

MULRC Media
Law
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Center
MEDIA LAW LETTER

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MLRC's Annual Dinner November 7, 2007
William J. Brennan, Jr. Defense of Freedom Award
Presented to David Fanning
Panel Discussion With Documentary Filmmakers

At the annual dinner on November 7 at the Grand Hyatt in New York, MLRC presented the William J. Brennan, Jr. Defense of Freedom Award to David Fanning. Fanning was honored for his role in creating and sustaining the FRONTLINE television documentary series.

MLRC Chair Ralph Huber presented the award and made the following remarks:

“Tonight, we will be presenting the William J. Brennan, Jr. Defense of Freedom Award, which is not something we do every year. This award was established to honor those whose actions have advanced the cause of freedom of expression. And it is given in the name of the first recipient, the honorable William J. Brennan, Jr. He was an impassioned voice for the principles of free speech and the Brennan Award serves as a symbol and celebration of the principles of the First Amendment.”



MLRC Chair Ralph Huber



William J. Brennan, Jr. Defense of Freedom Award

“Our recipient tonight is David Fanning, the creator and executive producer of the PBS documentary program, *Frontline*. *Frontline* began in 1983 and since then has aired over 500 documentaries – investigative pieces – on subjects as wide-ranging as the war in Iraq to the authenticity of Shakespeare's dramas. *Frontline* is the only regularly scheduled investigative documentary series on broadcast television today. It has won all the major journalism awards out there, and not just once but many times over. It has been a consistent platform for the best independent producers in the business. It runs, week after week, documentaries that are engaging, informative and entertaining all while remaining true to the highest ideals of journalism. David Fanning was there at

the beginning. As creator of *Frontline*, he has been its guiding light since day one, marshalling not only the best in reporting but the resources and station support needed in the eclectic, even eccentric, world of public broadcasting.”

(Continued on page 4)

PHOTOS BY JULIENNE SCHAER

MLRC's Annual Dinner November 7, 2007

(Continued from page 3)

David Fanning:

“This award, in the name of a man who did more than anyone to strengthen the First Amendment, to protect the individual from the hand of government and to protect the full-throated conversation of democracy. It is humbling to share it. This honor is, of course, for Frontline and that's not any single person. It is a collective work and conscience of an enormously talented group of journalists, producers and reporters that have over 25 years done the hard work of making the documentaries.”



David Fanning

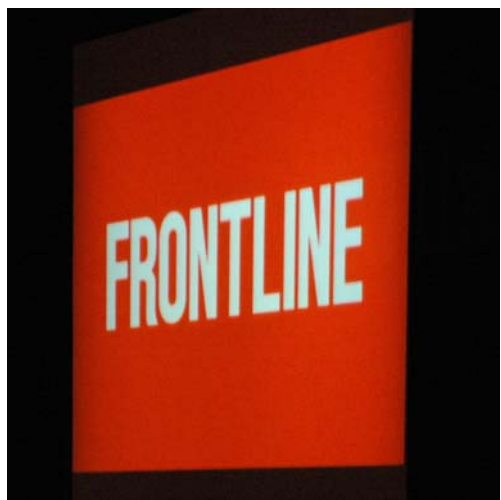
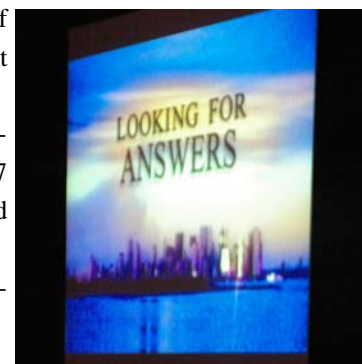
The MLRC annual dinner also featured a panel discussion entitled “Witnesses to Our Time: Independent Voices of the Documentary.” It was moderated by Judy Woodruff of *The NewsHour with Jim Lehrer* and featured David Fanning, FRONTLINE producer Lowell Bergman and documentary filmmakers Heidi Ewing and Alex Gibney.



Judy Woodruff is a senior correspondent with *The NewsHour with Jim Lehrer* on PBS. She recently completed part two of the PBS documentary series, “Generation Next: Speak Up. Be Heard,” a project to interview young people in America and report on their views.

Lowell Bergman is a producer and correspondent for FRONTLINE and an investigative reporter with *The New York Times*. He is also the Reva and David Logan Professor at the Graduate School of Journalism at the University of California at Berkeley.

Heidi Ewing is a documentary filmmaker whose film credits include the 2007 Oscar-nominated film, “Jesus Camp,” and



“Boys of Baraka.”

Alex Gibney is a documentary filmmaker with more than 40 films to his credit, including the 2006 Oscar-nominated film, “Enron: The Smartest Guys in the Room.”



From left: Heidi Ewing, Judy Woodruff, David Fanning, and Alex Gibney

Judy Woodruff: *“What is it that attracts you to that idea, that story? You’ve all done such accomplished work. What is it that turns you on about a story? That makes you think this is something I want to spend time with?”*

David Fanning: *“What you have to do is say, this is territory that’s interesting for us. How do we turn this over in a way that we can find and angle of vision into it? Where can we put the chisel on the rock and hit it hard and open it up in some way? That will require somebody out and doing old fashioned leg work.”*



Lowell Bergman

Lowell Bergman: *“...the expansion--technological expansion of the media in the internet and otherwise has made it impossible, in this country and other countries, to keep information from people. That’s one of the most important things that’s happened technologically. The expansion of the documentary form.”*

Alex Gibney: *“What’s really important for documentarians is to find a voice, not in a self-conscious way but in a way that finds a way of telling a story that makes the most sense for them.... When I started making the film Enron, I thought I’d lost my mind. I had broken rule number one of the filmmakers handbook, which is never make a film about accounting. But I was confident in that film because it really wasn’t about numbers. It was about people.”*



Alex Gibney



Heidi Ewing

Heidi Ewing: *“We try to go at subject matter through individual characters. Sort of, non-luminaries. Regular run of the mill people that if we hadn’t come along would never have gotten their moment.”*

James Goodale Passes the Torch at PLI Communications Law Conference

For 35 Years His Conference Set the Media Law Agenda and Created Our Media Law Bar

By Floyd Abrams

When James Goodale announced on November 12th that after chairing the yearly PLI seminar on Media Law for the past 35 years he would be passing the torch “to those younger than I” the sense of disbelief in the media bar was palpable. PLI without Goodale?

For 35 years, PLI was Goodale. He conceived of the notion of a yearly PLI session to explore the pressing issues in media law. He decided what subjects would be discussed, who would present an update on each, how long each subject would be discussed and every other issue relating to the yearly discussions.

In doing so, Goodale all but created new areas of law, played a major role in articulating what that law was and – most telling of all – created, for the first time in American history, a media bar.

Consider. From the first PLI Media Law session through the most recent one this year, one section was devoted to commercial speech. That was Goodale’s call, initially made with respect to the first PLI Media Law meeting in 1973, a time when the only pronouncement of the United States Supreme Court about commercial speech was its laconic 1942 ruling in *Valentine v. Chrestenson* concluding that such expression received no First Amendment protection at all.

Two years after the 1973 PLI session, the Supreme Court in *Bigelow v. Virginia* granted for the first time First Amendment protection of such speech in the context of advertisements for abortions; a year later, the Court did so far more clearly in a purely commercial context, holding unconstitutional, in *Virginia Pharmacy Board v. Virginia Consumer Council*, a statute prohibiting pharmacists from advertising prescription drug prices.

No one could have predicted that result with any confidence in 1973. Even more surely, no one could have predicted then that issues relating to commercial speech would consume a greater part of the Supreme Court’s docket in the 35 years that followed than any other First Amendment subject. Yet as early as 1973, without benefit of any Supreme Court precedent

holding that commercial speech was protected under the First Amendment, Goodale knew--he really knew!--it was.



