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Report on LDRC Institute High
School Program, p.48
and Update on LDRC Bench/
Media Report, p.43

Reporting Developments Through November 21, 2001

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Editor's Note:

At the end of "Fair Use Not Gone with the Wind" in our previous issue, we failed to properly identify the authors of the article. Gregg D. Thomas is a partner and Rachel E. Fugate is an associate at Holland & Knight in Tampa, Fla. Mr. Thomas and Ms. Fugate, along with James B. Lake of Holland & Knight, filed an amicus brief on behalf of CNN, Cox Enterprises, Dow Jones & Company, Media General, The New York Times Company and Tribune Company in the 11th Circuit challenging the original granting of a prior restraint. We appreciate Mr. Thomas's and Ms. Fugate's contribution to the *LDRC Libelletter* and apologize for the oversight.

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Of Film Clips and Fair Use

By Robert D. Balin and Gregory A. Welch

Determining whether to pay a licensing fee for the use of film clips in a documentary, news report or other fact-based television program can present a nettlesome dilemma. While the unlicensed use of short movie clips to illustrate editorial points in a new non-fiction work often seems to be at the core of the fair use doctrine, the risk of provoking an expensive infringement suit may well persuade the user to nonetheless obtain a license to avoid what one court has termed “the murky realm” of fair use litigation. Indeed, until recently, there has been little case law on the use of film clips to help parties assess whether a particular use will be deemed fair by the courts.

This uncertainty in the law may now, however, be coming to an end. In the past few months four different district court judges in the Southern and Eastern Districts of New York have ventured into the murky waters and have issued remarkably uniform decisions concerning the fair use of film clips in news and documentary programs. *Video-Cinema Films v. CNN*, 2001 WL 1154625 (S.D.N.Y. Sept. 28, 2001) (Jones, J.); *Hofheinz v. Discovery Communications*, 2001 WL 1111970 (S.D.N.Y. Sept. 20, 2001) (Baer, J.); *Hofheinz v. A&E Television*, 2001 WL 725285 (S.D.N.Y. June 27, 2001) (Sweet, J.); *Hofheinz v. AMC Productions*, 147 F.Supp.2d 127 (E.D.N.Y. 2001) (Sifton, J.). These decisions are already being appealed to the Second Circuit, and the outcome of those appeals may determine whether the current licensing (or non-licensing) practices of news and documentary producers continue.

The Video-Cinema Case

The *Video-Cinema* case arose from news stories on CNN, ABC and CBS reporting on the death of actor Robert Mitchum in July 1997. As is common practice when actors die, the news obituaries on CNN and the other networks each reported the details of Mitchum’s lengthy screen career, with accompanying clips (ranging from six to 22-seconds) from several of Mitchum’s films. Among the excerpts used were brief clips from the 1945 war film *The Story Of G. I. Joe*, for which Mitchum received his one and only Oscar nomina-

tion — a fact reported by each news network as the *G. I. Joe* clip was shown. Typical of the practice followed by newsrooms for day-of-death obituaries, all the film clips used in the Mitchum reports came from video store rentals, video purchases or archival footage and no licensing fees were paid by the networks. For example, CNN obtained its 17-second *G. I. Joe* clip from a video documentary about Mitchum that a CNN reporter had earlier purchased from a Virgin Megastore.

At the time of the Mitchum news obituaries in July 1997, plaintiff Video-Cinema Films did not own the copyright in *G. I. Joe*, but had been negotiating to purchase the film from the University of Southern California, to whom *G. I. Joe* had passed by bequest. Nonetheless, upon learning that Mitchum had died, Video-Cinema’s president spent 10 hours simultaneously watching two TV sets, flipping through broadcasts on seven different stations to find news obituaries that used *G. I. Joe* clips. Thereafter, in September 1997, Video-

Cinema submitted a revised contract proposal to U.S.C. in which it inserted a new contract provision granting Video-Cinema retroactive rights in *G. I. Joe* that would pre-date the July 1997 Mitchum obituaries.

On the day Video-Cinema’s president received the fully executed U.S.C. contract (with retroactive ownership rights), he began sending letters to 12 different national and local news organizations demanding a “fee” from each of \$5,000 (\$10,000 in the case of the networks) for its use of *G. I. Joe* clips in its Mitchum obituaries. Each news organization — including ABC, CBS, NBC, FOX and CNN — independently responded that its unlicensed clip use was permitted by the fair use doctrine. Video-Cinema thereafter sued ABC, CBS and CNN in the Southern District of New York for copyright infringement.

On September 28, 2001, Judge Barbara Jones granted summary judgment to the news defendants on fair use grounds, finding that “the public would be hindered by denying Defendants’ fair use defense.” *Video-Cinema*, 2001 WL 1154625, *9. On the first fair use factor (purpose and character of the use), she held that the defendants had used the *G. I. Joe* clips for the statutorily-favored purpose of news re-

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[T]he outcome of those appeals may determine whether the current licensing (or non-licensing) practices of news and documentary producers continue.

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porting and that their usage was “transformative” — since the 1945 film (which is the granddaddy of the “war-is-hell” genre) was intended to entertain and inform audiences about the stark reality faced by American infantrymen in World War II, whereas the Mitchum obituaries had the “entirely new purpose” of educating viewers about Mitchum’s acting career through short snippets from his many films. *Id.* at *6. Using a nice turn of phrase, Judge Jones stated that “[j]ust as parody must mimic the original work to make its point, and biographers are permitted to quote their subjects, so too should obituaries about actors be allowed to show reasonable clips of their works.” *Id.* In awarding the first fair use factor to defendants, Judge Jones also noted that, inasmuch as the obituaries constituted transformative news reporting (one of the illustrative favored purposes set forth in 17 U.S.C. § 107), defendants’ status as commercial entities was of little significance since “[o]therwise . . . the fair use doctrine would be limited to not-for-profit entities.” *Id.*

Judge Jones found that the second fair use factor (nature of the copyrighted work) was neutral or, at best, only slightly favored the plaintiff. Although *G. I. Joe* is a creative, fictional work (and, thus, entitled to greater copyright protection than a factual work), Judge Jones joined a growing line of decisions in the Second Circuit by holding that this was entitled to little weight since *G. I. Joe* was widely published upon its 1945 theatrical release and in many subsequent TV airings — and, thus, defendants did not usurp first publication rights. *Id.* at *7 (citing *Arica Institute v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992)). As one Second Circuit decision has noted, it is unpublished works that are the “favorite sons” of the second fair use factor. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991).

On the third factor (amount and substantiality of the portion used), Judge Jones found that the news defendants’ use of short six to 22-second clips from the 108-minute film was quantitatively “de minimus.” 2001 WL 1154625 at *7. She also ruled that, on a qualitative basis, the brief clips shown by defendants — in which, for example, Mitchum’s character orders a soldier to dig latrines “from

here to Rome” — could hardly be described as the “heart” of the film, particularly since they did not distill the movie’s plot. *Id.*

Finally, Judge Jones ruled that the fourth fair use factor (effect upon the potential market) also favored the news defendants. Specifically, she found that defendants’ use of short clips in their news stories did not in any manner usurp or harm the market for the full-length film itself, a fact that plaintiff’s president had acknowledged at his deposition. While Video-Cinema primarily argued that defendants’ uses deprived it of clip licensing fees, Judge Jones — again following a growing line of Second Circuit authority — held that a copyright plaintiff “is not entitled to a licensing fee for a [use] that otherwise qualifies for the fair use defense.” *Id.* at *9 (quoting *Liebovitz v. Paramount Pictures*, 137 F.3d 109, 117 (2d Cir. 1998)). Finally, noting that in his 38 years in the film licensing business plaintiff’s president could point to only three small settlement payments he has received for

use of clips in obituaries, Judge Jones concluded that “there is not a regular traditional market for obituaries.” *Id.* at *9.

Since three of the four fair use factors favored defendants, Judge Jones granted summary

judgment and dismissed the complaint. Video-Cinema has appealed.

The Hofheinz Trilogy

By the time Judge Jones issued her recent opinion in Video-Cinema, three other district court judges had likewise issued decisions concerning fair use of film clips. Each of these cases was brought by Susan Hofheinz, whose late husband, James Nicholson, was one of the primary forces behind American International Pictures (AIP), a film company that popularized science fiction thrillers (“Killers from Space”) and the monster movie genre (“I Was a Teenage Werewolf”) in the 1950s and 1960s. Hofheinz now controls the copyrights in many of AIP’s films.

In the first of these cases, *Hofheinz v. AMC Productions*, 147 F.Supp.2d 127 (E.D.N.Y. 2001), the defendant produced a documentary about AIP which included film clips ranging

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Judge Jones found that defendants’ use of short clips in their news stories did not in any manner usurp or harm the market for the full-length film itself.

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from ten to 54 seconds from several of the company's movies. Although the defendant had initially paid Hofheinz a \$36,000 licensing fee for use of the clips in cable distribution of its documentary, a subsequent dispute over a brief theatrical release of the documentary (to qualify it for Academy Award consideration) led to a breakdown in the contractual relationship and ultimately resulted in infringement claims.

Hofheinz also brought two other suits complaining about unlicensed use of film clips in documentaries. In *Hofheinz v. A&E Television*, 2001 WL 725285 (S.D.N.Y. June 27, 2001), A&E — as part of its "Biography" series — used a brief clip from "It Conquered the World" in a program on the career of actor Peter Graves. The 20-second clip was used to illustrate the actor's humble beginnings in sci-fi films, with Graves commenting that "You had to pay the rent and buy the groceries."

Finally, in *Hofheinz v. Discovery Communications*, 2001 WL 1111970 (S.D.N.Y. September 20, 2001), the defendant produced a documentary called "Aliens Invade Hollywood," which explored the "alien visitation" genre of films. This documentary (which

was shown on the Learning Channel) contained three film clips from "Invasion of the Saucerman," as they had appeared in the movie's 1957 trailer. The clips (totaling 48 seconds) were used in the documentary to illustrate the campy special effects used in early science fiction movies and because the film was apparently the first to explore the theme of a government cover-up of alien visitations.

The district courts in the three *Hofheinz* cases reached virtually identical conclusions on each of the fair use factors and, in each case, held the defendant's use to be fair. (In the *AMC* case, Judge Sifton denied Hofheinz's preliminary injunction motion and, in the *A&E* and *Discovery* cases, Judge Sweet and Judge Baer granted summary judgment to defendants.)

On the first factor, each documentary usage of Hofheinz's film clips was found to be transformative, adding something of value (such as commentary or scholarship) to create a new copyrightable work. While Hofheinz had argued that the documentaries were "mere entertainment" and not the type of lofty commentary or scholarship contem-

plated by the fair use doctrine, Judge Baer in the *Discovery* case, for example, declined to engage in "subjective line-drawing" between "entertaining and serious, plausible and implausible or weighty or frivolous commentaries." *Discovery*, 2001 WL 1111970 at * 4.

In the *Discovery* case, Judge Baer explained that the clips shown in "Aliens Invade Hollywood" were used transformatively to illustrate various points about this film genre, that the clips revealed little about the plot of "Invasion of the Saucerman" and that *Discovery* had no interest in the movie itself except as it related to the theme of its documentary. Noting that "transformativeness . . . forms the basis of the entire fair use analysis," Judge Baer found it "difficult to imagine a use of a short clip in a commentary/documentary that would not qualify as transformative," and broadly suggested "that owners of films may have little protection against the unlicensed use of fragments of their copyrighted work" in documentaries. 2001 WL 1111970 at * 3, 4 n.7.

Each *Hofheinz* court found that because AIP's films were creative works, the second fair use factor slightly favored the plaintiff, but gave this factor little weight. The third fair use factor in each case was handed to the

defendants, with the courts noting that the use of less than a minute of each feature film was not a significant amount either quantitatively or qualitatively.

Finally, in applying the fourth fair use factor, the *Hofheinz* courts acknowledged that there is a "small market" for documentary uses of film clips, but found that this did not end the analysis. *A&E*, 2001 WL 725285 at * 6. Like Judge Jones in *Video-Cinema*, the *Hofheinz* judges noted the "circularity" of plaintiff's claim to lost clip licensing revenues which, "if carried to its logical conclusion, would eviscerate the affirmative defense of the fair use doctrine since every copyright infringer seeking the protection of the fair use doctrine could have potentially sought a license . . ." *Id.* at * 7. Rejecting Hofheinz's entitlement to a licensing fee for an otherwise fair use of her clips, the three *Hofheinz* courts each found the fourth factor favored defendants as well and that the alleged infringements were, therefore, not actionable. Hofheinz has appealed in each case.

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The district courts in the three Hofheinz cases reached virtually identical conclusions on each of the fair use factors and, in each case, held the defendant's use to be fair.

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Do Transformative Uses Trump Licensing Markets?

By their collective force, the *Hofheinz* decisions — if upheld on appeal — may bring into question the continuing viability of the small (but very real) market that has developed for use of short movie clips in documentaries. More broadly, these cases present the Second Circuit with the opportunity to address and clarify what weight — if any — should be accorded a licensing market when the use at issue is transformative.

In this regard, the *Hofheinz* and *Video-Cinema* decisions are part of a larger shift in emphasis (particularly in the Second Circuit) away from whether an unlicensed use causes market harm to whether the use is transformative. Initially, in *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 566 (1985), the Supreme Court announced that the effect on the market for the copyrighted work was “undoubtedly the single most important element of fair use.” As a result, courts previously tended to give great weight to the fourth fair use factor.

More recently, however, in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Supreme Court retreated from this view and noted that the market factor was not preeminent. Instead, stating that “transformative works . . . lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright,” the Campbell Court emphasized that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against fair use.” *Id.* at 579. See also *id.* at 591 (“when . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred”).

Citing to Campbell, Judge Pierre Leval in the Second Circuit’s most recent fair use outing, *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001), proclaimed that transformativeness is “[t]he heart of the fair use inquiry” and that, as such, “market effect must be evaluated in light of where the secondary use is transformative.” *Id.* at 174, 176. The preeminence accorded transformative uses in fair use analyses has also recently been emphasized in other circuits as well.

For example, in *The Wind Done Gone* case, the Eleventh Circuit not only stated that the “critical question in analyzing the first factor is determining whether the secondary work is ‘transformative,’” but then having found *The Wind Done Gone* “at least in part” a transformative parody, the Court analyzed the remaining factors in light of this transformative use. *Suntrust Bank v. Houghton Mifflin Co.*, 2001 WL 1193890 (11th Cir. Oct. 11, 2001).

How, then, should the Second Circuit deal with the *Hofheinz* cases in which, while the challenged documentary uses are transformative, the plaintiff argues with some force on appeal that “[p]laying for excerpts of copyrighted [motion pictures] is the custom and norm in the entertainment industry.” (Brief of Plaintiff-Appellant in *Hofheinz v. AMC* at 37). Although the Second Circuit has not previously decided a case that directly presents this tension between the first and fourth fair use factors (i.e., licensing of transformative uses),

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its prior dicta indicates that transformativeness may well carry the day. For example, in *Castle Rock v. Carol Publishing*, 150 F.3d 132 (2nd Cir. 1998), the panel — anticipating the very issue in the *Hofheinz* cases — expressed the view that:

copyright owners may not preempt exploitation of transformative markets . . . by actually developing or licensing others to develop those markets. Thus, by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets.

150 F.3d at 145 n. 11. See also *Twin Peaks Productions, Inc. v. Publication Int’l. Ltd.*, 996 F.2d 1366, 1372 (2nd Cir. 1993) (“[a] copyright holder’s protection of its markets for derivative works of course cannot enable it to bar publication of works of comment, criticism or news reporting”)

In other cases, however, the Second Circuit has articulated a standard somewhat more protective of copyright owners. For example, in *American Geophysical Union v. Texaco*, 60 F.3d 913 (2nd Cir. 1995), the court indicated that

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the appropriate fourth factor inquiry is whether an unlicensed use “impairs traditional, reasonable or likely to be developed [licensing] markets,” and that “an unauthorized use should be considered ‘less fair’ when there is a ready [licensing] market...for the use.” *Id.* at 930, 931. *Texaco*, however, involved non-transformative copying of the entire copyrighted work (in that case, scientific journal articles).

The *Hofheinz* and *Video-Cinema* appeals should produce some much-needed guidance by the Second Circuit on whether news and documentary uses of short movie clips indeed constitute a “fair use market.” On a practical level, however, even if the Second Circuit so holds, the realities of the clip licensing market may not change drastically. For example, licensing fees are often paid simply to get access to the physical copies of older, hard-to-find films — a practice that presumably will continue. So too, producers and networks may have ongoing business relationships with motion picture studios and other content providers that go well beyond the mere need for clips in documentaries. As such, networks may continue to pay clip license fees for what would otherwise be transformative fair uses in order to maintain those relationships and to ensure a continuing flow of content for larger uses — such as TV exhibition of full-length films — that obviously require copyright holder consent.

Perhaps the biggest winners should the *Hofheinz* decisions be upheld on appeal may be the small independent documentary makers that may no longer feel compelled to pay clip licensing fees to avoid the costs and — at least till now — great uncertainty of fair use litigation. Finally, as Judge Sifton pointed out in the *AMC* case, to the extent that the *Hofheinz* and *Video-Cinema* decisions encourage creation of new transformative works, the ultimate beneficiary is the public.

Robert Balin and Gregory Welch, who practice at Davis Wright Tremaine LLP, represent CNN in the Video-Cinema case. The plaintiff's counsel in Video-Cinema is Gregory A. Sioris, who is also plaintiff's counsel in the Hofheinz cases. On the defense side in the Hofheinz suits, the attorneys for AMC Productions are James W. Dabney and Jonathan E. Moskin of Penny & Edwards LLP, and the attorneys for A&E Television Networks and Discovery Communications, Inc. are Douglas C. Fairhurst and Sandra Edelman of Dorsey & Whitney.

Tribune Wins Trademark Claim on Use in Headline and Memorabilia

By James Klenk

In affirming a district court finding on summary judgment in a trademark infringement dispute, the Seventh Circuit held, in *Packman v. Chicago Tribune Co.*, 267 F.3d 628 (7th Cir. September 27, 2001), that the fair use defense applied and there was no likelihood of confusion, when the *Chicago Tribune* ran a headline that used a trademarked phrase — “The joy of six” — to describe the Chicago Bulls’ sixth NBA championship. The paper then reproduced the headline — either with the entire front page or in a collage with five other headlines describing Bulls championships — on promotional memorabilia.

On June 15, 1998, the *Chicago Tribune*, along with several other papers throughout the country, used the phrase “The joy of six” as a headline describing the Chicago Bulls’ sixth NBA championship. As it does with its front pages describing other historic events, the *Tribune* replicated the entire front page onto T-shirts, posters, plaques and other memorabilia. The *Tribune* also contracted with Front Page News, Inc. to produce a collage t-shirt, that contained “The joy of six” headline, accompanied by the *Chicago Tribune* masthead, along with *Tribune* headlines announcing the Bulls five earlier NBA championships.

The plaintiff, Diana Packman, had a trademark for the phrase “The joy of six” for “entertainment services in the nature of basketball games” and sued the *Tribune* for trademark infringement. Packman did not complain about the use of “The joy of six” in the paper, but claimed that the reproduction of the headline on promotional material violated the Lanham Act.

In affirming the district court and finding in the *Tribune*’s favor, the Seventh Circuit first held that the fair use defense applied to the *Tribune*’s use of “The joy of six;” that is, that the phrase was not used as a trademark, that it was used descriptively, and that it was used in good faith. The court found that, since on all of the promotional items sold by the *Tribune* the *Tribune* masthead was prominently displayed, it was the *Chicago Tribune* masthead, and not “The joy of six” headline, that indicated the source of the promotional items at issue and thus that the

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Tribune Wins Trademark Claim on Use in Headline and Memorabilia

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Tribune had not used “The joy of six” as a trademark.

The court also found that “The joy of six” was used descriptively to describe a newsworthy event and that “this use did not change with the reproduction of the *Tribune’s* front page onto championship memorabilia.” 267 F.2d at 641. Finally, the court found that, even though the *Tribune* knew of Packman’s trademark, its use of the phrase was in good faith because “The joy of six” headline always appeared in conjunction with the *Chicago Tribune* masthead and because the decision to reproduce the front page on promotional items was made without input or regard to the specific editorial content of the front page.

The Seventh Circuit ruled, alternatively, that even if the fair use defense did not apply, there was no genuine issue of material fact that consumers were likely to be confused about the source of the *Tribune’s* goods. The court found the marks distinctive, largely because “The joy of six” as used by the *Tribune* was always identifiable as a newspaper headline. The court also found that, because the *Chicago Tribune* masthead was always present with the headline, the *Tribune* had no intent to pass off its goods as plaintiff’s. Likewise, the court found that the *Tribune* had merely used a descriptive phrase descriptively, and that plaintiff failed to provide any legitimate evidence of actual confusion.

James A. Klenk and Steven L. Merouse of Sonnenschein, Nath & Rosenthal in Chicago represented the Tribune Co. Reginald J. Hill of Chicago represented Packman.

