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MEDIA LAW LETTER

Reporting Developments Through November 30, 2006

MLRC

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MLRC Calendar

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December 7, 2006

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Washington, D.C.

**“The Future of the Free Press: Should Journalists
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Thursday, December 7

7 – 9 p.m.

- Nina Totenberg, legal affairs correspondent for National Public Radio
- Earl Caldwell, Writer-in-Residence at the Scripps Howard School of Journalism and Communications at Hampton University
- Judge Stanley Sporkin (Ret.), Partner at Weil, Gotshal & Manges, LLP
- Victoria Toensing, Partner at diGenova & Toensing, LLP
- Bob Drogin, Washington D.C. Intelligence Correspondent for The Los Angeles Times
- Tim Franklin, Editor and Senior Vice President of The Baltimore Sun
- Steven D. Clymer, Professor at Cornell Law School
- Lee Levine, Partner at Levine, Sullivan, Koch & Schulz, LLP
- Moderated By: Dale Cohen, Associate General Counsel, Media for Cox Enterprises, Inc.

National Press Club, 529 14th Street, NW. Washington, D.C. 20045

To reserve a seat, call the National Press Club: (202) 662-7501

MLRC's Annual Dinner November 8, 2006

Panel Discusses Reporting on National Security Under Threat of Indictment

On Wednesday, November 8, 2006, Scott Pelley of CBS News moderated a discussion on the current climate for reporting on national security and military issues with journalists Dana Priest of the Washington Post, James Risen of The New York Times, Pierre Thomas of ABC News and David Remnick, editor of the New Yorker.

The panel was part of MLRC's 26th annual dinner celebration at the Sheraton New York Hotel and Towers, 811 7th Avenue on 53rd Street.

Over 600 attendees heard the panel discuss the hovering specter of criminal leak investigations and direct criminal charges – and how reporters and their editors approach their work on national security and intelligence issues in the current environment.

Panelists discussed the controversy surrounding Dana Priest's report on the CIA's secret prisons in Eastern Europe, James Risen's reports on the Treasury Department's anti-terror bank monitoring program and the New Yorker's reports on military operations in Iraq and Afghanistan. Pierre Thomas also spoke about the threat of jail he faced for protecting his source in the Wen Ho Lee case.

“What do journalists think about the sobering possibility that their reporting might subject them not only to harassment and jail time for failing to reveal a source, but to actual indictment as co-conspirators under laws that were written for spies and traitors? I don't think I'm over-stating it to say that these are complex questions with profound implications for journalism, democracy, and the future of the First Amendment.”

— Henry Hoberman, MLRC Chair

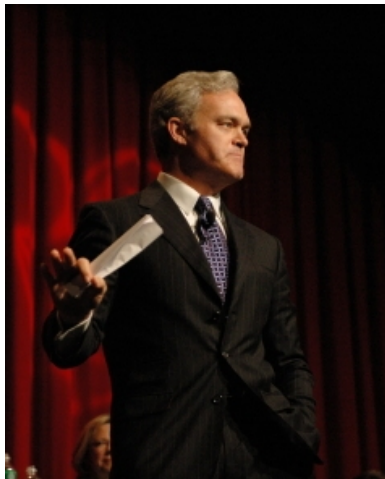


MLRC Chair Henry Hoberman



(from left to right) David Remnick, Dana Priest, Pierre Thomas and James Risen

PHOTOS BY JULIENNE SCHAER



Scott Pelley

Scott Pelley: *“James, why should you not be enjoying your Pulitzer Prize behind bars?”*

James Risen: *“Well, you know, I think the First Amendment came first; before the Espionage Act.”*

David Remnick: *“[Abu Ghraib] was irrefutable and it was horrible, and it was no question that we were going to publish it the earliest possible date.”*



David Remnick

James Risen: *“It is important for us as Americans to begin to think about changing the rhetoric that we use about leaks and about reporting on classified and national security information. I mean, I think, when I got into this business a long time ago, a whistleblower was someone who was kind of respected in society.”*



James Risen



Pierre Thomas

Pierre Thomas: *“Our society is built in part on the public having information. It’s what my bosses ask me to do every day when I come to work; which is ‘find out things about how the government is operating.’ And, essentially every day, people are telling me things they shouldn’t be telling me.”*

Dana Priest: *“People who had never met me before were actually calling me a traitor. And when I got over that viscerally, I said to myself and my kids, ‘You know, this really is all about the debate.’ And even though the debate is awkward and painful at the moment, I, in general, always had faith that the debate would be the prominent feature that we would remember when this era was over.”*



Dana Priest

Illinois Jury Awards Chief Justice \$7 Million in Libel Suit Against Newspaper

On November 14, a Kane County, Illinois jury returned a \$7 million verdict in favor of Justice Robert Thomas, the Chief Justice on the Illinois Supreme Court, in his libel suit against the *Kane County Chronicle*, a small suburban Chicago newspaper. *Thomas v. Page*, (jury verdict 11/14/06).

At issue were two editorial columns in the newspaper suggesting that Justice Thomas was influenced by political considerations in a attorney disciplinary case handled by the Illinois Supreme Court. The jury found that the columns were published recklessly and awarded \$5 million in reputational damages, \$1 million for emotional distress and \$1 million for economic harm. (Plaintiff had sought up to \$17 million in damages). This is the second highest damage award in a media libel trial in Illinois history and is exceeded only by a \$9.2 million award in *Green v. Alton Telegraph Printing Co.*, (Ill. Cir. Ct. 1980).



Justice Robert Thomas

A more detailed report from defense counsel will be published in next month's *MediaLawLetter*.

Background

On May 15, 2003, May 20, 2003 and November 25, 2003, the *Kane County Chronicle* published opinion pieces by columnist Bill Page discussing an attorney disciplinary case involving Kane County

State's Attorney Meg Gorecki. She was being disciplined for offering a job in exchange for campaign contributions.

The columns suggested that Illinois Supreme Court Justice Robert R. Thomas may have been influenced by political calculations when deciding Ms. Gorecki's punishment. In particular, the first column reported that Justice Thomas was "pushing hard for various sanctions, including disbarment. Other Justices do not agree with him, at least two opting for simple censure, but Thomas' pressure could result in a single 'compromise' – a year's suspension of Gorecki's law license."

After the Illinois Supreme Court suspended Ms. Gorecki's law license for four months, Bill Page wrote a column stating that the "suspension is, in effect, the result of a little political shimmy-shammy. In return for some high profile Gorecki supporters endorsing Bob Spence, a judicial candidate favored by Thomas, he agreed to the four-month suspension."

Justice Thomas sued Page, managing editor Greg Rivara, and the *Kane County Chronicle* for libel and false light. In pretrial rulings, the trial court held that the columns could be found to be defamatory per se and were not statements of opinion. See *MLRC MediaLawLetter* Oct. 2005 at 5. After defendants subpoenaed the other justices of the Illinois Supreme Court, the case also spawned an interlocutory appeal on questions of first impression involving the existence and scope of a judicial deliberation privilege. Because the Appellate Court recognized the privilege and found it to be absolute, *Thomas v. Page*, 361 Ill. App. 3d 484, 837 N.E.2d 483 (Ill. App. 2nd Dist 2005), defendants faced severe limitations on their ability to obtain discovery from the other justices about the deliberations in the Gorecki case. In addition, shortly before trial, the court granted plaintiff's petition to divest the reporter's privilege, thereby requiring Mr. Page to reveal his confidential sources. To avoid an immediate interlocutory appeal, plaintiff agreed to allow Mr. Page to maintain the confidentiality of his sources provided that, at trial, Mr. Page went no further than to state that he had sources and believed they were in a position to know the information they provided to him.

Trial

The trial began on October 25 before a jury of seven women and five men. Plaintiff's major themes at trial were that the columns were false, that Page was biased in favor of Gorecki (Page's daughter had interned for Ms. Gorecki), that the newspaper should have verified the columns and that they seriously damaged the judge by harming his chances of a federal judgeship or position with a major law firm.

Defendants' sought to prove that the political influence charge was substantially true and that the columns were not published with actual malice. Defendants also stressed that lack of evidence of harm to reputation and the speculative nature of any harm to future earnings.

After deliberating for eight hours the jury returned with a verdict for plaintiff.

Steven P. Mandell, Stephen J. Rosenfeld, Steven L. Baron, Brendan J. Healey and Natalie A. Harris of Mandell Menkes LLC in Chicago represented the defendants. Joseph A. Power, Jr. of Power Rogers & Smith, P.C. of Chicago represented plaintiff.

Media Libel Trials with Judicial Plaintiffs

Since 1980 there have been at least 11 media libel trials involving judges as plaintiffs. Interestingly, four of the trials were in Pennsylvania – the only state with multiple trials of this type.

Judges won eight of the 11 trials. The highest damage award came in a Texas trial in *Bently v. Bunton* where a jury awarded \$8,295,000 to a judge who had been accused of corruption on a local cable access program. On appeal liability was affirmed but the damage award was reduced to \$1.3 million. The next highest award was this month's \$7,000,000 verdict in *Thomas v. Page*.

The trials and results on appeal are summarized below.

ILLINOIS

***Thomas v. Page*, No. 04-LK-013 (Ill. Cir. Ct., Kane County Nov. 14, 2006)**

Verdict: \$7,000,000 jury verdict for plaintiff

Post-trial motions and appeal: Pending

Illinois Supreme Court Justice Ronald Thomas sued *Kane County Chronicle* columnist Bill Page over opinion columns that criticized the judge's motives in meting out a suspension to an attorney. The columns stated while other Justices on the court favored the lesser punishment of censure, Thomas held out for stiffer punishment to extract political endorsements from the attorney's supporters.

MASSACHUSETTS

***Murphy v. Boston Herald*, Civil No. 02-2424B (Mass. Super. Ct., Suffolk County verdict Feb. 18, 2005)**

Verdict: \$ 2,090,000 jury verdict for plaintiff

Post-Trial Motions: Award remitted to \$2,010,000

Direct appeal to the Massachusetts Supreme Judicial Court pending.

Superior Court Judge Ernest Murphy sued the *Boston Herald* over a front page article headlined "Murphy's law: Lenient judge frees dangerous criminals." The article reported that, "According to several courthouse sources, Judge Ernest R. Murphy said of a teenage rape victim, "She can't go through life a victim. She's 14. She got raped. Tell her to get over it." The reporter repeated the allegations on a cable talk show.

MISSISSIPPI

***Hosemann v. Loyacono*, No. 02-0127-CI (Miss. Cir. Ct. 2003)**

Trial Result: jury verdict for defendant

Appeal: None.

Final Award: \$ 0.00

County Court Judge H. Gerald Hosemann sued the *Vicksburg Post* over a news report that the judge was arrested for allegedly beating up his former court reporter. The judge later pleaded no contest to a misdemeanor charge of disturbing the peace and the court reporter stated that the judge had not harmed her.

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MISSOURI

Lewis v. News Press & Gazette Co., No. 91-6037-CV-SJ-8 (W. D. Mo. 1992)

Trial Result: \$ 35,000 jury verdict for plaintiff

Appeal: None.

Final Award: \$ 35,000

Missouri Circuit Judge Kenneth Lewis sued the *St. Joseph News Press-Gazette* over an article about local resentment over the judge's construction of barriers around the road on his farm. The judge alleged the article implied he violated a criminal statute prohibiting the obstruction of a roadway.

OHIO

Sweeny v. New York Times Co., No. Civil 00-2942 (N. D. Ohio 2003)

Trial Result: jury verdict for defendant

Appeal: None

Ohio Supreme Court Justice Francis Sweeny sued the New York Times over an article that criticized his decision not to recuse himself from a civil case brought by the son of Sam Sheppard seeking to clear his father's name. The article stated that Sweeny "voted unsuccessfully last year to block Mr. Sheppard's lawsuit from going forward in court. Despite his involvement in the earlier case, he declined to recuse himself."

PENNSYLVANIA

DiSalle v. Pittsburgh Post Gazette, No. 367 September Term 1979 (Pa. Ct. C. P. 1986)

Trial Result: \$ 2,210,000 jury verdict for plaintiff

Appeals: judgment affirmed, 544 A.2d 1345, 15 Media L. Rep. 1873 (Pa. Super, Ct. 1989), *cert. denied*, 492 U.S. 906 (1989).

Final Award: \$ 2,221,000

Pennsylvania Commonwealth Court Judge Richard DiSalle sued The Post-Gazette over an article that reported that he had prepared a fraudulent will years earlier when working as a private attorney.

McDermott v. Biddle, No. 3693 March Term 1984 (Pa. Ct. C.P. 1990)

Trial Result: \$6,000,000 jury verdict for plaintiff

Appeals: judgment reversed and new trial granted.

Final Award: Case settled for costs

Pennsylvania Supreme Court Justice James T. McDermott sued the *Philadelphia Inquirer* over a series of investigative articles titled "Above the Law" which chronicled questionable practices by Justices of the Supreme Court. Justice McDermott claimed that the publications suggested his votes in two cases were improperly influenced by campaign contributions and certain friendships and that he engaged in nepotism by obtaining a job for his son.

Merriweather v. Philadelphia Newspapers, Inc., No. 03271 (Pa. Ct. C. P. 2000)

Trial Result: \$ 500,000 jury verdict for plaintiff

Post-Trial Motions and Appeals: JNOV granted and affirmed.

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Final Award: \$ 0.00

Philadelphia Municipal Court Judge Ronald B. Merriweather sued the *Philadelphia Daily News* over an article entitled “Feds: Court Reporter’s Pot Trial Fixed.” The article reported on the indictment of another judge for fixing a case and having it reassigned to plaintiff. Although the article stated that Judge Merriweather was not “accused of wrongdoing” he alleged it implied he participated in the wrongdoing.

Vislosky v. Courier Times, Inc., No. 88-1727 (Pa. Ct. C. P., Bucks Cty. 2000)

Trial Result: jury verdict for defendant

Appeals: Not appealed

Final Award: \$ 0.00

District Justice Dorothy Vislosky sued the *Bucks County Courier Times* over an article headlined “District Attorney is probing decisions by 2 DJs,” and subsequent editorials, that discussed an investigation into decisions made by plaintiff and another judge.

TEXAS

Bentley v. Bunton, No. 37488 (Tex. Dist. Ct. 1997)

Trial Result: \$ 8,295,000 jury verdict for plaintiff

Appeals: Judgment against one defendant reversed, judgment against the other defendant remitted. See, e.g., No. 12-97-00376-CV, 2005 WL 673938 (Tex.App.-Tyler Mar 23, 2005).

Final award: \$1,300,000

Texas District Court Judge Bascom Bentley III sued local public access cable talk show host Joe Ed Bunton and cohost Jackie Gates for repeated comments accusing the judge of being corrupt.

WEST VIRGINIA

Hinerman v. Daily Gazette Co., Inc., No. 84-C-137 (W. Va. Cir. Ct. 1990).

Trial Result: \$300,000 jury award

Appeal: Affirmed 423 S.E.2d 560, 20 Media L. Rep. 2169 (W. Va. 1992), *cert. denied*, 507 U.S. 960 (1993).

Final Award: \$300,000

Municipal Court Judge Raymond Hinerman sued *The Charleston Gazette* over an editorial that criticized Hinerman’s work as a private lawyer for the United Mine Workers union.

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JANUARY 25, 2007

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Presented with Southwestern Law School’s Donald Biederman Entertainment and Media Law Institute

Former Judge Loses Appeal In Defamation Case Involving Lost Election

By Tracy A. Braun

The Illinois Appellate Court has affirmed the dismissal of a \$110 million non-media defamation lawsuit brought by former Justice Gordon Maag against business organizations and individuals who allegedly distributed a campaign flyer harshly criticizing Maag's record on the bench. *Maag v. Illinois Coalition for Jobs, Growth & Prosperity*, No. 5-06-0048 (Ill. App. Ct. Nov. 2, 2006). Maag blamed the flyer for his election defeat in 2004, when he not only failed to win election to the Illinois Supreme Court, but also lost his seat on the Appellate Court.

Though commenting that the flyer was "full of disparagement and innuendo unbecoming a campaign for judicial office," the Appellate Court agreed that Maag's defamation *per se*, defamation *per quod*, and tortious interference with business relations claims failed as a matter of law.

Background

The case concerns a campaign flyer prepared by the Illinois Coalition for Jobs, Growth and Prosperity and distributed during Maag's 2004 campaign. At the time, Maag was running for a seat on the Supreme Court, while also seeking to retain his seat on the Appellate Court in the event he did not win the Supreme Court race.

After a hard-fought campaign, Maag lost the Supreme Court race to Justice Lloyd Karmeier, and also fell short of the 60 percent "yes" vote he needed to hold on to his seat on the Appellate Court. Shortly thereafter, he filed suit against the Coalition, the Illinois State Chamber of Commerce and two individuals, all of whom he blamed for distribution of the flyer and his election defeat.

The flyer criticized Maag's record on the Appellate Court. The front side of the flyer proclaimed, "In Southern Illinois, the 'Wheels of Justice' have ground to a screeching halt...Gordon Maag's Record on Crime: embarrassing – and dangerous."

The reverse side criticized Maag's "Questionable Decisions" and summarized Maag's decisions in six criminal cases, along with commentary such as "What was he

thinking?," "Letting a Murderer Back on the Streets," and "A Mistake with Consequences."

For example, one case summary read, "Judge Maag turned a man convicted of soliciting the murder of a pregnant woman free, on a technicality." The flyer suggested to readers, "On November 2nd, tell him [Maag] we can't afford his brand of 'justice' anymore."

Maag alleged that the flyer cost him his seat on the Appellate Court and that he was entitled to \$110 million in compensatory and punitive damages. The trial court, with an out-of-district judge appointed to hear the case, dismissed Maag's complaint, and Maag appealed to the same district of the Appellate Court on which he had previously served. All of Maag's former colleagues from the

Fifth District recused themselves from hearing his appeal. Sitting with a panel composed of two judges from another district and a third who had joined the court after Maag lost his seat, the Appellate Court upheld the dismissal of all of Maag's claims.

The court found the context in which the flyer was disseminated – a hotly-contested political campaign where harsh criticisms would be expected – to be a critical factor.

Defamation Per Se

The court first analyzed the requirements for defamation *per se* under Illinois law. Plaintiff alleged that the flyer was defamatory *per se* because it fell into two of the categories for that type of claim: it imputed that he was unable to perform or lacked integrity in performing his duties of office, and it imputed that he lacked ability in his profession.

The court found the context in which the flyer was disseminated – a hotly-contested political campaign where harsh criticisms would be expected – to be a critical factor. In that context, the court said, a reader would likely have concluded that Maag made judicial decisions with which the authors of the flyer strongly disagreed, not that he was incapable of serving as a judge or that he lacked integrity.

The court noted that "when a person runs for public office, he puts his character in issue so far as it relates to his fitness and qualifications for office." Because none of

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Former Judge Loses Appeal In Defamation Case Involving Lost Election

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the flyer's statements, such as its accusations that Maag was soft on crime, were comments on his personal character, they were not actionable as defamation *per se*.

Additionally, the court held that the statements in the flyer were nonactionable opinion and not fact. The court observed that "exaggerated rhetoric is commonplace in political campaigns" and concluded that the statements were either rhetorical hyperbole, too vague to be verified as true or false, or would have been understood by a reader as opinion.

The court also agreed that the statements were not actionable because they were substantially true even though not accurate in every detail. The court found "troublesome" the "not completely accurate" case summaries, which were followed by actual case citations, suggesting to the reader they could be verified as factual assertions. However, the court concluded that the "thrust of the summaries is that plaintiff participated in rulings that benefited criminal defendants," which, though "simplistic and misleading," was also true.

The court also affirmed dismissal of Maag's related claims based on defamation *per quod* and tortious interference with business relations.

Among other things, the court noted that Maag failed to identify a single voter who changed his or her vote because of the flyer or to allege that the flyer caused Maag to slip in the polls.

Finally, the court held that Maag failed to state a claim for tortious interference with business relations. To bring such a claim, a plaintiff must allege a reasonable expectancy of entering into a valid business relationship. The Appellate Court agreed with the trial court's assessment that in Illinois "a public office holder ... does not have a sufficient expectancy of continued employment to support a tortious interference claim."

Richard J. O'Brien, Eric S. Mattson, Tracy A. Braun, and Jordan S. Ginsberg of Sidley Austin LLP in Chicago; Tyrone C. Fahner, John M. Touhy and Gregory Deis of Mayer, Brown, Rowe & Maw LLP in Chicago; and Bruce Stratton and Justin A. Reichert of Stratton, Giganti, Stone & Kopec in Springfield represented the defendants. Plaintiff was represented by Rex Carr of the Rex Carr Law Firm LLC in East St. Louis.