James Goodale

He spoke with the superb Seattle lawyer Cam DeVore about preparing an outline summarizing the then current state of commercial speech law and for years afterwards DeVore (soon joined by Robert Sack, then years away from the seat he graces on the United States Court of Appeals) presented to the growing assemblage of attendees at the yearly PLI seminars the clearest, most focused and most accurate statement of just where that ever-

changing body of law stood.

Or consider Goodale’s own contribution to the law with regard to the protection of confidential sources of journalists. The first PLI Media Law conference began within a year of the United States Supreme Court ruling in *Branzburg v. Hayes* holding--well, what did it hold? Goodale had been involved in the case from the start. As General Counsel of the *New York Times*, he had overseen the *Times*’s support for its reporter Earl Caldwell, who was seeking to avoid being ordered to reveal his sources that had permitted him to observe meetings of the Black Panther Party and other black militant groups.

From the time the decision was released, Goodale read it as not as the defeat that a 5-4 ruling against the three journalists might have indicated, but as governed by the concurring opinion of Justice Lewis Powell who had (in an opinion acutely characterized by dissenting Justice Potter Stewart as “enigmatic”) indicated that a case-by-case balancing process should be utilized by lower courts in determining when sources should be ordered revealed. The recent unearthing of Justice Powell’s notes with respect to his ruling indicates that Goodale correctly articulated what Powell either had said or meant to say.

In any event, Goodale’s formulation of the test that courts should utilize in such cases was first presented to PLI attendees, then cited by them to courts around the nation with a high level of success.

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James Goodale Passes the Torch at PLI Communications Law Conference

(Continued from page 6)

In the last few years, that success has been more pronounced in civil than in criminal cases. Merits aside, however, it is difficult to imagine a presentation at a legal gathering designed to instruct lawyers about developments in the law that has had more pronounced impact on the substance of the law itself.

More important still, I think, than any single subject discussed at Goodale’s PLI seminars was the impact it had on the bar, specifically the media bar. For not until Goodale began to gather the media bar together every year did anything exist that could be called a media bar. There were, to be sure, some lawyers that had handled, particularly in the years before much in the way of constitutional protection for the press had been established, libel cases, often with private detectives near

at hand. But it was the yearly meeting at Goodale’s seminars of media lawyers from around the nation that first created a media bar – people who found that their clients had much in common in terms of threats and the need for responses to them. That media lawyers also found their compatriots to be fun to be with made the yearly trek to the seminars even more attractive.

Given all this, Goodale’s decision to pass the PLI torch inevitably came as a shock. Not surprisingly, he chose well, asking two distinguished media lawyers, Bruce Keller and Lee Levine, to take the reins in the future. But before they do, it is well to express our appreciation for the irreplaceable and unforgettable contribution that Jim Goodale has made.

Floyd Abrams is a partner with Cahill Gordon & Reindel in New York.

Goodale all but created new areas of law, played a major role in articulating what that law was and – most telling of all – created, for the first time in American history, a media bar.

Now Available: Basic Guide to Employment Defamation and Privacy Law

Prepared by the Media Law Resource Center Employment Law Committee, this pamphlet provides a practical overview of defamation and privacy issues in the workplace and is intended to assist non-lawyers – supervisors and human resource professionals – who face these issues on a daily basis.

Each member firm has already received one printed copy of the pamphlet, with additional printed copies available for purchase from MLRC. The pamphlet is also available to MLRC members in electronic form on the MLRC web site at no cost.

MLRC members will find the pamphlet beneficial both for their own use and for distribution to their clients.

ORDER FORM

QUANTITY	TITLE	PRICE	TOTAL
	Basic Guide to Employment Defamation and Privacy Law	\$ 3 each	
		Sales Tax (New York State orders only)	
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Shock Jock's Radio Comments Can Support Emotional Distress Claim

Hustler v. Falwell Protections Not Applicable

An Alaska woman who filed suit after a radio station host heckled her on the air should get a new trial on whether his taunts resulted in intentional infliction of emotional distress, the Alaska Supreme Court ruled recently in a four to one decision. *Alaska v. Carpenter*, No. S-10700/10709, 2007 WL 3121658 (Oct. 26, 2007) (Eastaugh, Bryner, Carpeneti, Matthews, Fabe, JJ.).

The court held that the trial court's instructions prevented the jury from properly considering the intentional infliction of emotional distress (IIED) claim. However, the trial court properly dismissed plaintiff's defamation and false light privacy claims.

Background

In 1998, Juneau resident Karen Carpenter complained to radio station KJNO about the Tom Leykis Show, a national talk show broadcast on KJNO that often featured sex-related topics. In a letter to KJNO, Carpenter said the show was "very offensive" and she would work to have it taken off the air. Someone at KJNO faxed the letter to the Tom Leykis Show in California with a handwritten note, "Have fun." KJNO management already had decided to drop the show after advertisers complained about the content.

During a July 24, 1998, broadcast, Leykis commented on KJNO's cancellation. After reading Carpenter's letter, he stated:

And it's signed, the woman who wrote the letter-it's signed: Karen Carpenter. Well Karen, I have a little something that you could use right about now. [buzzing sound intended to simulate the sound of a vibrator]

Sit on this, you old prune. Come on, get close to the radio. Get right on top of the speaker, baby. You moron. You jerk. You and your little band of nut cases out there, trying to decide what's going to be on the radio in Juneau, Alaska. You know, maybe you ought to go out and get laid once in awhile, huh? [buzzing sound]

You cretin. Are your nipples getting hard yet, baby? Feel the power. You can't stop this show. Oh, you can stop Juneau, Alaska. But you can't stop me....

You and your stupid-your stupid church and your stupid religion, and you and your stupid god damned bunch of marauders. You morons. Jerks.

I'm enjoying this. I'm sporting wood right now, just thinking about it. Woo hoo....

Oh, Karen Carpenter. Karen Carpenter wanted our show off the air. No, not that Karen Carpenter. But Karen, sit on it, baby. [buzzing sound]

Oh, yeah. See, if you got more of this, you wouldn't be writing complaint letters to the station.

A caller attempted to broadcast Carpenter's home telephone and fax numbers, although the telephone number was partially bleeped out. Leykis encouraged listeners to make Carpenter's telephone number "ring off the hook" and he said to another caller:

we hate to lose you, but like I say, stay tuned, 'cause we're going to get back on in Juneau And we're going to make that woman's life a living hell.

According to the trial testimony, Leykis repeated the "living hell" comment throughout the broadcast.

Carpenter filed suit against Leykis; Westwood One, the producer of the show; Alaska Broadcast Communications, Inc.; and Steve Rhyner, KJNO's station manager. She alleged defamation, false light, negligent and intentional infliction of emotional distress, and spoliation of evidence because she was unable to obtain a complete copy of the broadcast.

Before trial, the trial court granted summary judgment to the defendants on Carpenter's claims of defamation, false light and negligent infliction of emotional distress, but denied summary judgment on Carpenter's claims of IIED, intrusion of seclusion and intentional spoliation of evidence.

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Shock Jock's Radio Comments Can Support Emotional Distress Claim

(Continued from page 8)

The jury found Westwood One had engaged in spoliation of evidence by failing to preserve a tape of the show after complaint was made and awarded her \$5,042 in compensatory and \$150,000 in punitive damages. However, the jury returned a verdict for Leykis and Westwood One on the IIED and intrusion claims.

Alaska Supreme Court Decision

On appeal, the Alaska Supreme Court affirmed summary judgment on Carpenter's defamation and false light claims. In an opinion written by Justice Eastaugh, the Court agreed that Leykis's statements about Carpenter were opinions protected by the First Amendment.