Opinion was by Judge Ripple, joined by Judges Manion and Kanne.

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In Wrongful Death Case, Court Denies NAMBLA's Motion to Dismiss

Family of a Murdered Boy Claims Material on Website Motivated Their Son's Killer

A District Court for the District of Massachusetts denied a motion to dismiss brought by the North American Man Boy Love Association ("NAMBLA"), after the family of a murdered boy claimed NAMBLA should be held liable for a crime committed by a man who viewed their website. See *Curley v. NAMBLA, et. al.*, 2001 U.S. Dist. LEXIS 18305 (Sept. 27, 2001). The family of Jeffrey Curley filed an action for damages under the Massachusetts wrongful death statute and the Ku Klux Klan Act after their 10-year-old son was murdered by then-neighbor Charles Jaynes. The family claimed Jaynes viewed NAMBLA's website "immediately prior" to committing his crime. See *LDRC Libelletter*, Sept. 2000 at 38.

The Curleys' complaint charged that NAMBLA and its various named members maintain information on NAMBLA's website explicitly describing how members can achieve the organization's goals of promoting pedophile activity and exchanging child pornography.

NAMBLA moved to dismiss the complaint for failure to state a claim on which relief can be granted, lack of personal jurisdiction and improper venue. In support of their motion to dismiss, NAMBLA contended that the content of its website and its newsletter was speech protected by the First Amendment because it did not amount to an incitement to imminent lawless action.

The court acknowledged that *Brandenburg* will not allow punishment of speech that is "mere advocacy," but also noted that speech "which counsels and procures criminal conduct will support liability for 'aiding and abetting' in both the criminal (citation omitted) and civil contexts," citing *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), (holding a publisher liable for wrongful death after it gave 'detailed factual instruction on how to murder and become a professional killer' in *Hit Man: A Technical Manual for Independent Contractors*). The court then denied the motion to dismiss for failure to state a claim on which relief can be granted because "it is not clear that the *Brandenburg* doctrine would foreclose liability on any set of facts that might be shown."

The court also said a "motion to dismiss for failure to state a claim should be granted only where it is clear that there is no set of facts that is consistent with the allegations that could support liability on any of the theories advanced by the plaintiff." The court felt there had been an inadequate amount of time for a sufficient factual record to be established.

The court also denied NAMBLA's motion to dismiss for lack of personal jurisdiction and for improper venue. The court said the defendants had waived the right to assert those defenses by "failing to raise the defenses of personal jurisdiction and improper venue in their motion for a more definite statement." The court also said that venue was proper because Jaynes's contacts with NAMBLA, as well as the abduction of Jeffrey Curley, had occurred within the district.

The decision was issued by District Judge George A. O'Toole, Jr. NAMBLA and its members were represented by Sarah Wunsch of the Massachusetts Civil Liberties Union Foundation. The Curleys were

represented by Lawrence W. Frisoli of Frisoli & Frisoli in Cambridge, Mass., and Patrick T. Gillen of Ann Arbor, Mich.

NAMBLA contended that the content of its website and its newsletter was speech protected by the First Amendment because it did not amount to an incitement to imminent lawless action.

California Trial Court Dismisses Case Over Violent Song Lyrics

By Rex S. Heinke and Jessica M. Weisel

In a case with extremely grave implications for the entertainment industry, the California Superior Court in San Luis Obispo, on Oct. 29, 2001, sustained without leave to amend demurrers filed by the band Slayer, its individual members, its record company and its various music distributors and publishers (collectively the "music industry defendants") in *Pahler v. Slayer, et al.*, S.L.O.S.C. Case No. CV 79356.

The case centered around song lyrics by the "death-

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California Trial Court Dismisses Case Over Violent Song Lyrics

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metal” band Slayer. The plaintiffs sued the music industry defendants, claiming that Slayer songs incited three teenage boys to kill the plaintiffs’ teenage daughter. After a previous demurrer, the plaintiffs settled on two legal theories. The first cause of action, never before litigated in California, relied on California’s Unfair Competition Law (the “UCL”), Business and Professions Code section 17200, *et seq.*, and asserted that the music industry defendants unlawfully and unfairly marketed Slayer songs to minors. The second cause of action was for wrongful death and maintained that the Slayer songs incited the teenagers to commit the murder. This case has been the focus of nationwide media attention because of the public discussion about violence in the media.

The Superior Court Rejected The Unfair Business Practices Claim

The plaintiffs’ unfair business practice claim principally alleged that the music industry defendants violated Penal Code sections 313.1 (disseminating “harmful matter”), 31 (aiding and abetting), 653f (soliciting a crime), and 272 (contributing to the delinquency of a minor). They also alleged that the defendants engaged in “unfair” practices by disseminating lyrics containing profanity, describing sexual activity and allegedly encouraging minors to commit crimes. The Superior Court rejected these claims.

Plaintiffs Could Not State A Claim For Unlawful Business Practices Because The Defendants Violated No Laws

THE SONGS WERE NOT “HARMFUL MATTER”

The heart of plaintiffs’ claim centered on Penal Code section 313.1, which prohibits the dissemination of “harmful matter.” Section 313.1 defines “harmful matter” as:

[M]atter, taken as a whole, which to the average person, applying contemporary statewide standards, ap-

peals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Cal. Penal Code § 313. This is a variation of the three-prong test that the United States Supreme Court set forth in *Miller v. California*, 413 U.S. 15 (1973), for obscenity.

Judge E. Jeffrey Burke rejected plaintiffs’ argument that Slayer’s music was harmful matter, because Penal Code section 313 only applies to sexual content. Relying on *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-505 (1985), and *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957), the court held that the Slayer lyrics did not, taken as

a whole, appeal to the prurient interest, which is a “shameful or morbid interest” in sex.

The Superior Court concluded that the song lyrics did not meet this test, because the lyrics focused on violence, not sex. Although it termed the

lyrics “offensive and abhorrent because of the callous violence described,” the Superior Court held that speech describing violence could not violate Penal Code section 313.

THE SONGS COULD NOT INCITE VIOLENCE

The Superior Court also rejected plaintiffs’ claim that the music industry defendants caused the teenage boys’ crimes.

This is not the first time that plaintiffs have sued media defendants for allegedly inciting violent behavior in listeners. In California, numerous cases have rejected such claims on First Amendment grounds, holding that the creators, producers and distributors of music, television programs and motion pictures cannot be liable for inciting violence under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See e.g., *McCullum v. CBS, Inc.*, 202 Cal.App.3d 989 (1988) (dismissing claim against Ozzy Osbourne and CBS on grounds that lyrics of song “Suicide Solution” could not have incited suicide of plaintiffs’ decedent); *Olivia N. v.*

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California Trial Court Dismisses Case Over Violent Song Lyrics

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National Broadcasting Co., 126 Cal.App.3d 488 (1981) (First Amendment protected broadcaster of television movie against allegation that plaintiff was attacked and raped by persons who had seen and discussed similar scenes in movie). Other cases have reached similar conclusions. See *James v. Meow Media, Inc.*, 90 F.Supp.2d 798 (W.D. Ky. 2000); *Davidson v. Time Warner Inc.*, 25 Media L. Rep. 1705 (S.D. Tex. 1997); *Yakubowicz v. Paramount Pictures Corp.* 404 Mass. 624, 536 N.E.2d 1067 (1989); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987); *De-Filippo v. National Broadcasting Co. Inc.*, 446 A.2d 1036 (R.I. 1982); *Walt Disney Productions Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981); *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D. Fla. 1979).

Relying on the controlling authority of *McCollum*, in particular, the Superior Court held the music industry defendants could not be liable for adding and abetting, soliciting a crime or contributing to the delinquency of a minor. Quoting *McCollum*, the Superior Court stated:

[M]usical lyrics and poetry cannot be construed to contain the requisite “call to action” for the elementary reason that they simply are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory. Reasonable persons understand musical lyrics and poetic conventions as figurative expressions which they are. No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action. To do so would indulge a fiction which neither common sense nor the First Amendment will permit.

McCollum, 202 Cal.App.3d at 1002. Thus, the remaining grounds for plaintiffs unlawful business practices claims, all variations on the incitement doctrine, could not survive First Amendment scrutiny.

The Superior Court Refuses To Regulate The Marketing Of Slayer Music

A fundamental concern articulated by the Superior Court is that the marketing of music containing profanity, graphic violence and sexual conduct described in Slayer’s music is

not prohibited by any statute. To provide any relief sought by plaintiffs, under the “unfairness” prong of the UCL, the Court would have had to create its own restrictions. This, however, is the province of the legislature and executive, and not the judicial branch:

Although it has a broad scope, the sweep of the UCL is not unlimited. It cannot invest trial courts with the power to fashion new rules, regulations or orders that restrict speech in the name of protecting minors from harmful or indecent matter. No reported case has subjected non-commercial speech to judicial scrutiny and the UCL remedies of injunctive relief and restitution.

Moreover, even if it were “theoretically possible” for a court to apply the UCL in such a fashion, the Superior Court recognized “courts are neither empowered nor equipped to do so in cases where the issues would require them to address and to manage complex areas of social or economic policy.” This, the Superior Court held, “is a distinctly legislative function.”

Accordingly, unless the legislature passes content-based legislation to restrict the distribution to children of Slayer music — a restriction which would be subject to strict scrutiny — the UCL cannot be employed to create such restrictions.

The Superior Court Rejected The Wrongful Death Claim

Reiterating its incitement analysis, the Superior Court also rejected the wrongful death claim. Under *McCollum*, the First Amendment bars imposition of liability for protected speech. Because the Slayer songs were protected, the wrongful death action could not lie.

Future Proceedings

The plaintiffs have publicly announced that they intend to appeal the decision to the California Court of Appeal.

Rex S. Heinke is a member of Greines, Martin, Stein & Richland in Beverly Hills, Calif. Jessica M. Weisel is an associate for Greines, Martin, Stein & Richland.

District Court Relies on CDA to Dismiss Defamation Claim Against Kinko's

The Lawsuit Was Filed After a Kinko's Computer User Posted Allegedly Defamatory Remarks On-line

A South Dakota District Court dismissed a defamation claim filed against Kinko's, relying on § 230 of the Communications Decency Act. *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F.Supp.2d 1069 (D.S.D. Sept. 27, 2001). Kinko's was alleged to have rented out the computer and Internet access from which the defamatory statements were published. It was the second defamation case in less than a month to apply the immunity granted to internet providers under § 230 of the CDA in a novel context. The other case was *Schneider v. Amazon.com, Inc.*, in which the Washington State Court of Appeals held that federal law provides immunity to web site operators for lawsuits arising from user content posted on their sites. 2001 Wash. App. LEXIS 2086, 29 Media L. Rep 2421 (Wash. App. 2001).

Both the *Schneider* case and the *PatentWizard* case cite to *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), the seminal case applying § 230 immunity.

Zeran was a case against an Internet service provider. The *Schneider* case was against a website, and *PatentWizard* was against a computer provider.

The *PatentWizard* case arose when Michael Neustel, a lawyer specializing in patents and the owner of PatentWizard, was hosting a "chat room" session about software recently released by PatentWizard. One of the participants in the chat room was a user with the screen name "Jimmy." During the session, Jimmy, who was allegedly logged on from a Kinko's computer, made "numerous disparaging statements about Neustel and PatentWizard." The plaintiffs claimed these comments "defamed them and interfered with their prospective business relationships."

The plaintiffs, subsequent to the chat room session, claimed they were unable to locate "Jimmy" because of the configuration of the Kinko's computer network. Kinko's does not keep a record of the identities of the people who rent its computers, and does not give an Internet Protocol address to each of its rented computers. The plaintiffs claimed they were unable to pursue legal remedies against "Jimmy" and thus filed suit against Kinko's.

The plaintiffs' suit brought six claims against Kinko's: (1) negligent failure to monitor its computer network; (2) negligent failure to maintain proper and adequate records; (3) negligent spoliation of evidence; (4) intentional spoliation of evidence; (5) aiding and abetting defamation; and (6) aiding and abetting interference with prospective business relationships. Kinko's made a motion to dismiss the action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The court granted the motion after it determined that the complaint sought to treat Kinko's as a publisher, and thus bringing Kinko's within the statutory protections of the CDA.

According to the court, the complaint sought to treat Kinko's as a publisher in two ways. First, according to the court, "it seeks to treat Kinko's as a distributor by imposing

liability upon Kinko's for its conduct in disseminating Jimmy's statements." Citing *Zeran*, the court said this "is itself prohibited by § 230." Second, the court held that the complaint "seeks to place

Kinko's in Jimmy's shoes, by holding Kinko's responsible for alleged defamatory matter that was published by Jimmy." Quoting *Zeran*, the court said the "plain language of § 230 'creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'"

In the short opinion, the court noted that the "legislative resolution" of the policies surrounding internet provider immunity "shape the content of communication over the Internet." The court felt § 230 "errs on the side of robust communication." Thus, to hold Kinko's liable for a third-party's postings would be contrary to the legislative intentions of § 230.

The opinion was written by Chief Judge Lawrence L. Piersol. Plaintiff's counsel was Ronald A. Parsons of Johnson, Heidepreim, Miner, Marlow & Janklow in Sioux Falls, S. Dak. and Matthew S. McCaulley of Hynes & McCaulley in Sioux Falls. Defendant's counsel was Jeffrey C. Clapper of Boyce, Murphy, McDowell & Greenfield in Sioux Falls and Raymond L. Sweigart of Blair Jacobs, Pillsbury, Winthrop LLP in McLean, Vir.

[T]o hold Kinko's liable for a third-party's postings would be contrary to the legislative intentions of § 230.

Executive Order Allows Withholding of Presidential Records

Either Former or Sitting President May Order Secrecy; Action Criticized

Both current and former presidents will have authority to keep presidential records secret for indeterminate periods under an executive order signed Nov. 1 by President Bush. The order was issued after the President acted three times to delay the release of records from the Reagan administration, which were to become public in January.

Reagan's The First

The Reagan administration was the first subject to the Presidential Records Act of 1978, Pub. L. No. 95-961, 92 Stat. 2523-27, codified as amended at 44 U.S.C. §§ 2201-7. That legislation was passed in the wake of the Nixon administration's attempts to withhold tapes and files from public disclosure, and provided that it would first apply to the president elected in 1980 – Ronald Reagan.

The Act provides that most presidential and vice-presidential records be made public after five years. 44 U.S.C. § 2204(b)(2). However, the law also allows an outgoing president to restrict disclosure of records containing defense or foreign policy secrets and "confidential communications requesting or submitting advice between the president and his advisors, or between such advisors," for up to 12 years after the president leaves office. 44 U.S.C. § 2204(a), (b)(1).

A separate national security provision allows the administration of a sitting president to keep presidential and other documents containing classified defense or foreign policy information secret for up to 25 years, and longer in some circumstances. See Exec. Order 12958, 60 Fed. Reg. 19825 (1995), as amended by Exec. Order 12972, 60 Fed. Reg. 48863 (1995) and Exec. Order 13142, 64 Fed. Reg. 66089 (1999), set out at 50 U.S.C. § 435 note.

Prior to 1980, a president or his family decided which records to make public, although most presidents since Franklin Roosevelt have donated their records to the government. While the Presidential Libraries Act, ch. 859, 69 Stat. 695 (1955), codified as amended at 44 U.S.C. § 2112, established a system of repositories for presidential docu-

ments, the papers were still considered private property of the presidents until the Presidential Records Act declared that "[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records ..." 44 U.S.C. § 2202.

Executive Order 12667

Two days before leaving office in January 1989, President Reagan signed an executive order requiring the Archivist of the United States to give both the sitting and former president 30 days notice of the impending release of the former president's records. See Exec. Order 12667, 54 Fed. Reg. 3403 (1989).

Within that period, the sitting president, upon the rec-

ommendation of the Counsel to the President or the Attorney General, could either request a delay in the release of the records, or order that the records be withheld indefinitely under a claim of executive privilege.

After a sitting president decided to withhold the records, the Archivist was forever prohibited from disclosing the records "unless directed to by [a sitting] President or by a final court order." Exec. Order 12667, § 3.

The former president could also request that records be withheld under an executive privilege claim, but the final decision on whether the material should be public was made by the Archivist. Exec. Order 12667, § 4.

Bush Delays, Then Issues Order

As the first administration subject to the Presidential Records Act, the internal policy papers of President Reagan and Vice President George H.W. Bush were to become accessible to the public on Jan. 20, 2001 – 12 years after they left office in 1989.¹ The documents, which include 68,000 pages of confidential communications between Reagan and his advisors, are stored at the

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Executive Order Allows Withholding of Presidential Records

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Ronald Reagan Presidential Library and Museum in Simi Valley, Calif.

After requesting three extensions this year, on Nov. 1, President George W. Bush issued a new executive order, Exec. Order 13233, 66 Fed. Reg. 56025 (2001), to replace the order issued by President Reagan.

The new order gives sitting and former presidents 90 days, not 30 days, to review the material. Exec. order 13233, § 3(b). And, at the conclusion of this period, *either* may block disclosure of the documents on the basis of executive privilege. See *id.*, § 3(c), (d).

For Vice Presidential records, either the sitting president or the former vice president may block disclosure on this basis. *Id.*, § 11. This marks the first time that a former vice president will have control over his records; under the previous executive order, only former presidents could request that documents from their former vice presidents be withheld.

Records withheld from public access would still be available to the sitting President, the Congress, and the courts as provided for under existing law. Exec. Order 13233, § 6. Others seeking records withheld under the order can take their cases to court, but the records will be disclosed only by “a final and nonappealable court order.” *Id.*, § 3(d)(1)(i), (ii), § 6.

Legal Basis

In a section titled “Constitutional and Legal Background,” the Bush order cites three grounds as bases for the provisions of the order: the 12-year withholding authorized by the Presidential Records Act and the Supreme Court’s decisions in *U.S. v. Nixon*, 418 U.S. 683 (1974) and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

The section cites *Nixon v. Administrator of General Services* for the principles that “constitutionally based privileges available to a President ‘survive[] the individual President’s tenure,’” Exec. Order 13233, § 2(b), *citing Nixon v. Administrator* at 449, and that “a former Presi-

dent, although no longer a Government official, may assert constitutionally based privileges with respect to his Administration’s Presidential records ...” Exec. Order 13233, § 2(b).

Despite this statement, in its decision in *Nixon v. Administrator* the Supreme Court did give some deference in the case to opinions of presidents subsequent to Nixon, stating that “the fact that neither President Ford nor President Carter supports [President Nixon’s] claim detracts from the weight of his contention that the [Presidential Recordings and Materials Preservation] Act² impermissibly intrudes into the executive function and the needs of the Executive Branch.” *Nixon v. Administrator* at 449. In light of the Act’s requirement that the material be evaluated by

professional archivists for sensitive security and personal materials, *id.* at 450-52, in a 7-2 decision the Court upheld the lower court’s denial of an injunction preventing release of the records.

U.S. v. Nixon, 418 U.S. 683 (1974), was the first Supreme Court case to recognize that there may be an “executive privilege” for presidential materials. The case is cited in Bush’s executive order in support of the statement that

The Supreme Court has held that a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a ‘demonstrated, specific need’ for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding.

Exec. Order 13233, § 2(c), *citing U.S. v. Nixon* at 713.

In some press reports on the Executive Order, this has been incorrectly portrayed as the standard for obtaining presidential records under the order. But this reference is included within section 2 of the order, titled “Constitutional and Legal Background,” not section 3, “Procedure for Administering Privileged Presidential Records.” In this location, the reference to the alleged

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The new order gives sitting and former presidents 90 days to block disclosure of the documents on the basis of executive privilege.

Executive Order Allows Withholding of Presidential Records

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“demonstrated, specific need” standard is legally non-operative, similar to *dicta* in a court decision or a statement of legislative findings in legislation.

It is possible, however, that this will become a *de facto* standard if the Administration chooses to withhold documents and force requestors to litigate for access.

Moreover, the statement represents an overly broad reading of the decision in *U.S. v. Nixon*. In the decision, the Supreme Court unanimously³ refused to quash a subpoena from the Watergate prosecutor for tape recordings and documents relating to Nixon’s conversations with aides and advisers. “The generalized assertion of [executive] privilege,” the Court held, “must yield to the demonstrated, specific need for evidence in a pending criminal trial.” *U.S. v. Nixon*, at 713.

Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

Id. at 706.

In other words, the Court held that the Watergate prosecutor had shown a “demonstrated, specific need” which overcame any claim of executive privilege. But the Court did *not* hold that the only way to overcome an executive privilege claim was to show such a compelling need.

The D.C. Circuit went further in deciding a subsequent case in the Nixon tapes saga. After *Nixon v. Administrator* was remanded, the District Court granted summary judgment to the Archivist. The D.C. Circuit affirmed the grant in an appeal brought by Nixon, and rejected Nixon’s claim that those seeking access to his presidential tapes should be required to show a “particularized need.” See *Nixon v. Freeman*, 670 F.2d 346, 359 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1035 (1982).