Judges As Libel Plaintiffs

The *Thomas* and *Maag* cases are just the latest in a line of libel lawsuits brought by judges. Other recent cases are:

McGraw v. Blankenship, No. 04-C-317 (W. Va. Cir. Ct. July 25, 2005). A West Virginia judge sued a local television station for broadcasting a political advertisement that sharply criticized his decision in a criminal appeal and called him a "radical." The court held that statements to be non-actionable opinion.

New Times, Inc. v. Isaacks, 146 S.W.3d 144, 32 Media L. Rep. 2480 (Tex. 2004), *cert. denied*, 545 U.S. 1105 (Jun 06, 2005). A judge and state prosecutor sued over a satirical article that portrayed them sentencing a six year old girl to jail for writing a book report. The Texas Supreme Court granted summary judgment in favor of defendants, recognizing that satire is protected under the First Amendment.

Joyce v. NextMedia Group, Inc., 2004 WL 1932742, 32 Media L. Rep. 1795 (Pa. Ct. Com. Pleas 2004). A Superior Court judge sued over statements made on a morning entertainment radio show that he parked in a handicapped parking space. The court ruled the statement not defamatory.

Sikora v. Plain Dealer Publ'g Co., 2003 WL 21419279 (Ohio App. June 19, 2003). A juvenile court judge sued over a newspaper editorial stating among other things that he "snubbed or flubbed the rules." The editorial was deemed protected opinion.

Altbach v. Kulon, 754 N.Y.S.2d 709 (NY App. 2003). A local town justice sued a man who caricatured him as a devil in a painting and used a photograph of the judge in flyers promoting his work. The court held that the defendant's flyers were artistic expressions entitled to protection under the First Amendment.

\$3.5 Million Bench Verdict in Pennsylvania Libel Case

Articles Alleging Mob Ties Held Defamatory, Despite Indictment of Plaintiff's Associate

A Pennsylvania state judge last month awarded \$3.5 million to businessman Thomas A. Joseph for ten articles published in the Wilkes-Barre *Citizens' Voice* in 2001 which alleged that Joseph and his businesses were linked to a federal money-laundering investigation. *Joseph v. The Scranton Times, L.P.*, No. 3816-C of 2002 (Pa. C.P. Luzerne County verdict Oct. 27, 2006). In an unusual case, the judge never ruled on whether plaintiff was a private or public figure – although under Pennsylvania's rules of appellate procedure the trial judge would still be allowed to file a written decision addressing this question.

Background

The articles were published after federal investigators raided plaintiff's home and businesses on May 31, 2001. Raids also took place at the homes of reputed mobster Billy D'Ellia and two of his associates.

The *Citizens' Voice* coverage of the investigation cited anonymous sources who said that a federal grand jury was investigating whether a defunct newspaper owned by Joseph and his current direct mail and telemarketing company had been used for money laundering, and that a limousine service he owned was used to transport money, drugs, prostitutes and guns to and from Philadelphia, New York and Atlantic City.

Neither Joseph nor his businesses were ever indicted, and the records seized in the raids were eventually returned.

Joseph and his son Thomas J. Joseph sued the newspaper, two reporters, the newspaper's corporate parent, and several corporate officers in May 2002, for libel and false light. (The corporate parent, Scranton Times, Inc., also publishes the Scranton, Pa. *Times-Tribune*.)

Plaintiffs did not sue the Wilkes-Barre *Times Leader*, which also covered the raids. In his testimony during the trial, Thomas J. Joseph said that the *Times Leader* was more balanced, because it included comments from his and his father's attorneys.

The defendants' motion for summary judgment was denied without opinion. And the trial judge never ruled on plaintiffs' status.

Bench Trial

The bench trial before Common Pleas Judge Mark Ciavarella occurred over two weeks in May 2006. The elder Joseph admitted in his testimony that he was once close friends with D'Ellia, but he denied that he was involved in any criminal activity. The newspaper's theme at trial was that its articles were true, and that any harm to plaintiffs was of their own doing.

On the second day of the trial, Judge Ciavarella ruled that the newspaper could not present a search warrant affidavit as evidence that the stories were true, since it was hearsay. The judge rejected the defense argument that it was admissible as a record of public action. "Just because it's [an alleged crime] in the document does not mean it happened," Judge Ciavarella said in announcing his ruling from the bench. "I don't know if it's true or not."

Over defense objections, plaintiffs were permitted to call Temple University Associate Professor Christopher Harper, formerly a bureau chief for *Newsweek* and ABC News and a producer for the ABC News program *20/20*, as an expert on journalistic practices. He testified that the *Voice* violated its own policy, and general good practice, by using anonymous sources where they were not "absolutely necessary." "What you have here is the equivalent of a journalistic train wreck," he said. During cross-examination, Harper admitted that he did not know whether the articles were true or not.

Plaintiffs also presented a businessman who said that he gave less business to the elder Joseph's mailing house company after the articles appeared. But on cross-examination the witness admitted that he has since restored his use of the company.

The plaintiffs presented another expert: economist Andrew Verzilli, a emeritus professor of economics at Drexel University and a consultant. Verzilli testified that plaintiffs' businesses lost up to \$3.5 million after the *Voice* stories were published. On cross, he said that this figure did not take into account how Joseph managed the businesses, and could not show that it was a direct result of the articles.

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\$3.5 Million Bench Verdict in Pennsylvania Libel Case

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The plaintiffs' case ended with testimony from the son, Thomas J. Joseph. He said that the *Voice* articles did not distinguish between him and his father. He also said that the articles, which were published when he was separated from his wife, led to his divorce – although at the time of the trial he was again living with this ex-wife, without having remarried.

At the conclusion of plaintiffs' case, Judge Ciavarella denied a defense motion for a directed verdict, except as to the claims of the son.

Defense Case

The newspaper attempted to begin its case by calling one of the state investigators who was cited in the affidavit for the original raid of the elder Joseph's home and business – the affidavit that had earlier been excluded as hearsay. The investigator appeared, but told the court that he could not testify because of an ongoing grand jury investigation.

Three other state and federal agents sent letters saying that they could not testify. The defense asked Judge Ciavarella to order their appearance, but withdrew the motion after agreeing that the investigators' failure to testify would not create a negative inference against the newspaper.

The question of confidential sources arose the following day, after the newspaper presented testimony from one of the defendant reporters, James Conmy. Conmy testified that his colleague and co-defendant reporter Ed Lewis took over the story after he developed confidential sources within the investigation. Conmy did not identify the sources, in accordance with Pennsylvania's shield law.

Prior to Conmy's testimony, plaintiff's counsel asked Judge Ciavarella to bar any discussion of the sources' credibility without revealing the sources' identity. Ciavarella did not issue such an order, but warned defense counsel that any discussion of the sources' credibility would open the door to allow the plaintiff to attack the sources' credibility.

The defendants called an accountant to counter the plaintiffs' damages expert. Defendants concluded by reading the deposition of Thomas A. Joseph's ex-wife, who said that she had been questioned by federal investigators whether her husband had ties to prostitution and drug dealing, and his connections to Billy D'Ellia.

On the last day of trial, a sealed indictment against D'Ellia for money laundering was filed in federal court in Harrisburg, Pa. The indictment was unsealed a week later, and the newspaper then moved to re-open the libel case and introduce the indictment and the supporting affidavit of probable cause and brief as evidence. The plaintiff did not oppose the motion, and it was granted after a June 27 hearing.

Although Judge Ciavarella said that he would issue a ruling in August, he did not do so until October 27.

In a terse, three-page verdict, he found for Thomas A. Joseph on his libel claim, awarding him \$2 million in compensatory damages; and he found in favor of Joseph's mailing house company, awarding it \$1.5 million in compensatory damages. Judge Ciavarella denied a request for punitive damages.

Judge Ciavarella also rejected Joseph's false light claims. He also entered a verdict for several corporate officers named as defendants in the suit, and found that Joseph's limousine company had not shown any damages.

Ciavarella did not rule on whether Thomas is a public or private figure, and his written verdict did not explain what standard had been used in finding "credible evidence" that the newspaper had libeled Joseph.

After the verdict, the defense filed post-trial motions for judgment notwithstanding the verdict, a new trial, or remittitur.

Plaintiffs were represented by George W. Croner of Kohn Swift & Graf, P.C. in Philadelphia. The Citizens' Voice was represented by W. Thomas McGough, Jr. of Reed Smith, LLP in Pittsburgh.

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California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity

By Patrick Carome and Colin Rushing

The Supreme Court of California and the Northern District of Illinois have each recently issued decisions examining the limits of 47 U.S.C. § 230 (“Section 230”), the federal statute that has been construed by courts throughout the country to provide broad immunity for online intermediaries from most claims based on third-party content. In the closely watched case of *Barrett v. Rosenthal*, S122953 (Cal. Nov. 20, 1996), the court reaffirmed the broad immunity that has been recognized by a broad range of federal and state courts.

In *Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, No. 06-C-0657 (N.D. Ill. Nov. 14, 2006) (hereafter “CLC”), however, while the court ruled in favor of Craigslist – the online intermediary asserting the defense – it nonetheless articulated a narrower vision of Section 230 than has prevailed in the courts. Thus, while *Barrett* and *CLC* each upheld the respective defendant’s claim of immunity, the *CLC* decision does suggest that there are still quarters in which the widely accepted, broad reading of Section 230 may meet with skepticism.

Broad Immunity for Nearly Ten Years

Section 230(c)(1), the statutory provision that was at issue in *Barrett*, *CLC*, and the other leading cases governing online intermediary liability for third party content, broadly provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added).

Beginning with *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), and including decisions from the United States Courts of Appeals for the Third, Ninth, and Tenth Circuits, as well as the Supreme Court of Florida and numerous federal district courts and intermediate state appellate courts throughout the country, courts have concluded that this language broadly immunizes online intermediaries from claims based on third-party content.

See, e.g., *Green v. America Online, Inc.*, 318 F.3d 465 (3d Cir.), *cert. denied*, 124 S. Ct. 200 (U.S. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir.), *reh’g denied*, 351 F.3d 904 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2812 (U.S. 2004); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir.), *cert. denied*, 531 U.S. 824 (2000); *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1013-17 (Fla.), *cert. denied*, 534 U.S. 891 (2001).

Reaffirming Zeran and its Progeny

In 2003, in the *Barrett v. Rosenthal* case, the California Court of Appeal (an intermediate appellate court) rejected *Zeran* and adopted a construction of Section 230 that, if followed in California, would have substantially transformed

the landscape for online intermediaries subject to jurisdiction in that state by generally eliminating immunity whenever the intermediary allegedly had notice of the purportedly tortious content.

But on November 20, 2006, the Supreme Court of California reversed the Court of Appeal and con-

firmed that *Zeran* had accurately gauged Congress’s intent. In particular, the California Supreme Court explicitly agreed with *Zeran* in concluding that Section 230 immunity applies even where the defendant allegedly knew or should have known of the allegedly tortious content. Moreover, the *Barrett* court also recognized that the protections of Section 230 extend to “users” of interactive computer services who act as intermediaries for other people’s content — even when such users actively select the allegedly tortious content for redistribution online.

Background

In *Barrett*, the defendant asserting Section 230 immunity was not the typical defendant in a Section 230 case, such as AOL or Google, who provides a service through which third-party content from millions of different sources flows every day.

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The California Supreme Court explicitly agreed with Zeran in concluding that Section 230 immunity applies even where the defendant allegedly knew or should have known of the allegedly tortious content.

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Instead, the defendant in *Barrett* was an individual, Ilena Rosenthal, who operated and participated in an Internet discussion group concerning non-traditional forms of health care. The Plaintiffs in the case, two doctors, alleged that Rosenthal committed libel by distributing defamatory statements in e-mails and Internet postings, and that she continued to do so even after being warned that the statements in question were false and defamatory.

Rosenthal was not the originator of the statements at issue; rather, she had received them from others and then selected them for electronic redistribution to others in her discussion group. The doctors brought suit, and Ms. Rosenthal responded with an Anti-SLAPP motion in which she asserted, among other defenses, that she was immune from liability under Section 230.

Although she prevailed at the trial court, Ms. Rosenthal lost in the intermediate appellate court. See *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142 (Cal. Ct. App. 2004), *rev'd*, S122953 (Cal. Nov. 20, 2006). In a lengthy opinion, the Court of Appeal attacked the entire body of law construing Section 230, including case law from the Ninth Circuit and other California Courts of Appeal, and concluded that those courts had all interpreted Section 230 incorrectly.

Specifically, the intermediate appellate court held that the protections of Section 230 were not available when the defendant allegedly was on “notice” of the allegedly tortious content at issue.

The Supreme Court of California then granted Ms. Rosenthal’s petition for review to consider three issues: whether the Court of Appeal’s theory was correct; the definition of the term “user” in Section 230(c)(1); and whether the protection afforded a “user” depends on whether the user engaged in “active” or “passive” conduct.

§230 and Liability on “Notice”

Making the same argument advanced by the plaintiff in *Zeran* and the dissenters in *Doe v. AOL* in the Florida Supreme Court, 783 So. 2d at 1018-28 (Lewis, J., dissenting), the Court of Appeal in *Barrett* had held that Section 230 does not apply to claims in which the defendant allegedly had “notice” of the harmful nature of the content.

Purporting to rely on pre-Section 230 case law, the Court of Appeal concluded that such a notice-based claim

did not “treat” a defendant as a “publisher,” because it instead was based on the defendant’s status as a “distributor” of content. According to this view, so-called “distributor” liability can be imposed on those whose sole role is to disseminate content published by someone else, such as bookstores and newsvendors.

Under the common law of many if not most states, as well as the First Amendment, such “distributors” enjoy protection from liability unless it can be shown that they knew (or, perhaps, should have known) about the harmful nature of the content at issue -- that is, that they had “notice” of the content.

The Court of Appeal in *Barrett* sought to transform this form of heightened protection for information clearing-houses into a theory of “distributor liability” under which a claim would not “treat” a defendant as a “publisher” if it is alleged that the defendant “knew or should have known” about the content. According to this view, holding the defendant liable in such a case would “treat” it not as a “publisher or speaker” (the relevant words of the statute) but instead as a “distributor” (a word not used in Section 230).

In a lengthy opinion, the California Supreme Court rejected the Court of Appeal’s narrow reading of Section 230 on numerous grounds. In particular, the court acknowledged that so-called “distributor liability” still requires treating the defendant as a publisher. To take the most obvious example, one of the elements of a defamation claim is publication of the allegedly harmful content — as a result, holding a distributor liable for defamation (on the theory it was on notice of the content but nevertheless distributed it) still requires finding that it published the content.

Moreover, the California Supreme Court agreed with *Zeran* that a claim based on alleged “notice” of harmful content puts the defendant squarely in the role of a “publisher,” because such a defendant would have to carry out a quintessential duty of a publisher: deciding what to do with the content (e.g., whether to retract it). Slip Op. at 13-16.

The California Supreme Court also recognized that a regime of notice-based liability would fundamentally undermine Congress’s main goals in passing Section 230. As

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California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity

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numerous courts (including the Fourth Circuit in *Zeran*) have recognized, one of those main goals is to encourage service providers to engage in active *self*-regulation. Congress recognized that a regime that permits notice-based liability punishes those service providers who take the most robust steps to identify and screen out, block, or remove harmful content, because those very steps are likely to put service providers in the position of having “notice” of harmful content.

As the California Supreme Court explained: “Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability.” Slip Op. at 21. In other words, by eliminating the risk of liability based on “notice” of harmful content, Section 230(c)(1) gives service providers freedom to engage in robust self-regulation of their own services.

Finally, the California Supreme Court also recognized that a regime of “notice-based” liability would necessarily chill online speech and harm the development of new electronic media, contrary to Congress’s second key purpose. In particular, the court observed that it would be nearly impossible for service providers to determine which content is tortious and which is not and thus service providers would face powerful incentives to remove content once anyone complained about it, stifling robust speech and possibly causing service providers to scale back or even stop offering the types of services that could expose them to claims.

Protection for “Users”

As noted above, *Barrett* was one of the few cases in which the defendant asserting immunity was an individual “user” of an interactive computer service. The *Barrett* court, like other courts to consider the issue, however, easily determined that the term “user” in Section 230(c)(1) necessarily included individual users of interactive computer services such as Ms. Rosenthal. This flows logically and naturally from the text of the statute and is a difficult conclusion to avoid.

Next, the state Supreme Court considered whether the immunity should be restricted only to circumstances in which a user’s role with respect to tortious third-party content is “passive” -- that is, when the user does not play an “active” role in the selection of that content. Basing its decision on the language of the statute and Congress’s intent, the court rejected the view that this distinction was relevant to the analysis.

As the court explained, there is nothing in the language of the statute suggesting that Section 230 protects only users who engage in “passive” conduct. In fact, the court reasoned, distinguishing between active and passive users would have a perverse effect: a user who engaged in “active” deletion of content may find herself deemed to have also “active[ly]” selected the remaining, non-blocked content for dissemination, while a “passive” intermediary who screened and reviewed nothing could find itself immune. *Id.*

Accordingly, the court concluded that Section 230’s protection extends to users -- whether or not their role in disseminating someone else’s content was “active” or “passive.”

The California Supreme Court also recognized that a regime of “notice-based” liability would necessarily chill online speech and harm the development of new electronic media.

CLC v. Craigslist

In *CLC*, the defendant was craigslist – an entity that, unlike Ms. Rosenthal, has the characteristics of the more common sort of Section 230 defendant, namely, an online service provider that serves as a platform for the communications of many thousands, if not millions, of individual users.

craigslist offers different sites for different geographic regions, each accessible through www.craigslist.org or directly by its own URL (such as chicago.craigslist.org). On each site, craigslist offers a bulletin board service, with different categories and subcategories (such as personals, for sale, and housing) on which individual users can post various types of or other content.

While craigslist does not engage in pre-screening of user posts, it does have a robust form of self-policing on the part of its user community: users have a mechanism to flag what

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they perceive to be inappropriate or off-topic content, and such content is automatically removed if it is flagged by a sufficient number (pre-set by Craigslist) of users.

The *CLC* case concerned notices posted by users in the housing category of Craigslist's Chicago page. According to the plaintiff, a group that advocates for fair housing rights (among other things), a small fraction of Craigslist users had posted notices for housing that expressed preferences "on the basis of race, color, national origin, sex, religion and familial status" in violation of the federal Fair Housing Act. Slip Op. at 7-9.

Rather than sue the individual users, however, CLC alleged that Craigslist was liable under 42 U.S.C. § 3604 (c), a provision of the Fair Housing Act that prohibits a person from "mak[ing], print[ing], or publish[ing], or caus[ing] to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

In its threshold motion for judgment on the pleadings, Craigslist asserted that Section 230 barred this claim, because the cause of action was based entirely on third-party content – namely, ads posted by users – and Craigslist's sole alleged role was in providing an electronic forum for that content.

The district court agreed with Craigslist that Section 230(c)(1) bars CLC's claim. In doing so, the court rejected a number of the plaintiff's assertions about the scope of Section 230, including its argument that the statute does not provide any protection against *federal* statutory claims. See Slip Op. at 11-12, 27.

A New and Confusing Standard?

But the court did *not* completely agree with Craigslist's view of the scope of Section 230. Perceiving shortfalls in the widely accepted analysis of the *Zeran*

court, the district court "decline[d] to follow *Zeran's* lead" and took a different tack. Rather than providing immunity from all claims, the Illinois court concluded that Section 230 applies only to claims in which "publishing" is an explicit, technical element.

The district court's approach seemed to be based on *dicta* in a previous decision of the Seventh Circuit, *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003), in which Judge Easterbrook ruminated about two alternative approaches to Section 230. (Ultimately, the Section 230 issue was not reached or decided in that case, because the panel affirmed the lower court's order of dismissal, which had been based on Section 230, on alternative state law grounds.)

One of Judge Easterbrook's hypotheses in that *dicta* seemed to suggest that Section 230's prohibition on treating an online intermediary as a "publisher or speaker" of someone else's content might apply only to claims, for example defamation, for which "publishing" is an explicit element.

The district court in the *CLC* case acknowledged that Congress passed Section 230 (at least in part) to overrule a state trial court

decision in which Prodigy, the provider of an early online service, was held potentially liable for defamation based on the third-party content one of its electronic bulletin boards specifically *because* had general practices and policies regarding the self-regulation of content on its service.

Thus, as the district court in *CLC* recognized, Congress passed Section 230 "to address the problem of holding liable for defamation ICSs that reviewed third-party content . . . while leaving free from liability ICSs that did not review content." Slip Op. at 24. The *CLC* court seems to have concluded, however, that Congress was *principally* interested in providing immunity only from defamation claims or from other claims for which "publishing" is an explicit, technical element. *Id.*

The *CLC* court readily acknowledged that its narrow interpretation of Section 230(c)(1) is contrary to the holdings of numerous other courts, and its opinion did not cite any precedent (other than the *Doe v. GTE dicta*) for that interpretation.

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Rather than providing immunity from all claims, the Illinois court concluded that Section 230 applies only to claims in which "publishing" is an explicit, technical element.