Many of Leykis's remarks about Carpenter were pure insults that were not factually verifiable. Even those statements that could constitute implied factual assertions, such as those about Carpenter's sexual habits, were not "factual" under the circumstances. No listener would understand Leykis's remarks about Carpenter's sexual habits to imply actual facts about Carpenter. Sex-related jokes were a common feature of the show. 2007 WL 3121658 at *6.

However, the court reversed the jury verdict on the IIED claim, finding that a confusing trial court instruction prevented the jury from properly considering that claim. The jury had received a proper instruction on the elements of IIED, but a prior instruction stated as follows:

Instruction No. 17: The law protects most speech. By example, statements of opinion, even if insulting or distasteful, are generally protected speech. It is only in limited circumstances that speech can be punished or be the basis of liability for damages. Therefore, you shall not consider words spoken to or about Karen Carpenter unless you find that the speech is not protected because of either of the following reasons:

(1) Speech that is intended to provoke a hostile reaction under circumstances where a clear and present danger of immediate violence exists is not protected speech.



Tom Leykis

(2) Publication of private factual information about an individual with knowledge or in reckless disregard that disclosure of the factual information would be highly offensive to a person of ordinary sensibilities is not protected speech. A fact is "private" if (a) it is not known to the public, that is, not a public record and not information legally available to the public or the media; and (b) the private fact is of a kind that, if publicized, would be highly offensive to a reasonable person; and (c) the private fact is not newsworthy, that is, of legitimate concern or interest to the public or an appreciable percentage of the public.

You cretin. Are your nipples getting hard yet, baby? Feel the power. You can't stop this show. Oh, you can stop Juneau, Alaska. But you can't stop me....

You and your stupid-your stupid church and your stupid religion, and you and your stupid god damned bunch of marauders. You morons. Jerks.

Instruction No. 18 then went on to explain the elements of Carpenter's IIED claim:

Karen Carpenter claims that Tom Leykis or Westwood One or its employees or agents intentionally inflicted emotional distress on her by virtue of a radio broadcast on July 24, 1998.

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Shock Jock's Radio Comments Can Support Emotional Distress Claim

(Continued from page 9)

For Karen Carpenter to recover for this claim of intentional infliction of emotional distress, you must decide that it is more likely true than not true that Tom Leykis[s] or Westwood One[s] or its employee's conduct was extreme and outrageous and that he/they intentionally or recklessly caused Karen Carpenter severe emotional distress.

The Court held that Instruction No. 17 may have prevented the jury from properly considering Carpenter's IIED claim. By its terms, the instruction limited liability for "words spoken to or about Karen Carpenter" to only two categories: 1) incitement to violence; and 2) private facts. The instruction, therefore, potentially prevented the jury from fairly considering whether Leykis's statements inviting listeners to make plaintiff's life a "living hell" constituted outrageous conduct under her IIED claim.

Court Distinguishes Hustler v. Falwell

In the most interesting portion of the decision, the Court discussed the application of *Hustler v. Falwell*, 485 U.S. 46 (1988) to plaintiff's claim, finding that the heightened protection for speech outlined in that case did not apply here where plaintiff was not complaining about the falsity of the speech and where the speech did not involve a matter of public concern.

In *Falwell*, the United States Supreme Court held that the First Amendment affords heightened protection to speech in the "area of public debate about public figures," regardless of whether the speaker's motivation was ill will, hatred, or mere desire to inflict emotional distress. Heightened First Amendment protection does not extend to IIED claims based on speech that is not about a public figure or about a matter of public concern.

We distinguish between speech, however crude, somehow contributing to the public debate about a public figure or a matter of public concern or directed at persuading the ultimate target to change her mind about a matter of public concern, and speech intended merely to harass or cause others to harass the target. Speech of the latter sort is not entitled to First Amendment protection. A defendant's conduct in uttering words is therefore not invariably constitutionally protected from claims alleging the tort of outrage. 2007 WL 3121658 at *10.

Continuing in a footnote the Court added:

Falwell does not stand for the proposition that every IIED claim based on an utterance invariably requires proof of a falsehood. Permitting Carpenter to pursue an IIED claim that is not dependent on factual falsity does not permit her to evade the constitutional limitations that apply to her defamation claim. 2007 WL 3121658 at fn. 44.

Plaintiff was entitled to a retrial on this issue because "there was sufficient evidence to permit a jury to find that Leykis's words in issuing his so-called "call-to-arms" departed from the bounds of protected speech." *Id.* at * 12.

In a concurring opinion, Justice Carpenter stated that he would have held that Carpenter was a private figure who should receive greater protection from hurtful speech.

In a dissenting opinion Justice Fabe questioned the majority's characterization of Leykis's speech as outrageous speech. The dissent said Leykis's "living hell" statement was not necessarily aimed at encouraging listeners to call plaintiff but expressed a belief that the show would return and the return would make her life "a living hell." The dissent also said the ruling could chill protected speech by allowing the jury to consider Leykis's derogatory statements about Carpenter in deciding her IIED claim.

Other Claims

The Court also held that the trial court did not err in denying Westwood One's motion for a directed verdict on the spoliation of evidence claim; the punitive damages award for the spoliation claim was not excessive; an Alaska statute that requires a court to deposit half of a punitive damages award into the state's general fund was constitutional; and pro rata attorneys fees should be deducted from the state's 50 percent share of the punitive damages award.

Karen Carpenter was represented by Ray R. Brown and Linda M. O'Bannon, Dillon & Findley, P.C., of Anchorage, and Jack B. McGee, Law Office of Jack B. McGee, of Juneau. Westwood One and Tom Leykis were represented by Leslie Longenbaugh and L. Merrill Lowden of Simpson, Tillinghast, Sorensen & Longenbaugh, of Juneau. The state of Alaska was represented by Assistant Attorneys General Jason T. Mogel and Gregg D. Renkes.

New York Court of Appeals Affirms Dismissal of Photo Privacy Case

Single Publication Rule Applies to Privacy Claim

New York's highest court unanimously affirmed summary judgment for a well-known photographer and art gallery in a statutory invasion of privacy claim brought by a man who was photographed in Times Square. *Nussenzweig v. DiCorcia*, 2007 N.Y. Slip Op. 08783, 2007 WL 3375602 (N.Y. Nov. 15, 2007) (Pigott, Ciparick, Graffeo, Read, Smith and Jones, JJ.).

The court agreed that the claim was barred by New York's one year statute of limitations where the claim was brought more than one year after the photo was publicly displayed at an art exhibit. Significantly, the court held that the single publication rule applies to claims brought pursuant to Civil Rights Law §§ 50 and 51. The court found that New York appellate courts have generally applied the single publication rule to statutory privacy claims, but noted one appellate case holding that a §§ 50 and 51 claims runs from the date of the most recent violation of the statute. See *Russo v Huntington Town House, Inc.*, 184 AD2d 627, 628 (NY App. 2d Dept. 1992).

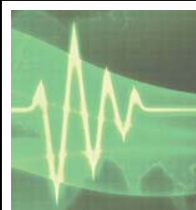
Rejecting that reasoning, the court stated:

"The policy underlying the adoption of that rule is likewise implicated here and we therefore hold that the single publication rule applies to claims brought pursuant to Civil Rights Law §§ 50 and 51."

At issue was one of a series of candid photographs taken between 1991 and 2001 by Philip-Lorca DiCorcia on the streets of New York. The photographs were exhibited at a gallery in New York in 2001 and were also republished in a catalog of the show. One of the subjects was plaintiff Erno Nussenzweig, an Orthodox Hasidic Jew. Plaintiff filed suit in 2005 under §§ 50 and 51 of New York's Civil Rights Law which prohibits the unconsented-to use of identity within the State of New York "for advertising purposes or for the purposes of trade." Plaintiff also claimed the photograph offended his religious beliefs and therefore constituted an interference with his right to the free exercise of religion.