We also see no justification for requiring the Ad-

ministrator to condition access upon a showing of particularized need. We do not understand “presumptive” to mean that all the tapes in the Administrator’s custody must be presumed fully to implicate the [executive] privilege, and that would-be listeners must override that presumption with a showing of need.

Id. at 359.

After the decision in *Nixon v. Freeman*, the Archivist promulgated regulations for access to the Nixon materials, as required by the Presidential Recordings and Materials Preservation Act. PRMPA § 104(a). And while it was not included in the regulations, the Archivist announced that, upon the advice of the Justice Department, he would withhold any material for which Nixon claimed executive privilege, and the requester would have to go to court to obtain access to such materials.

This policy was challenged, and rejected, in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988).

We read the statute, as do appellees, as imposing on the Archivist the responsibility to arrange for disclosure of a category of the Nixon papers. The burden to seek disclosure is not, as is largely true of the Freedom of Information Act, 5 U.S.C. § 552 (1982), for example, placed upon the public.

Public Citizen at 1480.

With the regulations settled, the Archivist proceeded to make the Nixon tapes available to the public, the only exceptions under the statute being material related to national security and Nixon’s private matters. A new dispute arose when the Archivist announced his intention to keep, in non-public files, the portions of the tapes dealing with private matters. Nixon argued that under the statute these materials had to be returned to him, and all other copies destroyed. The district court granted summary judgment to Nixon, and the D.C. Circuit affirmed.

The text and structure of the Act indicate that Congress plainly intended § 104(a)(7) to require the

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return to President Nixon of all versions of materials deemed by the Archivist “not likely to be related” to Watergate and “not otherwise of general historical significance.” ... The Act specifies that the materials to be given to Nixon under § 104(a)(7) be given to him “for his *sole custody and use*.” If the Archivist were to maintain versions of the conversations contained in these materials, then Nixon’s estate could not be said to exercise either sole custody over them or sole use of them. Rather, custody and use would be shared with the Archivist. (Citations omitted, emphasis supplied by court.)

Kutler v. Carlin, 139 F.3d 237, 242 (D.C. Cir. 1998).

The cases involving Nixon’s records finally ended in 2000, when the government agreed to pay his estate \$18 million for the records and tapes.

In another relevant case, in 1995 a federal court held that an agreement between former President George W. Bush and former Archivist Don Wilson, which would have given the former president control over electronic records created by aides during his administration, violated the Presidential Records Act and was unconstitutional. *See American Historical Ass’n v. Peterson*, 876 F. Supp. 1300 (D.D.C. 1995).

Members of Congress Object to New Order, Lawsuit Threatened

At a Nov. 6 hearing on the new order held by the House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, historians, academics, public interest advocates and Republican members of Congress urged Bush to rethink the order.

“The bottom line is that the new order appears to violate not only the spirit but also the letter of the Presidential Records Act,” Rep. Doug Ose (R-Calif.) said at

the hearing. “In 1978, Congress very clearly expressed its clear intent to make presidential records available for congressional investigations and then for the public after a 12-year period. This new order undercuts the public’s rights to be fully informed about how this government — the people’s government — operated in the past.”

While no Democrats attended the hearing because of other commitments, Reps. Henry Waxman (D-Calif.) and Janice Schakowsky (D-Ill.) submitted a letter to President Bush in which they stated that the order “violates the intent of Congress and keeps the public in the dark.”

Subcommittee chair Rep. Stephen Horn (R-Calif.) said that Bush should “revisit” the order, and said that he may introduce legislation on the issue.

Acting Assistant Attorney General M. Edward Whelan

defended the order, saying that it simply clarified some of the issues in Reagan’s order.

But Rep. Ose was not impressed. “If there is no intended change, then why the change in the wording?” he

asked.

Meanwhile, attorney Scott Nelson of the Public Citizen Litigation Group told the *Christian Science Monitor* that his group and historical associations will “very likely file litigation” challenging Bush’s order.

“The bottom line is that the new order appears to violate not only the spirit but also the letter of the Presidential Records Act,” said Rep. Doug Ose (R-Calif.)

¹ Under the statute, papers from George H.W. Bush’s term as president are due to be released on Jan. 20, 2005 — 12 years after he left that office.

² The Presidential Recordings and Materials Preservation Act, Pub. L. 93-526, title I, §§ 101-106 (1974), 88 Stat. 1695, codified at 44 USCS 2107 note, which applied only to the Nixon Administration, required the National Archives to take custody of all documents, recordings, and other materials from that administration, and promulgate regulations for public access to such materials, subject to screening of the materials for national security and to return private papers to Nixon.

³ Justice Rehnquist, who served in Nixon’s Justice Department and was appointed by him to the court, did not participate in the decision.

Reporter Turns Over Notes After Missouri Supreme Court Declines to Hear Case

By Jean Maneke

In October, an appellate court in the state of Missouri declined to take the opportunity to address directly the issue of privilege for a reporter's unpublished notes of an interview with a criminal suspect, leaving stand a trial court's order for the reporter to testify in a deposition in the criminal case. *White v. Jackson*, No. SC83977 (Mo. Oct. 16,

UPDATE: Leggett Dealt Another Setback, Remains in Jail

The 5th Circuit Court of Appeals has refused to rehear the case of Vanessa Leggett, the freelance writer from Houston who remains in jail for refusing to testify before a federal grand jury and turn over the research materials she has gathered while working on a book about a Houston society murder. The 5th Circuit has also rejected a request to release Leggett on bond.

Leggett was doing research on the 1997 murder of Houston resident Doris Angleton when a federal grand jury looking into the murder issued a broad subpoena to Leggett. See *LDRC LibelLetter*, August 2001 at 7. A district court held Leggett in contempt when she refused to comply with the subpoena. Leggett has been in jail since July 20.

In August, the 5th Circuit Court of Appeals let stand the decision of a three-judge panel in Houston that held there was no applicable reporter's privilege that would allow Leggett to refuse to testify and withhold research. See *In Re Grand Jury Subpoena*, No. 01-20745 (5th Cir. Aug. 17, 2001).

Leggett has long surpassed the record for incarceration of a journalist in America. The previous record for incarceration of a journalist is believed to have been set by a Los Angeles reporter almost 30 years ago. William Farr, then with the *Los Angeles Herald Examiner*, was jailed for 46 days in 1972 for refusing to reveal the source of leaked documents in the Charles Manson trial.

Leggett's only remaining appeal would be to the United States Supreme Court. Leggett is represented by Mike DeGeurin of Foreman, DeGeurin, Nugent & Gerger in Houston.

2001).

Marshall White, a reporter with the *St. Joseph*, [Missouri] *News-Press*, interviewed the suspect in a murder case and did a story immediately thereafter. The story dealt in part with the suspect's claim that he did not confess to or commit the crime and Busey's allegations that the sole deputy present during his police interview twisted the story, deliberately framing the suspect.

Shortly after the story ran in May, the prosecutor subpoenaed the reporter to appear at an upcoming hearing and produce his notes. At a later point, the prosecutor also issued a subpoena for the reporter's deposition. The *St. Joseph News-Press* filed a motion for a protective order and to quash the subpoena.

In September, the reporter appeared and refused to answer questions concerning his interview with the suspect or to produce his notes. At a hearing the next week, the court then took up the pending motion filed by counsel for the reporter.

There is no statutory privilege in Missouri for protecting a reporter's confidential notes. The reporter, however, argued that there was both a First Amendment privilege, as set out in the line of cases including both *Branzburg v. Hayes*, 408 U.S. 665 (1972) and *U.S. v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), and a privilege based on state case law, including *CBS, Inc., v. Campbell*, 645 S.W.2d 30 (Mo. App. 1982), *Continental Cablevision v. Storer Broadcasting*, 583 Fd. Supp. 427 (E.D.Mo. 1984), and *State v. Ely*, 954 S.W.2d 650 (Mo. App. 1997), protecting the material obtained by Mr. White in the process of gathering news.

The prosecuting attorney argued that *CBS Inc. v. Campbell* supported the proposition that there was no shield for a reporter in a criminal investigation, and that the *Branzburg* decision controlled.

The trial court issued a written opinion finding some jurisdictions had recognized a qualified privilege for reporters in criminal cases, but generally only in divulging the identity of and information obtained from a confidential source. Further, it stated, Missouri had never recognized such a privilege in criminal cases. See *State of Missouri v. Busey*, No. 01-CR-72130-1 (Sept. 14, 2001).

Additionally, the court noted that this was not a confi-

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Reporter Turns Over Notes After Missouri Supreme Court Declines to Hear Case

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dential source situation, and that part of the interview was published in the paper. Although no evidence was produced by the prosecutor to show he had sought the information from other sources, the court ruled that no alternative means of obtaining the same information existed because the defendant could not be forced to testify and the information sought related to his alibi defense.

The Court of Appeals denied a petition for writ of prohibition, as did the Missouri Supreme Court.

The decision was made to go no further, in part because of factual considerations involving the notes. Mr. White, a veteran reporter, had done an excellent job with the interview, having limited his note-taking to the few direct quotes he wanted in the newspaper story. The notes sought contained no unpublished information. Further, by the time this process was completed, enough time had passed that the reporter could honestly testify that he had little independent recollection of any other actual statements made to him by the suspect, other than to say that the story as written was a true and accurate reflection of the interview. In short, although the appeal was dropped, the newspaper was comfortable at that point that the prosecutor would obtain little, if anything, helpful.

And, further, the prosecutor was also relying on a signed waiver of rights by the defendant, which included the statement that "anything you say can and will be used against you in court," and which was marked as being "regarding interview with News-Press...."

Finally, inasmuch as the appellate court process had resulted in only denials of writs, no permanent damage was done to case law in the state of Missouri on this subject, leaving for another day the opportunity to broaden the reporter's privilege issue in the state.

Jean Maneke, of The Maneke Law Group in Kansas City, Mo., represented Marshall White and the St. Joseph News-Press.

The first issue of the 2002 LDRC BULLETIN, a REPORT ON TRIALS AND DAMAGES will be published at the end of January 2002.

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Courts Take Aim Against Post-Verdict Media Access to Jurors

By David L. Cook

In a recent flurry of activity, several courts have acted to restrict media access to jurors after verdicts have been rendered. Most significantly, the Fifth Circuit affirmed an order precluding any contact with jurors after their discharge without prior court approval, and a New Jersey state court barred media contact with and media descriptions of jurors, even descriptions of what was evident to the reporters in the courtroom. These and other recent decisions may be harbingers of a trend to restrict access to jurors, which threatens significantly to impair the media's ability to gather and report information about newsworthy trials.

Fifth Circuit Affirms Blanket Prohibition

The Fifth Circuit's ruling arose in the first personal injury suit to go to trial involving a Ford Explorer sport utility and allegedly defective Bridgestone/Firestone tires. The parties in that case, *Rodriguez v. Bridgestone/Firestone, Inc.*, Civil Action No. M-01-165 (S.D. Tex.), reached a settlement during the fourth day of jury deliberations. Immediately following settlement, on August 24, 2001, District Judge Filemon B. Vela discharged the jurors and advised them not to discuss the case publicly. On August 29, 2001, Judge Vela entered a subsequent order directing that "no contact shall be entertained by any individual with any juror who served in this case without written application and specific approval by the Court."

The Associated Press ("AP") and Freedom Texas Newspapers ("Freedom") separately moved to vacate this order. The news organizations argued that interviewing jurors about their own reactions to this highly publicized — and resolved — case implicated constitutional protections for newsgathering. AP and Freedom maintained that the order was unconstitutional because it precluded legitimate newsgathering activities without limit in time or scope, and that it constituted a prior restraint by

barring reporters from speaking to jurors. In the absence of such a restraint, AP reminded the court, jurors are not compelled to respond to press inquiries, and they remained free to decline comment.

Judge Vela denied both motions to vacate on August 31, explaining that his order was intended to protect juror "dignity" and to prevent the tainting of similar cases pending across the country. Then, four days *after* denying the media's motions and without the media's knowledge, Judge Vela circulated a questionnaire informing jurors that a specific news reporter had requested permission to interview them. The questionnaire asked whether each juror wished to be interviewed. Seven of the nine jurors responded to that questionnaire and all seven accepted the judge's suggestion that they not be interviewed.

AP and Freedom, joined now by *The Houston Chronicle* ("Chronicle"), promptly moved in the Fifth Circuit for a writ of mandamus. Noting that the order "severely re-

These and other recent decisions may be harbingers of a trend to restrict access to jurors, which threatens significantly to impair the media's ability to gather and report information about newsworthy trials.

stricts the [news organizations'] ability to gather information regarding one of the most newsworthy trials in the nation this year," by prohibiting interviews with "the most crucial observers of the trial — the jurors — about their impressions of

the case," petitioners argued that the restriction was particularly troubling given the myriad of similar suits pending in courts around the country. The news organizations also argued that the order was overbroad because it "prohibit[s] all communications by *anyone* with *any* juror on *any* topic," and unconstitutionally shifts the burden of proof to journalists to show good cause for contacting a juror. They also argued that the order constituted a prior restraint on the speech of reporters, yet failed to identify any "clear and present danger" or "serious and imminent threat" requiring such a severe sanction.

In answering the motion, Judge Vela argued that his order served a compelling interest by protecting jurors from post-verdict harassment and invasion of privacy, and he claimed that the order was narrowly tailored because "Jurors are free to contact the petitioner or any other per-

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son wishing to interview them; only the petitioner or any other person wishing to interview the Jurors is prohibited from doing so without the trial court's permission."

In an order filed on September 24, 2001, the United States Court of Appeals for the Fifth Circuit denied the media's petition, reasoning that the "district court's order is narrowly tailored to avoid abuse of members of the trial jury, all of whom have told the court they do not wish to communicate with the media." No appeal of this unpublished decision is pending.

Texas

Judge Vela's order was under review by the Fifth Circuit when, on Sept. 18, 2001, a Harris County, Tex. trial court adopted more limited restrictions on media access to jurors in *Texas v. Yates*, Trial Court Cause No. 880205.

Judge Belinda Hill ordered that "[n]o person connected with, employed by, or acting on behalf of any news media organization shall interview or attempt to interview any person called to be a member of the venire from which the

jury is to be chosen or any person chosen to serve on the jury for the competency hearing in the case." Judge Hill also prohibited any "visual representation" of any juror or potential juror, but did not restrict written descriptions (other than names, addresses and contact numbers). While the order precluded contact with discharged rehiremen, it limited the duration of the order to "remain in effect for voir dire, the jury selection process and all competency proceedings."

New Jersey

Another order prohibiting juror contact by the media was entered in Camden County, N.J. in August. Superior Court Judge Linda G. Baxter prohibited media contact with jurors in a criminal case, *State v. Neulander*, Indictment No. 1993-06-00, and precluded the publication of

any description that might identify any particular juror.

This media restraint emanated from a widely-publicized capital murder case involving a locally prominent rabbi who allegedly hired two men to kill his wife. Recognizing the public interest surrounding the case, the trial judge invited members of the media to discuss trial coverage procedures in advance of the trial, but gave no indication that a prior restraint was being considered. At the conclusion of that pre-trial meeting, the judge issued an order restraining the media from "publiciz[ing] in any way ... the identity [or] descriptions that would reasonably identify any juror ... unless authorized by further Order of this Court," and barred all "media representatives [from] contacting or attempting to interview any juror or potential juror."

Prior to jury selection, Philadelphia Newspapers, Inc.

("PNI") and AP filed a motion with the trial court to vacate the prohibition on juror descriptions as an unconstitutional prior restraint and to limit the otherwise unbounded order so as to prohibit media contact only until a

juror or prospective juror is excused by the court. The court refused to hear the motion until Aug. 31, 2001; voir dire commenced in open court on Aug. 20, 2001, utilizing a procedure that required prospective jurors to complete a 50-page questionnaire. Due to confusion about the scope of the existing order, on August 21, PNI and AP moved pursuant to that order for authorization to publish certain information concerning potential jurors that was disclosed during the initial day of voir dire. The judge refused to hear the application until August 31 as well. Reporters were left to guess what specific types of information were precluded under the ambiguous language of the order, resulting in some self-censorship to steer well clear of the judge's order.

PNI and AP filed an emergency application to the Appellate Division, seeking to vacate the order or stay the

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Recognizing the public interest surrounding the case, the trial judge invited members of the media to discuss trial coverage procedures in advance of the trial, but gave no indication that a prior restraint was being considered.

Courts Take Aim Against Post-Verdict Media Access to Jurors

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prior restraint until their motions were heard by the trial court. The Appellate Division denied this motion on August 24, citing the pending August 31 hearing date before the trial court.

Oral argument on the motions was finally heard by the trial judge on Aug. 31, 2001. Judge Baxter denied the motions, reasoning that the restraint on media identification of jurors could be inferred from the New Jersey Supreme Court's guidelines for camera coverage of court proceedings, which prohibit "photography of a jury ... such as to permit visual recognition of jurors." Judge Baxter asserted that allowing print media to identify jurors would therefore circumvent this prohibition on broadcast media. Furthermore, the judge reasoned, disclosure of identifying information may make jurors less forthcoming in their questionnaires. As to post-verdict interviews, the judge indicated that the order was "not intend[ed] ... to encompass that which would happen after a verdict," but that the media would have to "apply to the Court on an emergent basis at the time the jury renders its verdict ... to ascertain whether interviews may be permitted." The judge also amended the July 18 order to read: "Media representatives shall not contact or attempt to interview any juror or potential juror; however, subsequent to entry of the verdict in this case, petitioners may apply to this court for relaxation of the provisions of this paragraph".

On September 7, 2001, PNI and AP sought to appeal from the Appellate Division on the grounds that the trial court's order constituted a prior restraint that irreparably infringes First Amendment rights. The news organizations argued that the order restraining publication of descriptions identifying jurors must be vacated since it is not narrowly tailored to protect the jurors' privacy interests. Moreover, the guidelines were prohibitively vague, resulting in self-censorship of information that would not jeopardize a juror's privacy. PNI and AP also argued that the prohibition against interviewing excused jurors and post-verdict contact without permission from the court consti-

tuted a prior restraint as well, by prohibiting reporter's speech. Relying heavily on *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982) and *Press Enterprise I*, 464 U.S. 501 (1984), petitioners maintained that requiring application to the trial court after the conclusion of a juror's service did not suffice. Without giving any reasons, the Appellate Division denied the media's motion seeking leave to appeal Judge Baxter's order.

Judge Baxter declared a mistrial on November 13 after the twelve jurors were unable to reach a unanimous verdict despite seven days and almost 44 hours of deliberation. The prosecutor announced that he planned to seek a new trial on identical charges. NBC Television Network ("NBC") and local NBC affiliate WCAU-TV moved to vacate (or relax) the judge's August order regarding media contact with jurors. PNI and AP together filed a similar motion. The court heard argument from NBC on the following day but denied the motion. The judge cited the possible re-trial as a basis to preserve the prohibition on post-discharge juror interviews, but insinuated that she may have been more inclined to modify her order had there not been a hung jury. No date has been set for a possible re-trial of the case.

The revised language of Rule 4-202.2 contains a presumption that juror names be made public, but it severely erodes the strict scrutiny formerly required to prevent disclosure.

Utah

Consistent with this apparent trend, the Utah Judicial Council adopted a rule on August 24, 2001 that is intended to facilitate juror anonymity following a trial verdict or jury discharge. The amendment to Rule 4-202.2(4) of the Utah Code of Judicial Administration allows jurors to keep their names secret upon request and approval of the judge. The rule reads in pertinent part that "[a]fter the judge has discharged the jurors, the names of the jurors who tried the case shall be a public record, unless a juror requests that his or her name be a private record and the judge finds that the interests favoring privacy outweigh the interests favor-

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UPDATE: Peavy Settled

According to news reports in Texas, the litigation between Dan Peavy and WFAA-TV, A.H. Belo Corp. and reporter Robert Riggs has been settled. This litigation was part of a trilogy of cases involving the publication of unlawfully obtained tapes of telephone conversations. The other two cases are *Bartnicki v. Vopper*, 532 U.S. 514 (2001) and *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999). *Boehner* was returned by the United States

Supreme Court to the D.C. Court of Appeals for reargument (held a few weeks ago) in light of the Supreme Court's decision in *Bartnicki*.

In *Peavy v. WFAA-TV*, 221 F.3d 158 (5th Cir. 2000), cert. denied, 2001 U.S. LEXIS 4005, 69 U.S.L.W. 3748 (U.S. 2001), the Fifth Circuit reversed summary judgment and reinstated Peavy's Texas and federal wiretap claims. See *LDRC Libelletter*, August 2000 at 9. Peavy, then a school district trustee, alleged that the Dallas television station and its reporter indirectly encouraged the interception of Peavy's cordless phone conversations. The conversations were directly intercepted by Charles Harman, the plaintiff's neighbor, using a police scanner.