California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity

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In explaining its holding, the district court observed that it would have been unusual for Congress to grant absolute immunity for service providers “that do not screen any third-party content whatsoever,” given the heading of Section 230(c) (“Protection for “Good Samaritan” Blocking and Screening of Offensive Material”) and Congress’s apparent intent to protect those who *did* remove content. *Id.* at 24-25.

At the same time, however, the court *did* recognize that service providers enjoyed absolute immunity from certain types of claims -- under the *CLC* court’s approach, service providers enjoy protection from *all* claims in which publishing is an element, but enjoy no protection from claims in which it is not.

Ultimately, the district court concluded that craigslist enjoyed protection from the FHA claim because the language of the FHA provision on which *CLC* based its suit prohibited *craigslist* from “publishing” the discriminatory advertisements. But a tension in the court’s narrow (some might say hyper-technical) reading of Section 230 is revealed in the final footnote of its opinion, in which the court acknowledged that the same provision also prohibits “mak[ing]” and “print[ing]” allegedly discriminatory advertisements.

The court concluded that craigslist did not “make” the allegedly discriminatory notices at issue in the case because they originated, as the complaint alleged, from third parties. Slip Op. at 27 n.18. The court also concluded that craigslist did not “print” the ads because the role it plays with respect to third-party postings does not fall within “any reasonable interpretation of that word.”

The need for such close analysis of the specific legal elements of the claim being asserted by a plaintiff contrasts sharply with the approach followed in *Zeran* and its progeny. The virtually uniform approach of all those courts has been to examine whether the plaintiffs’ claims turn on an allegation that

the online intermediary disseminated content that originated with a third-party.

In this regard, the district court seems not to have heeded the warning of other courts, including the Fourth Circuit in *Zeran*, that determining whether immunity is available based on fine distinctions in how plaintiff couches her claims would simply encourage artful pleading by plaintiffs and disserve Congress’s key policy objectives. Under the *CLC* court’s unprecedented approach, however, the protection would not be based on the nature of the online intermediary’s role but rather on whether a statutory or a common law definition of any given

cause of action fortuitously includes or omits the words “publisher” (or “speaker”) or some variation thereof.]

Upshot?

The decision in *Barrett* continues and reinforces the trajectory of the Section 230 case law. The vast majority of courts continue to conclude that Congress

deliberately chose language that would encompass all types of online intermediaries, all types of content, and all forms of online services and media.

At the same time, however, the decision in *CLC* reveals that some courts remain uncomfortable with this broad immunity. In fact, given the Seventh Circuit dicta in *Doe*, district courts in that jurisdiction (such as the *CLC* court) may be encouraged (or feel compelled) to challenge *Zeran* and its progeny. Such decisions are, at least for now, still outliers and the law is becoming increasingly settled in favor of broad immunity.

Patrick Carome is a partner and Colin Rushing a counsel at WilmerHale in Washington, D.C. WilmerHale represented a wide range of Internet companies and trade associations as amici in Barrett and serves as co-counsel for craigslist in the CLC case. The views expressed in this article are those of the authors, and do not necessarily reflect the views of their firm or clients.



U.S. Supreme Court Rejects Newspaper's Motion to Stay Disclosure of Phone Records

Without opinion the U.S. Supreme Court this month rejected a motion to stay the Second Circuit's recent decision in *New York Times v. Gonzales*, 459 F.3d 160 (2d Cir. August 1, 2006). See *MLRC MediaLawLetter* Aug. 2006 at 9.

A divided Second Circuit held that federal prosecutors could subpoena third-party phone company records as part of a grand jury investigation to determine who leaked information to the paper about impending government action against two Islamic charities.

The Second Circuit majority concluded that because "the government has a compelling interest in maintaining the secrecy of imminent asset freezes or searches lest the targets be informed and spirit away those assets or incriminating evidence" no privilege could overcome the government's need to determine the identity of the leakers. In a lengthy dissent, Judge Sack found that the government had not exhausted alternative means to obtain the information.

The Times' motion for rehearing en banc was denied on November 2. The newspaper then submitted a motion to Justice Ruth Bader Ginsburg, Circuit Justice for the Second Circuit, seeking a stay pending the High Court's ruling on a petition for certiorari. She referred the motion to the entire Court which rejected it on November 27.

Among other things, The Times argued that there is a reasonable probability that the Court would grant a petition of certiorari to address the reporter's privilege issue in light of the disparity among lower courts about the scope and nature of the protection for confidential sources.

Update: Judge in Hatfill Case Sanctions Newspaper For Not Revealing Source

Times Cannot Rely on Existence of Sources

On November 20, the Magistrate Judge who ordered The New York Times to disclose columnist Nicholas Kristof's confidential FBI sources for his series of columns about anthrax "person of interest" Steven Hatfill sanctioned The Times for its decision not to comply with that order.

Judge Liam O'Grady ruled that The Times will "not be allowed to refer to, rely on, or enter into evidence the existence of" the two confidential sources. He also ordered The Times to reimburse plaintiff for "the reasonable expenses including attorneys' fees and costs incurred by plaintiff in filing and arguing his motion for sanctions."

In imposing these sanctions, Judge O'Grady rejected plaintiff's argument that The Times should be prohibited from filing any dispositive motions, forbidden from taking any further discovery (including the deposition of the plaintiff), and fined \$25,000 per day until compliant.

Following Fourth Circuit precedent, Judge O'Grady observed that a sanction for failure to abide by a discovery order under Fed. R. Civ. P. 37 must be narrowly tailored to ameliorate the prejudice suffered by the party denied the discovery in question and be in proportion to the circumstances of the case. Because The Times's non-compliance with the discovery order was undertaken in order to preserve its right to appeal the court's earlier ruling on the reporter's privilege and not in bad faith, and because denying The Times the opportunity to rely on the sources at trial will both ameliorate the prejudice to plaintiff and serve as a deterrent in future cases, the court found this sanction adequate.

The Times does not intend to appeal the sanctions ruling, although it has preserved its right to appeal the underlying order requiring disclosure of the confidential sources. Dispositive motions are to be filed in the case on December 1, and trial is scheduled for January 29, 2007.

Column About Politician's Indirect "Ties" to Organized Crime Subject to Innocent Construction

By Damon Dunn

An Illinois Appeals Court this month affirmed dismissal of a former political candidate's libel and false light claims against the Chicago Sun-Times, Inc. and political columnist Steve Neal based upon a column published in the "Commentary" section of the *Chicago Sun-Times* newspaper on February 18, 2002. *Seith v Chicago Sun-Times, Inc. et al.*, 1-03-1307 (Ill. App. 1st Dist. November 9, 2006).

Background

Former U.S. Senate candidate Alex Seith sued over a February 2002 column, entitled "Underdog Wood Goes for Rose" ("the Rose column"). The column primarily described how then-Lieutenant Governor Corrine Wood, a hopeful for the Republican nomination for the gubernatorial race, had hired political strategist Don Rose to assist her in an "underdog" campaign.

The particular portion of the Rose Column that Seith alleged was defamatory is as follows:

Among the other Republicans for whom Rose has worked are former Sen. Charles H. Percy and former Gov. Jim Edgar. In 1978, Rose helped Percy win a tough re-election contest over conservative Democrat Alex Seith. Rose bought ads throughout the state that reprinted the late Sun-Times columnist Mike Royko's column about Seith's ties to the mob-linked 1st Ward. Rose and Royko contributed significantly to Percy's come-from-behind win over Seith.

Seith alleged that the defendants published the column with knowledge of falsity or reckless disregard because ten years ago Seith wrote a letter to the editor complaining about an earlier column by Steve Neal entitled "Blind Ambition" that discussed allegations about plaintiff's ties to a convicted First Ward political operative.

Seith alleged that his reputation had "largely recovered from the defamatory falsehoods" in the 1996 "Blind Ambition" column but "as a direct and proximate result of the publication of the 2/18/02 Neal column, Seith [had] been severely damaged in

his reputation and [had] suffered emotional distress." Seith requested \$1,000,000 each in compensatory and punitive damages.

The trial court granted defendants' motion to dismiss, finding the Rose Column was subject to an innocent construction. Under the Illinois "innocent construction rule," the complained-of statement cannot be actionable as *per se* defamation if it is reasonably subject to an innocent interpretation. The words used in the allegedly defamatory statement, however, must be reasonably viewed, considered in context with the other words in the statement, and the implications therefrom must be given their natural and obvious meaning.

The column did not directly link Seith to organized crime but instead imputed those links to the First Ward.

Appeals Court Decision

This month the Court affirmed in an unpublished order. The Court placed emphasis on the "context of the entire column" and initially observed that Seith overlooked this context in alleging that Neal accused him of being in or tied to organized crime:

Plaintiff's argument, however, does not consider the statement in the context of the entire column. The article itself was not about Alex Seith, his 1978 race for the U.S. Senate, his connections to Chicago's First Ward political organization, or that organization's links to organized crime. Instead, from the title to the closing words, the article is about Don Rose, a wily and resourceful political advisor. Neal is describing Rose as a political "miracle worker." The single paragraph where Mr. Seith is mentioned is provided merely as an example of the kinds of political tactics that Rose had employed in the past against the political opponents of his clients.

The Court agreed with the Sun-Times that Neal was providing examples of the "hardball attack-style politics" that Rose employed on behalf of his clients. The article did not vouch for the validity of any claims that Rose made about any of these politicians.

The Court also agreed that the most pejorative statements were not aimed directly at Seith and, to the extent they could be

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Column About Politician's Indirect "Ties" to Organized Crime Subject to Innocent Construction

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understood as a comment directly about Seith, they were not necessarily defamatory. In particular, the column did not directly link Seith to organized crime but instead imputed those links to the First Ward. The Court therefore distinguished the case from those where the allegations of "mob links" were aimed more directly at the plaintiffs themselves.

With respect to Seith's connections to the First Ward, the Court found that the word "ties" was "rather ambiguous". While the word "ties" was meant to communicate some sort of connection, the Court cited a leading dictionary's definitions as referring to either "a moral or legal obligation to someone or something typically constituting a restraining power, influence, or duty," or alternatively as a mere "a bond of kinship or affection."

Even though these definitions were not dispositive, they provided the Court with insight into the word's various meanings. The Court therefore concluded that the word "ties" did not necessarily reflect "a coordination of effort or an extreme closeness." The Court explained that "[t]he Rose column cer-

tainly does not state that the First Ward sponsored Mr. Seith, or that he was part of or the beneficiary of the First Ward's machinery or the First Ward's 'links to organized crime.'"

The Court also considered the public and social context in which the Rose Column appeared. Citing *Brennan v. Kadner*, 351 Ill. App. 3d 963 (2004), the Court explained that "when construing the meaning and value of a comment, one must consider the context, including the public and social context of rhetoric uttered during a political campaign."

In sum, the Court found the case was much closer to a series of Illinois cases applying the innocent construction rule to uphold the dismissal of a defamation suit, citing in particular an earlier Sun-Times case involving reputed mob links, *Salamone v. Hollinger International, Inc.*, 347 Ill. App. 3d 837 (2004).

Damon E. Dunn, a member of Funkhouser Vegosen Liebman & Dunn Ltd. in Chicago, Illinois, represented Steve Neal and the Chicago Sun-Times, Inc. Plaintiff was represented by Daniel S. Hefter of Fox, Hefter, Swibel, Levin & Carroll, LLP.



50-STATE SURVEYS

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Radio Host's Comments About Own Case Not Protected Opinion

By John C. Greiner and Kathy Lasher

In November, an Ohio appeals court reinstated portions of a defamation suit against a radio station and a talk show host over statements the host made about a criminal case he had personally handled. *Brown v. Lawson*, No. C-050443 (Ohio Ct. App. 1st Dist. Nov. 9, 2006) (Sundermann, Hendon, JJ.).

Background

Defendant Kenneth Lawson hosts a weekly radio talk show on a local Cincinnati radio station, which is owned by Radio One. Lawson is also a fairly well-known criminal defense attorney. Lawson represented Stephen Hill, formerly a local television news reporter, in a criminal proceeding in which Hill was accused of sexually abusing plaintiff's grandchildren. During two radio broadcasts, Lawson discussed his view, as Hill's attorney, of what had occurred during his client's sexual-offender classification hearing.

Plaintiff alleged that Lawson made two defamatory statements about her on the radio talk show: that 1) Brown had given her grandsons condoms; and 2) that Brown was aware of Hill's sexual contact with her grandsons, but had turned Hill in to the authorities only when Hill had stopped paying the boys.

In response, Lawson and Radio One argued that the remarks were constitutionally protected opinion. The trial court agreed and granted summary judgment.

Appeals Court Decision

On appeal, Ohio's First District Court of Appeals held that Lawson's statements were not constitutionally protected opinion because a reasonable listener would have believed that Lawson, as Hill's attorney who represented Hill at the sexual-predator hearing, had made statements about what had occurred at the hearing that were factual in nature.

By making this finding, the appellate court seems to have relied more on the standard announced in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) than on the standard adopted by the Ohio Supreme Court in *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279 (1995). While *Milkovich* focuses on the narrow question of whether the statement conveys a verifiable fact, the *Vail* standard sets out a broad

test that considers the overall context in which the statement is uttered. The *Lawson* court seems not to have given as much weight to the format of *Lawson's* program – interactive “talk radio” designed to elicit opinions – as it did to the substance of the statement.

Once it disposed of the opinion defense, the court examined whether Brown, as a private-figure plaintiff, had presented a genuine issue of material fact sufficient to survive the summary judgment motion that had been granted by the trial court below.

The appellate court determined that the trial court did not err in granting summary judgment in favor of Lawson and Radio One as to the statement that Brown had provided condoms. Lawson based this statement on testimony from a psychiatrist who had testified at Hill's hearing. Thus, Brown failed to show by clear and convincing evidence that Lawson had not acted reasonably in attempting to discover the truth or falsity of that statement.

But, the appellate court went on to hold that the trial court **did** err in granting summary judgment in favor of Lawson and Radio One as to the statement about Brown turning in Hill after the payments stopped. Genuine issues of material fact existed as to “whether Lawson published the second statement, whether the statement was true, and if the statement was false whether Lawson acted reasonably in attempting to discover its truth or falsity.” The record was devoid of any evidence from which the court could “determine whether [Lawson] acted reasonably in attempting to discover the truth or falsity of the statement.”

Although Ohio law offers greater protection for opinion than *Milkovich* – because Ohio law required the court to examine the overall context of the statement – the *Lawson* case illustrates that the opinion defense has its limits even in Ohio. When the “opinion” sounds too much like factual information from an “insider”, the court likely will reject the opinion defense.

John C. Greiner is a partner, and Kathy Lasher an associate, at Graydon Head & Ritchey in Cincinnati. Plaintiff was represented by Robert Newman, Newman & Meeks. Radio One, Inc. was represented by Andrew J. Dorman and David Brown, Janik & Dorman, LLP. Kenneth L. Lawson represented himself.

California Court Dismisses Britney Spears Libel Case Not Defamatory to Say Married Couple Made Sex Tape

A California trial court this month dismissed Britney Spears' defamation suit against *US Weekly* magazine over an item reporting that Spears and her husband made an sex tape. *Spears v. US Weekly LLC*, No. SC087989 (Beverly Hills Sup. Ct. Nov. 3, 2006).

That issue was a short item in the tabloid magazine's "Hot Stuff" section headlined: "Brit & Kev: Secret Sex Tape? New parents have a new worry: racy footage from 2004." The item reported that Spears and her husband were concerned that a former friend might release a copy of a tape the couple made; and that they reviewed a copy of the tape with their lawyers "acting goofy the whole time" they watched it.

In a short and succinct order, Los Angeles Superior Court Judge Lisa Hart Cole granted the magazine's motion to dismiss the complaint under California's anti-SLAPP statute. Given Spears' promotion of her own sexual persona in her performances and in a reality television series, and the evolving standards of sexual mores, it is not defamatory to say that a wife and husband taped themselves engaging in consensual sex.

As to the evolving standards of sexual mores, the court wryly noted: "In the Dick Van Dyke show a married couple slept in separate beds, but in *Sex and the City* single women slept in many different beds."

US Weekly was represented by Elizabeth McNamara and Alzono Wickers of Davis Wright Tremaine. Plaintiff was represented by Martin Singer of Lavelly & Singer in Los Angeles.



Summary Judgment for Magazine in Privacy Case Over Topless Photo

By Tom Curley

A federal court recently rejected the invasion of privacy claims of a woman who sued a magazine after it published a topless photo of her taken at a motorcycle-related fundraiser. In granting summary judgment for the defendant magazine, the court held that the plaintiff had no reasonable expectation of privacy with respect to the photo, even if plaintiff was unaware that the photographer was present at the fundraiser. *Barnhart v. Paisano Publications, LLC*, Civil No. JFM-06-318 (D. Md. Oct. 17, 2006) (Motz, J.).

Background

The case involved privacy claims asserted by plaintiff Tonya Barnhart against Paisano Publications, LLC, publisher of *Easyriders* motorcycle magazine. In the summer of 2004, the plaintiff, then 29 years-old, attended an outdoor fundraiser and concert staged by a Maryland motorcycle club. The event, which attracted several hundred adults who purchased tickets to attend, is held annually to raise money for local charitable efforts.

As the court explained, the event was “‘bring your own’ alcohol, and continued all day into the early hours of the next morning. At some point during the day women began removing their shirts in return for being given beads, [plaintiff], swept up by the Mardi Gras type atmosphere, was hoisted onto the shoulders of two men and voluntarily lifted up her shirt.” An amateur photographer at the event captured the moment on film and later submitted a photo of plaintiff exposing herself to *Easyriders*, which regularly accepts photo submissions from readers.

After the magazine published the photo in 2005, plaintiff brought suit against *Easyriders* in the U.S. District Court for the District of Maryland alleging all four branches of the invasion of privacy tort. The thrust of

plaintiff’s claims was that she was unaware that a photographer was present at the fundraiser and that, once she became aware, she objected to any photography. Plaintiff further claimed that she believed that, “at the moment she removed her shirt she was in the company of only about 10 people, all of whom she knew and trusted,” as the court noted.

Discovery refuted the contention that plaintiff could have been unaware the photographer was present at the fundraiser, as the very same photographer openly took photos of plaintiff on multiple occasions during the event prior to taking the photograph of plaintiff published in *Easyriders*. The photographer also disputed that plaintiff objected

to the taking of the photo at issue in the lawsuit.

In any event, the magazine argued, and the court found, that plaintiff’s lack of consent to the photo – and her mistaken belief about who was present when she exposed herself – were legally irrelevant to her claims for intrusion upon seclusion and publication of private facts. The court held that, at bottom,

“plaintiff’s lifting up of her shirt cannot reasonably be said to have constituted a private act. She exposed herself at an outdoor fund-raising event open to any member of the public who purchased a ticket.”

Thus, the relevant legal question was not who plaintiff may have subjectively believed was watching her at the time, but rather, whether plaintiff was in a setting in which it was objectively reasonable for her to have an expectation of privacy in the act of exposing herself. As a matter of law, such an expectation was unreasonable here.

Interestingly, plaintiff also brought a claim for false light invasion of privacy, although she conceded that the photo as published accurately depicted her conduct at the fundraiser. Relying on the decisions in *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984) and *Douglass v. Hustler Magazine*, 769

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“Plaintiff’s lifting up of her shirt cannot reasonably be said to have constituted a private act. She exposed herself at an outdoor fund-raising event open to any member of the public who purchased a ticket.”



Summary Judgment for Magazine in Privacy Case Over Topless Photo

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F.2d 1128 (7th Cir. 1985), plaintiff argued that “the photograph’s publication gives the [false] impression that she is the type of person who consents to having a topless photograph of herself published in *Easyriders* magazine.”

The court, however, distinguished those two cases as involving magazines with a different content than that of *Easyriders* and as cases in which (unlike in this lawsuit) the plaintiffs had “presented voluminous evidence” in support of their contention that they had been harmed by the false implication they had consented to appear in the publications.

Finally, the court rejected plaintiff’s commercial misappropriation claim, holding that under Maryland law as elsewhere, the taking of a photograph “in a public place at a newsworthy event” was not actionable as misappropriation.

Michael Sullivan and Tom Curley of Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. represented Paisano Publications, LLC together with its General Counsel Mark Dodge. Plaintiff was represented by David Ellin of Baltimore, Maryland.

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California Appeals Court Affirms Dismissal of Right of Publicity Claim Over Video Game

First Amendment Provided Complete Defense to Claims

By Louis P. Petrich

A California appellate court recently affirmed summary judgment for the distributors of a video game, holding that the First Amendment provided a complete defense to each of the celebrity plaintiff's claims that the distributors misappropriated her likeness and identity. *Kirby v. Sega*, No. B183820, 2006 WL 2718911 (Cal App. 2d Dist. Sept. 25, 2006) (Boland, Cooper, Flier, JJ.).