In 2006, the trial court granted summary judgment for the defendants, holding the photograph was artistic and not commercial; and that there was no state action to support a free exercise claim. See 34 Media L. Rep. 1495 (NY Sup. Ct. Feb. 8, 2006). In March 2007, a five judge intermediate appeals court unanimously affirmed on statute of limitation grounds. Three judges saw no need to address the constitutional defenses, but in a lengthy concurrence two judges agreed that the photos were protected by the First Amendment.

Jay Goldberg, NY, represented the plaintiff. Lawrence C. Barth, NY, represented the defendants.



Presenting the 5th Annual Conference by The Media Law Resource Center and Southwestern Law School's Donald E. Biederman Entertainment & Media Law Institute

The Digital Earthquake: Groundbreaking Changes Affecting Entertainment and Media Law

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Dallas Newspaper Prevails in Libel Lawsuit Filed by Mexican Newspaper

Summary Judgment Granted on Interlocutory Appeal

By Paul C. Watler

A Texas court of appeals delivered a defense victory for the *Dallas Morning News* in a rare libel case pitting two newspapers against each other. *Belo Corp. v. Publicaciones PasoDelNorte, S.A., de C.V.*, No. 08-06-00113-CV, 2007 WL 2729867, *1 (Tex. App.—El Paso Sept. 20, 2007, no pet. h.).

In September, the Court of Appeals for the Eighth District in El Paso rendered summary judgment for Belo Corp., *The Dallas Morning News*, and two of the newspaper's reporters on claims that they published libelous material in an article about a Mexican newspaper's coverage of the suspected murders of more than 400 women in Juarez, Mexico.

A unanimous three-judge panel of the court ruled that the Mexican newspaper, *El Diario*, failed to present a genuine issue of material fact that *The Dallas Morning News* acted with actual malice. In so holding, the court reversed the trial court's decision denying summary judgment for *The Dallas Morning News*.

Background

El Diario claimed that *The Dallas Morning News* committed libel when it published an article headlined "Newspapers in Fight Over Juarez's Image" in 2004. The article examined *El Diario*'s coverage of the killings and their effect on the city. The report included claims that the newspaper's publisher viewed Juarez as a "flawed border town maligned by muckraking journalists who have turned the killings of some women by resentful macho men into a global cause celebre" and that *El Diario*'s critics charged its publisher with soft-peddling reporting about the killings, allegedly in return for government advertising.

El Diario claimed that *The Dallas Morning News* acted with actual malice because its article contained misleading paraphrasing and misrepresentations about government advertising, glaring omissions resulting in gross distortions about *El Diario*'s coverage, and *The Dallas Morning News* had an injurious motive against *El Diario*.

Court Grants Summary Judgment

Writing for the court, Justice Ann Crawford McClure declared that *El Diario*, a public figure, failed to present a genuine issue of material fact that *The Dallas Morning News* acted with actual malice. The court found that *The Dallas Morning News* did not distort the viewpoint of *El Diario*'s publisher when it paraphrased him as saying that Juarez is a "flawed border town" and that he was "in no one's pocket."

In addition, the court held that *The Dallas Morning News* did not create a false impression about *El Diario*'s coverage by mentioning only two of the newspaper's articles on the killings as examples of its reporting. The court noted that *The Dallas Morning News*'s decision not to analyze every article published by *El Diario* about the killings "does not establish that [it] acted with actual malice."

The court also ruled that *The Dallas Morning News*'s reliance on allegedly biased sources did not amount to actual malice, nor did the newspaper's report – claimed by plaintiff to be mistaken – that celebrity activist Jane Fonda specifically criticized *El Diario* regarding its coverage of the killings.

Moreover, the court held that even if *The Dallas Morning News* published the article with the intention to harm *El Diario*'s reputation, an injurious motive alone was not sufficient to establish actual malice. Finally, the court disagreed with *El Diario*'s assertion that actual malice could be inferred because *The Dallas Morning News* allegedly inaccurately characterized the newspaper's coverage, finding that "before actual malice can be inferred, there must be more than a scintilla of evidence upon which to base the inference."

The court thus reversed the trial court's denial of traditional and no-evidence motions for summary judgment and rendered summary judgment in favor of *The Dallas Morning News*. A motion for rehearing by *El Diario* remains pending.

Paul C. Watler of Jackson Walker L.L.P. and J.L. Jay of Scott & Hulse, P.C. represented Defendants Belo Corp., The Dallas Morning News, L.P., Belo Interactive, Inc., The Dallas Morning News of Texas, Inc., Alfredo Corchado, and Laurence Iliff. Plaintiff Publicaciones Paso Del Norte, S.A. de C.V. was represented by Joseph G. Chumlea and J. Morgan Broadus III.

Hawai'i Federal Court Dismisses Surf Legends Libel and Privacy Claims

Surfer a Public Figure; Publication Was Newsworthy

In a libel and privacy action brought by a legendary 1970's surfer against a surf magazine, the federal district court of Hawai'i granted summary judgment to the magazine dismissing the libel and bulk of the privacy claims. *Chapman v. Journal Concepts, Inc., et al.*, Civil No. 07-00002, 2007 WL 3331766 (D. Haw. Nov. 7, 2007).

The court held that plaintiff was a general purpose public figure who must satisfy the "actual malice" standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964), to prevail on his defamation and defamation-related claims.

Background

Craig Elmer "Owl" Chapman is a surfer and shaper of surfboards living on the North Shore of Oahu, Hawai'i, which is known as the "mecca" of surfing. Chapman is an icon of the "soul surfing" era in the 1970's. In the summer of 2006, *The Surfer's Journal* ("TSJ"), a magazine whose readership consisted predominantly of surfers, published an article about Chapman.

The author wrote about his experience in ordering a custom surfboard from Chapman and his adventure in getting his order fulfilled to capture the legend behind Chapman. The article was accompanied with photographs of Chapman in and around the North Shore and his shaping room. The issue of TSJ in which the article appeared also contained liner notes in which the publisher of TSJ shared his impressions of Chapman and reprinted anecdotes and commentary on Chapman from people who knew him.

Chapman sued TSJ, its publishers, various editors, the author of the subject article, and the photographer who took the pictures appearing in the article. The complaint sought damages for defamation, invasion of privacy, misappropriation of identity, disparagement of trade, false light, and emotional distress.

The defendants filed a motion for a summary judgment determination that Chapman was a public figure, and accordingly, that the *New York Times* "actual malice" standard applied to Chapman's defamation, privacy, and emotional distress claims. The motion also argued that the privacy claims were not viable as a matter of law because the subject publication concerned newsworthy matters of public interest.



El Hombre Invisible
(With apologies to William S. Burroughs)
An Owl Chapman Story
By Jeff Johnson

"In a pinch he'll pace the bike path between Val's reef and the Sunset beach lifeguard tower. If not he'll just sit on the hood of his car (or someone's car) and wait, an unlit cigarette dangling from his fingertips, eyes alert and discerning, "Hey kid," he'll say in that nasal, condescending

voice. "You need a new board.. a real board."

This doesn't always work right away, it takes some time, and he's got a lot of time. He'll then resort to a kinder approach. "Psst. Hey kid, what happened there? Ah, Sunset can be a bitch to boards. That looks bad, man. Looks like you need a new one." The kid will pause for a moment and its hook line and sinker. Owl Chapman will have money tonight."

SurfersJournal.com, 2006

Public Figure Ruling

The court held that Chapman is a general public figure in the context of the surfing community. The court declined to construe the types of public figures described in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as "finite or absolute prototypes." Instead, the court acknowledged that subcategories of public figure status could exist in the spectrum between the general purpose public figure of *New York Times* and the limited public purpose figure articulated in *Gertz*.

Thus, although Chapman was not a limited purpose figure because he did not insert himself into a public interest dispute, he did not need to qualify as a general public figure for all purposes for the "actual malice" standard to apply. The court found that Chapman, like other sports figures, attained public figure status by virtue of his position in the relevant athletic community, which, in this case, was the surfing community.