Harman, who turned over the recordings to the television station, claimed the conversations revealed threats and proof of public corruption relating to the plaintiff's position as a school district trustee. Harman also made and supplied the television station with additional recordings. WFAA-TV broadcast three reports on the plaintiff's alleged corruption.

The district court granted summary judgment to the defendants on First Amendment grounds, applying a strict scrutiny standard to the wiretap statutes and finding them unconstitutional as applied to the media defendants. See *LDRC Libelletter*, Oct. 1999 at 10. The Fifth Circuit reversed, distinguishing the Third Circuit's decision in *Bartnicki*.

The Fifth Circuit found that issues of fact existed as to whether the reporter was indirectly involved in the interceptions and therefore procured the interception in violation of the statutes. The court noted that the reporter took tapes from the source, inquired about the content of the recordings, advised the source not to edit the tapes so as to compromise their authenticity, and promised to investigate the content of the tapes. Issues of fact also existed as to whether the news broadcasts disclosed the contents of the phone communications or whether the broadcasts were based on independent sources.

The United States Supreme Court denied cert last May.

Tom Leatherbury, Bill Sims, Mike Raiff, and Stacey Dor of Vinson & Elkins in Dallas represented WFAA-TV and Robert Riggs.

Courts Take Aim Against Post-Verdict Media Access to Jurors

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ing public access." The new rule also permits judges to delay the release of juror names for up to five business days after discharge of the jury. These changes were enacted despite the lack of any evidence that Utah jurors had ever been harassed by reporters.

Several media organizations, including The Associated Press, challenged the proposed rule during the comment period, arguing that it infringed upon the media's qualified First Amendment right of access to court records and was contrary to United States Supreme Court precedent. This challenge succeeded in limiting the originally proposed language, which would have created a blanket privacy protection for all juror names following discharge. The revised language contains a presumption that juror names be made public, but it severely erodes the strict scrutiny formerly required to prevent disclosure. Rather than showing a compelling reason for withholding a name and ensuring that no less restrictive alternative is available, under the rule a judge will grant a juror's request for privacy if balance of interest tips slightly in favor of the juror. The rule provides no guidance on how the factors in this balancing should be weighed, and effectively removes the press and public from the whole process by not requiring any public notice or opportunity to be heard concerning the withholding of a juror's identity. The constitutionality of the new rule has not yet been challenged in court.

David L. Cook is an associate at Clifford Chance Rogers & Wells LLP in New York. The firm acted as counsel for the Associated Press in the matters discussed.

A South Dakota “Crazy” Opinion on Jurisdiction

By Katherine M. Bolger

A federal judge in South Dakota has issued an opinion that, if followed by other federal judges, could cause havoc in forcing publishers to defend tort claims in jurisdictions where they have absolutely no direct contact. The case involved the use of the name of the legendary Native American figure — Crazy Horse — in connection with the sensitive issue of consumption of alcohol. The United States District Court for the District of South Dakota has adopted a very expansive interpretation of the “effects test” for personal jurisdiction originally articulated by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed. 2d 804 (1984).

In *Estate of Tasunke Witko, a/k/a Crazy Horse v. Hornell Brewing Co.*, 156 F.Supp.2d 1092 (D.S.D. 2001), a liquor manufacturer used the name of legendary member of the Sioux Indian tribe, Crazy Horse, in the manufacture, sale and distribution of an alcoholic beverage known as “The Original Crazy Horse Malt Liquor.” The descendants of Crazy Horse sued the Hornell Brewing Co., Inc. and its proprietors for defamation, misappropriation and misuse of inheritable property rights, privacy violations and negligent infliction of emotional distress arising out of the unauthorized use of the Crazy Horse name. The Plaintiff also alleged violations of the Indian Arts and Crafts Act, the Lanham Act and the Federal Trademark Dilution Act.

The Hornell Brewing Co., Inc. settled the case, but the two individual defendants, the owners and operators of the Hornell Brewing Co., Inc., moved to dismiss the plaintiffs’ complaint for lack of personal jurisdiction. The court denied the defendants’ motion, holding instead that defendants’ contacts with the State of South Dakota were sufficient for the court to exercise personal jurisdiction. The court reasoned that, despite the fact neither of the defendants had been to South Dakota, and the malt liquor was not distributed in South Dakota, the defendants effectively “reached into” South Dakota by using the name Crazy Horse.

Relying on *Calder*

In reaching its decision, the *Crazy Horse* court relied heavily on the United States Supreme Court’s decision in *Calder*, in which the plaintiff, a California resident, sued a Florida-based newspaper, reporter and editor for defamation.

After applying the “effects test” to determine personal jurisdiction, the Supreme Court concluded that jurisdiction was proper. The Court’s analysis focused primarily on the fact that the plaintiff Shirley Jones lived and worked in California and on fact that California was the state in which the newspaper had its largest circulation. Based on these facts, the Court concluded “California was the focal point both of the story and of the harm suffered.” *Calder*, 465 U.S. at 789. Jurisdiction, therefore, was proper over the defendants because the defendants had “expressly aimed” their tortious conduct at a California resident. *Id.* The *Calder* Court expressly rejected the concept, articulated by the lower court in that case, that the First Amendment concerns raised by forcing writers and editors to appear in remote jurisdictions should be considered in making the personal jurisdiction analysis. *Id.*

The lynchpin of the *Crazy Horse* analysis was the language from the *Calder* opinion that focused on conduct “expressly aimed” at the plaintiff. The court con-

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Calder Warped

The case reported here, *Estate of Tasunke Witko v. Hornell Brewing Co.*, is but one of several decisions in recent years that have distorted *Calder v. Jones* to the point where it could be argued that any time a defendant knew or should have known that the plaintiff lived in a particular jurisdiction, personal jurisdiction over the defendant can be founded on the “effects” test. Totally ignored are the other facts and factors that the Supreme Court found that girded its decision in that case — not the least of which was that the publication for whom the defendants worked had its largest circulation in the plaintiff’s residence.

Other recent decisions on the issue include: *Stanley Young v. New Haven Advocate*, U.S. District Court for the Western District of Virginia, Civ. No., 2:00CV0086 (Aug. 10, 2001); *Nancy Miracle v. N.Y.P. Holdings, Inc.*, (D.Hawaii March 2000); *Cochran v. N.Y.P. Holdings, Inc.*

A South Dakota “Crazy” Opinion on Jurisdiction

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cluded that, even though the defendants had never been to South Dakota, and Crazy Horse malt liquor was not marketed in South Dakota, the defendants had expressly aimed allegedly tortuous conduct at the plaintiff because “defendants effectively have ‘reached into’ South Dakota by using the Crazy Horse name on liquor and proceeding to do so while knowingly impacting the descendants of Crazy Horse who are residents of South Dakota.” *Id.* at 1099.

South Dakota Contacts

Two factors influenced the South Dakota court’s decision. First, the court concluded that the defendants directed their conduct at South Dakota residents because the individual defendants knew both that Crazy Horse was a famous leader of the Lakota Sioux people, renowned, among other reasons, for his opposition to the use of alcohol by the Lakota people, and because Crazy Horse’s descendants lived in large numbers on three reservations in South Dakota. *Id.* at 1099-1100.

Second, the court determined that the harm from defendants’ allegedly tortuous action was suffered in South Dakota. Specifically, the court cited the Crazy Horse descendants’ allegations that they had suffered disgrace and embarrassment in the Lakota culture because of the association between the icon Crazy Horse and liquor. Therefore, the court concluded, that defendants’ conduct was directed at residents of South Dakota and harmed residents of South Dakota.

An Expansive View of Calder

The decision in *Crazy Horse* represents an extremely expansive interpretation of the Court’s decision in *Calder*. It seems to stand for the proposition that a defendant may be hauled into a court in a remote jurisdiction, regardless of whether the defendant manufactured, distributed or mar-

keted a product in the jurisdiction, simply because the defendant used the name of a resident (or the ancestor of a resident) of that jurisdiction.

However, a compelling argument could be made that the *Crazy Horse* decision should be limited to its facts. The court itself emphasizes the degree to which the outcome was determined by the fame of Crazy Horse, the “renowned and beloved leader of the Lakota Sioux.” *Crazy Horse*, 156 F.Supp.2d at 1095. Indeed, the court cited Crazy Horse’s fame as a reason it credited the defendants’ with knowledge that the distribution of liquor would cause harm to the residents of South Dakota. The court also appeared influenced by the fact that, before the filing of the lawsuit, several citizens of South Dakota put pressure on the defendants to cease distributing the malt liquor under the Crazy Horse

name. Specifically, Senators Tom Daschle and Larry Pressler sent the defendants a letter indicating that the use of the name Crazy Horse to sell alcohol was an affront to Native Americans. *Id.*

Therefore, it seems that *Crazy Horse*, though alarming in its permissive definition of contact “expressly aimed,” may have limited application to cases that do not involve individuals who have not achieved Crazy Horse’s legendary stature.

The plaintiffs were represented by Robert Wood Gough of Rosebud, S. Dak., Eric Antoine of Rosebud, Stuart Keler of San Francisco and Gregory Dresser, Christina Kirk-Kazhe, Christine Neuhoff, Jason Crotty and Kimberly Eckhart of Morrison & Foerster in San Francisco.

Michael Schaffer of Devenport, Evans, Hurwitz & Smith represented the defendants.

Katherine M. Bolger is an associate at Squadron Ellenoff Plesent & Sheinfeld in New York

The court concluded that, even though the defendants had never been to South Dakota, and Crazy Horse malt liquor was not marketed in South Dakota, the defendants had expressly aimed allegedly tortuous conduct at the plaintiff because “defendants effectively have ‘reached in to’ South Dakota by using the Crazy Horse name on liquor and proceeding to do so while knowingly impacting the descendants of Crazy Horse who are residents of South Dakota.”

D.C. Court of Appeals Affirms Dismissal of Klayman Libel Case

By Kevin Baine and Margaret A. Keeley

The Court of Appeals for the District of Columbia, in a decision on October 18, 2001, affirmed the dismissal of defamation and false light claims filed by Larry Klayman (founder of Judicial Watch) against David Segal and *The Washington Post*, reminding potential libel plaintiffs that published statements are not to be read in isolation, but must be read within the context of the entire article in which they appear. *Klayman v. Segal, et al.*, No. 00-CV-896 (2001 D.C. App. LEXIS 225, Oct. 18, 2001). The appellate court held that although it was a close call

whether the challenged sentences of the article made Mr. Klayman appear odious, infamous or ridiculous, a close contextual reading of the article revealed nothing that would invoke hatred or loathing for Mr. Klayman, or that would hold him in disgrace or dishonor, or that would subject him to scornful laughter.

The Facts

Mr. Klayman is the founder of Judicial Watch, a conservative, non-profit organization that filed multiple legal suits against the former Clinton presidential admini-

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D.C. Court of Appeals Affirms Dismissal of Klayman Libel Case

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stration. The statement of which Mr. Klayman complained appeared in a column that David Segal wrote about the legal community, entitled “Washington Hearsay.” The column began with the question “Ever wonder how Larry Klayman gets on so many television talk shows?” It attributed Klayman’s “television omnipresence” in part to “good sound bites,” but also to his “old-fashioned badgering.” Quoting a former employee, the column continued:

“He would come in each morning and ask, ‘Who have you called and why haven’t you called.’ ” said the onetime employee, who requested anonymity. “If the show was doing Hollywood that night, he’d say call anyway. If they were doing Tiananmen Square he’d say, ‘Well, I’m an international lawyer, try to pitch that.’ *If there was a school shooting he’d say, ‘So what? We’re doing important things here.’* ” (emphasis added).

Klayman claimed that the italicized language was defamatory because it implied that Klayman was “insensitive to the murder of innocent children,” a charge which he found particularly offensive in light of his position as “the founder and General Counsel of a conservative pro-life ethics organization and public interest law firm, Judicial Watch, Inc.”

The Post argued that the challenged quotation, when taken in context, could not reasonably be understood to mean that Klayman did not care whether innocent children are murdered. Rather, the *Post* said, the challenged language meant simply that Klayman sought to get on talk shows on a daily basis because he thought that his work was important enough to warrant attention, regardless of the day’s news.

The Superior Court Decision

In the D.C. Superior Court, Judge Judith Bartnoff dismissed Mr. Klayman’s complaint upon the *Post*’s motion, explaining:

Although Mr. Klayman argues that the statement

makes him appear “insensitive to the murder of innocent children,” that is clearly not the meaning of the statement in the context of the article. The article does not say, directly or by implication, that Mr. Klayman does not care about the murder of children or about school shootings (or about Hollywood or Tiananman [sic] Square). What it conveys is that Mr. Klayman believes his work to be important and to warrant media attention and talk show appearances, on a par with other major news stories, including school shootings and notable international events.

Court of Appeals Decision

The Court of Appeals affirmed Judge Bartnoff’s deci-

sion after a lengthy oral argument peppered with questions for both sides. The court explained that Mr. Klayman read the challenged language too narrowly:

A close contextual reading of the article revealed nothing that would invoke hatred or loathing for Mr. Klayman, or that would hold him in disgrace or dishonor, or that would subject him to scornful laughter.

“Context” serves as a constant reminder that a

statement in an article may not be isolated and then pronounced defamatory, or deemed capable of a defamatory meaning. Rather, any single statement or statements must be examined within the context of the entire article.

When read in context, the court held, the challenged material merely illustrated the article’s theme — Mr. Klayman’s drive for publicity — and could not reasonably be read to accuse him of insensitivity to the murder of innocent children. For the same reasons, the court held that the article did not place Mr. Klayman in a highly offensive, false light, and dismissed the false light claim as well.

Kevin T. Baine and Margaret A. Keeley of Williams & Connolly LLP represented the defendants in this matter. The plaintiff represented himself.

That Plaintiff Uses Viagra and Is “Deadbeat Dad” Not Defamatory, New York Court Rules in Talk Radio Case

By Tom Curley and Naomi B. Waltman

A New York trial court has dismissed a lawsuit brought by a former radio personality who accused two of his broadcast rivals of defaming him when they interviewed his estranged wife on air and allegedly repeated her statements to the effect that the plaintiff used the prescription drug Viagra and was a “deadbeat Dad” who had abandoned his family. The court held that an allegation of Viagra usage is not defamatory as a matter of law at a time “when former Senator Robert Dole is advertising Viagra.” The ruling also applies New York’s already broad protection for statements of opinion in the hyperbolic context of a talk radio program.

Herman v. CBS Corp., et al. (No. 120009/00, N.Y. Sup. Ct. N.Y. County), a single-count libel action, arose out of the sometimes rough and ribald world of New York City talk radio. Plaintiff David Herman, a former on-air announcer at WNEW-FM, brought suit after two other WNEW radio talk show hosts known popularly as “Opie and Anthony” interviewed Herman’s estranged (now former) wife by telephone on the duo’s radio show. Herman alleged that, while on air, his estranged wife told listeners that the plaintiff used Viagra, a drug commonly prescribed for impotence, and that the plaintiff had “deserted” his wife and children and was a “deadbeat Dad.”

Herman did not name his estranged wife as a defendant, instead suing CBS, Infinity Broadcasting Corporation (which owns WNEW), and “Opie” and “Anthony,” disc jockeys Greg Hughes and Anthony Cumia. When Herman originally filed his action against these defendants in state court, the defamation claim — then based only on statements made by his estranged wife — was paired with an employment-related claim alleging breach of a collective bargaining agreement. The defendants removed the case to federal court, where the district court dismissed the employment claim on the merits, then declined to exercise supplemental jurisdiction over the state-law defamation claim. Herman refiled the defamation claim in state court against the same defendants — and added the new allegation that Hughes and Cumia had re-

peated his spouse’s allegedly defamatory statements.

The defendants moved to dismiss the lawsuit on several grounds, including that Herman’s estranged wife never uttered the objectionable statements during the December 1998 broadcast at issue, at least not in the form alleged by the plaintiff. In the procedural context of ruling upon the defendants’ motion to dismiss the complaint, Justice Jane S. Solomon assumed that all of the allegedly defamatory statements actually had been uttered. However, the court concluded that none of the three statements alleged was actionable.

Allegation of Viagra Use Not Defamatory

In her written opinion, Justice Solomon began by concluding that an allegation that the plaintiff used Viagra simply was not defamatory under New York law. In opposing the defendants’ motion, Herman contended that he had been

The court ruled that merely being the butt of a joke would not expose the plaintiff to the public contempt and aversion necessary to establish that the allegation was injurious to his reputation.

made the “butt of every ‘Viagra joke’ the listener has ever heard.” The court ruled that merely being the butt of a joke in such circumstances would not expose the plaintiff to the public contempt and aversion necessary to establish that the allegation was injuri-

ous to his reputation. “At a time when former Senator Robert Dole is advertising Viagra,” the court wrote, “a statement that a man is using it is not defamatory.”

“Deadbeat Dad” Opinion When Considered in Context

Considering next the allegations that Herman had “deserted” his family and was a “deadbeat Dad,” the court held them to be capable of a defamatory meaning, but in this context the statements were “so vague as to be opinions, not statements of fact.” As the statements would not have reasonably been understood by listeners to be intended as assertions of fact, they were non-actionable as a matter of law.

Relying particularly upon the expansive protection given to statements of opinion under the New York Constitution, the defendants emphasized that the remarks at issue took

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That Plaintiff Uses Viagra and Is “Deadbeat Dad” Not Defamatory, New York Court Rules in Talk Radio Case

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place in the spirited context of a talk-radio program in which one spouse offered her perspective on the source of her marital discord. New York courts, in cases earlier brought against radio stars Don Imus and Howard Stern, have recognized that certain talk radio programs are inherently forums for unvarnished opinion, much of it reasonably understood by listeners to be hyperbolic. See *Hobbs v. Imus*, 266 A.D.2d 36, 698 N.Y.S.2d 25 (1st Dep’t 1999); *Glickman v. Stern*, 19 Media L. Rep. (BNA) 1769 (Sup. Ct. N.Y. County 1991), *aff’d*, 188 A.D.2d 387, 592 N.Y.S.2d 581 (1st Dep’t 1992).

Justice Solomon, however, cautioned that not every “statement made by a spouse who is in the midst of a divorce will necessarily be understood as a statement of opinion” nor would “the vulgarity of a radio program protect[], as opinion, every utterance made on that program.” Nevertheless, she concluded that the accusations of desertion and being a deadbeat were simply too broad and generalized to establish a concrete factual assertion. “One person’s ‘deadbeat’ may be someone who pays debts late and another’s may be someone who pays not at all. Similarly, to say that a man has deserted his family may mean that he has moved out, is not supporting it financially, or that he does not communicate with its members.”

Significantly, the ruling also contains helpful conclusions on two additional issues under New York law upon which there is (arguably) some muddled precedent.

Libel Per Se Equated With Slander Per Se

First, the court looked to the relatively narrow, well-defined categories of slander *per se* for guidance as to whether the statements alleged constituted libel *per se*. (Defamatory statements broadcast by radio are considered libel under New York law.) The plaintiff had argued that the definition of libel *per se* is broader than that for slander, a position the court rejected. Because the statements at issue here fell outside the traditional slander *per se* categories, the plaintiff was required to plead special damages, *i.e.*, quantifiable financial injury. Herman failed to do so and his complaint was dismissed on this basis as well.

Separate Statements Are Not “Same Transaction or Occurrence”

Second, the court rejected what was in essence an attempt by the plaintiff to amend his complaint after the federal court declined to exercise jurisdiction over his state-law defamation claim to allege that, not only did his estranged wife make defamatory statements, but that the defendants repeated them. In the federal action, Herman had alleged only that his estranged wife made defamatory statements. The allegation that the talk radio hosts also made the same statements as well appeared only in the refiled state court complaint. A cause of action based on statements purportedly made by Hughes and Cumia would be time-barred unless spared by the “grace period” for refiling in state court afforded to those whose federal complaints are dismissed without prejudice.

The New York statute that creates the grace period, CPLR § 205 (a), provides that such a plaintiff may refile only those causes of action that arise from the “same transac-

tion or occurrence” alleged in the original complaint. Herman argued that he was permitted to “amplify” his complaint by making clear that other speakers — here, the original defendants — made the same remarks alleged in the federal action. He argued that the allegation involved the same defendants on the same radio broadcast making the same statements. However, the court held that, under New York law, each allegedly libelous utterance gives rise to a separate cause of action: “[T]he prior [federal] action gave no notice to defendants that plaintiff’s cause of action for libel was based on any statements other than those alleged to have been made by Ms. Herman, and the current allegation, that defendants ... repeated the Statements, is insufficiently related to the earlier defamation claim.”

CBS, Infinity, Hughes and Cumia were represented by in-house counsel Susanna M. Lowy and Naomi B. Waltman and Jay Ward Brown and Tom Curley of Levine Sullivan & Koch, L.L.P. of Washington, D.C. Derek A. Wolman and James N. Blair of Wolman Babitt & King L.L.P. of New York City represented the plaintiff.

The court held that, under New York law, each allegedly libelous utterance gives rise to a separate cause of action.