Background

Plaintiff, Kierin Kirby, professionally known as "Lady Miss Kier" or "Miss Kier" or "Lady Kier," was the lead singer of a retro-funk-dance musical group Dee-Lite, popular in the 1990's. She was also a dancer, artist, choreographer, and fashion designer who claimed to have developed the specific, distinctive look of a "fashionable, provocative, and funky diva-like artistic character."

She claimed her "unique public identity" combined retro and futuristic visual and musical style resulting from her signature costumes and lyrical expressions. Her costumes included platform shoes, knee socks, brightly colored form-fitting clothes and unitards, short pleated or cheerleader-type skirts, bare midriffs, cropped tops with words or a numeral written on the chest, space or other helmets, a blue backpack and red-pink hair worn in a "page boy flip" held by a headband, pigtails and other styles.

She also claimed to have signature lyrical expression with which she introduced herself in one of her music videos and three of her songs, "ooh la la."

Defendants are distributors of a video game called "Space Channel 5" ("SC5" or the "game") created from 1997 to 1999 by an employee of Sega, Japan, released in Japan in December 1999. Their character "Ulala" was originally conceived as a male but changed to a female to develop a video game to appeal to girls. The game's crea-

tor testified the name "Ulala" was a derivative of a Japanese name "Urara" modified to make it easier for English speakers to pronounce.

The game's creator also alleged that he developed the Ulala character based on the "anime" style of Japanese cartoon characters and denied using plaintiff as a reference. The choreographer of the video game's dance moves denied knowing of the plaintiff.

The game is set in outer space in the 25th Century and it features a computer generated image of a young fictional elongated and extremely thin female reporter named "Ulala" who works for a news channel called Space Channel 5. In the game, the character wears a few different costumes but is seen almost entirely in an orange outfit which includes the midriff exposing top bearing the numeral "5," a mini-skirt, elbow length gloves and stiletto heels, knee high platform boots.

Her hot pink hair is worn in short pigtails and she wears a blue headset and jetpack and blue gun holster strapped to her right thigh. The orange and blue colors were chosen because orange is the official color of Dreamcast, and blue is the corporate color of Sega, Japan. Defendant, Sega of America, Inc. released a "localized" version of the game in North America in June 2003.

In July 2000, plaintiff was contacted by a firm retained by a subsidiary of Sega, Japan to help promote a version of SC5 in England. Plaintiff was not interested in promoting SC5.

Plaintiff's operative complaint alleged (1) common law infringement of the right of publicity under California law; (2) misappropriation of likeness under California Civil Code § 3344; (3) violation of the Lanham Act, 15 U.S.C. § 1125(a); (4) unfair competition under California Business and Professions Code § 17200; (5) interference with prospective business advantage; (6) unjust enrichment.

(Continued on page 28)



Plaintiff

"Ulala"

California Appeals Court Affirms Dismissal of Right of Publicity Claim Over Video Game

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The trial court granted defendants' motion for summary judgment finding that while material issues of fact existed as to whether plaintiff's image was used by the defendants, all her claims were foreclosed by the First Amendment. The trial court also awarded defendants approximately \$600,000 in attorneys fees as prevailing parties under California Civil Code § 3344.

Court of Appeals Decision

The Court of Appeal affirmed, finding that while material issues of fact existed concerning the use of plaintiff's likeness and identity, the First Amendment provided a complete defense to all claims.

The court noted that plaintiff's character and defendant's both are thin, have similarly shaped eyes and faces, red lips and red and pink hair, both wear brightly colored form fitted clothing in a 1960's retro style. The defendant's character's "Ulala" name is a phonetic variant of "Ooh la la," the phrase often used by or associated with plaintiff. And both characters use the phrases "groove," "meow," "dee-lish," and "I won't give up."

These similarities gave rise to a factual issue on plaintiff's common law claim of misappropriation and her other related state claims.

The court next considered the Lanham Act claim, which it characterized as "the federal equivalent of a right of publicity claim," citing *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir.). The issue under the Lanham Act claim is the likelihood that reasonable consumers would be confused about the plaintiff celebrity's endorsement of defendant's work. The court concluded that a triable issue existed as to that claim as well.

However, the court found that all such claims were trumped by the First Amendment and in particular, by the free speech defense provided by the California Supreme Court leading decisions concerning the "transformative" use of a celebrity's likeness or identity. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 385, 291 (2001); *Winter v. D.C. Comics*, 20 Cal.4th 881, 891-892 (2003).

The court concluded that the free expression projected by the First Amendment to the U.S. Constitution and the even greater speech protection afforded by Article I, section 2 of the California Constitution extends to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings and entertainment, whether or not sold for profit. It relied on out-of-state decisions to hold that video games are expressive works entitled to as much free speech protection as the "most profound literature."

Under California's transformative test, the "inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." *Comedy III*, 25 Cal.4th

at 406. When the product containing the celebrity's likeness is so transformed that it has become primarily the defendant's own expression, rather than the celebrity likeness, it is protected free speech. *Id.*

Applying this test, the Court of Appeal agreed as a matter of law that

defendant's Ulala character is more than a mere likeness or a literal depiction of plaintiff. It is not a literal depiction. The setting in the 25th Century is unlike any public depiction of Kirby. Moreover, the dance moves performed by the defendant Ulala character are unlike plaintiff's movements in any of her music videos. "Taken together, these differences demonstrate Ulala is 'transformative' and Respondent's added creative elements to create a new expression."

The court rejected plaintiff's contention that Ulala was no more than an imitation or "rip off" of plaintiff because sufficient similarities precluded a conclusion that Ulala is not based on Kirby. The court held that it did follow that Ulala is nothing more than an imitative character – because defendants added new expression and the differences were not trivial. Second, the transformative test specifically does not require the defendant to say something factual or critical or comedic about plaintiff to receive First Amendment protection.

The court also rejected the invitation to "refine" the transformative test and instead to adopt the "predominant

(Continued on page 29)

The transformative test specifically does not require the defendant to say something factual or critical or comedic about plaintiff to receive First Amendment protection.

**California Appeals Court Affirms Dismissal
of Right of Publicity Claim Over Video Game**

(Continued from page 28)

use” test recently adopted by the Missouri Supreme Court in *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003). These considerations required dismissal of all but the Lanham Act claim.

Acknowledging that the Lanham Act claim is concerned with possible public confusion that Kirby endorses SC5 based on the admitted similarities, the court nevertheless found that the public interest in free artistic expression precluded application of the Lanham Act because of the many dissimilarities between the plaintiff and defendant’s characters.

Finally, the court remanded the case to the trial court to determine the amount of attorneys fees to be awarded to defendants as the prevailing party on the appeal under California’s misappropriation statute, Civil Code § 3344(a).

Louis P. Petrich is a partner with Leopold, Petrich & Smith in Los Angeles. Plaintiff was represented by Maxwell M. Blecher and Courtney A. Palko of Blecher & Collins. Defendants were represented by Tod L. Gamlen, Keith L. Wurster and Christopher J. Keller of Baker & McKenzie.

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Gun Dealer Voluntarily Dismisses Libel and RICO Suit Against New York City Officials

Georgia-based gun shop Adventure Outdoors, Inc. and affiliated plaintiffs have voluntarily dismissed, at least for now, a \$400 million Georgia RICO and defamation lawsuit against the City of New York, various officials of the City, and a private investigation firm hired by the City. *Adventure Outdoors, Inc., et al. v. Bloomberg, et al.*, No. 1:06-cv-1931 (N.D. Ga.) (Tidwell, J., recused) (Ward, J., recused) (Forrester, J.).

Background

The dismissed lawsuit arose out of a separate lawsuit filed by the City of New York in the United States District Court for the Eastern District of New York against Adventure Outdoors and several other gun dealers. The New York lawsuit alleged that Adventure Outdoors had allowed individuals to purchase guns even when it was clear that the gun was being purchased, not for the individual nominally engaged in the purchase, but rather for a third party.

These transactions, known as “straw purchases,” are a violation of federal gun laws. In preparing the New York lawsuit, the City of New York hired private investigators to conduct simulated straw purchases – transactions that appeared to be straw purchases but were not – in order to determine whether certain gun shops, to which guns involved in New York City crimes were traced at an inordinately high rate, were allowing straw purchases to take place.

After the filing of the New York lawsuit, Adventure Outdoors, along with several affiliated individuals and an affiliated corporation, filed suit in the Superior Court of Cobb County, Georgia. Adventure Outdoors’s lawsuit alleged that the simulated straw purchases amounted to a violation of the Georgia Racketeering Influenced and Corrupt Organizations Act.

The lawsuit further alleged that various high-ranking New York City officials libeled and slandered the plaintiffs when they announced the filing of the New York lawsuit. The City of New York, Mayor Michael Bloomberg, New York City Corporation Counsel Michael Cardozo, Police Commissioner Raymond Kelley, Criminal Justice Coordinator John Feinblatt, and the pri-

vate investigator who engaged in the simulated straw purchase and the investigation firm for which she worked were all named as defendants.

At a press conference announcing the filing of the suit, Adventure Outdoors attorneys Bob Barr, a former U.S. Rep. and current NRA board member, and his partner Edwin Marger painted Mayor Bloomberg as an arrogant billionaire intent on destroying the right to bear arms who “feels he is above the law.”

Plaintiffs Voluntarily Dismissed

Following removal to federal court, the defendants moved to dismiss plaintiffs’ claims in their entirety, on the grounds that, *inter alia*, the comments that formed the basis of the libel and slander claim were privileged as accurate reports of pending litigation, as comments made by public officials in the course of their official duties and as protected statements of opinion.

Defendants moved to dismiss the RICO claim on the grounds that plaintiffs could not establish the “predicate acts” necessary for a RICO claim and that an injury to reputation, which was the sole injury alleged by plaintiffs, was not remediable via a RICO claim. Defendants also raised several procedural defenses.

Rather than responding to the merits of the motion to dismiss, plaintiffs voluntarily dismissed all of their claims.

Plaintiffs have been represented by Bob Barr and Edwin Marger of the Law Offices of Edwin Marger. Defendants have been represented by Peter Canfield, Marcia Bull Stadeker and Matthew Crawford of Dow Lohnes; Kenneth Taber of Pillsbury Winthrop Shaw Pittman; and Eric Proshansky of the New York City Law Department.

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“If at First You Don’t Succeed ...”

Second Circuit Finds Artist’s Latest Use of Another’s Photography To Be Fair Use

By Toby Butterfield and Lisa Digernes

In three cases decided a decade ago, courts found artist Jeff Koons liable for willful copyright infringement for incorporating other people’s work into his own. In October 2006, the Second Circuit reviewed another case involving Koons’s “appropriation art,” holding this time that it was fair use for Koons to create a collage using part of a photograph created by plaintiff Andrea Blanch. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (Sack, Katzman, Murtha, JJ.), *affirming*, 396 F.Supp.2d 476 (S.D.N.Y. 2005).

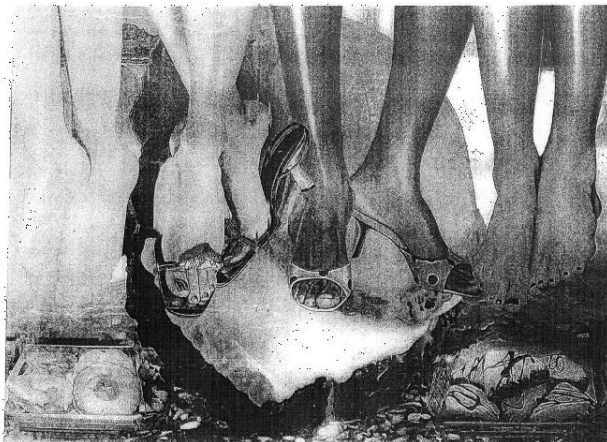
The three earlier cases all involved sculptures Koons exhibited in his “Banality Show” at Sonnabend Gallery in New York. Two sculptures were exact 3-D reproductions from photographs on post cards Koons bought. One portrayed a couple and their puppies (but did not include the photograph’s background); another showed two boys in a farmyard trying to push a large be-ribboned pig into a gift box. In the third case, Koons’s sculpture featured a cut-out image of a stuffed doll next to a sculpture based on the character “Odie” from *Garfield*. *See Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992); *Campbell v. Koons*, No. 91 Civ. 6055, 1993 WL 97381 (S.D.N.Y. 1993); and *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

A fair use defense was rejected in each of these cases. The different result in the Second Circuit’s new decision illuminates what uses courts now find to be “transformative.”

Background

The plaintiff in the recent case, Andrea Blanch, has been a photographer for over twenty years. In 2000, Blanch created a

photograph entitled “Silk Sandals” as part of an editorial six-page article entitled “Gilt Trip” about metallic makeup that appeared in *Allure* magazine. The photograph shows the lower part of a woman’s bare legs crossed at the ankles. Gucci sandals with an ornately jeweled strap are on her feet, which rest on a seated man’s knee in an airplane cabin.



Koons’s “Niagara”



Plaintiff’s Photo

Koons admitted that he copied, scanned and superimposed the legs, feet and Gucci sandals from the photograph, and incorporated them into a collage, which he then gave to his assistants to make the painting “Niagara” at issue in this case.

“Niagara” was part of a seven-painting series commissioned by Deutsche Bank for \$2 million, and displayed first at the Deutsche Guggenheim Berlin and subsequently at the Guggenheim Museum in New York.

In the painting, Koons merely altered the orientation of the legs from a 45-degree angle in the photograph to vertically downward. Koons described “Niagara” as featuring “four pairs of women’s legs and feet which dangle over a landscape. Below them is a monstrous chocolate-fudge brownie, served with a mound of ice cream and flanked by trays of glazed donuts and apple Danish pastries.”

According to Koons, his painting comments on “the ways in which some of our most basic appetites - for food, play, and sex - are mediated by popular images.”

Four Fair Use Factors

Purpose and Character of Use: In a decision written by Judge Robert Sack, the court emphasized that the most important part of the first fair use factor is whether defendant’s use is “transformative.” Crediting Koons’ explanation, the

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“If at First You Don’t Succeed ...”

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court found that he used Blanch’s image for a “sharply different” purpose than Blanch’s purpose in creating the image.

While Blanch wanted “to show some sort of erotic sense” and get “more of a sexuality to the photographs,” Koons used the image as “a fodder for his commentary on the social and aesthetic consequences of mass media.” The court also viewed the character of the uses as different: The court found Blanch’s fashion photograph was “created for publication in a glossy American ‘lifestyles’ magazine,” unlike Koons’ “massive painting” commissioned by a leading world bank and exhibited in art-galleries.

While Koons made a substantial profit from the sale of his work, the court discounted the commercial use because the work was transformative, and did not even comment on the commercial aspects of Deutsche Bank’s commissioning of the work. The court also found that Koons’s failure to seek permission for the copying was not in bad faith. In contrast, in *Rogers v. Koons*, *supra*, the court found bad faith because Koons had torn the copyright notice off the postcard before copying.

Nature of the Copyrighted Work: The Second Circuit disagreed with the district court’s description of Blanch’s photograph as “banal rather than creative,” and accepted the work as a creative work. However, the court then discounted this factor because the defendant’s use was transformative.

Amount Used: According to Blanch, her key creative decisions in the shoot “were the choice of an airplane cabin as a setting and her placement of the female model’s legs on the male model’s lap.” Koons extracted the legs, feet and sandals from the photograph. Again crediting Koons’s professed purpose, the court found that he copied “only that portion of the image necessary to evoke ‘a certain style of mass communication,’” and that this was “reasonable in relation to the purpose of the copying,” although Koons took approximately one-third of the photograph.

Market Effects: The court found that this factor greatly favored Koons, because Blanch had never pub-

lished or licensed the photograph after publication in *Allure*, and never licensed any of her photographs for use in other visual art works. Koons’s use therefore did not “cause any harm to her career or upset any plans” for the photograph or for any other Blanch photographs.

Conclusion

The court quoted considerably from Koons’s affidavit explaining his reasons for taking parts of Blanch’s photograph, but did not find it necessary to decide whether “Niagara” was a parody or satire, because Koons justified his borrowing as a commentary on mass communication. The court therefore did not need to “depend on [its] poorly honed artistic sensibilities” to decide whether Koons had a “genuine

creative rational for borrowing Blanch’s image,” or whether Koons merely borrowed the image “to get attention or to avoid the drudgery in working up something fresh.” In contrast, in *Rogers v. Koons*, the court refused to accept Koons’s sculpture as a parody under the fair use defense.

The court gave heavy weight to the transformative purpose and nature of “Niagara.” So what did Koons do differently this time? Unlike earlier cases, this time Koons took only parts of plaintiff’s photograph, changed them by placing them at a different angle, and incorporated them in a collage with other elements.

However, the court seems to shift the transformative analysis from the nature of the transformation to the purpose of the person making it. Such a shift could create a slippery slope. Many photographs are created for a narrow purpose, for example sports or commercials, and a user can easily profess a different purpose than that of the copyright proprietor. If a magazine cover featuring a male sports figure’s photograph is later used in an ironic collage billboard advertisement for women’s cologne, the purpose is clearly different; but is that use fair?

Toby Butterfield is a partner and Lisa Digernes an associate at Cowan, DeBaets, Abrahams & Sheppard LLP in New York. Plaintiff was represented by Robert W. Cinque, Cinque & Cinque, P.C., N.Y. Jeff Koons was represented by John B. Koegel, The Koegel Group, N.Y.

**Koons justified
his borrowing as a
commentary on mass
communication.**

S.D.N.Y. Denies Preliminary Injunction in Trademark Case Arising Out of Film Title

By Tom Curley

An attempt by a New York City theater production company to halt ongoing distribution of the film *Hollywoodland* was rejected by the Southern District of New York, which denied the production company's motion for a preliminary injunction following an evidentiary hearing late last month. *Mandrachia, et al. v. Focus Features LLC and Miramax Film Corp.*, Civ. No. 06-7591 (S.D.N.Y. Oct. 31, 2006) (Scheidlin, J.).



Background

The case arose out of the motion picture *Hollywoodland* which is based on the facts surrounding the 1959 death of George Reeves, the actor who played the role of Superman in the 1950s television series and movies. The film, which stars Ben Affleck, Diane Lane and Adrien Brody, examines Reeves' career struggles and premature death by gunshot wound in his Hollywood Hills home. Reeves' death was ruled a suicide by police.

Concisely stated, *Hollywoodland* – as its title conveys – uses Reeves' story as the backdrop to examine the reality beneath the glitter in the waning golden era of the Hollywood studio system. The term “Hollywoodland” is both a geographic place name and a commonly used word to refer to the entertainment industry writ large. The iconic “HOLLYWOOD” sign visible today in Los Angeles originally spelled out “HOLLYWOODLAND” before the last four letters deteriorated and the “LAND” was removed.

The film *Hollywoodland* opened in September 2006, following a major promotional campaign throughout the summer months. After the film was playing in some 1,500 theaters nationwide, plaintiffs – a New York theater production company named “Hollywoodland Productions, Inc.” and the

company's two principals – filed suit in the Southern District of New York and sought a preliminary injunction to halt ongoing distribution of the film and its soundtrack. Focus Features LLC and Miramax Film Corp., producers of the film, were named as defendants.

Plaintiffs' complaint alleged claims for trademark infringement, unfair competition and reverse confusion under the Lanham Act, as well as analogous claims under New York law. Each of plaintiffs' claims was

founded upon the premise that, due to defendants' allegedly improper use of the title “Hollywoodland” for their film,

plaintiffs' theater production company had and would suffer injury in the form of consumer confusion.

The principal theatrical production staged by Hollywoodland Productions was the show *Valentino The Musical*, an off-off Broadway musical

based on the life of the silent film star Rudolph Valentino. The musical was performed most recently for a theater audience in 2003.

Defendants' use of the “Hollywoodland” title for their film had not, and was not, likely to cause confusion among consumers.

Preliminary Injunction Hearing

Plaintiffs' preliminary injunction touched off a flurry of discovery culminating in an evidentiary hearing before Judge Scheindlin on October 30. Discovery established that plaintiffs' activities in the marketplace under the “Hollywoodland” banner were more limited in scope and in duration than the allegations of plaintiffs' complaint contended.

In opposition to plaintiffs' motion, the defendants argued that even if plaintiffs possessed trademark rights in the designation “Hollywoodland,” the First Amendment permits use of the term as the title of a movie in connection with which the term is artistically relevant. Defendants also

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S.D.N.Y. Denies Preliminary Injunction in Trademark Case Arising Out of Film Title

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asserted that plaintiffs' trademark was invalid on a number of grounds and that plaintiffs could not establish that there was any likelihood that an appreciable number of ordinary consumers would be confused by the name of the movie.

At the close of the evidentiary hearing on the preliminary injunction motion, Judge Scheindlin denied plaintiffs' motion in its entirety and held that defendants' use of the "Hollywoodland" title for their film had not, and was not, likely to cause confusion among consumers. In a bench ruling, the court applied the various likelihood-of-confusion factors set forth in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961), finding that each and every one of the relevant factors favored defendants.