Chapman's popularity and iconic status in the surfing community was evidenced by his appearance in numerous magazine articles, books, and movies and documentaries. The volume of published materials quoting or referencing Chapman indicated that the surfing public continued to have interest in Chapman, which meant that Chapman had access to channels of communication should he desired to rebut the facts reported in the subject article and liner notes.

Chapman contended that he was an intensely private person who, unlike professional athletes, did not participate in professional competitions or seek lucrative endorsements. The court nevertheless found that Chapman invited public attention and comment by virtue of his position or conduct.

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Hawai'i Federal Court Dismisses Surf Legends Libel and Privacy Claims

(Continued from page 13)

Chapman was known for surfing exceptionally dangerous and difficult waves, and for his mischievous behavior in and out of the ocean.

The court also noted that Chapman did not shun the media spotlight, as he had granted several interviews, been photographed on numerous occasions, and publicly touted his own surfing abilities.

Chapman further argued that even if he was a public figure status in the 1970's, that status dissipated with the passage of time. Whether public figure status could be lost over time is an unresolved issue in the Ninth Circuit. However, the court found it unnecessary to decide the issue because there were recent media pieces concerning Chapman, and there was evidence that Chapman's legend had been passed on to the next generation of surfers.

Privacy Claims

The court also granted summary judgment in favor of the defendants on Chapman's claims for misappropriation of identity claim and invasion of privacy. The legal theory of misappropriation of identity is applicable only to the unauthorized use of a person's identity or likeness in connection with the promotion or advertisement of a product or services.

The surfing magazine did not have such a purpose. Moreover, the magazine concerned newsworthy matters of public interest – namely, the surfing subculture – and was thus privileged from an action for invasion of privacy.

With regard to Chapman's generic invasion of privacy claim, the court construed it as asserting the theory of public disclosure of private facts. However, the magazine in issue did not disclose any private facts. The facts published in the article concerning Chapman's use of illicit substances were previously disclosed in publications disseminated within the surfing community by other sources. To the extent Chapman complained that the article contained derogatory facts or comments about his business practices, the court held that ordinary merchants do not have an expectation of privacy as to their sales and business transactions with customers.

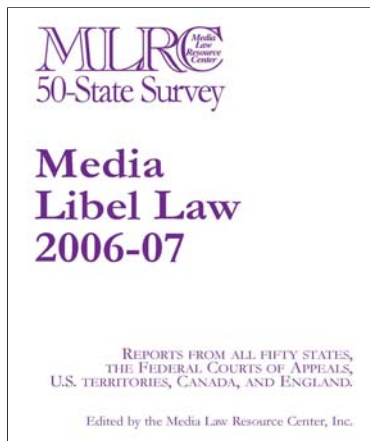
Finally, the court declined to grant summary judgment on the false light claim due to the unsettled nature of Hawai'i law on such claims and the need for further briefing.

Jeffrey S. Portnoy and Elijah Yip of Cades Schutte LLP of Honolulu, Hawaii represented Journal Concepts, Inc., dba The Surfer's Journal, and the individual defendants. Plaintiff was represented by Arthur E. Ross, Honolulu.



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Trial Court Preserves Anonymity of Blogger

Comments Not Actionable as a Matter of Law

A New York trial court recently dismissed a petition for pre-action disclosure seeking the identity of an anonymous blogger. *Greenbaum v. Google*, No. 102063/07, 2007 WL 3197518 (N.Y. Sup. Ct. Oct. 23, 2007) (Friedman, J.).

Intervening to quash the petition, the anonymous blogger urged the New York court to expressly adopt heightened protections for libel claims over anonymous speech. Although the trial court was mindful of the First Amendment protections for anonymous speech, it found it unnecessary to expressly rule on the issue since the complained of statements were not actionable as a matter of law.

Background

Petitioner Pamela Greenbaum is an elected school board member in Lawrence, New York. She was the subject of criticism on a blog entitled “Orthomom” – published by a woman who identifies herself “an Orthodox Jewish parent of school-age children.” Orthomom and several anonymous commentators criticized Greenbaum for her position on aid to

parochial schools. Greenbaum alleged that Orthomom defamed her by stating: “Way [for Greenbaum] to make it clear that you have no interest in helping the private school community.” Various anonymous commentators responded with the following statements which Greenbaum alleged were defamatory: “Pam Greenbaum is a bigot and really should not be on the board.” And: “Greenbaum is smarter than she seems. Unfortunately, there is a significant group of voters who can't get enough of her bigotry.”

Greenbaum filed a petition for pre-action disclosure against Google seeking data that would identify Orthomom and the other anonymous commentators. Google owns and operates “Blogger” – the blog publishing system used by Orthomom. Google informed Orthomom of the petition to allow her to oppose it.

Trial Court Ruling

Counsel for Orthomom urged the court to adopt the standards set out in *Dendrite Intl., Inc. v. Doe*, 342 N.J. Super.

Does Greenbaum, who has criticized numerous proposals by Mansdorf in the past, like the idea? “Why not?” she asked. “They could do it now,” so long as public school teachers are not being paid public funds to teach non-public school students.

Um...what? Unless I'm mistaken, there is no law against district private school students being taught on public school property by public school teachers. The reason such an arrangement generally does not occur is a matter of the choice private school parents make to send their children elsewhere to be educated. In this case, we are discussing the prospect of private school students receiving extracurricular education from public school teachers on public school property. There is no connection whatsoever to the religious education these students may receive in another venue during the school day. I just don't see how Greenbaum can object on principle to the concept of district children being taught by district teachers on district property. Anyone remember Super Sunday, the (now-defunct) program where district teachers were paid to provide extracurricular activities to private school students on public school property? That was legal. And if she's discussing her personal preference as opposed to some legal issue with Dr. Mansdorf's suggestion, then...wow. Way to make it clear that you have no interest in helping the private school community in any fashion.

Another choice Pam Greenbaum comment, from the same article:

I think Asher Mansdorf has the best interests of the kids at heart, but I think he has too many factions pulling at him. And I think he's getting screwed. He should stop listening to everyone else and start listening to his heart and he would be a much better president.

He should stop listening to everyone? In my estimation, a school board president who tries to listen to everyone, and tries to meet everyone in the district's needs, seems like a worthy president indeed.

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Trial Court Preserves Anonymity of Blogger

(Continued from page 15)

134, 775 A.2d 756 (N.J. App. 2001). Under *Dendrite*, a libel plaintiff is required to give notice to the anonymous speaker so that he or she can oppose disclosure. In addition, the court must review the proposed claims under a motion to dismiss standard to determine whether the plaintiff has a prima facie cause of action, and also must require the plaintiff to produce evidence sufficient to make a prima facie showing in support of each of the elements of the cause of action. If the court concludes that the plaintiff has a prima facie cause of action, the court must then “balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity.” *Id.* at 142, 775 A.2d 756.

The trial court noted that appellate courts in New York “have not articulated the standards that should govern applications for the disclosure of the identities of anonymous internet speakers.” The court agreed with the notice requirements imposed in *Dendrite* (and followed them in this case), but found that under the facts “the court need not reach the issue of the quantum of proof that should be required on the merits because, here, the statements on which petitioner seeks to base her defamation claim are plainly inactionable as a matter of law.”

Indeed, the court noted that “under the well settled law of New York, even where constitutional interests are not at stake, the proponent of pre-action disclosure must demonstrate that it has a meritorious cause of action.” Here *Orthomom*’s statement was not defamatory. Moreover, her statement, as well as those of the anonymous commentators, are protected opinion.