Illinois Trial Court Dismisses Defamation Suit Against CBS Brought by Chicago Official and His Hot Dog Stand

By Tom Curley

Ruling from the bench on Oct. 4, an Illinois trial judge dismissed defamation and related causes of action brought by a Chicago official against a CBS television station and one of its investigative reporters. In so doing, the court refused to treat a reporter's blunt questions as statements of fact, refused to accord a corporation the right to bring a false light claim, and, treating the "of and concerning" requirement as one of Constitutional dimension and one for initial court determination, refused an argument that the plaintiff had the right to reach a jury in a per quod case with extrinsic evidence on the issue — noteworthy and potentially helpful rulings.

The case, *Schivarelli v. CBS* (No. 99L009185, Ill. Cir. Ct. Cook County), arose out of a 30-second promotional announcement broadcast in 1999 by CBS's Chicago station, WBBM-TV. The announcement generally promoted a body of investigative work by WBBM reporter Pamela Zekman and accordingly referenced several stories Zekman had broken in recent years. One involved a Chicago Streets and Sanitation official, Peter Schivarelli, who allegedly collected a city paycheck for time he spent on purely personal matters, including traveling to Notre Dame football games and working at a hot dog stand he owned.

Zekman's investigative reports regarding Schivarelli's conduct while a government official initially were broadcast by WBBM in 1997. Schivarelli took no legal action at the time of these broadcasts, which apparently prompted a government inquiry into his conduct and Schivarelli's subsequent announcement that he would voluntarily take early retirement from his position. A report produced by the Chicago Inspector General, which the defendants obtained pursuant to a subpoena during the lawsuit, substantiated Zekman's reporting.

However, when the station two years later broadcast the promotional announcement referencing the story on Schivarelli, he filed suit in Cook County Circuit Court on behalf of himself and his business alleging claims for defa-

mation, false light, misappropriation and commercial disparagement.

The sum and substance of Schivarelli's complaint against CBS, WBBM and Zekman related to a brief excerpt from one of the earlier investigative reports contained in the announcement: Reporter Zekman is shown standing next to Schivarelli in a parking lot and saying to him, "Let's sum this up for a second, the evidence seems to indicate that you're cheating the city."

Allegation That Public Official "Cheating" His Employer Is Opinion

The three causes of action advanced by Schivarelli individually (as distinct from those alleged by his business, a local hot dog stand) were straightforward: Schivarelli alleged that he had never "cheated" his employer, the City of Chicago, in any form and therefore the allegation was defama-

[T]he court held that the statement "the evidence seems to indicate that [the plaintiff was] cheating the city" was an opinion, not a provable assertion of fact.

tory and invaded his privacy by casting him in a false light. In addition, Schivarelli brought a cause of action for misappropriation alleging that his likeness had been used without his permission to promote Zekman's news re-

ports.

The defendants brought a series of motions to dismiss the complaint as originally filed and as subsequently amended, the most recent of which prompted a two-hour hearing before Judge Peter Flynn, who ruled from the bench that Schivarelli had failed as a matter of law to state claims for defamation and for false light. While Judge Flynn entered only a *pro forma* order, a transcript of his ruling is available.

Regarding Schivarelli's defamation claim, the court held that the statement "the evidence seems to indicate that" the plaintiff was "cheating the city" was an opinion, not a provable assertion of fact. Therefore, he held it was non-actionable under the First Amendment and Illinois law.

In so ruling, the court was influenced by the fact that the challenged language was posed as a question to the plaintiff with a degree of equivocation. Although pronouncing it a "very close question," the court concluded that to hold the

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Chicago Official and His Hot Dog Stand

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statement to be an assertion of fact could constrain journalists from asking concise, blunt questions: “[W]hat Ms. Zekman says is put in such a way as to invite a response. . . . I do think that the statement was cautiously worded along the lines of ‘appears to indicate’ rather than a flat, ‘the evidence shows that.’ . . . [H]ow does [talk show host] Larry King operate if every time he asks an interviewee a hard question, he has to say ‘but I don’t really know and I’m not saying it.’”

The court had earlier rejected the defendants’ argument that Illinois’ “innocent construction rule” independently required dismissal of Schivarelli’s defamation and false light claims in the absence of special damages, which Schivarelli did not allege. As applied in Illinois, the innocent construction rule mandates that, where a statement is reasonably capable of both a meaning that is defamatory *per se* and an alternative meaning that is not, the statement is not actionable as defamation *per se*. Instead, the statement may be actionable as defamation *per quod*, which requires specific allegations of pecuniary loss.

The defendants argued that an allegation of “cheating” could be innocently construed as a criticism of unethical — though non-criminal — behavior by a public official. In contrast, the plaintiff contended that the only reasonable interpretation of the statement was a specific charge of criminal wrongdoing.

In a bench ruling late last year, the court held that the statement could not be innocently construed, concluding that the promotional announcement necessarily would be understood by a local audience to be a serious allegation of political corruption. “This is, after all, Chicago,” the court wrote. “And I say that not in jest. In the particular climate of news reporting in Chicago, corruption is something which, as an instant recognition people say, ‘oh, yeah, people go to jail for that.’”

Regarding Schivarelli’s cause of action for false light invasion of privacy, the defendants argued that, under the First Amendment and Illinois law, it must fail for the same reason as his defamation claim ultimately failed, *i.e.*, the challenged language constituted an opinion not capable of being proven true or false. In addition, the defendants argued that the plaintiff could not establish, as the tort requires, that it is

“highly offensive” for a news reporter to query a government official as to whether he is “cheating” the taxpayers. The court agreed, observing that cases decided by the Illinois courts and the Seventh Circuit establish that the highly offensive standard is, as a matter of law, “extraordinarily high.”

As to Schivarelli’s cause of action for commercial misappropriation, the court had dismissed that part of the original complaint in its prior ruling. Specifically, it held that any such cause of action was barred by the Illinois Right of Publicity Act, 765 ILCS 1075/35(b), which expressly provides that the tort “does not apply to,” *inter alia*, “use of an individual’s identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account” or to “promotional materials, advertisements, or commercial announcements for [such] a use.”

No Meat In Hot Dog Stand’s Defamation, False Light Claims

The lawsuit also involved several causes of action asserted on behalf of a business owned by Schivarelli, a hot dog stand known as “Demon Dogs.” Demon Dogs brought claims for commercial disparagement, defamation, and false light invasion of privacy arising

out of the same promotional announcement. The factual predicate for these claims depended upon a tortured construction of the announcement which, in addition to showing the brief excerpt from Zekman’s report on Schivarelli, also referenced a wholly unrelated story reported by Zekman on unsanitary conditions at local restaurants. Demon Dogs argued that that the segment of the promotion concerning sanitary conditions in restaurants would be understood to imply that Demon Dogs served unsanitary food because the segment depicting Schivarelli was taped in a parking lot near the hot dog stand. Demon Dogs itself, however, was not depicted or referenced in the promotional announcement.

Addressing what it called an issue of first impression in Illinois, the court dismissed Demon Dogs’ false light claim on the grounds that corporations, unlike individuals, have no standing to bring false light claims, adopting the position taken by the Restatement (Second) of Torts. Although Judge

[T]he court dismissed Demon Dogs’ false light claim on the grounds that corporations, unlike individuals, have no standing to bring false light claims.

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Flynn observed that he was making new law in Illinois on this point, he also noted that the Illinois Supreme Court has taken a “consistently guarded approach to the false light tort and [has shown] consistent hesitation with viewing those torts expansively.”

Regarding Demon Dogs’ causes of action for commercial disparagement and defamation, Judge Flynn had agreed with the defendants in his earlier ruling that the broadcast was not “of and concerning” the hot dog stand. In its amended complaint, therefore, Demon Dogs recast its cause of action as one for defamation *per quod* in order to side step defendants’ “of and concerning” argument.

Demon Dogs argued that, under Illinois law, a *per quod* claim by definition permits the plaintiff to base an alleged defamatory meaning on facts extrinsic to the statement at issue. Thus, the hot dog stand argued that it was necessarily entitled to present to the jury any extrinsic facts it could marshal to show that viewers understood the broadcast to refer to Demon Dogs. The court, however, held that whether the defamatory statement is reasonably “of and concerning” the plaintiff is a threshold decision for the court, regardless of whether the claim is for defamation *per se* or *per quod*.

Moreover, the court held that the “of and concerning” requirement is a constitutional imperative derived from the Supreme Court’s decision in *New York Times Co. v. Sullivan*. Citing that landmark decision, the court noted that the Supreme Court had explicitly rejected the trial testimony of witnesses who said they believed the advertisement at issue in that case was “of and concerning” plaintiff L.B. Sullivan. Thus, comparing the promotional announcement at issue to the allegations in the complaint, the court concluded that the broadcast could not reasonably be viewed as “of and concerning” Demon Dogs, regardless of whether or not Demon Dogs alleged that third parties understood the promotional announcement to refer to it.

The plaintiffs have filed a notice of appeal.

Defendants were represented by CBS in-house counsel Susanna M. Lowy and Anthony M. Bongiorno and Lee Levine, Jay Ward Brown and Tom Curley of Levine Sullivan & Koch, L.L.P. of Washington, D.C. and Michael J. Hayes and Myriam Pierre Warren of Gardner, Carton & Douglas of Chicago. Alan J. Mandel of Greenberg Traurig of Chicago represented the plaintiffs.

School District’s Director of Transportation Found to be Public Figure

Court of Appeals Upholds Grant of Summary Judgment When Director Couldn’t Show Actual Malice

A Massachusetts Court of Appeals upheld a summary judgment in favor of a newspaper after the court held that a former director of maintenance and transportation for the Amherst-Pelham Regional School District was a public official who could not satisfy actual malice requirements. See *Netherwood v. Am. Fed’n. of State, County and Mun. Employees, Local 1725, & another*, 2001 Mass. App. LEXIS 982 (Mass. App. Ct. Oct. 19, 2001).

Francis Netherwood, the former director, had sued a local union and The Republican Company, publisher of the *Union-News*, for defamation and tortious interference with a contractual relationship after Netherwood’s contract was not renewed by the school district.

In 1991, a local state, county and municipal employees union sent a letter to the school district superintendent informing him of complaints the union had received about Netherwood. Among other things, the letter from the union claimed Netherwood had verbally abused employees and created an “intimidating and sexually charged environment.” After an investigation, the school district superintendent asked Netherwood to create a plan to address the issues raised. The superintendent found the plan inadequate, and the school district decided not to renew Netherwood’s contract. Naturally, this story became the subject of four news articles printed in the *Union-News*.

After the suit was filed, a Massachusetts Superior Court judge granted the newspaper’s motion for summary judgment. In an opinion by Judge Lenk, joined by Judges Gelinas and Kafker, the Appeals Court of Massachusetts affirmed the grant of summary judgment. Most significantly, the court found that Netherwood was a public official.

Netherwood, as director of maintenance and transportation, was a municipal employee for a “sizable school district” who was “ultimately responsible for the maintenance of buildings and grounds” for nine schools. He supervised approximately 60 people, and he received

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School District's Director of Transportation Found to be Public Figure

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a salary of almost \$60,000 a year. Prior to the accusations of discrimination, Netherwood had already been subjected to public scrutiny of alleged misuse of funding.

The appeals court found that the "scope of Netherwood's duties, the level of his compensation, the continuing public debate about the performance of his duties, and the impact of his job performance not only upon the sixty employees whom Netherwood supervised but also on the regional public school district's students, faculty, and other employees" were all factors that made Netherwood a public official.

As a public official, Netherwood had the burden of showing the newspaper acted with actual malice when it reported on the allegations of discrimination in 1992. In an attempt to meet this burden, Netherwood argued that the articles were "published with reckless disregard of the statements' truth or falsity." Among other things, Netherwood claimed the reporters' key sources were biased and thus the reporters should have entertained some doubt as to the truth of the allegations. The court of appeals found no evidence that the reporters had no reason to entertain a serious doubt. Therefore, the court of appeals found that Netherwood had failed to show an ability to prove at trial, by clear and convincing evidence, that the newspaper had published the articles with actual malice. Thus, summary judgment for the paper had been appropriate.

The court of appeals also reviewed the trial's courts issuance of a JNOV in favor of the labor union. In Massachusetts, defamatory statements in the context of labor disputes are only actionable if they are made with actual malice. The court of appeals found that Netherwood had, likewise, failed to carry this burden. The court of appeals found that the labor union, by reporting the complaints to the school district, had not acted with actual malice. Moreover, Netherwood had failed to show the labor union's actions were the proximate cause of the non-renewal of Netherwood's contract with the school district.

Joseph P. Pessolano of Pessolano, Dusel, Murphy & Casartello, P.C. in Springfield, Mass., represented The Republican Company. Steven A. Torres of Boston represented the American Federation of State, County and Municipal Employees, Local 1725. Frank R. Saia of Springfield, Mass., represented Francis Netherwood.

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DC District Court Grants Summary Judgment for Media Commentator

The Court Holds a Former FBI Agent is a Limited Purpose Public Figure

A District Court for the District of Columbia granted summary judgment for a media commentator who had been sued for conspiring to harm a former FBI agent “on account of his lawful discharge of the duties of his office” and “on account of his having provided testimony” in a criminal trial. *See Sculimbrene v. Reno*, 158 F.Supp.2d 8 (D.D.C. 2001). The court determined that Lanny J. Davis, a media commentator who had criticized former FBI agent Dennis Sculimbrene on “Cross Fire” and “Rivera Live,” could take advantage of traditional First Amendment defenses despite the fact that the plaintiff did not bring a traditional defamation claim. The court held the plaintiff was a limited purpose public figure who raised no genuine issue of material fact as to whether Mr. Davis acted with actual malice, and thus granted Mr. Davis’s motion for summary judgment.

The case arose in the wake of the Travelgate and Filegate controversies during the first term of the Clinton presidency. Prior to the controversies, the FBI assigned Mr. Sculimbrene to the White House to conduct background interviews of White House executives and staff, as well as other FBI officers, volunteers and contractors requiring access to the White House. One of the people that he interviewed was David Livingstone, who was later implicated in the Filegate controversy.

Shortly afterwards, the Travelgate and Filegate stories broke. The plaintiff got involved in both of those situations by, among other things, recommending that the FBI interview him, confirming the accuracy of information in a book written by a former FBI agent, and giving an unsworn interview to the Senate Judiciary Committee concerning Filegate during which the Mr. Sculimbrene relayed his opinion regarding the “chaotic management” of the White House Personnel Security Office and an alleged connection between Mr. Livingstone and Hillary Clinton. (White House Counsel Bernard Nussbaum told the Mr. Sculimbrene that Mr. Livingstone was highly recommended by Hillary Clinton, who apparently knew Mr. Livingstone’s mother.) In the aftermath of these stories, Mr. Davis appeared on “Cross Fire” and “Rivera Live” and attacked the Mr. Sculimbrene’s credibility.

In 1998, Mr. Sculimbrene was “forced to take an early retirement” from the FBI as a result of the “false accusations and disparagement to which he had been subjected, and the

other, unwarranted retaliation and harassment alleged therein.” He sued FBI General Counsel Howard Shapiro, “other unknown officials and agents” and Mr. Davis under 42 U.S.C. § 1985, alleging that Mr. Davis had conspired with others to “injure Plaintiff in his person and property on account of lawful discharge of his duties” and “on account of having provided testimony in a court of law of the United States.” Mr. Davis moved to dismiss the charges of conspiracy, or alternatively he moved for summary judgment for lack of actual malice.

The motion to dismiss was denied because the plaintiff’s complaint could still be amended to include sufficient allegations of conspiracy. The motion for summary judgment, however, was granted.

Judge Colleen Kollar-Kotelly considered the action as a defamation claim, stating that “in effect, [the] Plaintiff’s theory posits that Defendant Davis conspired with others to defame him. Accordingly, the constitutional considerations and protections afforded to defendants in a defamation action seem equally applicable to the Section 1985 claims presented in this case.”

Before reaching the limited-purpose public figure analysis, the court first rejected Mr. Davis’s claim that his speech was protected opinion. The court felt that Mr. Davis’s statements carried an implication that they could be proven true. Thus, the opinion defense was not available to Mr. Davis. Yet, that did not mean that Mr. Davis was without any First Amendment protections.

Following *Gertz and Waldbaum v. Fairchild*, 627 F.2d 1287 (D.C. Cir 1980), the court found the plaintiff to be a limited-purpose public figure. This status, in turn, raised the level of First Amendment protections for Mr. Davis by requiring Mr. Sculimbrene to show Mr. Davis acted with actual malice.

The court’s analysis of the limited-purpose public figure status was rather straight forward. To be considered a limited-purpose public figure, according to *Waldbaum*, an individual must achieve “special prominence” in a public controversy. Attaining “special prominence” can be done in one of two ways. First, by “purposefully” trying to influence the outcome of the controversy, an otherwise private figure can become a limited-purpose public figure. Second, an other-

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California Court Dismissed Suit Under SLAPP

By Rochelle Wilcox

The California Court of Appeal recently reaffirmed the broad reach of California's SLAPP statute in a case brought by the American Humane Association ("AHA") against the *Los Angeles Times* (the "*Times*"). AHA filed its lawsuit after an interview with a *Times* reporter convinced AHA's management that the *Times* had obtained a copy of a report discussing conflicts in AHA's western regional office, which had been prepared by AHA's counsel in connection with a wrongful termination claim by AHA's former president. The

complaint sought (1) a declaration that the report was protected by the attorney-client privilege; (2) a declaration that the privilege had not been waived; and (3) an order restraining the *Times* from publishing any information from the report. AHA also immediately sought a temporary restraining order, in an attempt to prevent the *Times* from publishing information from the report.

No TRO

The *Times* successfully defended against the TRO attempt, which had prompted the writs and receivers judge who presided over that proceeding to comment that the case involved "a classical prior restraint of speech situation." The *Times* also filed a motion under California's anti-SLAPP statute (Civil Code § 425.16), asking the court to strike AHA's Complaint. The SLAPP motion was personally served on AHA's counsel; that same day, AHA filed a notice of dismissal without prejudice and mailed it to the *Times*' counsel.

The *Times*, relying on uniform California authority holding that a plaintiff cannot avoid the consequences of having filed a SLAPP suit by voluntarily dismissing its complaint, proceeded with the hearing on its motion, seeking an award of attorneys' fees. The motion was heard by the judge assigned to the case (rather than the writs and receivers judge), who denied the motion on the grounds that the *Times* had not submitted "evidence" that AHA's Complaint fell within the SLAPP statute. The court also concluded that the *Times* could not be awarded its fees even if the motion had been granted, because a fee motion had not been simultaneously submitted to the court. The *Times* appealed.

SLAPP Motion Denial Reversed

The court of appeal for the Second Appellate District unanimously reversed the trial court's decision. In the unpublished portion of its decision, the appellate court held that the *Times* had met its burden of establishing that AHA's Complaint fell within the SLAPP statute. Specifically, the court found that the first and second causes of action for declaratory relief arose out of the *Times*' exercise of its free speech rights, because they were prompted only

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DC District Court Grants Summary Judgment for Media Commentator

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wise private figure can become a limited-purpose public figure if he could have "realistically have been expected, because of his position in the controversy, to have an impact on the resolution."

In the D.C. Circuit, whether or not a person is a limited-purpose public figure is determined by using an "objective, 'reasonable-person' standard according to which courts in this Circuit should examine 'the facts, taken as a whole,' to determine as a matter of law, whether an individual is a public figure." The court concluded that it "seems likely that a reasonable person would have expected Agent Sculimbrenne to play a significant role in determining the 'outcome of the controversy.'"

The court relied heavily on Mr. Sculimbrenne's statements implicating Hillary Clinton in the hiring of Mr. Livingstone as a cause for a reasonable person to think Mr. Sculimbrenne would have an impact on the resolution of the Filegate controversy.

It followed that summary judgment was appropriate for Mr. Davis because Mr. Sculimbrenne could not carry the increased burden of a limited-purpose public figure and show Mr. Davis acted with actual malice.

Counsel for Mr. Sculimbrenne was Paul J. Orfanedes of Klayman & Associates in Washington, D.C.

Defendants were represented by Anne L. Weissman and John Russell Tyler of the U.S. Department of Justice, Timothy B. Mills of Patton Boggs in Washington, D.C., and Thomas P. Ryan of McCarthy, Wilson & Ethridge in Rockville, Maryland.

California Court Dismissed Suit Under SLAPP

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by the *Times*' newsgathering activities in connection with an issue of public interest. The court held that the third cause of action, which sought a prior restraint, arose directly out of the *Times*' "activities as a newspaper" and therefore fell within the statute.