Most notably, plaintiffs' minimal impact in the marketplace has not caused the public to view the term "Hollywoodland" as referring to plaintiffs and their products. Thus, their marks are relatively weak. In addition, the parties' goods and services are marketed to different customers through different channels and plaintiffs were unlikely to "bridge the gap" between the parties by expanding their goods and services into the same market occupied by defendants.

On the issue of actual consumer confusion, the court held that plaintiffs were unable to demonstrate such confusion and Judge Scheindlin rejected as irrelevant a parade of friends and business acquaintances offered by plaintiffs to purportedly establish such confusion. In the Second Circuit and elsewhere, as the court noted, the testimony of friends and associates of the mark holder is not probative on the issue of consumer confusion, as these individuals are not the type of "consumers" with which the Lanham Act is concerned.

Finally, the Court ruled for defendants without even reaching defendants' argument that use of "Hollywoodland" as a film title is protected by the First Amendment. The Second Circuit has held that, where a trademarked term appears in the title of a movie and has some artistic relevance to that movie, the Lanham Act must be narrowly applied to avoid a conflict with the First Amendment. *See, e.g., Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

Because the title "Hollywoodland" is artistically relevant to the film, application of the Lanham Act to that title is very narrow and plaintiffs must therefore demonstrate a particularly compelling likelihood of consumer confusion in order to prevail on their claims, as *Rogers* and its progeny require. The court found, however, that plaintiffs' motion failed even under a less rigorous likelihood-of-confusion burden.

Following denial of their preliminary injunction motion, plaintiffs voluntarily dismissed their lawsuit.

Robert Penchina and Tom Curley of Levine Sullivan Koch & Schulz, L.L.P. in New York City represented Focus Features LLC and Miramax Film Corp. Plaintiffs were represented by James M. Gibson and Robert L. Powley of Powley & Gibson, P.C. of New York City.

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Ontario Court Strikes down Anti-Leak Provisions as Unconstitutional

State Secrets Law Violated Canadian Charter

By Stuart Svonkin

In a landmark decision issued on October 19, 2006, Justice Lynn Ratushny of the Ontario Superior Court of Justice struck down Section 4 of Canada's *Security of Information Act* (SOIA) as unconstitutional. *O'Neill and Ottawa Citizen Group Inc. v. The Attorney General of Canada* (Court File No. 11828).

In her decision, Justice Ratushny held that the so-called "anti-leakage" provisions of the SOIA – which made it a criminal offence punishable by up to 14 years in prison to communicate, receive, or retain "secret official" or "official" government information – violated guarantees of freedom of expression and fundamental justice provided under the *Canadian Charter of Rights and Freedoms*.

The case was the first constitutional challenge to Section 4 of the SOIA ever mounted. The provisions of Section 4 have their roots in the British *Official Secrets Act* of the late nineteenth and early twentieth centuries. In the aftermath of the September 11, 2001 attacks in the United States, those provisions were reenacted as part of Canada's *Anti-Terrorism Act*.

Background

As previously reported in the September 2006 MLRC MediaLawLetter, the case stemmed from a November 8, 2003 newspaper article, entitled "Canada's Dossier on Maher Arar," published in the *Ottawa Citizen* and written by *Citizen* reporter Juliet O'Neill.

O'Neill's article addressed the Royal Canadian Mounted Police (RCMP) investigation into Arar, a Canadian citizen who was deported to Syria by U.S. authorities, and referred to information leaked by Canadian security officials. As part of a government investigation into the leak, in January 2004 the RCMP obtained and executed search warrants against the *Citizen's* offices and O'Neill's home. The warrants were based on, and sought evidence related to, alleged offences under Section 4.

Lawyers for O'Neill and the *Citizen* applied to the Ontario Superior Court of Justice to have the warrants quashed. The application was based on a number of grounds, including that Section 4 was unconstitutional, that the warrants comprised an abuse of process, and that the warrants were improperly issued and therefore invalid. The Canadian Civil Liberties Association (CCLA), the Canadian Broadcasting Corporation, and several other media entities intervened to join in the constitutional challenge. The case was argued in Ottawa during the last two weeks in August.

Statute Was Overbroad

The Court's decision was a resounding victory for O'Neill, the *Citizen*, the media, and civil liberties. The

Court determined that Section 4 was impermissibly overbroad and accordingly violated freedom of expression and freedom of the press as protected by the *Charter*. This determination was based in part on the conclusion that critical terms in the anti-leakage

provisions – including "secret official", "official", and "authorized" – lacked any definition, either in the SOIA or in any binding classification scheme.

The Court observed that "the consequence of this is that [the offense provisions] are standardless In their present state, the impugned sections give the state the unfettered ability to arbitrarily protect whatever information it chooses to classify as 'secret official' or 'official' or unauthorized for disclosure and to punish by way of a criminal offence those 'speakers', 'receivers' and 'listeners' who come within that protected sphere."

The Court specifically noted that the British *Official Secrets Act*, which was the progenitor of Section 4, was amended in 1989 to address the very problems of overbreadth that plagued the Canadian measure.

The Attorney General of Canada offered three main responses to the contention that Section 4 was unconstitutionally overbroad. The first argument was that the scope

(Continued on page 36)

**Critical terms in the
anti-leakage provisions –
including "secret official",
"official", and "authorized"
– lacked any definition**

Ontario Court Strikes down Anti-Leak Provisions as Unconstitutional

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of Section 4 had been narrowed by provisions of the *Access to Information Act*, Canada's freedom of information statute.

The Attorney General's second argument was that the common law provided a "public interest defense" to a charge under Section 4 that limited the reach of the law. Finally, the Attorney General suggested that the application of the statute was circumscribed by means of prosecutorial discretion.

The Court rejected all three arguments, concluding that none of the mechanisms suggested by the Attorney General cured the constitutional infirmities in Section 4 identified by the applicants and the interveners. The Court concluded that Section 4 "fails to define in any way the scope of what it protects and then, using the most extreme form of government control, criminalizes the conduct of those who communicate and receive government information that falls within its unlimited scope including the conduct of government officials and members of the public and of the press."

As a result, the Court ruled, Section 4 unreasonably and unjustifiably chilled constitutionally protected expression.

The Court also accepted the applicants' argument that Section 4 was void for vagueness. Relying on many of the same reasons discussed in its analysis of overbreadth, the Court held that Section 4 failed to provide appropriate guidance to members of the press and the public, as well as to law enforcement officials, as to what types of conduct and expression were subject to prosecution. On that basis, the Court concluded that Section 4 violated the *Charter's* guarantee of fundamental justice.

The CCLA advanced an additional attack on Section 4, based on the contention that two of the three offenses at issue in the case – the "communication" and "retention" offenses – lacked the fault or *mens rea* element required for "true crime" offenses as a matter of constitutional law.

The Attorney General objected to this argument being made, among other reasons because the argument was not being pursued by O'Neill or the *Citizen*. At the hearing, that objection was argued and overruled, and the Court allowed the CCLA to argue the *mens rea* issue. In its decision, the Court concluded that the communication offence and all but

one of the retention offences under Section 4 lacked the required fault element and, as strict liability "true crime" offences, were inconsistent with the *Charter*.

The Court also determined that the warrants and the threat of prosecution against O'Neill were part of an unsuccessful attempt to intimidate the reporter to reveal her confidential source of the official information referenced in her article. The Court accepted the applicants' contention that this improper purpose constituted an abuse of process and a violation of the constitutional right of freedom of the press. This was a separate and additional basis, the Court concluded, for quashing the warrants. Finally, the Court found that the warrant applications were not inconsistent with criminal law requirements and that the issuing Justice had reasonable and probable grounds to issue the warrants.

As a result of the Court's rulings on the constitutional and abuse of process grounds, the warrants were quashed and Section 4 was struck down. The Attorney General has 30 days from the date of the decision to appeal the ruling.

The warrants and the threat of prosecution were part of an unsuccessful attempt to intimidate the reporter to reveal her confidential source.

John B. Laskin and Stuart Svonkin of Torys LLP acted for the Canadian Civil Liberties Association. Juliet O'Neill and the Ottawa Citizen Group Inc. were represented by Richard G. Dearden and Wendy J. Wagner of Gowling Lafleur Henderson LLP and David M. Paciocco of Edelson & Associates. The Attorney General of Canada was represented by Robert J. Frater, Marian Bryant, and Steve White. The Canadian Broadcasting Corporation was represented by Edith Cody-Rice, its Senior Legal Counsel.

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Keeping a Lid on Secrets – The UK Approach

By Marietta Cauchi

The statement this past Spring by American Attorney General Alberto Gonzales that the press could be subject to criminal liability for disclosing classified information has evoked parallels to the UK's notorious Official Secrets Act. The UK's Official Secrets Act has been in place for nearly 100 years and has been used to criminally punish leakers and to enjoin the press from disclosing official secrets broadly defined.

The Act was most recently revised in 1989 following the high profile Spycatcher case where the government stopped publication of the memoirs of Peter Wright, a former intelligence agent in the U.K., despite its publication elsewhere, and prosecuted two civil servants for leaking information to the press. *See Attorney-General v Guardian Newspapers No. 1 1987 3All ER 316/No. 2 1988 3All ER 545; R v Ponting 1985 Crim LR 318; R v Tisdall 1984 6 Cr. App.R. 155.*

In 1989, the scope of the Official Secrets Act was narrowed to limit the classes of official information protected. But the Act still broadly criminalizes disclosures about the security and intelligence services. There is also a ban on disclosing material about Britain's defense and international relations if "it endangers the interests of the United Kingdom abroad" or "seriously obstructs the promotion or protection of those interests."

And it still applies to disclosure by the press and public if they know or have reasonable cause to believe, that the information is protected against disclosure.

Official Secrets & Article 10

The Spycatcher case eventually ended up in the European Court of Human Rights which held that the UK's actions in obtaining injunctions against newspapers after the information had already been published abroad had violated the right to freedom of speech under Article 10 of the European Convention on Human Rights. *See The Observer and Guardian v the United Kingdom (Spycatcher Case), Judgment of 26 November 1991 Series A No 216.*

Lord Lester, who represented newspapers in the Spycatcher case, said: "The European Court of Human Rights made it clear in Spycatcher that a prior restraint is the most

draconian form of interference with free speech and requires the most compelling justification."

Cases under the Official Secrets Act are rare and have mainly been brought against government officials who have leaked information to the press – rather than against the publishers. The recent high-profile prosecution of former MI5 British secret agent David Shayler has put the issue again firmly on the legal map.

Shayler was convicted in 2002 for passing classified information and documents to the press. *R v Shayler 2 WLR 754 2002*. Represented by Liberty, the UK civil liberties organization, Shayler pursued his case to the House of Lords where he argued that the absolute prohibition on disclosure breached Article 10 of the ECHR.

During litigation there was some discussion about whether a defense of necessity should be available for the Act to comply with Article 10. Necessity is a common law doctrine, defined as pressure of circumstances compelling one to commit an illegal act.

The Court of Appeal, while ruling out the availability of the broad general public interest defense, had ruled that a defense of necessity was available when a defendant committed an otherwise criminal act to avoid an imminent peril of danger to life or serious injury. However on the specific facts of his case the Court of Appeal said that this defense was not available to Shayler. *R v Shayler*, 1WLR 2206 2001.

The House of Lords didn't agree that a defense of necessity was available under the Official Secrets Act and suggested that there were other routes Shayler could have taken including application for judicial review *See R v Shayler*, 2002 UKHL 11.

The House of Lords also ruled that the relevant provisions of the Official Secrets Act were not incompatible with the right of free expression under Article 10, citing a number of cases where the European Court had recognized "the need to preserve the secrecy of information relating to intelligence and military operations in order to counter terrorism, criminal activity, hostile activity and subversion." *See, e.g., Engel v The Netherlands (No 1) (1976) 1 EHRR 647, paras 100-103; Klass v Federal Republic of Germany (1978) 2 EHRR 214, para 48; Leander v Sweden (1987) 9 EHRR 433, para 59; Hadjianastassiou v Greece*

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Keeping a Lid on Secrets – The UK Approach

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(1992) 16 EHRR 219, paras 45-47; *Esbester v United Kingdom* (1993) 18 EHRR CD 72, CD 74; *Brind v United Kingdom* (1994) 18 EHRR CD 76, CD 83-84; *Murray v United Kingdom* (1994) 19 EHRR 193, para 58; *Vereniging Weekblad Bluf! v The Netherlands* (1995) 20 EHRR 189, paras 35, 40.

According to the Lords:

The special position of those employed in the security and intelligence services, and the special nature of the work they carry out, impose duties and responsibilities on them within the meaning of article 10 the safeguards built into the OSA 1989 are sufficient to ensure that unlawfulness and irregularity can be reported to those with the power and duty to take effective action, that the power to withhold authorisation to publish is not abused and that proper disclosures are not stifled.

R v Shayler 2002 UKHL 11 at ¶ 36.

Other Recent Case

Shayler's case was followed in 2004 by that of Katherine Gun, a translator at the GCHQ, the electronic surveillance arm of the British intelligence, who was sacked for leaking a secret email to the Observer newspaper.

Gun claimed that the email was from the US National Security Agency and asked British officers to bug the United Nations offices of countries voting on war against Iraq. Gun had to wait eight months between her arrest and the decision to charge her and another three months until the case came before the court on an initial hearing – all the while facing a prison sentence of up to two years under the OSA.

In a statement when she was charged, Gun claimed that any disclosures that may have been made were justified because they exposed serious illegality and wrongdoing on the part of the US government which attempted to subvert our own security services. She also said the disclosures could have helped prevent wide scale death and casualties amongst Iraqi civilians and UK forces in the course of an illegal war.

At the initial hearing and in an embarrassing climb-down for the government, the case was dropped and a 'not

guilty' verdict entered when the prosecution offered no evidence at Gun's initial hearing in court. The prosecution attorney was reported to have declined to give a reason other than to say there was "no longer sufficient evidence for a realistic prospect of conviction," because the prosecution could not disprove the defense of necessity.

Prosecuting the Press?

Loud alarm bells rang again at the end of last year when the Attorney General – who is the chief legal adviser to the Government and has the final decision on whether to prosecute under the Act – threatened newspapers with prosecution for publishing the contents of memo memorializing a 2004 meeting between President Bush and Prime Minister Blair.

An article in the Daily Mirror under the front-page headline "Bush plot to bomb his ally" reported that Bush had suggested bombing TV station al-Jazeera.

The threat of criminal prosecution against the press is rare – media defendants are more usually parties to injunction proceedings to restrain publication of confidential information, for example, in the Spycatcher case and various cases deriving from Shayler's disclosures.

The government did not follow through on its threats against the press, but charged civil servant David Keogh and former government researcher Leo O'Connor with violating the Official Secrets Act by leaking the document.

The case against Keogh and O'Connor is ongoing. No date has been set for trial, but in a preliminary hearing conducted in secret Mr Justice Aikens agreed with the government that disclosure of the memo would have serious consequences for national security.

Marietta Cauchi is a lawyer and reporter for Dow Jones in London.

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Strip Search Lays Bare the Law of Privacy

ECHR Says Govt Search Violated Article 8

By David Hooper

Those attending the international law session at the NAA/NAB/MLRC Media Law Conference in September may recollect discussion of a breaking judgment on privacy law given by the European Court of Human Rights the day before the conference started. *Wainwright v. United Kingdom*, ECHR No. 12350/04 (Sept. 26, 2006).

In *Wainwright*, the ECHR held that the UK violated Article 8 of the European Convention.

At issue was an over-zealous and needlessly humiliating strip search of Mary Wainwright and her son Alan when they visited another son of Mrs Wainwright held on remand in jail on a charge of murder.

That son was also suspected of being involved in a prison drugs ring. This led to the unduly intimate searching of Mary and Alan Wainwright. Matters were exacerbated by the fact that Alan suffered from cerebral palsy with severe arrested sexual and intellectual development to the extent that he was a patient within the meaning of the Mental Health Act.

An English County Court found that there was a sloppy disregard of the normal procedures for such searches which were conducted without any feelings for the privacy of Mary and Alan and the court awarded £2,600 damages for battery (assault) and Alan recovered £4,500. Each sum was deemed to include £1,000 aggravated damages. The incidents occurred in 1996 so it was ten years before the proceedings were concluded in Europe.

The Court of Appeal of England & Wales set aside the judgment in favour of Mary and awarded Alan £3,750. This ruling was upheld by the House of Lords.

House of Lords Ruling

On appeal, the claimants asked the House of Lords to declare that there is a general tort of invasion of privacy in UK law making the searches actionable. In an opinion written by Lord Hoffman, the House of Lords refused to do so. *Wainwright v Home Office* [2003] UKHL 53 (Oct. 16, 2003). Analyzing the issue under both common law and the UK's obligations under the European Convention on Human Rights, Lord Hoffman concluded, "it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another."

ECHR Ruling

The European Court of Human Rights which included the English judge Sir Nicolas Bratza, disagreed with this view. The requirement to submit to a strip search would generally constitute an interference with the right of privacy under Article 8 of the Convention and it would therefore have to be justified as being "in accordance with the law" and "necessary in a democratic society."

Here there were highly invasive and potentially debasing procedures to persons who were not convicted prisoners or under reasonable suspicion of having committed a criminal offense. The search, though, was not outrageous enough to constitute a violation of Article 3 of the ECHR, which prohibits torture, and inhuman or degrading treatment or punishment" but the court felt that the searches were not proportionate to the legitimate aims of the prison service in the manner in which they were carried out and they were not "necessary in a democratic society."

The question therefore was whether the Wainwrights had an adequate remedy so as to comply with Article 13 of the Convention. This provides that "everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

The European Court felt that there was a breach of Article 13. The fact that the House of Lords had found that negligent action carried out by the prison officers did *not* ground any civil liability and that there was no general tort of invasion of privacy meant that the Wainwrights did not have available to them a means of obtaining redress for the interference with their rights under Article 8 of the Convention. The European Court awarded each Applicant 3,000 (£2,000) and 17,500 costs (£11,700)

In effect, the *Wainwright* decision extends the boundaries of privacy, suggesting that there should be a general tort of invasion of privacy that extends beyond disclosures of personal information.

David Hooper is a partner with Reynolds Porter Chamberlain in London. The applicants in Wainwright were represented by solicitor David Reston and barrister Ian Christie of 5RB.

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THE OTHER SIDE OF THE POND

UK and European Law Update

By David Hooper

This column of the MLRC MediaLawLetter focuses on developments in the United Kingdom and the rest of Europe which may be of interest to First Amendment lawyers and intellectual property lawyers.

Anti-Terror Laws

Terrorist offences have led to an increase in the powers that the police now have against the media, notably under Sections 12, 19, 38B, 39 and 58 of the Terrorism Act 2000 and under Sections 1, 2 and 8 of the Terrorism Act 2006 covering such matters as obligations on journalists to disclose information to the police and journalists collecting material which could be of use to terrorists

To date the most significant power seems to be under Schedule 5 Terrorism Act 2000 which deals with Production Orders. These powers do not have the safeguards for the media contained in the Police and Criminal Evidence Act 1984 which had special provisions for journalistic material. The powers under the Terrorism Acts are more draconian and potentially more confrontational and can lead to the police acquiring journalists' notes and sources.

There is currently before the courts a police application against the BBC concerning a program broadcast on *Newsnight* on 1 August 2005 following the London bombings where the BBC is required to hand over not only the transmitted program but the rushes, notes and "any other relevant material."

Background information on this case can be found in an article written by Stephen Whittle, the controller of BBC editorial policy published in the British Journalism Review (http://www.brj.org.uk/data/2005/NO4_whittle.htm).

There are at present a very large number of upcoming trials of alleged terrorist conspirators scheduled in England. The legal problems to which this has given rise are manifold.

Firstly, there have been cases where newspapers have wrongly named or identified a person who in fact was not charged with any offence. This has led to multiple claims.

The media tend to get the best results if the claims can be consolidated with an offer of amends under Section 2 Defamation Act, 1996.

This means forgoing a substantive defense but receiving a discount of up to 50% on the assessed damages. See, e.g., *Veliu v Mazrekaj* [2006] EWHC 1710 (QB) and *Angel v Adrian Stainton* [2006] EWHC 637 (QB). The level of the discount will depend on the promptness of the retraction and the absence of any aggravating features in the way the case is defended.

Conditional Fees

A meeting has now taken place between claimant lawyers and the media and those representing them over the issue of conditional fees. The meeting took place under what is rather quaintly known as "Chatham House Rules," namely that the discussions are to remain confidential.

However, this is a significant part of the attempt by the Department of Constitutional Affairs to mediate between the potentially conflicting interests of those who could not otherwise afford to bring libel actions on the one hand and on the other the media's concerns about laying down parameters for an appropriate level of remuneration to reflect the reality of the risk. It is therefore a question of watch this space.

