANCE** — a collection of articles taking a practical look at the Fair Use Doctrine in copyright law, investigating what can be used, what cannot, and why.

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LDRC Celebrates 20 Years

(Continued from page 33)

though television networks may be less inclined to call races early.

Ross lamented the “pack mentality” of journalists in coverage of both the election results and the aftermath.

“There will be changes made [in how the media covers elections],” DeVore said. “They will not be profound, but there will be changes made.”

Annual Meeting

At the LDRC’s annual meeting held prior to the reception and dinner, the LDRC media membership elected Adam Liptak of *The New York Times* as the newest member of the LDRC Board of Directors. In addition, Hal Fuson of The Copley Press, Susanna Lowy of CBS, and Kenneth Vittor of The McGraw Hill Companies were reelected to the board.

Ken Vittor’s tenure as chair of the board will expire at the end of 2000. He will be replaced in this position by Robin Bierstedt of Time, Inc.

LDRC Executive Director Sandra Baron gave the board a summary of the organization’s activities during the previous year. Highlights included the creation of the Newsroom Seminar Bank, the LDRC London Conference, the LDRC Institute high school education project, and planning for the upcoming LDRC/NAA/NAB Libel Conference, which will be held September 12-14, 2001.

DCS Breakfast

The activities of the previous year were also discussed at the annual breakfast meeting of LDRC’s Defense Counsel Section (DCS) on November 14. In addition to a report from outgoing DCS President Tom Kelley, each of the committee chairs gave reports on their committee’s current and future projects.

Officers for the DCS for 2001 will be: Susan Grogan Faller of Frost Brown Todd, President; David Schulz, of Clifford Chance Rogers & Wells, Vice-President; Lee Levine of Levine, Sullivan & Koch, Secretary; and Bruce Johnson of Davis Wright Tremaine, Treasurer. Tom Kelley, Faegre & Benson, will become President Emeritus. Tom Leatherbury, current President Emeritus, will rotate off the Executive Committee. Each member

of the Executive Committee serves one year in each post and then moves up one rank, or off the Executive Committee as the case may be.

Jim Stewart of Butzel Long and Tom Kelley discussed their plans for a “Jury Debriefing Project” in which jurors in libel trials will be interviewed after deliberations in order to gain insights into how juries decide media cases.

Rachelle Bin then moderated a panel which addressed various programs and options for dealing with bench/media relations. A copy of her updated report on the options – the first issue of which was circulated with the LDRC *LibelLetter* in June 2000 – is available from LDRC upon request.

Her panel included Bruce Johnson, who discussed the “Fire Brigade” in Washington State which handles urgent, potential bench/media clashes; Cynthia Counts, on the Georgia bench/media conferences; and Kelli Sager on the judicial committee in California that regularly meets with media representatives to discuss issues of mutual interest.

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LDRC Institute High School Education Project

Your Participation is Encouraged!

On November 15th, LDRC produced a Fred Friendly-style seminar for high school students focusing on the media and criminal justice. The seminar, held at the Newseum in New York City, was written and moderated by Jay Brown of DCS member firm Levine Sullivan & Koch. Among the questions the seminar explored were: Whether and how the media covers crime stories? What role do lawyers play in shaping media coverage? What tensions exist between the press and a criminal suspect's fair trial interest?

The aim of the day's seminar was to give students a better idea of how media and legal professionals handle these issues, to illuminate the First Amendment freedoms involved, and to teach students to ask relevant questions about such freedoms.

Seminar Panelists

On the panel were Zachary Carter, a former US Attorney and judge, and now co-chair of the white collar crime and civil fraud practice group at Dorsey & Whitney; Jan Constantine, Senior Vice President of News Corporation; Susan Farkas, NBC News producer; Justice Emily Jane Goodman of the New York Supreme Court; Rikki Klie-man, Court TV anchor and correspondent; Len Levitt, *Newsday* police reporter; Jack Litman, criminal defense attorney with Litman, Asche & Gioiella; Larry Neumeister, Associated Press court reporter; Eric Shawn, Fox News reporter; and Lou Young, anchor and reporter for News 2 New York (WCBS TV).

LDRC's High School Education Project

This seminar was part of a project developed over the past year by LDRC, with the support of the Freedom Forum's First Amendment Center, to educate high school students on free press issues and values and to do so in a dynamic and thought-provoking way, in the style of the Fred Friendly seminars. By relying on interested members throughout the country, LDRC's goal is to develop this into a nationwide pro bono program. We hope that members will produce similar seminars in their local high schools – or invite student groups to another facility, such as a firm or company conference center.

Teach-in Session & Handbook

After the seminar LDRC held a three hour "teach in" to discuss how to produce and moderate seminars. A geographically diverse group of 17 LDRC member lawyers attended the seminar and teach in. About 15 other lawyers unable to attend the session will receive copies of a handbook project that was distributed at the teach in. The teach in was led by Jay Brown and Martha Elliott, both of whom worked professionally on producing Fred Friendly Seminars, including many of the late Fred Friendly's award-winning PBS programs on the Constitution, law and ethics.

The teach in participants discussed and analyzed the specific style and techniques for moderating this type of seminar, as well as practical issues in producing them, such as selecting a venue and casting the panel. The project handbook includes memos on getting started and moderating, three detailed hypotheticals that can be used as the basis for seminars, and suggested follow up materials that can be distributed to students and teachers. The handbook also contains a video and full transcript of the media and law enforcement hypothetical which was produced in May 2000. The handbook will be supplemented with a video of the media and criminal justice seminar.

LDRC members interested in the project should e-mail LDRC staff attorney Dave Heller for more information.

Interested in a pro bono education project for your firm or company?

The LDRC Institute High School Education project is designed to teach high school students about First Amendment issues and values through dynamic Fred Friendly style seminars. Learn how to produce and/or moderate seminars in your local community. Contact Dave Heller at dheller@ldrc.com.