The court also held, in the unpublished portion of its decision, that AHA did not meet its burden of establishing a probability of prevailing on the merits. The court found that AHA could not prevail on the first and second causes of action because there was no actual dispute between the parties; and further found that AHA could not prevail on its third cause of action because it "sought a clearly unconstitutional prior restraint on the freedom of the press under either the United States or California Constitutions." The court also rejected AHA's argument that AHA was entitled to the injunction because the *Times* purportedly obtained the report illegally, finding that AHA produced no evidence to support this claim. Finally, the court of appeal found that AHA's voluntary dismissal of its complaint was of no import because a ruling on the substantive merits of the case had been made before the voluntary dismissal and because AHA had dismissed the complaint without prejudice.

In the published portion of its decision, the court of appeal held that the *Times* was entitled to be reimbursed for its fees and costs, even though documentation of the fees and costs had not been submitted at the same time as the SLAPP motion. The court noted that the SLAPP statute mandates an award of fees to a *prevailing* defendant, and that the *Times* had given notice in its SLAPP motion that if it was successful, it would seek its fees and costs in a separately filed motion. The court found that under California's statutory scheme governing an award of fees, a successful defendant can recover its fees and costs in one of three ways: "[t]he successful defendant can make a subsequent noticed motion as was envisioned by defendant in this case; seek an attorney fee and cost award at the same time as the special motion to strike is litigated as is often done; or as part of a cost memorandum." Consequently, the court of appeal reversed the order below and remanded the case to the trial court, directing it to award the *Times* its fees incurred in connection with the SLAPP motion, on appeal, and after issuance of the remittitur.

Counsel for the Times were Kelli Sager, Alonzo Wickers IV, and Rochelle Wilcox of Davis Wright Tremaine, and Karlene Goller of The Los Angeles Times.

Counsel for the Plaintiff were Michael St. Denis and Kandace Rayos of Sheppard, Mullin, Richter & Hampton.

Opinion by Judge Turner. Judges Grignon & Willhite concurred.

UPDATE: Court of Appeals Affirms Dismissal of Defamation Case Against Random House

Band Manager Sued Over a Passage in a Book About David Geffen

The California Court of Appeal has upheld a trial court's dismissal of a defamation action brought against Random House by the manager of a 1960s soft rock band. See *Colecchio v. Random House, Inc., et. al.*, 2001 Cal. App. LEXIS 1830 (Nov. 6, 2001). Patrick Colecchio, the manager of the '60s band The Association, sued over a passage in a book about David Geffen. The court of appeals agreed with the trial court that the passage detailing the "legend" of how Geffen signed The Association to a contract adequately informed readers that the story was not factual, and thus, not actionable.

Colecchio was upset over a paragraph in the book *The Operator*, in which author Thomas King wrote:

The legend went that Geffen signed the Association — a band that made it big with such songs as "Never, My Love" and "Cherish" — after having heard that the band's manager had been intoxicated at a wild party one night. Geffen was not at the party, the story went, but he called the manager the morning after and referred to "conversations" they had the night before. Geffen told the manager that he had, "as requested," drawn up the contracts to represent them at the agency. "Where does the chutzpah come from?" Owen Laster thought, upon hearing Geffen tell the story. Geffen remembered the story differently; he said he signed the group after being introduced to them by Joe Butler, the drummer in the Lovin' Spoonful.

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UPDATE: Supreme Court Denies Certiorari in Case Against Russian Newspaper

Former Russian Columnist Loses his Chance to Bring Suit Against his Former Newspaper

The Supreme Court denied the petition for certiorari filed by a former Russian columnist who had sued the Russian daily newspaper *Novoye Russkoye Slovo* after he was the subject of columns that implied he was a secret spy for the KGB. See *Navrozov v. Novoye Russkoye Slovo Publishing Corp.*, cert. denied, No. 01-453 (U.S. Nov. 13, 2001). Two years ago, a New York City trial court granted a motion to dismiss Lev Navrozov's defamation

claim against the Russian daily newspaper and two of its columnists. See *LDRC LibelLetter*, November 1999 at 15. Ever since the trial court's dismissal, Navrozov has failed to get a court to reinstate his claim. See *LDRC LibelLetter*, March 2001 at 14.

Navrozov, who emigrated from the Soviet Union to America in 1972, wrote two columns for *Novoye Russkoye Slovo* (NRS) in late 1995 and early 1996. Navrozov's columns expressed his anti-Soviet views. Later in 1996, Boris Gart and George Vainer (at the time, NRS's editor-in-chief) wrote three columns for NRS as sardonic responses to the columns by Navrozov. Each of the three columns that gave rise to the suit contained passages citing certain statements made by Navrozov, extrapolating them to imply suspicions that Navrozov actually had a cordial relationship with the KGB.

In 1999, New York County Supreme Court Justice Martin Schoenfeld relied on New York case law delineating the field of protected opinion, and dismissed the suit for failing to

state a cause of action. N.Y.L.J. Oct. 13, 1999 at 26. The court found that the context of the columns' publication in the op-ed pages of the newspaper would indicate to reasonable people that the statements were not "assertions of fact offered for their accuracy; rather they were expressions of opinion." The court also noted that the newspaper's editorial board had prefaced each of the subject columns by identifying its author as an opponent of Navrozov. Moreover, the mocking, satirical tone of the columns would indicate the intention of the authors was to voice opinion, not present facts.

The trial court's opinion drew parallels between the allegedly defamatory columns and Oliver Stone's "J.F.K.," in which Stone based his movie on known facts, then speculated upon an underlying conspiracy.

By denying certiorari, the Supreme Court brought an end to the Navrozov's lawsuit.

Kenneth Norwick, of Norwick & Schad in New York, represented NRS. Navrozov represented himself.

Court of Appeals Affirms Dismissal of Defamation Case Against Random House

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Specifically, Colechio was upset with the "legend" portion of the story. Colechio claimed he did not agree to Geffen's representation of the band under the circumstances described in the "legend." He also claimed that the statement "damaged his reputation and caused him emotional distress."

After the trial court dismissed the claim, concluding that "the average reader reading this paragraph would conclude that the initial description of how Geffen signed the Association was based on a myth," Colechio appealed. See *LDRC LibelLetter*, July 2001 at 30.

Colechio relied upon *Milkovich v. Lorain Journal*, but the Court of Appeals said this case was "not a case where the author has merely stated as opinion an assertion of objective fact." The court went on to say that the by stating that the "story constitutes a legend, and that Geffen states that the event occurred differently, it informs the reader that the story is not factual."

Judge Nott wrote the opinion for the panel, joined by Judges Cooper and Todd.

Colechio was represented by Neville L. Johnson, Brian A. Rishwain and James T. Ryan of Johnson & Riswain. King and Random House were represented by Stephen G. Contopoulos, Bradley H. Ellis and Frank J. Broccolo of Sidley Austin Brown & Wood.

The [trial] court found that the context of the columns' publication in the op-ed pages of the newspaper would indicate to reasonable people that the statements were not "assertions of fact offered for their accuracy; rather they were expressions of opinion."

First Amendment Bars Enforcement of French Court Order Censoring Speech on Yahoo!'s U.S. Servers, Federal Court Rules

By Bob Vanderet

Last year, a court in Paris, acting on a complaint filed by two French non-profit organizations fighting anti-semitism in France, ordered the American Internet Service Provider Yahoo! to “take all necessary measures to dissuade and render impossible any access [by French users] via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Naziism or a contesting of Nazi crimes.” Non-compliance by Yahoo! subjected the company to a daily fine of 100,000 francs (approx. \$13,300).

The French order was premised on a post-WW II provision in the French Criminal Code that prohibits the sale or display of Nazi emblems or insignia. In the French proceeding, Yahoo! noted that its French subsidiary's French-language website, Yahoo.fr, operated in full compliance with French law, and that its American-based servers were operated from the U.S., in English, and were targeted primarily to an American audience. The mere fact that French users could access the U.S. web portal, Yahoo! argued, did not mean that Yahoo! could be ordered to conform the speech of its American

or other users to French standards.

The French court rejected Yahoo!'s position, the judge presiding in the French case telling the press that the case raised the question of whether American internet companies will be able to “take shelter behind the First Amendment to the American Constitution which guarantees absolute freedom of speech in that country,” or instead will “be willing to accept a line of international public morality that would be acceptable to everybody?”

In December 2000, Yahoo! filed a complaint in U.S. District Court in San Jose, California, seeking a declaration that the French court orders were unenforceable in this country because they conflicted with both the First Amendment and with provisions of the Communications Decency Act, which protects American ISPs from liability for content posted by others. *See Yahoo Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, No. C-00-21275 JF (N.D.Cal. 2001 US Dist. LEXIS 18378, Nov. 7, 2001).

The French organizations that had obtained the French court orders moved to dismiss Yahoo!'s declaratory relief action for lack of personal jurisdiction, but Judge Jeremy Fogel denied the motion in a published opinion last June.

In November, Judge Fogel went on to address the merits of the complaint, ruling that Yahoo! was entitled to summary judgment on its request for a declaration of the non-enforceability of the French court orders. Noting that the case “presents novel and important issues arising from the global reach of the Internet,” the Court held the French court orders to be clearly unenforceable as a violation of First Amendment rights.

“What is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually mean-

(Continued on page 38)

French Supreme Court Applies Single Publication Rule to Online Libel

According to a report by Agence France-Presse, the French Supreme Court released a decision on Oct. 16, 2001 holding that the limitation period to bring an action for defamation for material published on the Internet is three months from the date of first publication — the same time period applied to other media. The decision apparently reversed a lower court decision that held that publication on the Internet was continuous publication whereby the limitation would only begin to apply once material was removed from the Net.

First Amendment Bars Enforcement of French Court Order Censoring Speech on Yahoo!'s U.S. Servers, Federal Court Rules

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ingless, the implications of this question go far beyond the facts of this case.”

Relying on a string of cases that refused to enforce English libel law judgments, (including *Matusevitch v. Telnikoff* 877 F.Supp.1 (D.D.C. 1995), the Court held that, “Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.”

Bob Vanderet is a partner in O'Melveny & Myers LLP, and represented Yahoo! in the case along with his colleagues Neil Jahss and Kerry Lyon-Goldman.

European Proposal on Hate Speech

The Committee on Legal Affairs and Human Rights of the Council of Europe issued a report on Oct. 12, 2001, with a proposal on how the draft Council of Europe Convention on Cyber-crime can include a protocol on hate speech. The Council is concerned about websites that promote racism, and wish, to the degree possible, to define and criminalize hate speech. The Committee felt it imperative to enlist the cooperation of all states that have within their boundaries facilities that host racist sites.

It is worth noting that the Committee was not insensitive to the limited degree to which they could seek American assistance on this problem, recognizing the First Amendment and the limits it puts on governmental restrictions and penalties on speech. The Committee was interested, however, in seeking ways to address the problem they perceive of racist sites, actually directed to recipients in Europe where restrictions on hate speech are in force, using facilities in countries such as the U.S. where protections for speech are greater. Sites hosted in the U.S. that contain content not in English, but, for example, in German, would be the target of the European protocol.

The proposal would ask states “to do everything in their power to ensure that binding rules were not circumvented by dissemination, via servers located on their territory, of hate messages aimed exclusively at an audience in a less permissive state.”

The report can be found at www.legal.coe.int.

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English Court Enjoins Newspaper Publication For Violating Right of Privacy

In a remarkable decision, an English High Court judge enjoined a tabloid newspaper from publishing an admittedly true expose of a professional soccer player's adulterous affairs with a lap dancer and an aspiring model on the new legal ground that a right of privacy applies to sexual relationships and the details of sexual activity within those relationships, either within or without marriage, whether or not there was an agreement between the parties to treat the matters as confidential. *A v. B & C*, Case No.HQ0101837 (High Court Sept. 10, 2001) (Mr. Justice Jack). A law report on the decision is available through www.thetimes.co.uk.

Kiss and Tell Article About Soccer Player Enjoined

At issue in this case was a so-called "kiss and tell" story — both women had sold their stories to the newspaper, a common staple of English tabloid journalism. The judge, who reviewed drafts of the articles, found that each was concerned with "salacious" descriptions of the sexual activity between the married soccer player and "C" or "D" — the unidentified femme fatales. The articles, the judge intoned, were "intended for the prurient."

Treating the case like a matter of utmost national security, the court held all of its proceedings in private and ordered that the plaintiff, the newspaper, "C," and "D" (who was not a party to the action) not be identified. Furthermore, the judge had ordered the defendants not to reveal the very existence of the action from the time the first preliminary injunction was applied for and entered on April 27, 2001 until the beginning of November, when the court released this decision on the merits of the preliminary injunction.

Decision Reveals The Facts But for the Parties' Names

Despite his deep concern with the privacy of the

plaintiff, the judge's decision, in the manner of the Starr Report gives a lengthy and clinical recount of where, when and how many times the plaintiff met with "C" and "D" perhaps supplanting the very need for the tabloid story. One example:

On 25 February they [A & C] met and possibly had lunch together, certainly dinner. She says that they had sexual intercourse: he is silent as to that She asserts that on 8 March he picked her up from a gym and they had intercourse at her house after some lunch On 10 March they went to a club and spent the night at her house and they had intercourse. . . . She alleges that on various occasions he had promised to

marry her and to move in with her. By the end of March she says that she was angry that he had lied so much.

It is not clear what relevance these facts have to the decision other than to prove that the

articles were true and that the soccer player conducted the affairs openly, facts which would argue against the result.

Player Obtained Injunction on Eve of Publication

Plaintiff learned of the impending articles on April 27, 2001, two days before they were to be published — presumably because the newspaper called him for comment. Plaintiff applied for and was granted an injunction that day. His primary legal theories were that publication of the articles would be a breach of confidence and an invasion of privacy. Plaintiff also brought a claim for copyright violation based on the apparent copying of telephone text messages sent by A to C and D which, the court analyzed, numbered in the hundreds. This theory was effectively abandoned.

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English Court Enjoins Newspaper Publication For Violating Right of Privacy

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Breach of Confidence and Privacy

Breach of confidence theory can generally be used to restrain publications under English law where there is a fiduciary relationship or express agreement of confidentiality between the parties. For example, last year Cherie Booth, the wife of Prime Minister Tony Blair, was able to stop the family's former nanny from publishing her memoirs where the nanny had entered into an express agreement not to reveal confidences gleaned from working for the Blairs. In the case of *Barrymore v. News Group Newspapers, Ltd.* [1997] F.S.R. 600, a case cited by the court as somewhat analogous to the instant case, a married man who had a homosexual relationship was able to enjoin the *Sun* newspaper from publishing supposedly confidential information about the plaintiff's wife. But note, the disclosure of the affair was not itself a breach of confidence, only the marital confidences between the plaintiff and his wife were protected.

Breach of confidence theory, as it has stood, would not apply to the instant situation. But the court described breach of confidence; as a theory in transition because of the development of substantive privacy rights under the European Convention on Human Rights, re-

cently incorporated in U.K. law.

The legal basis for the decision was essentially a balancing act performed by the judge in which he weighed the right of free expression guaranteed by Article 10 of the Convention against Article 8's protection for privacy. The decision demonstrates the haphazard, if not infuriating, way in which principles of privacy are being introduced into UK law following the incorporation of the European Convention on Human Rights in which judges are acting as final arbiters of the "public interest" — if not effectively as public censors.

If you are interested in working on the LDRC International Committee, contact ldrc@ldrc.com or committee co-chairs:

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Icon of Romanian Revolution Non-Suited on Appeal by the AP

By Richard N. Winfield

The Associated Press prevailed in late October in a criminal libel prosecution in Bucharest, Romania which drew the attention of human rights groups and the press in Central Europe and tested the limits of press freedom in that nascent democracy. The litigation involved an AP news story reporting that an icon of the anti-communist revolution had collaborated with the secret police during the Ceausescu regime.

Relying on the free press jurisprudence of the European Court of Human Rights, the AP succeeded in reversing an award of moral damages granted by the District Court in Bucharest in favor of a powerful and controversial cleric and political figure. The Bucharest Tribunal, the intermediate appellate court, granted the appeals of AP and its Bucharest correspondent, Alison Mutler, and denied the cross-appeal of the plaintiff, Bishop Laszlo Toekes.

Toekes came to world prominence as communist regimes were toppled in Central Europe over a decade ago. An ethnic Hungarian churchman whose opposition to former dictator Nicolae Ceausescu sparked the overthrow of the regime, Toekes became a leader of the minority Hungarian political movement. When the archives of Securitate, the Ceausescu regime's notorious secret police, became public, they revealed that countless Romanians had acted as informers, many as a result of coercion.

In June 1998 a communist newspaper in Bucharest, *Adevarul*, reported that Securitate files revealed that Toekes had collaborated with the Securitate. Copies of written agreements between Toekes and the Securitate were published. Toekes issued a public statement contending that the Securitate had forced him to inform, that he had written hundreds of pages for the Securitate, that he caused harm to no one, and that he was a victim of the Securitate.

The AP transmitted a news dispatch relying on the published account, Toekes' agreements with the Securi-

tate and Toekes' statement. The AP reported, "A bishop whose opposition to Romania's communist regime sparked the 1989 revolution against former dictator Nicolae Ceausescu acknowledged Monday that he collaborated with the feared secret police. Laszlo Toekes, an ethnic Hungarian bishop of the reformed Church, said in a statement that he was forced to inform for the Securitate secret police after years of harassment. He called himself a 'victim of the Securitate' and insisted that he harmed no one."

Toekes commenced a libel action in England against the *Times of London*, which had published the AP dispatch. Rather than litigate, the *Times* capitulated and agreed both to publish a retraction stating that the AP report was erroneous, to pay Toekes' solicitor's fees and to make a charitable donation of £750.

Toekes then commenced proceedings in Bucharest against AP and Ms. Mutler for both the crime of calumny and civil libel. The complaint charged that Toekes "is a person of international repute, is an emblematic person of the revolution, is a bishop of Oraclea and honorary chairman of the Party of Hungarians in Romania, as well as the fact that the Securitate links are ... shameful."

The police conducted the initial interrogation of the press defendants and a prosecutor appeared during the trial. Sessions of the bench trial before District Court President Titu Birceanu took place over a period of two years. While the District Court in May 2001 found no basis for criminal liability, it found that AP had violated the rights of Toekes, was guilty of negligence and therefore civilly liable, and was required to pay about \$22,000 in moral damages plus costs and fees.

The District Court criticized the AP report because "damage was done to the image of Laszlo Toekes, who was known abroad as a symbol of the revolution of 1989, as an important factor in making this revolution...." The AP had "breached the professional obligation of informing on the problem transmitting.... infor-

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The decision was reportedly the first libel judgment entered by a Romanian court against a non-Romanian news organization.

Icon of Romanian Revolution Non-Suited on Appeal by the AP

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mation.... which could prejudice.... [Toekes'] image.... [T]he story should have noted that the priest... was forced by acts of mental and physical violence to give mendacious statements to the former Securitate... but not that the priest Laszlo Toekes collaborated with the Securitate." The decision was reportedly the first libel judgment entered by a Romanian court against a non-Romanian news organization, and was roundly criticized by some newspapers.

Toekes appealed from the District Court's acquittal of the charge of criminal libel, and AP appealed from the determination of civil liability. AP's Bucharest counsel, Marian Nazat, filed an appeal and recommended that AP's general counsel in New York file a separate brief.

Recognizing that Romania is a signatory to the European Convention on Human Rights, AP submitted a brief which relied exclusively upon the opinions of the European Court of Human Rights in Strasbourg which interpreted Article 10 of the European Convention. Article 10, which protects free expression, has been the subject of considerable litigation in Europe. AP's brief cited, *inter alia*, Strasbourg authorities which provided optimum protection for political speech; warned that political figures must assume that they will be criticized, often unfairly; recognized good faith reporting; and criticized judicial reliance on facts not available to the reporter. We focused critically on the District Court's willingness to rely upon the cramped definition of "collaborator" adopted by Parliament and a government committee's administrative determination that Toekes had not been a collaborator. Significantly, both the legislation and the determination occurred two years after Associated Press had moved its dispatch. AP cited Article 10 authority that condemned such practice.

In late October, the Bucharest Tribunal rejected Toekes' appeal and adopted AP's appeal, vacating the District Court decision and opinion.

Richard N. Winfield is a partner at Clifford, Chance, Rogers & Wells in New York

Romanian Press Fighting Deluge of Libel Lawsuits

Despite the recent victory scored by the Associated Press in a criminal libel lawsuit in Romania, the local media in Romania are being overwhelmed with libel lawsuits. One newspaper, the daily *Evenimentul Zilei*, is currently fighting approximately 100 libel cases, according to reports by the Associated Press. The paper's managing editor told the AP that libel lawsuits are being used as "bullying tactics" and a way to prevent the paper from writing critical articles.

Procedural differences are part of the reason that libel laws in Romania can be used as a way to impede the press's ability to function. Romanian courts don't hold preliminary hearings to review the evidence, thus lawsuits are rarely rejected, according to the AP.

One investigative reporter, who has been sued "at least 60 times," told the AP that journalists are the "scapegoat" and are "harassed through courts." An example of the harassment is one libel case that continued despite the fact that the plaintiff withdrew the suit. Another journalist was retired after a court dismissed the case against him. According to the AP report, courts tend to be more lenient to journalists if there is public pressure.