The statements of both *Orthomom* and the anonymous commentators are based on the single disclosed fact, the truth of which Greenbaum does not contest, that Greenbaum opposes the use of public school funds for programs for Yeshiva students and others who receive their full-time education at private schools. As such, the statements are readily identifiable as protected opinion.

In conclusion, the court noted that both parties acknowledged that the issue of local school funding was “a highly charged dispute” in the community. In this context, disclosure of anonymous speakers “would have a chilling effect on protected political speech.”

“*Orthomom*” was represented by Paul Alan Levy, Public Citizen Litigation Group, Washington, D.C. and Donald Rosenthal, Harman & Craven LLP. Petitioner was represented by Adam B. Feder, Feder and Rodney, P.L.L.C., Brooklyn, NY. Google was represented by Tonia Ouellette Klausner, Wilson Sonsini Goodrich & Rosati, New York.

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Negligence Claims Against Radio Stations Over Financial Shows Dismissed

Stations Had No Duty to Monitor Hosts' Investment Business

A California appeals court affirmed dismissal of negligence claims against two radio stations over the alleged theft of investment funds by the hosts of financial advice programs. *Park v. Korea Radio USA, Inc.*, 2007 WL 3358139 (Cal. App. 2d Dist., Nov. 14, 2007) (Willhite, Manella, Suzukawa, JJ.) (unpublished).

Background

Defendants Radio Korea and Radio Seoul hired Hyun Soo Jang and Kang Sang Kim, the owners of Unus Capital Management, Inc. and Peoplen Investment, Corp, to host financial advice programs on their stations. The hosts dispensed financial advice, answered questions from listeners and solicited clients for their companies.

Plaintiffs, a group of ten listeners who invested money with Unus and Peoplen, claimed the company misappropriated their money. They sued the company, its principals and the radio stations.

As to the radio stations, plaintiffs alleged that they promoted, represented, and endorsed the hosts "as licensed experts in the fields of financial planning and investment advice" and that defendants "knew or should have known that listeners including plaintiffs would believe that the stations were vouching for the ability, honesty and expertise" of the hosts.

In particular, the stations allegedly knew that listeners "in the Korean community would rely heavily on the fact that the radio stations had selected [the] hosts for these programs and were vouching for their ability, honesty and expertise."

Moreover, plaintiffs alleged that the radio stations breached their duty to exercise due care by failing to investigate whether the hosts were licensed, by failing to determine if the hosts were investing plaintiffs' funds as represented, and by failing to warn listeners that defendants took no responsibility for the hosts' actions. According to plaintiffs, defendants "chose not to investigate."

The trial court dismissed for failure to state a claim, finding no factual allegations to support the claim that the radio stations investigated and certified the companies as valid investment firms. And with respect to the allegation that defendants had failed to monitor whether the hosts had properly invested plaintiffs' funds, the trial court stated that plaintiffs had "not cited any authority that would suggest that such a duty exists."

Appeals Court Affirms Dismissal

The appeals court first examined whether a duty of care was owed by the radio stations to the plaintiffs. The court looked to analogous cases where no duty was found to exist. No duty was owed where a magazine was alleged to have impliedly endorsed an advertisement simply by publishing it. *Park*, 2007 WL 3358139 at *3 citing *Walters v. Seventeen Magazine*, 195 Cal. App. 3d 1119 (1987) (no duty to investigate claims of each product advertised in magazine; to hold otherwise would have dire effects on the magazine industry). Similarly, a corporate sponsor of an event was not liable when the event failed to pay a promised prize. *Id.* at *4 citing *McCulloch v. Ford Dealers Advertising Assn.*, 234 Cal. App. 3d 1385 (1991).

The court also cited the Ninth Circuit's decision in *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991). In *Winter*, the defendant published a reference book on wild mushrooms. Plaintiffs purchased the book and, relying upon its contents, picked and ate mushrooms which caused them to become critically ill. The Ninth Circuit held that the publisher had no duty to investigate the accuracy of book it published.

The appeals court noted two exceptions to the general rule that no duty is owed by publishers or sponsors. First is a situation where a magazine has guaranteed a product and even offers a replacement or refund if it is defective. *Park* at *5 citing *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680 (1969). The second situation is where a trade journal has undertaken the burden of investigating products and reporting their safety. *Id.* citing *FNS Mortgage Service Corp. v. Pacific General Group, Inc.*, 24 Cal. App. 4th 1564 (1994).

Finding that the radio stations had made no express endorsements as in the latter two cited cases, the court of appeals held that there was no duty of care between the radio stations and the listeners, even if there had been an implied endorsement. The court affirmed dismissal.

Plaintiffs were represented by Sullivan, Workman & Dee, Los Angeles, CA. Korea Radio USA, Inc. was represented by Joseph Kouri and Michele L. Flowers of Sedgwick, Detert, Moran & Arnold, in Los Angeles. Radio Seoul was represented by Eric J. German, Mitchell Silberberg & Knupp, Los Angeles.

Penguin Putnam Wins Copyright Infringement Trial Over Dorothy Parker Poems

Previously Published Compilation Lacked Sufficient Creativity to Be Protected

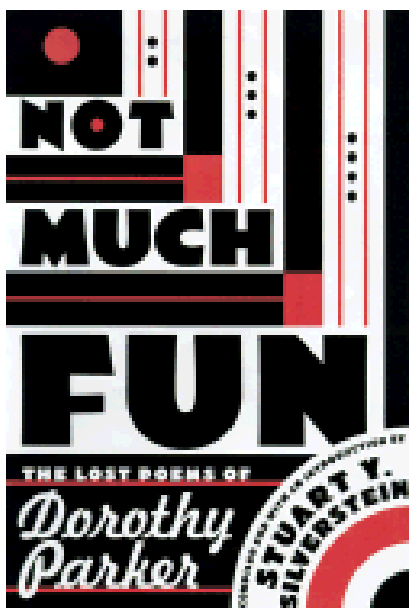
In a bench verdict issued this month, a New York federal court rejected a copyright infringement claim against Penguin Putnam over its publication of certain Dorothy Parker poems. *Silverstein v. Penguin Putnam, Inc.*, No. 01 Civ. 309 (JFK) (S.D.N.Y., Nov. 6, 2007) (Kennan, J.).

Plaintiff had compiled and published a set of Dorothy Parker poems. Penguin Putnam later republished nearly all of them in its own compilation of Dorothy Parker poems. The interesting issue in the case was whether plaintiff's compilation was entitled to copyright protection.

Following a bench trial this summer, featuring evidence from academics on the nature of poetry, Judge John Keenan ruled this month that plaintiff's compilation lacked sufficient creativity to gain copyright protection. The judge also rejected plaintiff's related trademark and unfair competition claims.

Background

In 1996, plaintiff Stuart Silverstein published a compilation of poems by Dorothy Parker entitled "Not Much Fun: The Lost Poems of Dorothy Parker." The poems had not previously appeared together in any Dorothy Parker compilations, but had been published in various periodicals in the 1920's to 1940's. Silverstein put together the compilation by reviewing original or microfilm copies of the newspapers and magazines in which Parker had published her work. Silverstein offered his manuscript to Penguin, but rejected its offer to publish the poems as part of a larger collection. Instead, Silverstein's book was published by Scribner, an imprint of Simon & Schuster.