Jameel

Much has been written already about the House of Lords decision in *Jameel v. Wall Street Journal*, [2006] UKHL 44. <http://www.bailii.org/uk/cases/UKHL/2006/44.html>

The most striking point was that indicated by Baroness Hale namely that if there was ever a case which should attract a privilege, this was it. It is only puzzling that that seems to have escaped the trial Judge, Mr Justice Eady and a strong Court of Appeal.

It is regrettably the fact that it is seldom that the Court of Appeal and the House of Lords see eye to eye on a media case. The Judgment of Lord Hoffmann is compulsory reading for anyone interested in the interpretation of free-

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dom of speech in the United Kingdom. The case goes some way to remedying the unreality of the previous approach to Reynolds cases and a lack of understanding of the editorial process on the part of Her Majesty's Judges.

A key point to come from Lord Bingham's judgment was that weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless matter.

The remarks by Lord Hoffmann on the subject were even more pointed. Allowance must be made for editorial judgment; the fact that the judge with the advantage of leisure and hindsight might have made a different editorial decision should not destroy the defense.

Lord Hoffmann's criticism of the trial judge was even more searing when he criticized his view that responsible journalism was too vague and subjective. The reference in Lord Hoffmann's judgment to the jargon of the old Soviet Union indicated judicial disapproval of a very high order. Yet he must surely be right in suggesting that lawyers who can deal with the idea of "reasonable care" should not have any problem with deciding what is "responsible journalism."

Access to Court Documents

One of the things that I have often been asked by American lawyers is about access to court files. The answer is that access was hitherto very limited and essentially confined to a Claim Form or Writ as it used to be called and publicly made Court Orders.

Until documents were referred to in court, there was little that could be accessed without permission from the court—not always readily given. That changed by virtue of the Civil Procedure Rules 5.4 (c) where non-parties to proceedings could request copies of documents such as Statements of Case which set out in detail what the litigation was about and these could be obtained as of right.

However, as the provisions were coming into force on 2 October 2006 an application was made on behalf of The Law Society of England and Wales against the Department of Constitutional Affairs to seek to prevent this rule operating retrospectively. The impetus for this litigation appears to have come from the law firm Schillings, the champions of the privacy of celebrities.

The litigation continues. Mr Justice Keefe on 5 October 2006 extended the injunction pending the resolution of the dispute. There will be greater openness regarding future litigation, it remains to be seen whether agreement can be reached on the retrospective effect of the order or whether that has to be litigated.

Publication of details of the lurid allegations made by Heather McCartney against her husband Paul in her divorce petition has produced libel and privacy claims still to be resolved, as possibly will be the question of how much such detail can be published in the light of the Judicial Proceedings (Regulation of Reports) Act 1926.

The Right of Short Reporting

Those concerned with news access need to follow the developments in the Audio-Visual Service Directive which in effect updates the Television Without Frontiers Directive (89/552/EEC). There is at present no specific right to use short video clips of newsworthy events without consent in EU audio-visual media law, although the right does exist in some members states' domestic legislation.

Article 9 of the European Convention on Trans-frontier Television (ECTT) suggests that member states "examine and, where necessary, take legal steps such as introducing the right to short reporting on events of high interest to the public."

There is at present no binding obligation on individual members states to do so. The European Commission in December 2005 issued proposals for amendment with a view to modernizing the Directive (COM (2005) 646 final).

The Directive is bedeviled by the distinction between linear services, i.e., traditional television and non-linear which are non-scheduled and consist, for example, of on-demand broadcasting and internet services where the user decides on the time when a specific program is transmitted.

The non-linear services will be subject only to a minimal number of restrictions but the line is a little easier to state than to define – for example in relation to short clips to mobile phone users during sports matches. Under Recital 27 exclusive rights holders should grant short extracts to both broadcasters and intermediaries where the intermediaries act on behalf of a broadcaster.

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Article 3(b) creates a right to short-reporting whereby broadcasters with exclusive rights are required to grant up to 90 seconds to other broadcasters for news purposes. The question will inevitably arise as to the extent to which news agencies will benefit from these changes.

The right to short-reporting is restricted to broadcasters. News agencies are not themselves broadcasters but they play a crucial role in the gathering and dissemination of news by supplying small broadcasters with packages of news material that would otherwise not be available to them. Questions are likely to arise as to whether it is discriminatory to restrict the access rights solely to broadcasters and whether these legislative differences restrict free movement of news agency services between European countries.

Problems for Publishers

The British Government has been much exercised of late by whether convicts and disobliging former civil servants should be entitled to keep the fruits of their authorship. The recent decision of the European Court of Human Rights *Blake -v- United Kingdom* 26 September 2006 Application No. 68890/01 suggests that in the case of convicts a government can prevent them enjoying their royalties.

Blake was a Soviet spy who worked for MI6 and escaped while serving a 42-year jail sentence. His book *No Other Choice* had been published in 1990 by Jonathan Cape – now part of Random House. He did, however, recover 5,000 euros in damages and 2,000 in costs because he had been deprived of his rights of due process under Article 6 of the European Convention. The litigation in the UK had lasted nine years two months, that in Europe lasted a further five years and eight months.

John Reid the UK Home Secretary is currently having discussions with publishers and victims of crime regarding proposals to amend the law to ensure that criminals do not profit from their wrongs by their literary efforts. Amongst those who have are the drug dealer Howard Marks, assorted Great Train Robbers, Mad Frankie Fraser and the disgraced politicians Jeffrey Archer and Jonathan Aitken.

There are also proposals from the House of Commons Public Administration Committee that, as has happened

with members of the Special Forces, the Crown will assert copyright over the contents of their books enabling the Crown to prevent their publication and/or to collect all profits.

It is now proposed that this should extend to senior civil servants born, it seems, of the government's displeasure over the memoirs of the former UK Ambassador to the USA, Sir Christopher Meyer, *DC Confidential*. A distinction is made with the civil servants who it is said must be trusted to keep private discussions confidential and the politicians who were conducting those discussions. It has not been proposed that the Crown seek to claw back a reputed £400,000 paid to the former Home Secretary David Blunkett whose career hit the buffers over his business dealings and a work permit for a lady friend's nanny

Foul Balls

After the NAA/NAB/MLRC Conference in Alexandria, Virginia, I was invited to watch the New York Mets and Washington Nationals game. Looking up from my blackberry I couldn't help noticing the ball swiftly approaching my face which is struck a millisecond later.

The first treatment for the injury was to ask me who the President was and when I replied "I would rather not say," I was asked who the British Prime Minister was.

Unlike the First Amendment this is a case where the law seems to be broadly the same on both sides of the Atlantic. The House of Lords in *Bolton -v- Stone* (1951) AC 850 said that even a passerby on a street outside a cricket ground could not complain if he was struck by a cricket ball. Equally Jane Costa was unable to sue the Boston Red Sox when hit by a foul ball. *Costa v. Boston Redsox*, 809 N.E.2d 1090 (Mass. 2004).

One might be luckier in New Jersey where it seems it might be possible to recover damages if you were struck while buying a hot dog. *Maisonave v. The Newark Bears* 2005 881A.2d 700 (N.J. 2005). I won't be suing!

David Hooper is a partner at Reynolds Porter Chamberlain in London

Speakers Bureau on the Reporter's Privilege

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

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

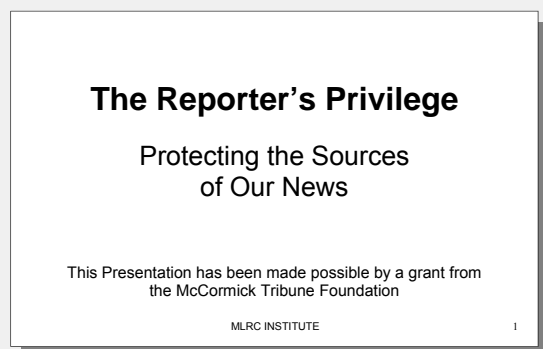
We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

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

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

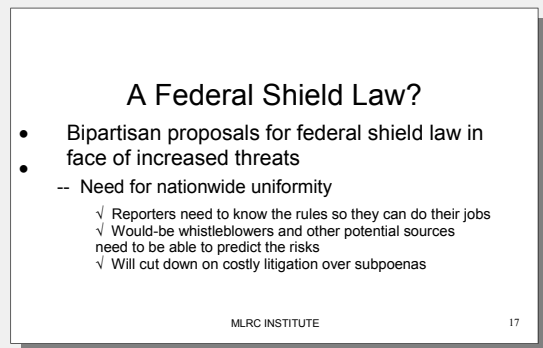
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

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



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

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



FCC Revisits Indecency and Profanity Rulings Following Remand from the Second Circuit

New Order Dismisses Two Complaints, but Finds CBS in Violation for Nicole Richie, Cher Witticisms

On November 6, 2006, the FCC released an order, revisiting allegations of indecency and profanity on four television programs: the *2003 Billboard Music Awards*, the *2002 Billboard Music Awards*, *The Early Show*, and *NYPD Blue*. See FCC Order, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-166A1.pdf

At issue was the following:

1. On the *2003 Billboard Music Awards*, which aired on Fox Television Network at 8pm EST, sometime celebrity and *Simple Life* star Nicole Richie, who was presenting an award, made the following statement: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." This observation came after co-presenter Paris Hilton noted on air that the telecast was live, so Ms. Richie had better "watch the bad language" and after Fox managed to bleep out one apparent curse word from Ms. Richie's prior line.
2. On the *2002 Billboard Music Awards*, which also aired on Fox at 8pm EST, Cher, who was receiving an award, said: "People have been telling me I'm on the way out every year, right? So fuck 'em."
3. *The Early Show*, which aired on CBS at 8:10 am EST, with the viewer complaint coming via a station in Pittsburgh, PA, featured *Survivor: Vanuatu* contestant Twila Tanner's reflection that she "knew [fellow contestant Chris Daugherty] was a bullshitter from Day One."
4. Finally, the complaints concerning *NYPD Blue* cited use of the word "bullshit" in several episodes first airing in Kansas City, Missouri at 9pm, CST.

Background

The FCC had previously addressed these four instances in a March 2006 Order and "found that the broadcasts ... apparently violated the statutory and regulatory prohibitions against airing indecent and profane material." The broad-

cast parties then sought review from the circuit courts. The Second Circuit consolidated the petitions for review, and then remanded to the FCC after that body asked that it be able to review its order due to procedural complaints made by the broadcasters.

November 2006 Order

The remand resulted in the November Order, which held, in short, that broadcasting the statements made by Nicole Richie and Cher violated 18 U.S.C. § 1464 and the FCC regulations regarding broadcast indecency. The commission

**An award show is not
"breaking news" ... so adding
about five seconds to the
delivery would not impede
the "viewer's experience."**

also found that these two instances were in violation of the § 1464 "prohibition on the broadcast of 'profane' utterances." The FCC did not, however, propose forfeiture sanctions for either of these violations.

As for *The Early Show*, the commission deferred to CBS's assessment that the offending comment was made during a "bona fide news interview" and dismissed the complaint, noting that Ms. Tanner's comment was "neither actionably indecent nor profane in [that] context."

Finally, the FCC dismissed the *NYPD Blue*-related complaints on procedural grounds because the complaints were "filed by the same individual from Alexandria, Virginia, where, . . . the material was aired during the safe harbor" time period.

FCC Commentary

In its analysis of the two *Billboard Music Award* complaints, the FCC focused extensively on Fox's actions. In general, the commission noted, "with respect to programming aired during the safe harbor [broadcasters' practices] reflect their recognition that airing the 'F-Word' and the 'S-Word' on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium."

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FCC Revisits Indecency and Profanity Rulings Following Remand from the Second Circuit

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Along these lines, the Fox President of Entertainment himself had testified before Congress that Nicole Richie's comments "contained 'inappropriate language.'" Indeed, Fox had edited out Ms. Richie's comments for the showings in the Mountain and Pacific Time zones. For the FCC, each of these factors counseled towards finding them indecent.

The FCC also refused to excuse Fox based on "the live, unscripted nature of the material." The commission reasoned that Fox "well knew" that "Ms. Richie frequently used indecent language in inappropriate contexts." As the broadcasting home of *The Simple Life*, Fox had bleeped nine expletives proclaimed by Ms. Richie during three episodes of the show. Still, Fox did not indicate to the FCC that it had warned Ms. Richie about her language or had taken any other cautionary steps before broadcasting the Billboard Music Awards.

Fox had implemented a five-second time delay, but not all of Ms. Richie's language was screened via this method. Indeed, the commission noted, Fox should have known this would be the case since it had used the same time delay and editing system the year before, when Cher was on the air.

A more careful delay, such as one "of five, ten, or even fifteen seconds" would not, according to the FCC, "meaningfully affect[] the value of this programming or significantly implicate[] First Amendment values." This award show was not "breaking news" and due to the nature of the broadcast medium, live television "is not literally live[,]" so adding about five seconds to the delivery would not impede the "viewer's experience."

The FCC addressed other constitutional concerns as well, reiterating the continuing relevance of *Pacific* regardless of current technological changes. "The broadcast media continue to have 'a uniquely pervasive presence' in American life[,]" the commission noted. Some 15.4 million American households still "rely exclusively on broadcast television" and, according to the Kaiser Family Foundation, "68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections." Children, the commission continued, re-

main a prevalent audience for broadcasters, and unlike the internet, television is accessible to children below the reading age level.

According to news reports, CBS will appeal the FCC's decisions regarding the two Billboard Music Awards shows to the Second Circuit.

In other FCC news, CBS was in the Third Circuit at the end of November, appealing the \$550,000 fine it received from the FCC for the broadcast of the now-infamous Janet Jackson "wardrobe malfunction." The FCC's September 2004 Order concluded that the halftime incident was indecent and that "even assuming that neither CBS nor MTV had advance knowledge that Ms. Jackson's breast would be exposed during her broadcast performance, the record clearly established that officials of CBS and MTV did have prior knowledge of, indeed were intricately involved in the planning process for, and tacitly approved, the sexually provocative nature of the Jackson/Timberlake segment." (Order available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-209A1.pdf)

Before the Third Circuit, CBS argued that it did not participate in the planning of the Jackson/Timberlake segment and that the exposure of Ms. Jackson's breast was unexpected.

Internet Gambling Prohibition and Enforcement Act

By Anthony S. Traymore

The Internet Gambling Prohibition and Enforcement Act (“Internet Gambling Act”) was signed into law by President Bush on October 13, 2006. The new law is actually a combination of two bills: The Internet Gambling Prohibition Act and The Unlawful Internet Gambling Enforcement Act of 2006.

The Internet Gambling Act was enacted to “modernize” the Wire Act. The Wire Act was enacted in 1961 and it generally made it a federal crime to use wire communications to transmit or assist betting on sporting events. *See* 18 U.S.C. § 1084. (Available at: <http://uscode.house.gov/download/pls/18C50.txt>).

There was some disagreement about whether the Wire Act extended to online casino gambling, like Internet poker. The Internet Gambling Act clearly brings all Internet gambling activity under its purview by implementing the following:

- Expands the definition of “communication facility” to cover all transmissions made over the Internet or wirelessly. This eliminates the ambiguity over the application of the Wire Act to Internet or wireless transmissions.
- Expands the definition of “bets and wagers” to include all “games subject to chance”. This definition was revised to cover the predominant forms of Internet gambling – sports wagering, casino-style gambling and lotteries.
- Expands the territory encompassed by the act to include transmissions within the territorial jurisdiction of the United States and to or from “any place outside the jurisdiction of any nation” to or from the United States.
- Broadens the scope of the prohibited transmissions to include bets or wagers or “information assisting in the placing of bets or wagers.” This eliminates the argument that Internet gambling transactions did not take place in the United States because the bettor’s account was maintained offshore.
- Prohibits the acceptance or processing of any credit transaction, electronic funds transfer, check or similar instrument, or the proceeds of any other form of financial transaction. This section clearly implicates third party payment processors like PayPal or Neteller.
- Increases the maximum prison term for violation of the Wire Act from two years to five years and adds an injunction remedy which would permanently prohibit anyone convicted of violating the act from participating in any gambling business.

- The Internet Gambling Act also provides for limited civil remedies against ISPs. An ISP may be ordered to remove Internet gambling websites or block hyperlinks to such websites that are transmitting money to Internet gambling websites provided that the government notifies such ISP of the exact hyperlinks to take down or IP addresses to block. However, the limitation of remedies against an ISP does not apply if the ISP is acting in concert with an Internet gambling operation.

The act also amends Chapter 53 of Title 31 of the United States Code, focusing primarily on the prohibition of processing financial transactions related to unlawful Internet gambling. Lastly, the act provides for the development of governmental regulations, policies and procedures to enable businesses to identify and block money transactions to and from Internet gambling websites.

Prior Enforcement Activity

Prior to the enactment of the Internet Gambling Act, beginning in 2003 and continuing through 2006, the Department of Justice had already taken aggressive measures against media companies, publishers, radio stations, and website operators, advising these entities that accepting advertising from Internet gambling websites would rise to the level of aiding and abetting such operations in violation of the Wire Act, the Travel Act and the Interstate Telephone Act of 1964. *See* Wire Act, 18 U.S.C. § 1084 (1961); Travel Act, 18 U.S.C. § 1952 (1961); Interstate Telephone Act, 18 U.S.C. § 1055 (1964). *See also* 18 U.S.C. § 2 (for definition of aiding and abetting).

The 2003 version of one such letter from the DOJ states, in pertinent part:

As you are no doubt aware, advertisements for Internet gambling and offshore sportsbook operations are ubiquitous on the Internet, in print ads and over the radio and television. The sheer volume of advertisements... is troubling because it misleads the public in the United States into believing that such gambling activity is legal, when, in fact, it is not. Because of the possibility that some of your organization’s members may be accepting money to place such advertisements, the Department of Justice, as a public service, would like you to be aware that the entities and individuals placing these advertisements may be violating various state and

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Internet Gambling Prohibition and Enforcement Act

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federal laws and that the entities and individuals that accept and run such advertisements may be aiding and abetting these illegal activities....

Notwithstanding their frequent claims of legitimacy, Internet gambling...operations that accept bets from customers in the United States violate Sections 1084, 1952, and 1055 of Title 18 of the United States Code, each of which is a Class E felony....Broadcasters and media outlets should know of the illegality of offshore sportsbook and Internet gambling since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities.

See Letter from John G. Malcolm to National Association of Broadcasters, *Re. Advertising for Internet Gambling and Offshore Sportsbooks Operations* (June 11, 2003).

Sporting News

On June 11, 2003, the DOJ sent a letter to Magazine Publishers of America, the owner of *Sporting News*, warning that advertisements promoting Internet gambling and offshore sports betting operations were illegal. While in a public statement, a representative of the *Sporting News* stated that it stopped running the advertisements after receipt of the letter, it actually continued to run the advertisements for more than six months thereafter.

While the United States never filed a complaint in this matter, on or about January 19, 2006, *Sporting News* agreed to a \$7.2 million settlement with the United States comprised of a \$4.2 million fine and \$3 million in public service advertisements aimed at dissuading people from gambling over the Internet.

Discovery Communications

In 2003-2004, the DOJ took action over a promotional arrangement between Tropical Paradise Enterprises, S.A., owner and operator of ParadisePoker.com, and Discovery Communications, Inc. In April 2004, the FBI seized a \$3.25 million advance payment that Discovery received from Tropical for advertising services to be provided to Tropical in the promotion of ParadisePoker.com.

U.S. v. BETonSPORTS

The most recent activity by the DOJ is certainly the most troublesome for advertisers and promoters of Internet gambling

websites. On June 1, 2006, the United States filed an action against BETonSPORTS PLC, its CEO and other individuals involved in the operation of or in relation to its business. Most troublesome for advertising agencies and media companies, three companies that provided advertising and marketing services to BETonSPORTS: Mobile Promotions, Inc., Direct Mail Expertise, Inc. and DME Global Marketing and Fulfillment (collectively, "DME") were named as defendants in the case—along with their owner, William Hernan Lenis and other employees of DME.

In addition to the alleged violations of the Wire Act and Travel Act, the prosecution alleges racketeering conspiracy, mail fraud, tax evasion, interference with administration of Internal Revenue Laws, forfeiture and, of course, aiding and abetting violations of each of these offenses.

The fact that marketing firms and their agents are named as defendants and are being prosecuted as "part of the enterprise" with respect to the racketeering conspiracy charges is particularly troubling in that it potentially opens up advertising agencies and media companies to a host of charges which may be encompassed under the umbrella of the racketeering conspiracy charge – for all of which they could be found jointly and severally liable.

Impact of the Statute

The Internet Gambling Act eliminates any ambiguity over whether the operation of Internet gambling websites are illegal in the United States. In response, several of the largest Internet poker websites, including Party Gaming, the operator of Party Poker, have indicated that they will shut down operations in the United States.