Libel is a criminal offense in Romania and is punishable by up to five years in prison.

Improving Bench/Media Relations: The Effort Continues

By **Rachelle Bin**

As discussed last year, many organizations around the country are actively engaged in promoting positive dialogue between members of the bench and the press. Below are a few examples of some of the steps being taken to foster better relations between the two groups.

The American Bar Association

Through its subgroup, the National Conference of Lawyers and Representatives of the Media, the American Bar Association has agreed that, along with the National Press Foundation, it will co-sponsor educational programs for career journalists. As envisioned, the programs will include small, regional meetings throughout the country. The ABA hopes to reach working journalists, many of whom are new to the profession, with regional sessions that are easily accessible and minimally disruptive to working schedules. The sessions will also provide journalists with the opportunity for one-on-one discussions with local legal leaders. Judges, attorneys, and experienced journalists will be featured on the panels.

The ABA will assist the National Press Foundation in designing the programs and in identifying faculty and locations for the training sessions. It is anticipated that participating journalists will be provided with ABA materials. Additionally, the ABA plans to identify ABA entities which have expertise in various areas of the law and which could provide faculty, materials, and input on the curriculum.

The ABA will ensure that state and local bar associations are apprised of the programs in their areas and that they have an opportunity to identify local issues that are relevant and timely for the participants. The National Press Foundation will handle fundraising and will identify the ABA as a co-sponsor. From 1986 through 1991, the ABA and the National Press Foundation had collaborated on holding a series of seminars around the country for journalists. The National Conference of Lawyers consists of 16 members: eight ABA representatives, including lawyers and judges; and eight representatives of national media organizations.

Connecticut

The Connecticut Bar Association has taken several steps to encourage positive interaction between judges, lawyers and journalists by educating the media on law-related issues and by guiding lawyers in their dealings with the press.

This past year, the Connecticut Bar Association's Media and the Law Committee sponsored two seminars on media-related issues. The first seminar, entitled "Where Should the Media Draw the Line" was a workshop for the Connecticut news media. Speakers discussed the differences between a private citizen and a public figure; explained the distinct theories of privacy tort liability; and discussed the limits on reporting about public citizens in the public eye. Panelists also highlighted selected Connecticut media privacy cases. The following month, the Committee sponsored a seminar for lawyers entitled "Getting Beyond 'No Comment.'" This second seminar offered lawyers advice on how to work with the media and judges while handling high profile cases.

The Media and the Law Committee also sponsors roundtable discussions where lawyers and journalists can express their concerns about the reporting in the press of legal actions and proceedings.

Finally, earlier this year, the Connecticut Bar Association published the newly updated version of "Media and the Law Handbook." The Handbook, which is designed to assist journalists who cover the courts and legal-related matters, discusses, in "plain English," some of the principal aspects of the criminal and civil justice systems, as well as libel law and cameras in the courtroom.

Iowa

For the past couple of years, judges and journalists in the Des Moines area have met periodically to discuss issues of common concern. Late last year, area journalists were invited to a "media school" at the local courthouse. A committee of journalists and judges jointly prepared the agenda and the meeting was open to all members of the local news media. Panelists included experienced courthouse reporters, civil and criminal judges, clerks and court administrators. Participants discussed the basics of the court system; the idiosyncrasies of juvenile and domestic court; access by the

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Improving Bench/Media Relations

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media to courthouse public records; rules for cameras in the courtrooms; and the services offered to the media by the judicial district. The meeting concluded with a tour of the jail. Many participants, particularly reporters who had had little experience covering the courts, found the interaction helpful.

National Center for the Courts and Media

The Donald W. Reynolds National Center for the Courts and Media, located on the campus of the University of Nevada, Reno, and part of the National Judicial College, was created to encourage dialogue among judges and journalists. Specifically, the Center hopes to provide a forum for discussing the inherent tensions between the Sixth Amendment's guarantee of a fair trial and the First Amendment's guarantee of a free press.

The Center hopes to offer seminars for judges to explain the role of the media and the media's needs in reporting cases. Judges will also be advised on how to deal with the media in certain situations. Additionally, the Center would like to provide journalists, particularly those new to the legal beat, instruction about the legal "do's and don'ts" of covering the courts. Journalists will have the opportunity to participate with judges in problem-solving sessions where they will discuss certain hot topics such as gag orders, cameras in the courtroom, access and confidentiality of sources.

The Center also hopes to serve as a resource center for journalists by providing them with a list of judges who may be able to comment on legal issues or about ongoing cases. For more information on the Center's activities, you can visit their website at www.judges.org/NCCM.

Wisconsin

In order to improve accurate reporting of the courts in the media, the Wisconsin State Bar's Media-Law Relations Committee sponsors periodic seminars for judges and journalists. Role-reversal among judges and journalists has been a central theme of the discussions. The first seminar, held in 1997, was sponsored by the Supreme Court, the Court of Appeals, the Wisconsin Newspaper Association, and the Soci-

ety of Professional Journalists. The seminar included lectures on how the Supreme Court and the Court of Appeals operate, tours of the Wisconsin State Law Library and of the Supreme Court chambers, and a question and answer session.

A subsequent seminar in Green Bay in 1999 brought together approximately 50 judges and journalists from an 11-county area. Since judges felt that inaccurate or incomplete news stories about sentences lead to undue criticism of the judiciary, sentencing was the focus of the morning's discussion. Participants were presented with a hypothetical homicide case and asked to impose a sentence on the defendant. The sentences were then compared and participants explained their decisions. A discussion of access followed the hypothetical. Participants were given an opportunity to visit

further during the concluding luncheon.

The most recent seminar, held March 2001 in Milwaukee, asked reporters to issue sentences in a mock criminal trial. Judges were asked to write the headlines based upon

the journalists' sentences. In addition to role-reversal, participants were read an actual news story about a plaintiff who was awarded \$1.6 million after a slip and fall injury. The judge, who in real life had upheld the award, explained that the news story was unfair since it had omitted several important details that had provided a strong basis for the award. Though journalists may have disagreed with the judge's comments, at least they were informed how incomplete reporting may lead to a negative perception of the judiciary.

Conclusion

As the above examples indicate, many organizations are actively, and creatively, involved in promoting positive dialogue between members of the press and of the judiciary. As long as such interaction continues, there is hope that relations between the two professions will improve.

Rachelle Bin is a media lawyer who wrote the original LDRC Bench Media Project Report in June 2000. A copy of the report can be delivered on request.

The most recent seminar, held March 2001 in Milwaukee, asked reporters to issue sentences in a mock criminal trial. Judges were asked to write the headlines based upon the journalists' sentences.

The Battle— In Afghanistan and With the Pentagon – Continues

As Northern Alliance troops and their American advisors swept towards southern Afghanistan troops, western journalists followed — and in some cases, as in the capture of Kabul, led. But the Pentagon still refused to allow access to American troops in Afghanistan and surrounding countries, and the deaths of seven Western journalists underscored the inherent danger in reporting from a war zone.

On the Ground

Journalists who had been tagging along with Northern Alliance troops moved south as the Taliban began ceding territory and major cities. Reports included the jubilant reaction of Kabul residents and the brutality of Northern Alliance fighters towards retreating Taliban troops.

As journalists began to explore homes and military facilities abandoned by the Taliban and al Qaeda, they reported on documents they found, some of which discussed building nuclear bombs, biological poisons, and how to conduct assassinations. The myriad documents led to doubts over their authenticity, and to ethical questions over whether reporters could take the papers, and whether they should be turned over to the American or British governments. News organizations contacted by the *Wall Street Journal* said that they would turn over sensitive documents, but would not say whether they had done so or not.

Prior to the advance, journalists had expressed frustration with Northern Alliance officials responsible for handling press relations, and with “fixers” who offered information, transportation and access — of varying degrees of usefulness, and for a price. And they had encamped themselves in locales as varied and as far afield as a tent in Afghanistan near the Tajikistan border, the Marriot Hotel in Islamabad, even the summer home of assassinated Northern Alliance leader Ahmed Shah Massood, 40 miles north of Kabul.

The British and American governments, meanwhile, set up “Coalition Information Centers” in Islamabad, London and Washington to provide the anti-terrorism coalition’s view of developments to reporters, especially from the Arab world.

But American media continued to object to the lack of access to American troops, who are mainly stationed in the countries surrounding Afghanistan. Pentagon officials

said that the restrictions were necessary because the governments of these nations feared that publicity of the American troops’ presence would stir civil unrest. Reporters were able to interview some of the troops in Uzbekistan via telephone.

The sensitivity of some foreign governments was shown when the Saudi government protested news reports that American officials were upset at a lack of full cooperation from Saudi Arabia. The nation serves as a major control base for American operations in Afghanistan, although officials of both governments have been loathe to discuss this.

Reporters also had access to some aircraft carriers from which American planes were launched for missions over Afghanistan, and some were allowed on military flights over the region. But they were not permitted on some carriers, such as the USS Kitty Hawk, from which several American commando raids were launched.

In mid-October, Defense Secretary Donald Rumsfeld denounced leaks which informed the press of American special forces operations before they were completed. “The fact that some members of the press knew enough about those operations to ask the questions and to print the stories was clearly because someone in the Pentagon had provided them that information,” he said at a Pentagon press briefing. “And clearly, it put at risk the individuals involved in the operation.”

In mid-November, *Hustler* publisher Larry Flynt filed suit against the Defense Department after the Pentagon refused his request to have reporters accompany combat troops in Afghanistan. In a letter refusing the request, Pentagon spokeswoman Victoria Clarke wrote that the denial was due to “the highly dangerous and unique nature” of the operations.

Flynt filed a similar suit over the invasion of Grenada in 1983; the case was dismissed as moot by the district court, and the decision affirmed by the D.C. Circuit. *See Flynt v. Weinberger*, 762 F.2d 134, 11 Media L. Rep. 2118 (D.C. Cir. 1985). *See also Nation Magazine v. Dep’t of Defense*, 762 F. Supp. 1558, 19 Media L. Rep. 1257 (D.D. C. 1991) (dismissing suit over Gulf War restrictions as moot).

Conflict also arose when the Pentagon selected ten reporters to accompany Defense Secretary Donald Rumsfeld

The Battle — In Afghanistan and With the Pentagon — Continues

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on his early-October tour of Middle Eastern countries. The reporters chosen included six television journalists, as well as reporters from *USA Today*, *The Wall Street Journal*, the *Los Angeles Times* and *The Washington Post*. As reported by *Editor & Publisher*, many reporters were upset that a wire service — particularly the Associated Press — had been excluded. But reporters for other news services argued that the AP should not be the only wire service included in media pools, while those from nationally prominent newspapers said that they should be given preference.

New Laws, New Secrecy

First Amendment advocates also expressed concern that new anti-terrorism legislation signed by President Bush. See USA PATRIOT Act of 2001, Pub. L. No. 107-56 (signed Oct. 26, 2001).

The new law allows for increased wiretap authority, which may make sources reluctant to speak to the news media. There was also some concern that the statute's definition of a "domestic terrorism" was so broad that publications with articles supporting a group deemed to be a terrorist organization could be forbidden.

Other provisions in new anti-terrorism legislation signed by President Bush will allow "secret evidence" to be used in criminal cases stemming from espionage investigations, and thus allow court proceedings to be closed to the public. Collection of such evidence is authorized by the secret Foreign Intelligence Surveillance Court under the authority of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862). For more information on this Act and the court, see "Federal Secrecy Provisions: It's a War Out There," LDRC LibelLetter, Oct. 2001, 53, 56. The provisions allowing expanded use of evidence expire on Dec. 31, 2005. See USA PATRIOT Act, § 224.

Concerns also continued to be raised over more than 1,100 people who have been detained under FISA as part of the ongoing investigation into the Sept. 11 terrorist attacks. Neither their identities nor the charges against the detainees have been disclosed, and courts have issued gag orders barring release of information about legal proceed-

ings.

In late October, a group of 22 human rights and news organizations filed a request under the Freedom of Information Act, 5 U.S.C. § 552, for the identities of, charges against and other information about the detainees. Among the groups making the request were the American Civil Liberties Union, the Electronic Frontier Foundation, the Electronic Privacy Information Center, the First Amendment Foundation and *The Nation* magazine. The request was also supported by Sen. Russ Feingold (D-Wis.), who sent his own letter to Attorney General John Ashcroft requesting release of the information.

Justice Department officials said that they were releasing as much information as possible without compromising ongoing investigations.

But Ashcroft himself may have violated a gag order in one of these cases. At an Oct. 31 news conference, Ashcroft revealed that three men detained in Detroit for possession of false documents may have had advance knowledge of the Sept. 11 attacks. As reported by the *Detroit Free Press*, this statement was in apparent violation of a gag order imposed by U.S. District Judge Gerald Rosen, and agreed to by both the defendants and the government, in order to preserve their right to a fair trial.

Meanwhile, President Bush signed an executive order allowing noncitizens accused of terrorism to be tried by military tribunals. See Military Order of November 13, 2001, 66 Fed. Reg. 57831 (2001). The order provides that public access to such proceedings may be determined by the Secretary of Defense, consistent with existing policies on classified information. *Id.*, § 4(c)(4). It is expected, however, that most such proceedings would be secret.

No Fly Zones

The FAA ban on news planes and helicopters within 22 miles of airports in the 30 largest American airports, imposed on Sept. 11, remains in place, and the FAA began investigations on whether television stations in Dallas and Miami violated the ban. See FDC 1/1474 (issued Oct. 21, 2001).

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The Battle — In Afghanistan and With the Pentagon — Continues

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In Dallas, the FAA ordered three helicopters following a police chase of a stolen lumber truck to land; only one complied. In Miami, two news helicopters covered another police chase; the FAA began its investigation after a competing station complained.

At least one of the Dallas helicopters that did not land was operated by a private contractor for KDFW. The station's live coverage was picked up nationally by the Fox News Channel and CNN.

Officials at the Miami stations under investigation, WFOR and WTVJ, said that the coverage did not violate the FAA rules, which allow flights within the 22-mile perimeter en route to a destination outside the limit. They added that air traffic controllers allowed the helicopters to fly near a nuclear power plant, prohibited by another FAA rule passed in the wake of Sept. 11. See FDC 1/1516 (issued Oct. 22, 2001).

In New York, television news directors complained that the flight restrictions limited their coverage of the crash of American Airlines flight 587 on Nov. 12. But the producer of local coverage of the New York Marathon on Nov. 4 was able to obtain special FAA permission to cover that event from the air.

The FAA says that the ban was imposed at the behest of the new Homeland Defense Agency and other defense agencies, and only those agencies can end the flight restrictions.

Across the Pond

In Britain, the Independent Television Commission censured ITN for a sequence in which the collapse of the World Trade Center was set to music, and warned al-Jazeera about broadcasting statements by Osama bin Laden. The Broadcasting Standards Commission declined to act over a BBC debate in which studio audience members expressed strong anti-American sentiment. And the military reminded newspapers not to publish information regarding special forces operations.

In the ITN case the commission — which licenses and regulates privately-operated broadcasters — labeled the two-minute segment, shown on Sept. 12, an “offence to taste and public feeling.” At the conclusion of five hours

of coverage of the attacks, the network showed the towers burning, then crumbling, to the accompaniment of Charles Gounod's classical composition “Judex,” which ends with a timpani roll.

ITN had told the commission that music used was funereal and appropriate, and that the segment was “intended to provide viewers with a few moments on which to reflect.”

“[S]etting to music the aftermath of the tragedy, including the rescue efforts, was moving and effective,” the commission wrote in its evaluation of the complaint. “However, the inclusion of shots of impacts on the World Trade Centre towers, in time with the music, and the collapse of the towers, was inappropriate.” Independent Television Commission, *Programme Complaints and Interventions Report: October 2001*, available at www.itc.org.uk.

In November, the Independent Television Commission announced that it was monitoring al-Jazeera's broadcasts in Britain via Sky Digital to determine whether its coverage of the war, including broadcasting videotaped statements by Osama bin Laden, constituted incitement to hatred.

al-Jazeera's French broadcast license allows it to be shown in other members of the European Union, including Britain. But the EU's Television Without Frontiers Directive also requires member governments to “ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.” Council Directive 89/552/EEC (Oct. 3, 1989), as amended by Directive 97/36/EC (June 30, 1997).

The BBC complaint stemmed from a live broadcast of “Question Time” on Sept. 13. The hostile questions from the audience led one panel member on the news discussion program, former American ambassador to Britain Philip Lader, to appear close to tears on the program. The BBC received more than 2,000 complaints about the program, and two days later BBC Director-General Greg Dyke apologized for “times in the program when the tone was not appropriate.”

Meanwhile, in early November British defense officials were planning to remind members of the “D” Notice Committee about the system's voluntary restrictions on

LDRC Institute First Amendment Seminar Held in New Jersey High School

The LDRC Institute's First Amendment High School Seminar Project had its first test in the field this month. On Monday Nov. 19, a seminar program was presented at Chatham High School in New Jersey. The program was put together by Bruce Rosen of LDRC member firm McCusker, Anselmi, Rosen, Carvelli & Walsh, in Chatham, and LDRC Staff Attorney Dave Heller. Bruce Rosen moderated the seminar and Dave Heller presented and coordinated the program with the school. Chatham High School teacher Tom Gray was the inside advocate for the program, promoting it to the high school staff and arranging for the technical production in the school auditorium.

The theme for the seminar was the media and the criminal justice system. Bruce Rosen led the panel of journalists and lawyers and the student audience in discussing a hypothetical scenario involving the murder of a teenager at the "Suburbia Mall" and the subsequent arrest of her boyfriend. Exploring the interplay of the media and the criminal justice system through arrest and trial, the panel, with questions raised by the students, discussed whether the crime was newsworthy, how it would be covered, whether and how details of the suspect's and victim's private lives would be reported, what role lawyers play in shaping media coverage and the potential free press and fair trial conflicts.

Taking part on the panel from the media side were Dianne Doctor, Vice President and News Director for WNBC-TV's NewsChannel 4; Bill Swayze, a crime, police and general beat reporter for New Jersey's largest newspaper, the *Newark Star Ledger*; and Jeff Weiser, a Bloomberg News anchor and reporter. The lawyer panelists were Somerset County Prosecutor Wayne Forrest; Peter Skolnik, from LDRC member firm Lowenstein Sandler in Roseland, N.J.; Judge Alvin Weiss, a recently retired member of the New Jersey Superior Court and now of counsel to the law firm Porzio, Bromberg & Newman in Morristown, N.J.; and Alan L. Zegas, the well-known criminal defense lawyer based in Chatham.

The seminar was well-received by the students and teachers. The students were drawn from the school's journalism and advanced social studies programs and they posed atten-

tive and thoughtful questions to the panelists. In addition, the high school videotaped the seminar for future classroom use. At the end of the program, the school raised the idea of doing the seminar again next year. The panelists were enthusiastic volunteers. Indeed, the day after the seminar Judge Weiss sent out a press release describing the program and his appreciation for the opportunity to interact with students.

Relying on LDRC members to act as moderators and investigators for the seminars, the goal of the Institute program is to spur students to think about First Amendment principles in the context of real life issues and dilemmas faced by the working press. The program was designed to use the dynamic and thought-provoking format of the "Fred Friendly Seminars" broadcast for many years on PBS. In this format,

familiar to most lawyers, the moderator leads panelists in a Socratic, and at times role-playing, discussion of a well-honed hypothetical. The hypotheticals developed by LDRC were designed to demonstrate how journalists and

lawyers interact, approach and attempt to resolve the complexities and conflicts that arise as they pursue their professions, ultimately helping students to think and ask questions about the rights and responsibilities of the press and legal system.

Members interested in producing or moderating a seminar in their local community can contact Dave Heller at LDRC to obtain copies of the project handbook and sample seminar videotape.

The seminar was well-received by the students and teachers. At the end of the program, the school raised the idea of doing the seminar again next year.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

Libel Defense Resource Center, Inc.
80 Eighth Avenue, New York, NY 10011

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LDRC Dinner Highlighted by Conversation With Sawyer, Hewitt and Bradlee

CNN's Isaacson Led Discussion of Journalism in the Wake of September 11

A conversation about the current pressures of journalism was the highlight of the LDRC's 21st Annual Dinner on Nov. 7. Walter Isaacson, chairman and CEO of CNN, led the conversation. Isaacson was joined by Ben Bradlee, Vice President at-large of *The Washington Post*, Don Hewitt, executive producer of "60 Minutes" for CBS News, and Diane Sawyer, anchor and correspondent of ABC News.

The conversation started with the topic of investigative journalism versus the free-flow of information in the wake of the Sept. 11 terrorist attacks. All three of the speakers have a distinguished track record in investigative journalism. Bradlee was the managing editor of the *Post* when the paper published the Pentagon Papers and when Bob Woodward and Carl Bernstein broke the Watergate story. Hewitt is best known for creating "60 Minutes," the news broadcast that has served as the model for the news-magazine format. Sawyer is widely known for her exclusive interviews, such as the first post-election interview with Florida Secretary of State Katherine Harris, and has received a long list of awards for investigative pieces, such as exposing unsanitary conditions at the Food Lion grocery chain in 1992. Isaacson, prior to joining CNN last summer, was managing editor of *Time* magazine for 4 years.