The Lost Poems of Dorothy Parker." The poems had not previously appeared together in any Dorothy Parker compilations, but had been published in various periodicals in the 1920's to 1940's. Silverstein put together the compilation by reviewing original or microfilm copies of the newspapers and magazines in which Parker had published her work. Silverstein offered his manuscript to Penguin,

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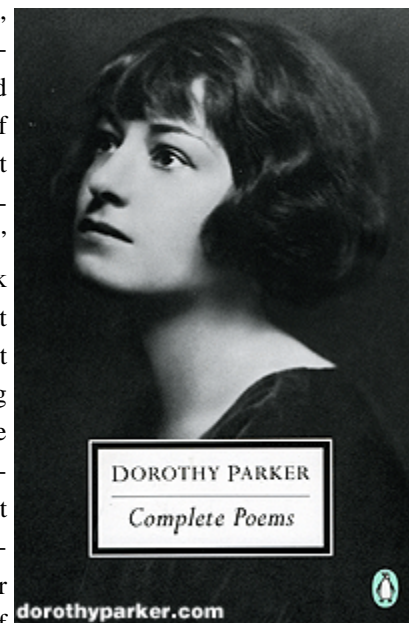
A few years later Penguin published most of the poems from Silverstein's compilation as part of a larger compilation of almost all of Dorothy Parker's poems in the aptly titled "Dorothy Parker: Complete Poems." Penguin photocopied the poems from Silverstein's work but placed them in a different order and omitted one of the poems. Silverstein was not given credit for his compilation by Penguin.

Previous Decisions

Silverstein sued Penguin for copyright infringement, violation of the Lanham Act and unfair competition over the unauthorized use of his compilation. In 2003, Judge Keenan granted summary judgment to plaintiff. *See Silverstein v. Penguin Putnam, Inc.*, 2003 WL 1797848 (S.D.N.Y. 2003). On the copyright claim, the court held that Silverstein had a valid copyright in the compilation because his selection, arrangement and coordination of the poems reflected "a substantial amount of creativity and judgment meeting the minimum requirement for originality."

On the trademark claim, the court held that publication without credit constituted "reverse passing off." And plaintiff's state law claims were not preempted by the Copyright Act. Finally, the court enjoined Penguin from further distribution or sale of "Complete Poems" and ordered that all existing copies be recalled.

On appeal, the Second Circuit vacated the injunction and remanded the case for trial to determine whether plaintiff's compilation was sufficiently creative to enjoy copyright protection. *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77 (2d Cir. 2004). The court found that although a compilation could be protected by copyright, material issues of fact existed as to whether Silverstein had exercised the necessary creativity in selecting and compiling the poems for his book.



(Continued on page 19)

Penguin Putnam Wins Copyright Infringement Trial Over Dorothy Parker Poems

(Continued from page 18)

Bench Trial

The case was tried without a jury from July 17, 2007 through July 25, 2007, with testimony from Silverstein and editors from Penguin and Scribner, as well as video depositions of academic experts.

In a 79 page bench opinion, Judge Keenan held that Silverstein's work in selecting and compiling the poems was insufficiently creative to merit copyright protection.

The Court finds that Silverstein simply selected for inclusion in Not Much Fun all of the uncollected Parker poems that he could find and that this selection process involved no creativity. His decision that certain works were poems was based objectively on whether the work contained the conventional structural features of a poem. This finding is evidenced by the fact that every poem in Not Much Fun is objectively recognizable as a poem and that Silverstein did not exclude any uncollected Parker poems from the book. It is further supported by the fact that Silverstein represented Not Much Fun as, and the book itself purports to be, a compilation of all of Parker's uncollected poems. Furthermore, Silverstein's decision that certain works were or were not authored by Parker was based on historical evidence and not creative judgment.

Judge Keenan examined several of the poems at length to show that in structure and format they were easily recognizable as poems. For example:

A litter of newspapers
Piled in smothering profusion.
Supplements sprawling shamelessly open,
Flaunting their lurid contents –

“Divorced Seven Times, Will Re-Wed First Wife,”
Unopened sheets of help advertisements;
Editorials, crumpled in a frenzy of ennui;
Society pages, black with lying photographs.

This is “objectively recognizable” as a poem and “no creative or subjective judgment inhered in their classification as such.” Although the court acknowledged plaintiff's “sweat of the brow” in putting together the compilation, “efforts of this kind are not the object of the copyright laws.” *Citing Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

Finally, the court held that Silverstein's reverse passing off claim under the Lanham Act failed. Citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), the court found that the claim must fail because Penguin, as producer of the book, is the “origin of the goods” under the Lanham Act, not Silverstein. The state law claims were dismissed because the court found that they were preempted by the Copyright Act.

Penguin Putnam was represented by Richard Dannay and Thomas Kjellberg of Cowan, Liebowitz & Latman, PC in New York. Plaintiff was represented by Mark A. Rabinowitz and Christopher Mickus of Neal, Gerber & Eisenberg, LLP in Chicago.



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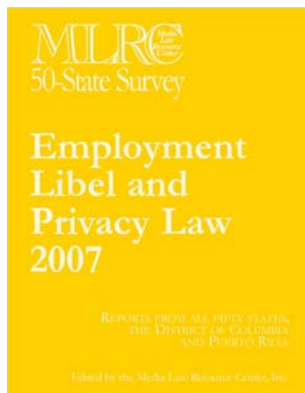
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Recent Cert. Petitions of Note: **Boehner v McDermott; Perfect 10, Inc., v. CCBill LLC, et al.**

First Amendment & Wiretap Law

Congressman James McDermott filed a petition for certiorari to the U.S. Supreme Court seeking review of an en banc ruling by the D.C. Circuit Court of Appeals holding that he violated the Wiretap Act by disclosing the contents of an illegally taped phone conversation. *See Boehner v. McDermott*, 484 F.3d 573 (D.C. Cir. 2007), *pet. for cert. filed*, 76 USLW 3189 (Sep 28, 2007)(No. 07-439).

In a 4-1-4 decision, the court held that McDermott did not have a First Amendment right to disclose the information because of his position at the time as a member of the House Ethics Committee, relying on *United States v. Aguilar*, 515 U.S. 593 (1995). *Aguilar*, the court stated, “stands for the principle that those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information.”

Significantly, the court rejected the reasoning of the earlier ruling by a three-judge panel that McDermott had no First Amendment protection simply because he had actual knowledge that the phone conversation was illegally intercepted and knew who intercepted the call. *See* 441 F.3d 1010, 34 Media L. Rep. 1481 (D.C. Cir. 2006). Judge Sentelle aptly described this reasoning as “fraught with danger” because its “defect in the chain” rationale could create broad liability for the press and public.

The questions presented in McDermott’s petition are:

1. Whether the D.C. Circuit flouted this Court’s decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), by applying the federal wiretapping statute, 18 U.S.C. § 2511(1)(c), to punish a disclosure of truthful information on a matter of public concern by someone not involved in unlawful wiretapping.

2. Whether the D.C. Circuit violated the separation of powers by punishing a Member of Congress under the federal wiretapping statute based on an alleged violation of an internal rule of the U.S. House of Representatives.

- [Opinion below](#) (D.C. Circuit)
- [Petition for certiorari](#)
- [Brief in opposition](#)
- [Petitioner’s reply](#)
- [Amicus brief of Representatives Howard Berman, Barney Frank, Zoe Lofgren and George Miller](#) (in support of McDermott)

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CDA Section 230 & State Right of Publicity Claims

Perfect 10, the publisher of print and online adult magazines, filed a petition for review of a Ninth Circuit decision involving the impact of § 230 of the Communications Decency Act (47 U.S.C. § 230) on state right of publicity claims. *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir. 2007), *pet. for cert. filed*, 76 USLW 3082 (Aug. 27, 2007)(No. 07-266).

Plaintiff sued a credit card payment processing company and web hosting company for, among other things, violating plaintiff's state law right of publicity. On that issue, the Ninth Circuit held that § 230 provided the defendants with immunity against Perfect 10's state law right of publicity claims. Only federal intellectual property right claims, the court ruled, are outside the scope of § 230 immunity. "Permitting the reach of any particular state's definition of intellectual property to dictate the contours of his federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes," the court held.