With the illegality of these businesses established by the Internet Gambling Act, the DOJ may be even more aggressive than in the past in its pursuit of United States entities affiliated with or providing services to Internet gambling businesses. Because there are significant jurisdictional and service of process hurdles to overcome to prosecute overseas operators, the DOJ will likely target affiliates located in the United States, including media and advertising companies that promote Internet gambling websites.

Anthony S. Traymore is an associate at Reed Smith LLP in New York.

MLRC Annual Meeting Nov. 8, 2006

The meeting was called to order by Henry Hoberman, chairman of the MLRC Board of Directors.

Mr. Hoberman welcomed everyone to the meeting and began by describing the two proposed amendments to Article III, Section 2 of the by-laws. The first proposed amendment would increase the maximum number of directors from nine (9) to eleven (11) and would give the DCS president full voting rights on the board.

Sandy Baron, executive director of MLRC, explained the second proposed amendment, meant to alter the language of Article III, Section 2, to comply with the New York not-for-profit corporations law regarding the filling of vacancies on the Board of Directors.

Next, Mr. Hoberman explained that the real substantive change to Section 2 of the by-laws was the proposal to give the DCS President a vote on the board of the directors. Mr. Hoberman said that the proposed amendment was in recognition of the contribution that the DCS members make to MLRC, and that the Board felt that affording the DCS President with a voting position was overdue.

Elections

Mr. Hoberman explained that Mr. Wimmer was the DCS President until his recent move to Gannett, and that the Board was delighted to have him join them. Mr. Hoberman also explained that due to the proposed by-law amendment adding to the maximum number of directors, the formation of the Board in its current time cycle would not fit the staggered terms that the board has had in the past. For this reason, Mr. Hoberman explained, Mr. Wimmer and Mr. Richieri are nominated to one year terms, with the expectation that they will be re-elected for two year terms at the next annual meeting. Mr. Huber, Ms. Rivlin and Ms. Weiner are nominated for two year terms. Finally, Mr. Hoberman, Marc Lawrence-Apfelbaum of Time Warner Cable, and Stephen Fuzesi, Jr. of Newsweek, Inc. were elected to a two year term at the last meeting.

Following these descriptions, Mr. Hoberman made a motion to approve the list of directors. Hal Fuson seconded the motion. All present voted in favor and Ms. Baron voted the 32 proxies, which had been retained and brought to the meeting, in favor of the new directors.

Next, Mr. Hoberman made a motion to approve the by-law Amendments that had been discussed. Mr. Fuson seconded the motion. All present were in favor of the amendments. Ms. Baron also voted the 32 proxies in favor of the amendments.

Financial Report

After the voting was complete, Mr. Richieri gave the financial report. Mr. Richieri said that the financial reports spoke to a "strong financial discipline." He also explained that the MLRC has been gradually building funds to create a form of endowment, and now has over \$1 million that the Board can begin to think about putting to work in creative ways.

Ms. Baron followed up by giving credit to Debra Seiden of the MLRC staff for working on the finances of the organization from day to day.

Next, Ralph Huber gave the report of the Strategic Planning Committee. Mr. Huber began by acknowledging the committee members, including Mr. Hoberman and Mr. Richieri, as well as those who are not on the Board, Robin Bierstedt, Kelli Sager and Karole Morgan-Prager.

Mr. Huber said that the committee has been looking at the direction in which the MLRC is headed. A key issue has been the state of the media membership in light of media consolidation. Mr. Huber said that he and Dale Cohen have undertaken to examine and analyze the membership dues and see if the MLRC should be taking a different approach to how it assesses dues. For example, the committee has looked at whether the MLRC should adopt a more formal dues structure. Mr. Huber said that the committee has been helped by Ms. Baron and Ms. Seiden, who have provided historical information about how the MLRC has collected revenue. The committee hopes to report on its findings about membership dues early next year.

Mr. Huber said that the committee has also been looking at how MLRC should reach out to non-traditional media and the international media community, and how those efforts could be tied to revenue.

Mr. Huber said that generally the MLRC has no critical problems to address, and that the committee was mostly

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MLRC Annual Meeting

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looking at how the organization can add value to its members and the public by its expanding its areas of expertise. The committee is eager for input.

Next, Kurt Wimmer gave the report of the Defense Counsel Section. Mr. Wimmer explained that Peter Canfield will be rotating up to be President of the DCS executive committee for next year. Robert Nelson of Hall Estill in Oklahoma will be added to the board as Treasurer. As Mr. Wimmer is no longer defense counsel, having joined Gannett, he will not be serving as a past president; James Stewart has agreed to keep that position for another year.

Mr. Wimmer said that the Pre-publication/Pre-broadcast Committee has been publishing a lot of reference material and that the Entertainment committee has also been doing good work. Mr. Wimmer said that the Model Shield Law Task Force was indebted to Ms. Baron and Maherin Gangat, who worked in detail with the model law and coordinated with the DCS and the media members in the effort.

Next, Ms. Baron gave the Executive Director's report. She thanked the Board and the former Board members for being so active and for all of their hard work. Ms. Baron also thanked the DCS, and pointed those present to the list of publications, which had been distributed at the beginning of the meeting.

Ms. Baron began the report by discussing the conference in Alexandria, V.A. There was a record crowd and the evaluations were still circulating, but would be tabulated. Ms. Baron thanked those involved with the planning. Some of the MLRC committees contributed a great deal to the conference, including the Ethics Committee, which coordinated boutiques at the conference and produces a monthly article in the MediaLawLetter. The Internet Committee also ran two boutiques and produced a series of articles for the conference, which are available on the website. Pre-pub/Pre-broadcast reports were also used as working tools in a boutique session during the conference; and the International Committee ran the opening sessions on privacy and copyright. Ms. Baron also thanked Tom Kelley, who conducted the Trial Tales session.

Ms. Baron said that the MLRC is in the planning stages for the now-annual set of sessions in Los Angeles with Southwestern Law School. The conference will be on January 26th. Last year at the Southwestern Conference there

were two sessions on product placement, a session on how to make a deal for product placement and a session on legal issues to consider when products are used when no deal is made, indecency regulation, and blurring fact and fiction, as well as a reception. Ms. Baron invited all to attend the 2007 conference, which will include sessions on the intersections of traditional and new media: deal issues, fair use, and the blogging. Brochures for the conference should be going out soon.

The California chapter, which was intended to try and serve the special needs and issues of California, has been meeting quarterly. The California Chapter meetings include short takes on various issues. Recently, the Chapter has discussed access issues, legislative proposals in California, indecency, and subpoenas. Any member in California is welcome to participate.

The London 2007 conference is in the planning stages and will be held Sept. 17th and 18th. If anyone has questions or ideas, they should contact David Heller of the MLRC staff.

Ms. Baron thanked Susan Buckley and the panel for the afternoon's symposium on the Espionage Act. She also referred to the publication list, and mentioned a few publications, including the Pre-pub/Pre-broadcast's Checklist, the Legislative Affairs Committee's monthly news column, the Newsgathering Committee's **PANIC BOOK**.

Ms. Baron then asked David Tomlin to speak about the Newsletter Committee. Mr. Tomlin said that the committee has continued to serve its traditional function of providing ideas and writers for Dave Heller. The committee has had three teleconferences to talk generally about the newsletter and has made a modification to the publication on the website: the index has direct links to the articles, instead of requiring the reader to scroll through pages.

Mr. Tomlin said the committee had begun to discuss whether to change the format of the MediaLawLetter so that it resembles an internet publication rather than a replica of a print publication. Finally, Mr. Tomlin noted that David Hooper has volunteered to take on the writing of a column on noteworthy events in the U.K.

Ms. Baron then continued, mentioning the successful work of the ALI Task Force and the Task Force on the Model Shield Law.

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MLRC Annual Meeting

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She asked members to keep an eye out for the MLRC's change of address card, noting that the organization will be moving around December 1st. Ms. Baron concluded by thanking the staff of the MLRC.

Maherin Gangat then spoke about the Task Force on the Model Shield Law. The shield law that recently passed in Connecticut was based in large part on the law developed by the Task Force. Ms. Gangat has kept up with other states that are interested in passing shield laws and provided them with the model law. These other states include Washington, Missouri, Texas and, more recently, Kansas and Massachusetts. The only state that seems doubtful to resume its interest this term is Missouri.

Ms. Gangat then gave the report on the MLRC Institute Speaker's Bureau, a project underwritten by a grant received by the MLRC Institute last year intended to educate the public on the reporter's privilege. The Institute presentations are conducted in venues such as bookstores, colleges and high schools. These presentations are conducted by lawyers from the member firms and the reporters from their publications. So far, there have been roughly 40 such presentations.

Ms. Gangat said that the Institute is currently under consideration for another grant, and has been discussing adding a second topic to its series. So far, suggested topics

have included covering wars, access to national security, libel, censorship, and covering the courts in trials. Ms. Gangat asked that anyone with ideas please contact her. Also, anyone who is interested in giving a presentation or knows of a venue should contact Ms. Gangat as well.

Mr. Hoberman encouraged people to look at the substantive information used by the Institute (available on the MLRC website).

Next, David Heller continued the report on the Institute, discussing a recent power point presentation the Institute is developing on basic defamation principles. The interactive presentation is designed for bloggers and reporters or any members of the public who might be interested, and is based on a reporting hypothetical, followed by a series of questions. Mr. Heller welcomed anyone who would like to see the presentation to email him.

Eric Robinson then mentioned that the Employment Committee has put together a basic legal primer, which had been distributed at the beginning of the meeting and is available for order and on the website.

Mr. Hoberman then announced that the Board had elected Ralph Huber as the next chairman of the Board of Directors. He thanked Sandy Baron for her tireless work and all members for another great year in the most challenging of times.

There being no further new business, the meeting was adjourned.

Minutes of the Defense Counsel Section Annual Breakfast Meeting

DCS Executive Committee President Kurt Wimmer called the annual meeting to order, welcomed everyone and thanked them for attending the breakfast. MLRC Chairman of the Board of Directors Henry Hoberman then took the floor briefly, and announced that Mr. Wimmer would be joining the MLRC Board of Directors since he has recently moved in-house with Gannett. Mr. Hoberman welcomed Mr. Wimmer and said that the Board was delighted to have Mr. Wimmer. Mr. Hoberman also thanked Mr. Wimmer for his terrific, thoughtful and creative work with the DCS.

Mr. Hoberman then said that the Board recognizes and appreciates that the DCS is the workhorse of the MLRC and could not be more thankful. Mr. Hoberman stated that, at the MLRC Board of Director's initiative, the MLRC, Inc.

By-laws were amended to allow for the DCS President to have a vote on the Board of Directors. Mr. Hoberman said that this change is in recognition of the fact that the DCS is the engine that drives the MLRC.

President's Report & Election of Treasurer

Mr. Wimmer then addressed the first order of business, which was the election of the new treasurer. Mr. Wimmer announced the names of the 2007 Executive Committee, as follows: Peter Canfield, President; Dean Ringel, Vice President; Kelli L. Sager, Secretary; and James Stewart, Emeritus. The executive committee nominated Robert D. Nelson of Hall, Estill, Hardwick, Gable, Golden & Nelson to serve as Treas-

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Minutes of the DCS Annual Breakfast Meeting

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urer. The committee asked for other nominations from the membership, and received none. Mr. Wimmer asked for a vote, and all present approved, by a voice vote, electing Mr. Nelson to the position of Treasurer.

Executive Director's Report

Next, Sandy Baron, the Executive Director of MLRC, introduced Peter Canfield, the new President of the DCS Executive Committee. Mr. Canfield echoed Mr. Hoberman's remarks about Mr. Wimmer and thanked Mr. Wimmer for his wise counsel and leadership. In particular, Mr. Canfield thanked Mr. Wimmer for his work on the federal shield law, which helped that initiative to go much farther than expected.

Ms. Baron then resumed the podium and thanked the outgoing Executive Committee.

Conferences & Programs

Ms. Baron then proceeded with her report, first mentioning the conference in Alexandria, VA. Ms. Baron thanked those involved with the planning of the conference. Some of the materials from the conference are available online, at the MLRC home page. Ms. Baron thanked the facilitators for their work, noting that the DCS Ethics Committee put together boutique sessions for the conference and that their monthly column from the MediaLawLetter is available online, as well. The Internet Committee put together an extensive set of articles for the conference, which is now available online. The Pre-publication/Pre-broadcast Committee produced a report that was relied upon while preparing the conference. The International Committee ran the opening

programs at the conference, and Tom Kelley put together the panel for the "Trial Tales" lunch program and the accompanying materials.

Next, Ms. Baron discussed the Southwestern Conference. Last year, the conference focused largely on the regulatory environment, with sessions on product placement, deal making, blurring of fact and fiction and indecency regulation. This year, the conference will be held on January 25, 2007.

The California Chapter, which meets quarterly, is one of the MLRC's more recent projects.

The London conference is still in the planning stages, and will be held September 17 and 18, 2007.

Ms. Baron then thanked Susan Buckley and all of the panelists from the MLRC's symposium on the Espionage Act, two days before.

The Shield Law Task Force has done great work with the draft model shield law and background materials. It is available to anyone whose state is considering enacting a shield law.

Publications

Ms. Baron also thanked the DCS for its contributions to the list of MLRC's publications, which had been distributed at the beginning of the meeting, as well as for its contributions to the brief bank, expert witness bank, and jury instruction bank.

Finally, Ms. Baron noted that the MLRC will be moving around December 1, 2007, and all members should keep an eye out for the MLRC's change of address card.

Committee Reports:

Mr. Wimmer then asked for the reports from the committees.

Committee Reports:

Advertising & Commercial Speech Committee

Josh Koltun reported that the committee has been following the ongoing events surrounding the Internet Gambling legislation, the Do-Not-Call/Do-Not-Fax registries, and questions involving how to define advertising.

ALI Task Force Committee

Tom Leatherbury reported that the committee had a relatively quiet year after wrapping up its 2005 work on the ALI on International Judgments Project. The committee will be monitoring and, if needed, acting as ALI takes up a privacy law project, and international copyright and trademark law issues.

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At this point, Ms. Baron also noted that ALI Task Force is a unique committee because it requires membership with the ALI. Ms. Baron encouraged DCS members to consider becoming ALI members, and asked that people return to their firms and find out if any of their colleagues are ALI members, to see if they would be interested in working with the Task Force.

Conference & Education Committee

Slade Metcalf spoke on behalf of the committee, noting that the conference in Virginia had the largest turn out ever, and thanked everyone in the room for their help. Looking forward to the 2008 conference, Mr. Metcalf said that the committee had sent out the conference surveys and was waiting for the returns. Once they are received, the committee will tabulate the results and focus on changes. The committee will be discussing a change of location, a change of format – such as whether to keep the boutique sessions – and the topics themselves. Anyone who has changes or suggestions should get in touch with the committee chairs.

Employment Law Committee

John Henegan directed everyone's attention to the *MLRC Basic Guide to Employment Defamation and Privacy Law* booklets, which had been distributed prior to the meeting. The committee spent a great deal of time developing this pamphlet as a guide for non-practitioners in companies and organizations, such as human resource directors, who deal with libel and privacy issues every day. Mr. Henegan thanked Bob Blackstone of Davis, Wright, Tremaine for his help, as well as Eric Robinson of the MLRC staff. This coming year the Employment Law Committee will be following independent contractor issues.

Entertainment Law Committee

Bruce Johnson reported that the committee has been following theft of idea issues and reality television issues.

Ethics Committee

Richard Goehler reported that the committee currently has over 40 active members.

It has been turning out monthly articles on practical ethical topics, which are available in the MediaLawLetter each month, as well as on the MLRC website, at http://www.medialaw.org/Template.cfm?Section=Ethics_Committee&Template=/MembersOnly.cfm&NavMenuID=383&ContentID=4543&DirectListComboInd=D.

The committee also ran two break out sections at the Virginia conference, using an extensive hypothetical it had developed.

International Media Law Committee

Jan Constantine spoke for the committee, noting that the committee had run the opening sessions on international law at the conference in Virginia. The committee urges people to use the MLRC website, which is the best place to find the committee's resources, including the Regional Updates (available at http://www.medialaw.org/Template.cfm?Section=MLRC_International_Media_Law_Committee&Template=/MembersOnly.cfm&NavMenuID=384&ContentID=4427&DirectListComboInd=D#RegionalReports). Ms. Constantine mentioned the new materials on Ireland and the U.K. and Australia and New Zealand. There are other substantive materials and links on the website, and committee is working with Eric Robinson and David Heller of the MLRC staff to develop the page.

Finally, Ms. Constantine mentioned a project she had been discussing with Brady Williamson regarding a possible trip of media lawyers to Iraq. The idea is to take two nights and three days in Iraq and talk to journalists to see what can be done to further their interests in that country.

Internet Law Committee

Peter Canfield reported that most of the committee's work was related to the Virginia Conference this year. The committee produced five articles, which are available on the MLRC website (<http://www.medialaw.org/Template.cfm?>

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[Section = Internet _ Law _ Committee & Template = / MembersOnly.cfm&NavMenuID=415&ContentID=4558&DirectListComboInd=D](#)) and cover topics including Section 230, blogs, privacy, the Google Library Project, and target advertising on the internet.

The committee ran one of the most popular boutique sessions at the conference and is hoping to translate that interest into membership.

Jury Debriefing Project

Chip Babcock reported that no juries have been debriefed largely because in recent cases judges were not allowing release of identifying information about juries.

Legislative Affairs Committee

Kevin Goldberg reported that the committee has been tracking legislation and updating its “Pending Legislation” page on the website (http://www.medialaw.org/Template.cfm?Section=Legislative_Affairs_Committee&Template=/MembersOnly.cfm&NavMenuID=386&ContentID=3862&DirectListComboInd=D) and has been producing articles in the MediaLawLetter to expound upon these developments. The committee is also working on a State FOI resource and attempting to have all of the links a practitioner would need available in one area.

MediaLawLetter Committee

Dave Tomlin said that the committee has about 40 members and is designed to be made up of a broad range of practice areas. The committee has had several teleconferences, during which they have encouraged people to submit ideas to and write for the newsletter. Beginning in the November issue, David Hooper will be contributing a short summary of developments in the U.K. Additionally, the page numbers in the table of contents of the electronic version of the Newsletter will now link the reader directly to the article page, so there is no longer any need to scroll through.

Finally, the committee is beginning to think about how the Newsletter can evolve into an internet-based publication.

Membership Committee

Susan Fowler reported that the MLRC membership has been increasing steadily. A key project is to develop potential membership in under-represented states.

Model Shield Law Task Force

Nathan Siegel said that at the state level, Connecticut passed a shield law this year, based heavily on the model shield law developed by the Task Force, and that Washington introduced a federal shield law bill. Mr. Siegel thanked Maherin Gangat of the MLRC staff for her work, taking the model law and making it useful to the states that were considering proposing a bill last year.

Mr. Wimmer also thanked Ms. Gangat for her work, and noted that the Task Force’s function as a sounding board was particularly helpful in drafting the federal bill.

New Legal Developments

Laura Handman reported that the function of the committee is to track the larger issues on the horizon, and to trendspot for topics that can be used in the Bulletins, conferences and symposiums. The committee proposed annotating the ethics hypothetical that was used in the breakout sessions at the Virginia Conference. It is also focusing on the upcoming London Conference and looking at issues for these sessions, such as the impact of British contempt laws on U.S. publishers.

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Newsgathering Committee

The newsgathering committee has produced the **PANIC BOOK**, which is available on the website (http://www.medialaw.org/Template.cfm?Section=Archive_by_Date1&Template=/MembersOnly.cfm&ContentID=3905). The committee is also working on a compendium of state statutes that deal with whistleblowers, based on the concerns arising from the *Garcetti* footnote. A model brief on newsgathering claims is in the works as is more material on confidential sources and restrictions on access.

Pre-Publication/Pre-Broadcast Committee

Sam Fifer reported that the committee has distributed a number of practical publications (available on the website http://www.medialaw.org/Template.cfm?Section=Pre-Publication_Pre-Broadcast_Committee&Template=/MembersOnly.cfm&NavMenuID=417&ContentID=4288&DirectListComboInd=D), including the checklists *Checklist on Identifying/Interviewing Children as Perpetrators, Victims and/or Witnesses* and “*Watch*” *Words: A Glossary*. The committee is also working on a publication on copyright and fair use.

Pre-Trial Committee

Michael Raiff reported that the committee is working on a paper on the reporters privilege or shield law in the context of a libel case against the media. The paper will deal with precluding defenses, striking evidence, choice of law issues, and how to handle discovery in this situation.

Trial Committee

Bob Nelson said that the committee is working on updating the *2000 Jury Instructions Manual* and the *Model Trial Brief*. The *Model Trial Brief* should be completed by the end of November or early December

Report of the California Chapter

Kelli Sager gave the report of the California Chapter, created to meet the unique needs of California-based members. Southwestern Law School has been a forum for the chapter’s meetings, which have covered topics such as indecency and national security issues, and have averaged about 20 to 30 people at meetings. Ms. Sager encouraged people to join the meetings via phone, and asked anyone with colleagues interested in joining the chapter to contact her.