Isaacson introduced the topic by then asking Bradlee if he was concerned about the free-flow of information at a time when it seems as though the government is trying to clamp down on information.

"I'm less worried than some of you about the obstacles in front of the press now," Bradlee said. "There were lots of things the *Post* didn't print in a time that was described as its finest hour. Of course you don't print some things. In the last analysis, some of them aren't very important."

Sawyer felt the analysis in times when information is being held boils down to three questions: "What is being asked (by the government)? How long will (the information) be held? Will the information eventually reach the public?" Sawyer said.

Hewitt later joked about being cut out of the information loop. "I don't have the problem (being asked to hold information) you have," Hewitt said. "Since Mike Wallace took on Westmoreland, the armed forces don't talk to us."

The Press and Patriotism

When Isaacson asked Sawyer about being a journalist at a time when the public is acting as a sort of a "Patriotism Police," Sawyer said journalists have to understand that they are "operating in a time of inflamed feelings."

"You have to know that the words you say land with a reverberation beyond sometimes the specific words themselves," Sawyer said.

Isaacson later indicated his belief that right now it is easy for journalists to get on the wrong side of public opinion. "If people think you're being less than patriotic, you can get in trouble," he said. Hewitt, however, dismissed that danger as part of journalism.

"That's a part of the history of journalism and you have to live through those times," Hewitt said. "If you don't do what you think is right (in order to stay away from public wrath) you don't belong in this business."

bin Laden Tapes

The conversation turned to the recent request by National Security Advisor Condoleezza Rice that news organizations use better judgment in running tapes of Osama bin Laden. Hewitt said he had "no problem" with Rice's request.

"We were just opening up the flood gates," Hewitt said. "It was going on the air raw. We were just giving him a microphone. Look at the tape. Use editorial judgment.

"I don't want to turn the air over to [bin Laden] and say 'You have one hour. Here you go,'" Hewitt said.

When the tapes were compared to live press conferences, the group felt there was a distinction between the live press conferences and running unedited tapes of bin Laden. Even if they were the same, running anything live poses a great threat to journalistic integrity, according to Bradlee.

"I think you have to understand that when you cover something live, you run the chance of being had," Bradlee said.

Bradlee's comment prompted Isaacson to ask which was worse: being had by the American government or by Osama bin Laden.

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LDRC Dinner Highlighted by Conversation With Sawyer, Hewitt and Bradlee

(Continued from page 49)

"If your friends take you," Bradlee said, "you're really in trouble." Later, Bradlee did say that government officials run a great risk lying to the press.

"If they lie, forget it," Bradlee said. "They're asking for all they get when they lie. We (journalists) will get the truth sooner or later."

Journalists and America

The conversation eventually centered on the role journalists play in this country. Sawyer defended the job that journalists have been doing in the years leading up to September 11.

"It's always deemed that we don't cover real issues enough," Sawyer said, despite the efforts that news out-

lets have made to cover the important issues in a timely fashion. Sawyer blamed that reputation on the "human nature not to pay attention, to be roused to political action when we're not in imminent danger."

Sawyer also dealt with the idea that the American media is partly to blame for a poor image around the world. "If you're talking about the breeding ground of discontent," Sawyer said, "it's not because they're watching CNN. This isn't where we're failing to make our case." Sawyer did say she felt the country was yearning for provocative debate.

Isaacson concluded the evening by saying that he felt the "free-flow of information" was the best solution to the issues the country will face in the coming months and years.

Minutes of the Media Members Annual Meeting

The meeting was called to order by Robin Bierstedt, chairman of the LDRC Board of Directors.

Ms. Bierstedt welcomed the LDRC media members to the meeting and thanked them for their support of the organization during the past year.

Election of Directors

Ms. Bierstedt reported that Henry Hoberman, of ABC Broadcasting, Inc., had been nominated by the Board of Directors, per the LDRC By-laws, to join the board of directors. Ms. Bierstedt asked for a motion for the election of Mr. Hoberman to the board. A motion was made by Ken Vittor, seconded by Hal Fuson, and adopted unanimously.

Next on the agenda was the re-election of Ms. Bierstedt, of Time, Inc., Dale Cohen, of the Tribune Company, and Mary Ann Werner, of The Washington Post Company, each to a two-year term. A motion was made for their re-election, seconded and adopted unanimously by voice vote.

Executive Director Report

Next on the agenda was the Executive Director's report. Ms. Bierstedt introduced Sandy Baron. Ms. Baron talked about the postponement of the NAA/NAB/LDRC Conference, which has been rescheduled for Sept. 25-27, 2002. Ms. Baron expressed her hopes that registrants for this year's conference would leave their registration in. Ms. Baron also discussed the LDRC's new offices, reminding the members that the LDRC now has new phone and fax numbers.

Ms. Baron introduced the LDRC staff, discussed the new database the LDRC is implementing and asked for the members to provide e-mail address that could be added to the database. Ms. Baron informed the members that this would be important because the Board has voted to start delivering the *LibelLetter* exclusively via e-mail. Ms. Baron said that there is also a possibility that the LDRC will start using e-mail alerts to inform the members of new developments.

Next, Ms. Baron discussed the upcoming LDRC BULLETINS, informing the members that the fourth quarter

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Minutes of the Media Members Annual Meeting

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BULLETIN would contain new developments and articles dealing with credential issues. Looking ahead to 2002, Ms. Baron informed the members that a Bulletin in 2002 will deal with criminal and regulatory restraints on newsgathering. Finally, Ms. Baron thanked the committees for their work, and thanked the media members for their support of the LDRC.

DCS Report

Next on the agenda was a report from the Defense Counsel Section. Susan Grogan Faller, president of the DCS Executive Committee, reported that the DCS was thriving and coming off an energetic year.

She discussed the proposed by-law amendment that the DCS would vote on at its annual meeting on Nov. 9th that would modify the current by-law requirements, *inter alia*, by allowing membership by the U.S. offices of multinational firms that may have non-U.S. offices that would not otherwise be eligible for membership, provided the firms agree to limit access to LDRC materials and services to only those offices that are eligible.

Sandy Baron also mentioned that in addition to the amendment to the DCS By-laws to recognize the needs of multinational law firm situations, LDRC was going to constitute a new associate membership for those non-U.S. law firms — noting, specifically, chambers or individual barristers — and non-U.S. offices of participating U.S. firms, that would be indicated in the DCS Directory as supporters of LDRC, would receive the quarterly LDRC BULLETIN, and participate in 50-State Surveys and international (but not domestic) conferences. She said these were important steps for the DCS membership to take as the membership grows to become more international.

Finally, Jim Stewart delivered a report to the media members on the jury debriefing project. Mr. Stewart gave a brief summary of their findings. Finally, Mr. Stewart reported that the project reminded him of something his mother told him: “Dear, why don’t you get out of trial work and do trusts and estates.”

Finally, Ms. Bierstedt asked if there was any new business. Being none, the meeting was adjourned.

Minutes of the Defense Counsel Section Annual Meeting

The meeting was called to order by Susan Grogan Faller, president of the DCS Executive Committee.

Ms. Faller welcomed the DCS members and quickly recapped the year and characterized it as a good one, despite the fact that the year included the postponement of the NAA/NAB/LDRC Annual Conference in Arlington, Va. because of the Sept. 11 terrorist attacks, and the expiration of LDRC’s lease at 404 Park South and subsequent office move.

Election of Treasurer

Ms. Faller moved to the election of the new treasurer. Jim Stewart of Butzel Long in Detroit was nominated by the DCS Executive Committee to serve as next year’s treasurer. There were no other nominations from the membership. Ms. Faller welcomed a motion for the election of Mr. Stewart. The motion was made, seconded and unanimously adopted.

By-Law Amendment

Next on the agenda was an amendment to the Defense Counsel Section by-laws that would modify the current by-law requirements, *inter alia*, by allowing membership by the U.S. offices of multinational firms that may have non-U.S. offices that would not otherwise be eligible for membership, provided the firms agree to limit access to LDRC materials and services to only those offices that are eligible. A motion to adopt the by-law amendment was made, seconded, discussed and unanimously adopted.

Executive Director Report

Ms. Faller then asked the Executive Director, Sandy Baron, for her report. Prior to the introduction of Ms. Baron, David Schulz, this year’s vice president of the DCS Executive Committee, took the podium to express the membership’s deep appreciation of Ms. Faller and her leadership of the Section.

Ms. Baron first thanked the membership for their support of LDRC. She also mentioned that in addition to the

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Minutes of the DCS Annual Meeting

(Continued from page 51)

amendment to the DCS By-laws to recognize the needs of multinational law firm situations, that LDRC was going to constitute a new associate membership for those non-U.S. law firms — specifically barristers — and non-U.S. offices of participating U.S. firms, that would be indicated in the DCS Directory as supporters of LDRC, would receive the quarterly LDRC BULLETIN, and participate in 50-State Surveys and international (but not domestic) conferences. She said these were important steps for the DCS membership to take as the membership grows to become more international.

Ms. Baron discussed the postponement of the NAA/NAB/LDRC Conference, expressing her wishes that all registrants remain registered for the conference, which will be held Sept. 25-27, 2002. Those who do will not experience any price rise in the conference fees, will receive Tom Kelley's extraordinary Trial Tales chapters from the conference binder, and will be helping the conference sponsors (NAA, NAB, and LDRC) manage the finance of the conference.

Ms. Baron reported on the LDRC's new offices. She reminded the membership that the LDRC has a new telephone number (212-337-0200) and a new fax number (212-337-9893). Next, she introduced the LDRC staff and discussed the new database LDRC has introduced. She urged members to provide LDRC with up-to-date information on their offices and email addresses.

This tied into the need for an updated e-mail list. Ms. Baron informed the DCS members that the Board has voted to deliver the LDRC *Libelletter* via e-mail in the future. Finally, Ms. Baron recapped a productive year for the LDRC staff.

LDRC Committees

Next on the agenda were the LDRC Committee Reports. Advertising and Commercial Speech Committee chair **Richard Goehler** informed the DCS members that his committee spearheaded the second quarter BULLETIN on misappropriation, right of publicity and related and commercial speech claims. He informed the DCS members that his committee is setting up a roundtable to discuss cases how best to litigate such claims. He also said he would like to see more of these issues covered in the

LibelLetter.

Next was the Conference Committee. **Daniel Waggoner** informed the DCS members that the NAA/NAB/LDRC Conference was set to go on Sept. 25-27, 2002. He informed the members that all the work would be updated, and the binders that would have been passed out at the conference on Sept. 12 will be carried over for next year but with updated and, where appropriate, newly created, materials.

Kurt Wimmer, for the Cyberspace Committee, reported that his committee had put together papers for the 2001 conference. Those papers were now available via the LDRC website since cyberspace papers have a short shelf life. The articles will also be updated for the 2002 conference. Mr. Wimmer also reported that Pat Carome will take over as chair of the Cyberspace Committee.

Next, **Sanford Bohrer**, for the Employment Law Committee, reported that his committee will be reviewing workplace issues that might be analogous to news-gathering issues. As an example, Mr. Bohrer cited e-mail searches.

Bruce Johnson reported for the Ethics Committee. Mr. Johnson reported that ethics issues have begun to be litigated more in media related contexts, and there is more emphasis on ethics issues as part of CLE.

Next, **John Berger**, for the Expert Witness Committee, reported that the committee believed it was about to come to an end. When that idea was met with some hesitation, it was decided that his committee will instead start an ambitious effort to create a new system to provide great information on expert witnesses. He expressed the need for greater input by the members regarding expert witnesses that they use or expert witnesses that they have to cross-examine. His hopes were that a system could be established that would provide quicker turn-around of information for the members.

Kevin Goering reported for the International Committee. Mr. Goering informed the members that Kurt Wimmer and Jim Borelli would take over the committee as co-chairs. Mr. Goering also reported that the

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Minutes of the DCS Annual Meeting

(Continued from page 52)

committee had accomplished a lot, and would be working on an international conference for 2003. Mr. Goering was pleased to see more international information in the Libelletter and in the outlines in the LDRC 50-STATE SURVEYS.

Next, **Tom Kelley** reported for the Jury Debriefing Committee, headed by Jim Stewart. Mr. Kelley's committee distributed a jury debriefing report done on an Oklahoma case litigated by Bob Nelon.

Next, **David Klaber**, for the Jury Committee, thanked former chair Dan Barr, and reported that the committee has updated the Jury Instructions Manual. Also, Mr. Klaber reported that the committee, formerly known as the Jury Instruction Committee, would go by a new name: The Jury Committee. The name of the committee was done as a response to the committee's desire to look into more than just jury instructions. The committee plans to also look into jury reform issues.

Next, **Jim Grossberg**, for the Legislative Affairs Committee, reported that his committee is still tracking the official secrets legislation in Congress. Mr. Grossberg said he would like to put together an academic list for testimony on bills.

Adam Liptak spoke for the LibelLetter Committee. Mr. Liptak reported that the LibelLetter will eventually be delivered exclusively via e-mail. He also said he would like to see the LibelLetter focus on cases with new and potentially precedential rulings, with articles that are written more concisely, and avoid issues where the rulings are mundane. He also encouraged the members to inform the LDRC of new developments.

Next, **Karen Frederikson** spoke for the Membership Committee. She expressed the desire to see continued growth in the DCS Membership and reported on her committee's efforts to recruit likely candidates.

Dean Ringel, for the Newsgathering Committee, reported that his committee will soon finish and release a compendium of cases on newsgathering for the use in briefs. He expressed his hope that his committee could put together a model brief on illegal newsgathering, and a checklist for ride along cases.

Bob Nelon spoke for the Pre-Publication/Pre-Broadcast Committee. He reported that the committee

will address the *Bartnicki-Peavy* issues so that the DCS members could be able to advise the media clients on these issues.

Joyce Meyers spoke for the Pre-Trial Committee. Ms. Meyers reported that her committee has completed the summary judgment checklist.

Finally, **David Sanders** and **Guylyn Cummins** spoke for the Trial Techniques Committee. They reported that in the last year, the model trial brief had been updated and a report issued on the jury consultants in libel cases.

Ms. Faller expressed her appreciation for the hard work of the committees.

Next on the agenda, Tom Kelley spoke about the LDRC Institute Project. Mr. Kelley expressed the importance of the media bar giving back to the community and of helping to educate students to the First Amendment. He reported on how the Institute High School Project, which involved the production of a "Fred Friendly Seminar" had run in Colorado, where Tom melded it with a federal bench/media project to program for both a judicial conference and for a high school. He referred to the June 2001 LibelLetter if the members had any questions about how the project had been initiated or functioned.

Ms. Faller proceeded to the new business. Jim Borelli discussed the proposal for an International Conference in 2003, and some of the issues that the International Committee was grappling with, such as where to hold the conference. Lastly, Dick Winfield spoke about the funding to support a media lawyer in Sarajevo under the umbrella of the ABA's CEELI program, and the need to find candidates to run this and other programs on media law in Eastern Europe.

Being no other business, the meeting was adjourned.

*Thank you to all who attended the
LDRC Annual Dinner and DCS Breakfast Meeting.*

We look forward to seeing you all again next year!

SAVE THE DATES

LDRC Annual Dinner

November 13, 2002

NAA/NAB/LDRC Libel Conference

September 25 -27, 2002

***Practice Guide: How to Defeat
Plaintiffs' Claims of Actual Malice***

(Continued from page 56)

- B. Routine Grants Of Summary Judgment For Failure To Show Actual Malice By Clear And Convincing Evidence**
- C. No Finding Of Actual Malice Where Plaintiff Has Shown Multiple Themes Against Defendants**
- D. Plaintiff Must Prove Knowledge Of Falsity As To Each Statement**
- E. Information Acquired After Publication Does Not Establish Actual Malice**
- F. Reporter's Rational Interpretation Of Complex Ambiguous Event Does Not Establish Actual Malice (*Bose* and *Pape* Analysis)**
- G. Negligence Or "Unprofessional Conduct" Does Not Establish Actual Malice**
- H. Failure To Investigate Does Not Establish Actual Malice**
- I. Failure To Speak To Favorable Sources Prior To Publication Does Not Establish Actual Malice**
- J. Failure To Consult With Plaintiff Prior To Publication Does Not Establish Actual Malice**
- K. Unfairness, Bias Or Slant In Publication Does Not Establish Actual Malice**
- L. The Character And Content Of A Publication Does Not Establish Actual Malice**
- M. Reporter's Ill Will Towards Plaintiff Does Not Establish Actual Malice**
- N. Knowledge Of Plaintiff's Denials Does Not Establish Actual Malice**
- O. Demand For Retraction Or Threat Of Libel Action Does Not Establish Actual Malice**
- P. Failure To Retract Statement After Publication Does Not Establish Actual Malice**
- Q. Reliance On A Single Source Does Not Establish Actual Malice**
- R. Reliance On Hostile Source Does Not Establish Actual Malice**
- S. Reliance On Source Who Is A Convicted Felon Does Not Establish Actual Malice**
- T. Reliance On Source Who Has Been Contradicted Does Not Establish Actual Malice**
- U. Reliance On Confidential Source Does Not Establish Actual Malice**
- V. Reliance On Previously Published Material Does Not Establish Actual Malice**
- W. Reliance On Reporter Does Not Establish Actual Malice**
- X. Respondeat Superior**
- Y. Review By Outside Counsel Constitutes Affirmative Evidence Of Lack Of Actual Malice**
- Z. Publication Of Prompt Correction Constitutes Affirmative Evidence Of Lack Of Actual Malice**
- AA. Attempt To Interview Plaintiff Constitutes Affirmative Evidence Of Lack Of Actual Malice**
- BB. Inclusion In Article Of General Denials By Plaintiff And Disclosure Of Bias Constitutes Affirmative Evidence Of Lack Of Actual Malice**
- CC. Mistaken Identity Does Not Establish Actual Malice**
- DD. Subsidiary Meaning Doctrine**
- EE. Unintended Implications Or Inferences That May Defame Plaintiff Are Not Evidence Of Actual Malice**
- FF. Reporters Should Not Be Held To The Platonic Ideal**

Jeffrey H. Blum and Jennifer L. Brockett are with Davis Wright Tremaine in Los Angeles

Practice Guide: **How to Defeat Plaintiffs' Claims of Actual Malice**

LDRC will soon be distributing via e-mail to members "Practice Guide: How to Defeat Plaintiffs' Claims of Actual Malice," by Jeffrey H. Blum and Jennifer L. Brockett of Davis Wright Tremaine LLP in Los Angeles. Below is an introduction to this document.

By Jeffrey H. Blum and Jennifer L. Brockett

When defamation plaintiffs face the onerous task of surmounting the public figure actual malice standard, they usually resort to a standard refrain: the reporter relied on biased sources; the reporter was negligent; the reporter had ill-will towards plaintiff; the reporter had knowledge of plaintiff's denials; the reporter relied on a single biased source; the reporter relied on a confidential source; the article was slanted or unfair towards plaintiff; and the reporter failed to interview sources favorable to plaintiff, among many others.

This Practice Guide collects — by these various themes — some of the leading/recent actual malice cases and includes quotations from each case. The pur-

pose of the Practice Guide is to inform defense counsel of this relevant case law so they can quickly respond to a claim of actual malice by a plaintiff.

Under the First Amendment, a public figure cannot recover for a defamatory statement unless he can prove that a defendant published the statement "with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. The New Yorker Magazine*, 501 U.S. 496, 510 (1991).

The actual malice standard focuses solely on the defendant's actual state of mind "at the time of publication." *Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 512 (1984). "Mere negligence does not suffice." *Masson*, 501 U.S. at 510. Rather, the term "knowledge of falsity means simply that the defendant was *actually* aware that the contested publication was false." *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 484 (7th Cir. 1986).

Similarly, to establish that the defendant published a statement with "reckless disregard" for the truth, the plaintiff must show "that the defendant *actually* had a 'high degree of awareness ... of probable falsity.'" *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989), citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (emphasis added by authors).

Often, plaintiffs attempt to satisfy this burden by pointing to circumstantial evidence to create an inference that the reporter subjectively had doubts about the truth of the challenged statements. For example, plaintiffs point to the reporter's ill-will, the bias of sources and/or inadequate investigation in an attempt to show actual malice. As set forth in the Practice Guide, courts routinely reject such attempts. One court's observation that "the standard of actual malice is a daunting one" recognizes how difficult it is for plaintiffs to show actual malice even when they levy a host of charges of poor, biased and sloppy journalism against defendants.

The Practice Guide contains the following sections:

A. The Actual Malice Standard Generally Defined

(Continued on page 55)

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***PRACTICE GUIDE: HOW TO
DEFEAT PLAINTIFF'S CLAIMS
OF ACTUAL MALICE***

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