Report on the MLRC Institute

Maherin Gangat reported on the Institute’s Speaker’s Bureau, which is sponsored by a grant from the McCormick Tribune Foundation. It was developed to educate the public on the reporter’s privilege. The bureau has hosted about 40 sessions so far, and Ms. Gangat thanked the many DCS members who have given presentations or helped to find speakers and forums. The Institute would like to continue with the Speaker’s Bureau, and is thinking of expanding topics, possibly to such subjects as covering wars, access to

national security, libel, censorship, and covering the courts in trials. If anyone has ideas for topics, speakers or venues, please contact Ms. Gangat.

Next, David Heller described a recent project that the Institute has undertaken to educate young reporters and bloggers on the basics of libel law. The information has been formatted into a power point presentation with a reporting hypothetical followed by a series of questions. If the format is successful, the Institute may expand into other areas, for example newsgathering issues and copyright.

New Business

Mr. Wimmer announced that due to the By-law change mentioned earlier by Mr. Hoberman, the DCS president would have voting rights on the MLRC Board of Directors, which was very meaningful and a nice vote of confidence.

Mr. Wimmer concluded by thanking everyone for attending and thanking Ms. Baron and the MLRC staff. There being no new business, the meeting was adjourned.

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Lift Is to Elevator as “Information Barrier” Is to . . . ?

By Brian S. Faughnan

Pam Yanqui is seated at her desk, not quite halfway through her first cup of coffee, when a ringing telephone pierces the silence. From the digital display screen, she can tell the caller resides in another office of her behemoth firm – Here, There & Everywhere, LLP. After the third ring, and one last sip of java, Pam punches the “Answer” button and says “Pam Yanqui.”

“Pam, this is Fred Coats, in the London office. I have a bit of a situation here and I wanted to chat about whether your client, Goliath Media, might be game to agreeing to an information barrier? I don’t want to go into too much detail at this point,” Fred adds “but, well, I just learned of a recent amalgamation, and we may have a problem with a particular client who has been instructing us regarding a know-how agreement. We’re confident there is no conflict, but we do think an information barrier might be necessary for us to be able to continue to act.”

Pam, uncertain she understood much of what Fred just said, but clearly having heard him use the word “conflict,” reminds Fred that for the New York office it is just now 7:30 a.m. and only 4:30 a.m. at Goliath’s Los Angeles office and asks him if she can call him back. Seconds after ending the call, Pam was already wondering how long might be the appropriate time to wait before calling Fred back to ask him just what in the world he was talking about. Luckily, on her way down the hallway to refill her mug, Pam bumps into her partner, Tom Budsman, who always seems to know the latest ethics and professional responsibility news. Pam asks Tom what he knows about conflicts of interest across the pond. Tom, ever helpful, tells Pam that he knows a good bit and asks her to stroll on down to his office so that he can give her a quick overview.

Effective May 2, 2006, two new rules issued by The Law Society of England and Wales, one governing conflicts of interest and one governing confidentiality and disclosure issues, have been added to the Solicitors Practice Rules as Rule 16D and Rule 16E respectively.¹ The text of Rules 16D and 16E

appears straightforward; however, along with the rules, the Law Society has provided additional guidance in the form of explanatory notes, consisting of one-hundred-and-eleven numbered paragraphs (sixty-six numbered paragraphs explaining Rule 16D and forty-five numbered paragraphs explaining Rule 16E).²

Although these explanatory notes are explicitly not a part of the two rules,³ the Law Society has specifically stated that these explanatory notes are “detailed guidance which explains how the rules apply” and “should be read carefully in conjunction with” Rules 16D and 16E.⁴

The purpose of this article is to try and provide you (as Tom might have provided Pam) an overview of the substance of these two new rules and to highlight some noteworthy aspects of the guidance provided in their accompanying explanatory notes. Part I discusses the new rule regarding conflicts of interest, Rule 16D, and its accompanying explanatory notes.⁵

Part II discusses the new rule on confidentiality and disclosure, Rule 16E, and its accompanying explanatory notes.

Part III briefly discusses another resource provided by the Law Society for use in understanding the effect and application of these two new rules.

I. Conflicts of Interest – Rule 16D

Rule 16D imposes a duty not to act when a conflict of interests exists (other than conflicts related to conveyancing, property selling, or mortgage related services which are dealt with in another rule), other than in certain limited circumstances set forth in the rule itself. Rule 16D(2)(a). “Conflict of interests” is defined by the rule as involving two types of situations: (1) where the solicitor’s or firm’s separate duties “to act in the best interest of two or more clients in relation to the same or related matters” conflict or where there is a “significant risk” that those duties may conflict; and (2) where the solicitor’s own interests in the matter or a related matter conflict (or there is a “significant risk” that they will conflict) with the solicitor’s duty “to act in the best interests of any client in relation to a matter.” Rule 16D(2)(b).

In Rule 16D’s explanatory notes, the point is made that the definition of conflict of interests requires the solicitor “to

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assess when two matters are ‘related.’” Rule 16D Explanatory Notes ¶ 3.⁶ The rule appears to provide explicit guidance with respect to certain situations that would always cause matters to be related for purposes of the rule – when a matter “involves the same asset or liability.” Rule 16D(2)(c).

The explanatory notes, however, reveal that in some situations where the same asset or liability is involved “some reasonable degree of relationship” would need to be present for a conflict prohibited by the rule to exist, and the notes advise that the solicitor “will need to make a judgment on the facts.” Rule 16D Explanatory Notes ¶¶ 4-5.⁷

With respect to the first type of conflict of interests, the Rule 16D(2)(b)(i) conflict between separate duties to act in the best interests of two or more clients, the rule provides for two exceptions to a solicitor’s or firm’s duty not to act. Rule 16D(3).⁸ The first exception, identifiable as the “common interest” exception, arises where clients “have a substantially common interest in relation to that matter or a particular aspect of it” and where all of those clients give their “informed consent” in writing to the solicitor or firm undertaking the representation. Rule 16D(3)(a) and Explanatory Notes ¶ 7(1)(a).

The second exception comes into play when multiple clients not otherwise having any conflict, or significant risk of conflict, between or among their interests, are “competing for the same asset which, if attained by one client, will make that asset unattainable to the other client(s)” and “have confirmed in writing” that they know that a firm is or may be acting for more than one client competing for the same asset but want that firm to act on their behalf as well. Rule 16D(3)(b). With respect to this second exception, no individual solicitor could have supervisory responsibility for the representation of more than one of the competing clients “unless the clients specifically agree.” Rule 16D(3)(b)(iv).

With respect to both types of exceptions, Rule 16D restricts their availability to situations where it is “reasonable in all the circumstances” for one solicitor or one firm to act for all of the clients. Rule 16D(3)(c). Further, any solicitor seeking refuge from the conflict of interests prohibition under either of these two exceptions must: (1) “draw all the relevant issues to the attention of the clients before agreeing to act or, where already acting, when the conflict arises or as soon as is reasonably practicable, and in such a way that the clients concerned can understand the issues and the risks involved;” (2) reasonably believe that the clients “understand the relevant

issues;” and (3) “be reasonably satisfied that those clients are of full capacity.” Rule 16D(3)(d).

The explanatory notes emphasize that this requirement of reasonableness “is an important rider” to the Rule 16D(3) exceptions and advise that the “criteria against which reasonableness will be judged is whether one client is at risk of prejudice because of the lack of separate representation” and that the burden will be on the solicitor “to demonstrate why it was reasonable to act for all the clients at the time the instructions were accepted.” Rule 16D Explanatory notes ¶¶ 8 & 9.

Without the benefit of the explanatory notes, a reader of the plain text of the rule might not fully realize how limited that second exception is intended to be. Apparently, this second exception will only be available to specialized areas of legal services where the clients are sophisticated users and where such arrangements are already accepted business practice and only in instances of disputes over assets involving corporate restructurings or insolvencies.⁹

With respect to the second type of conflict, the Rule 16D(2)(b)(ii) conflict of interests between the solicitor’s own interests and those of a client, the explanatory notes make clear that a very bright line is drawn by the rule such that “[t]here are no circumstances where [a solicitor] can act for a client whose interests conflict with [the solicitor’s] own interests.” Rule 16D Explanatory Notes ¶ 40. It is further explained that this prohibition extends to situations where others working in the solicitor’s firm have an interest in conflict with the client’s interest “and [the solicitor is] aware of the interest” and the interest possessed by the other person in the solicitor’s firm “impairs [the solicitor’s] ability to give independent and impartial advice.” Rule 16D Explanatory Notes ¶ 48.

The types of interest that the solicitor may possess that would cause a conflict are not limited to economic interests, and the explanatory notes tackle the thorny issue of sexual relationships between solicitors and clients by instructing solicitors who have become involved in such a sexual relationship to consider whether that relationship “may place [the solicitor’s] interests in conflict with those of the client or otherwise impair [the solicitor’s] ability to act in the best interests of the client.” Rule 16D Explanatory Notes ¶ 49.

Three other important conflict issues are addressed in Rule 16D: (1) conflicts arising only after a representation has commenced; (2) the ability of solicitors to accept gifts from clients; and (3) conflicts arising from the holding of public offices or appointments.

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Rule 16D(4) addresses how a lawyer or firm should resolve the situation arising when, after it is already engaged in the representation of multiple clients, a conflict between the clients' interests arises. Rule 16D(4). The rule, in a manner that certainly appears to differ from the general American resolution of the "hot potato" situation, provides that the solicitor or firm can continue to represent one of the conflicting clients "provided that the duty of confidentiality to the other client(s) is not put at risk." *Id.*

Rule 16D(5) prohibits a solicitor, an owner or employee of the solicitor's firm, and their family members from accepting any gifts "of a significant amount" unless the client making the gift is independently represented by another solicitor with respect to the making of the gift (or is a family member of the beneficiary of the gift).

If the client refuses to obtain the independent representation, the solicitor is not prohibited from accepting the gift, but is required to cease representing the client with respect to the matter in which the gift is being created. Rule 16D(5). The explanatory notes clarify that this rule is directed primarily, and perhaps exclusively, at gifts made in the context of the preparation of a client's will. Rule 16D Explanatory Notes ¶¶ 56-63.

Rule 16D(6) is implicated when a solicitor, someone else in the solicitor's firm, or a family member of the solicitor or of someone else in the solicitor's firm holds a public office or appointment. That rule requires a solicitor to decline to act for a client when: (1) a conflict, or a significant risk of a conflict, of interests arises as a result of the holding of that position; (2) "the public might reasonably conclude" that the holding of that position was used to the advantage of the client; or (3) the solicitor's "ability to advise the client properly and impartially is inhibited." Rule 16D(6)(a-c).

The explanatory notes provide a helpful list of seven examples of the types of public offices and appointments covered by the rule. Rule 16D Explanatory Notes ¶¶ 64-66.

II. Confidentiality and Disclosure – Rule 16E

Rule 16E sets forth three duties of solicitors: (1) a duty of confidentiality; (2) a duty of disclosure; and (3) a duty not to put confidentiality at risk by acting. Rule 16E(2-4). In so doing, as the explanatory notes make clear, this rule "deals for the first time with . . . conflicts between the duties of confidentiality and disclosure;" addresses "for the first time that it can be

acceptable to use information barriers;" and reinforces a solicitor's common law duty not to put a client's or former client's confidential information at risk "by acting adverse to the interests of that client/former client in a matter where the confidential information would be material." Rule 16E Explanatory Notes ¶¶ 1, 33.

Rule 16E sets forth the following duty of confidentiality for solicitors: "You and your practice must keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by your client or former client." Rule 16E(2). General and specific aspects of the duty of confidentiality – ranging from broad concepts such as the continuation of the duty after the end of the representation and that the duty can extend to information provided by prospective clients to narrow explanations of what cannot be disclosed, such as "the address of a client without the client's consent" – are discussed in the explanatory notes. Rule 16E Explanatory Notes ¶¶ 3-8.

Eleven paragraphs of explanatory notes, however, are dedicated to addressing certain exceptional circumstances permitting or requiring the disclosure by the solicitor of otherwise confidential information, such as reporting requirements for money laundering, communications covered by the Freedom of Information Act 2000, where the solicitor has information indicating a "very real" risk of physical harm to another, when the solicitor believes disclosure is necessary to prevent commission of a crime the solicitor reasonably believes will likely result in "serious bodily harm," information indicating sexual or other physical abuse of a child, when reasonably necessary to establish a criminal charge or civil claim by the client against the solicitor, or reports required to be made to the Legal Services Commission. Rule 16E Explanatory Notes ¶¶ 10-14, 19-20.

Under Rule 16E, a solicitor "must disclose to a client all information of which [s/he is] aware which is material to that client's matter regardless of the source of the information." Rule 16E(3). The rule, however, provides for certain exceptions to this duty of disclosure. First, Rule 16E enshrines the solicitor's duty of confidentiality as paramount to the duty of disclosure by establishing that the duty of confidentiality "always overrides the duty to disclose." Rule 16E(3)(i) and Explanatory Notes ¶¶ 1, 22. Second, three specific instances are identified where the duty of disclosure does not apply: (1) if disclosure would be legally prohibited; (2) if the solicitor and the client have expressly agreed "that no duty to disclose arises or a different standard of disclosure applies;" or (3) the solicitor

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reasonably believes “that serious physical or mental injury will be caused to any person if the information is disclosed to a client.” Rule 16E(3)(ii).

As with Rule 16D, without reading the explanatory notes, a reader of the rule might not be aware of important limitations on certain aspects of the rule. For example, the solicitor’s duty to disclose information is limited to information of which the specific solicitor is aware and does not extend to information known only by others in the solicitor’s firm. Rule 16E Explanatory Notes ¶ 21.

Further, although the rule establishes that the duty of confidentiality trumps the duty to disclose, the explanatory notes raise the issue that a solicitor cannot, presumably in the face of a claim by a client of a breach of duty, “excuse a failure to disclose material information because to do so would breach a separate duty of confidentiality,” and instruct a solicitor who is facing a conflict between the duty of confidentiality to one client and a duty to disclose to the other client to cease representing the client to whom the duty of disclosure would run. Rule 16E Explanatory Notes ¶ 23.

The explanatory notes also, despite acknowledging that the rule does not define “information which is material to that client’s matter,” assert that such information must be “relevant to the specific retainer with the client and not just information which might be of general interest to the client,” and that the information, to qualify, must be of the type that “might reasonably be expected to affect the client’s decision making with regard to its matter in a way which is significant having regard to the matter as a whole.” Rule 16E Explanatory Notes ¶ 25.

The third duty established in Rule 16E, the duty to not act in a manner that puts confidentiality at risk, requires a solicitor or firm to not act (or not continue to act) for another client on a matter where the solicitor or firm holds confidential information of a client or former client and that confidential information “might reasonably be expected to be material” in the matter and the other client “has an interest adverse” to the client or former client whose confidential information is possessed. Rule 16E(4).

This duty not to act can be overridden, however, if one of two types of “information barriers” – the United Kingdom’s equivalent of our “Chinese Walls,” “screens,” or “ethical walls” – can be erected. One type of information barrier requires client consent. The second type of information barrier can be implemented in the absence of consent. Rule 16E(5-6).

Rule 16E(5) imposes the requirements for the first type of information barrier and permits a solicitor or firm, with “the informed consent of both clients,” to act in a situation that would otherwise be prohibited by the duty set forth in Rule 16E(4) if: (1) the client to be represented knows that the firm “holds, or might hold, material information . . . in relation to their matter which [the solicitor] cannot disclose;” (2) the solicitor has “a reasonable belief that both clients understand the relevant issues after these have been brought to their attention;” (3) both clients have agreed to the conditions of the representation;¹⁰ and (4) “it is reasonable in all the circumstances to do so.” Rule 16E(5)(a).

The explanatory notes discuss an obvious difficulty in being able to obtain the required consent – the fact that often it will not be possible “to disclose sufficient information about the identity and business of the other client without risk of breaching that other client’s confidentiality,” and that, as a result, “generally it will be only sophisticated clients, for example, who will have the expertise and ability to weigh up the issues and the risks of giving consent on the basis of the information they have been given.” Rule 16E Explanatory Notes ¶ 35.

Establishing the second type of information barrier is an even more onerous undertaking. Rule 16E(6) provides that the duty not to act under Rule 16E(4) can be surmounted through the implementation of an information barrier without client consent only where the following requirements are satisfied: (1) it must not be possible to “obtain informed consent” from the client whose confidential information is possessed; (2) the client to be represented must have agreed to the representation knowing that the firm “holds, or might hold, information material to their matter which” the solicitor cannot disclose; (3) “safeguards which comply with the standards required by law at the time they are implemented are put in place;” and (4) “it is reasonable in all the circumstances to do so.” Rule 16E(6).

With respect to both types of information barriers, the explanatory notes describe certain additional restrictions on their use. First, the possibility is raised that the appropriateness of an information barrier can turn upon the “size or structure of a firm.” Rule 16E Explanatory Notes ¶ 43. Specific measures that would need to be in place to “demonstrate the adequacy of an information barrier” erected based on client consent, as well as other specific additional measures that may be necessary for an effective information barrier when proceeding without cli-

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ent consent, are also discussed in detail in the explanatory notes. Rule 16E Explanatory Notes ¶ 44.

III. Additional Information

The Law Society advises that the Guide to the Professional Conduct of Solicitors, including these new Rules 16D and 16E, will soon be entirely replaced by a new Code of Conduct. New Rules 16D and 16E will be found as Rule 3 and Rule 4 in that new Code of Conduct.

In the meantime, those of you seeking a more in-depth treatment of these new rules and their application to particular situations would be well served to download a copy of a June 2006 publication available at the Law Society's website titled "Practice Rules 16D & 16E Conflict, Confidentiality and Disclosure Questions, answers and examples."¹¹ In its introductory section, this document is described as being "intended to provide an introduction to and an overview of the new Practice Rules," but any reader is exhorted to read that document "in conjunction with the rules themselves and in particular, the Explanatory Notes accompanying each new rule which have been issued by the Law Society."

That document reads very much like an in-depth FAQ, while providing examples of "related" matters, examples of when the "common interest" exception would be available, and detailed information about the circumstances in which a solicitor can make use of an information barrier.

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1 Rule 16D can be found at: http://www.lawsociety.org.uk/documents/downloads/PE_ConflictRules.pdf; Rule 16E can be found at: http://www.lawsociety.org.uk/documents/downloads/PE_ConfidentialityRule.pdf

2 The explanatory notes to Rule 16D can be found at: http://www.lawsociety.org.uk/documents/downloads/PE_ConflictGuidance.pdf; the explanatory notes to Rule 16E can be found at: http://www.lawsociety.org.uk/documents/downloads/PE_ConfidentialityGuidance.pdf.

3 The explanatory notes being specifically titled: "Explanatory notes not forming part of rule 16D" and "Explanatory notes not forming part of rule 16E" respectively.

4 "Conflict of interest and the duties of confidentiality and disclosure – new rules in force," 5 May 2006, available at: <http://www.lawsociety.org.uk/professional/conduct/guidance/view=article.law?POLICYID=280655>.

5 As to conflicts, however, the most important piece of information one may need to know about the new rule is not found in the rule or in its explanatory notes, but rather in an article found at the Law Society's website: "As the new rules are de-regulatory this should mean that firms which are in compliance with the previous conflict requirements will comply with the new rules without need for change." See *supra* note 4.

6 The example of such a related matter provided in the notes is concurrent representation of a client who is negotiating with a publisher to get a novel published and another client who alleges that the novel breaches copyright and contains plagiarism.

7 As an example of a permissible concurrent representation despite involvement of the same asset or liability, the notes describe representing a company involved in a dispute with a garage over the cost of repairs to a company car and the representation of a potential purchaser of the company, even though the company car, as a minor asset of the company, would be included in the purchase.

8 The explanatory notes make clear that these two exceptions have no application to a conflict of interests arising under Rule 16D(2)(b)(ii).

9 See Explanatory notes to Rule 16D ¶ 7(2)(a) (explaining that the second exception "is intended to apply to specialized areas of legal services where the clients are sophisticated users of those services and conclude that rather than seek out new advisers they would rather use their usual advisers in the knowledge that those advisers might also act for competing interests"); Explanatory notes to Rule 16D ¶ 7(2)(b) (instructing solicitors and firms that they "should exercise considerable caution when proposing to [act under this second exception] in categories of work where to do so is not already accepted business practice"); Explanatory notes to Rule 16D ¶ 7(2)(c) (stating that solicitors should not seek to apply that exception "to disputes over assets other than in the context of corporate restructurings and insolvencies").

10 Certainly, a seemingly redundant requirement given the "informed consent of both clients" requirement set forth earlier in Rule 16E(5).

11 Available at: http://www.lawsociety.org.uk/documents/downloads/PE_ConflictConfidentialityQAs.pdf

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