The question presented in Perfect 10's petition is:

1. Section 230 of the Communications Decency Act provides immunity to interactive computer services for certain tort-based causes of action, but it bars courts from construing the immunity so as to "limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). Did the Ninth Circuit err in reading "any law" to mean only "any Federal law," in conflict with a decision of the First Circuit and statutory construction rules of this Court? The effect of this ruling is to grant defendants immunity, under Federal law, from state law intellectual property claims, contrary to the language employed by Congress.

- [Opinion below](#) (Ninth Circuit)
- [Petition for certiorari](#)
- [Brief in opposition](#)
- [Petitioner's reply](#)
- [Amicus brief of the Screen Actors Guild](#) (in support of the petitioner)
- [Amicus brief of CMG Worldwide, Inc.](#) (in support of the petitioner)

Florida Appeals Court Allows Limbaugh Divorce Settlement to Remain Secret

In a 2-1 decision, a Florida Appeals Court denied the *Palm Beach Post* access to the divorce settlement between conservative radio host Rush Limbaugh and his ex-wife Marta Miranda. *Palm Beach Newspapers, Inc. v. Limbaugh*, 2007 WL 2847524 (Fla. App. 3d Dist., Oct. 3, 2007) (Suarez, Cortiñas, Cope, JJ.).

In June, 2004 Rush Limbaugh, famous for extolling conservative values, announced to his radio audience that he and his wife of ten years, Marta Miranda, were getting divorced. The divorce, Mr. Limbaugh's third, was finalized later that year in December. A few months after the final judgment of dissolution, the *Palm Beach Post* sought to unseal the divorce file. Neither Mr. Limbaugh nor Ms. Miranda objected, and the record was unsealed.

Upon disclosure of the divorce file however, the *Post* found that the marital settlement agreement had not been included. The *Post* then filed a motion to compel the parties to make the agreement accessible by including it in the file. The trial court avoided the question of whether subject matter jurisdiction was proper and ruled instead that the marital settlement agreement was not a judicial record, and thus not constitutionally required to be accessible to the public.

The *Post* appealed the decision and the first time the Florida Court of Appeals heard the decision, it denied the motion. Upon the *Post*'s motion for rehearing, the appeals court issued a brief *per curiam* decision. The decision consisted only of the word "Denied" followed by a citation to *Davis v. Cincinnati Enquirer*, 840 N.E.2d 1150 (Ohio Ct. App. 2005). The *Davis* court denied a similar motion in Ohio on the grounds that the newspaper failed to follow the proper procedure for seeking access to sealed divorce records, which would have been to file for a writ of mandamus.

The lone dissenting judge in the *Post*'s Florida appeal, Judge Cope, originally agreed that the *Post*'s motion should be denied, but reconsidered upon the motion for rehearing. He began his dissent by refuting the trial court's determination that the document was not a public record. Judge Cope distinguished another Florida Court of Appeals decision *Palm Beach*

Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla.1987), where the court had found that depositions are not public records until they are filed with the court. In the *Limbaugh* case, unlike in *Burk*, a judge had initialed every page of the settlement and thus the document was a judicial record because of the judicial involvement.

Judge Cope went on to explain that since the document was a judicial record, the *Post* had a constitutional right of access under Art. I, § 24(a) of the Florida Constitution. This section states:



RushLimbaugh.com

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this Section or specifically made confidential by this Constitution. This Section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional

officer, board, and commission, or entity created pursuant to this Constitution.

Fla. Const. art. I, § 24. Having found the settlement to be a public record, Judge Cope would have granted the *Post*'s motion for certification on the question of whether the former husband and wife could establish that an exemption would apply barring access.

The dissent also disposed of the jurisdiction issue that the trial court had failed to reach. Judge Cope acknowledged that the *Post* had filed beyond the time for appeal, but stated that "parties cannot bargain away the public's right of access to public records." See *Friend v. Friend*, 866 So.2d 116, 117 (Fla. App. 3d Dist. 2004).

The Post was represented by Reeder & Reeder and L. Martin Reeder of Jupiter, Fl. Rush Limbaugh and Marta Miranda were represented by Caruana and Lorenzen and Dirk Lorenzen of Miami, Fl.; Richman Greer Weil Brumbaugh Mirabito & Christensen and Bruce A. Christensen of Miami, Fl.

Public Has Right to Know Penn State Football Coach's Salary

State Retirement Systems Records Subject to Disclosure

The Pennsylvania Supreme Court in a 3-2 decision ruled that Penn State football coach Joe Paterno's salary is a public record subject to disclosure under the state's Right to Know Act. *Pennsylvania State University v. State Employees' Retirement Board*, 2007 WL 4105958 (Penn. Nov. 20, 2007) (Cappy, C.J., Castille, Saylor, Eakin, Baer, Fitzgerald, JJ.).

The Pennsylvania Right to Know Act, 65 P.S. §§ 66.1-66.9, ("RTKA") mandates disclosure of public records, unless otherwise barred by law or disclosure poses a threat to an individual's personal security. Although publicly funded universities such as Penn State are outside the scope of the RTKA, the coach participates in a state funded pension plan and thus his salary information was subject to disclosure.

Background

In 2002, a reporter for the *Harrisburg Patriot-News* sought the salary information of several Penn State employees, including long-time football coach Joe Paterno, from the State Employees' Retirement Board ("SERS"). SERS agreed to release the information but the university objected. In 2005, an appeals court held that the information should be disclosed by SERS in accordance with Pennsylvania's RTKA. See *Pennsylvania State University v. State Employees' Retirement Bd.*, 880 A.2d 757, 764 (Pa. App. 2005)

The university resisted the order and was allowed to appeal to the Pennsylvania Supreme Court, arguing that it was not required to disclose the information and that disclosure would violate its employees' privacy.

Supreme Court Decision

Justice Fitzgerald, writing for the majority, found that the RTKA mandated disclosure of Paterno's salary. Distinguishing between the university and the retirement board, the Court noted:

the question before the Court is not whether [Penn State] must disclose the information at issue pursuant to the RTKA, but whether SERS must disclose the information requested pursuant to the RTKA. Without question, SERS is a state agency subject to the RTKA. Moreover, the information requested pertains to [Penn State] employees who have voluntarily elected to participate in SERS

The Court also rejected the argument that the disclosure would violate Paterno and other employee's right to privacy.

We hold that the public's interest in governmental transparency regarding receipts and disbursements of Commonwealth funds generally outweighs any recipient's, or future recipient's, right to privacy with respect to his or her name and relevant financial data. Any person who desires to keep such information private should refuse Commonwealth disbursements, and should decline SERS participation. The public has a right to know how the Commonwealth spends its money.

The majority also noted that even though Penn State employees might have had a "subjective expectation of privacy regarding their salaries and service history" they could "not reasonably expect the Commonwealth to keep secrets from its citizens regarding the disbursement of public funds, past, present or future."

In dissent, Chief Justice Cappy, joined by Justice Castille, argued that the salary information held by SERS was not a "public record" within the meaning of the RTKA – at least until an employee retires and draws on public funds.

Ontario Court of Appeal Recognizes Defense of “Public Interest Responsible Journalism”

Adopts Reynolds / Jameel Principles to Strengthen Press Protections

By Brian MacLeod Rogers

The Ontario Court of Appeal has ruled in favor of a *Reynolds/Jameel* defense for “public interest responsible journalism.” *Cusson v. Ottawa Citizen*, 2007 ONCA 771 (Nov. 13, 2007). This is the first time this defense has been recognized by an appellate court in Canada.

The unanimous decision by three justices was written by Justice Robert Sharpe, a respected scholar with a strong interest in libel law even before his appointment. It is carefully reasoned and closely based on the *Reynolds/Jameel* judgments by the UK House of Lords. While not binding outside Ontario, it is certainly persuasive and is likely to prove authoritative in other provincial jurisdictions across Canada. In strong terms, the decision makes it clear that it is time for a change in the common law of libel to better protect free expression.

The adoption of the approach to public interest journalism developed by the English House of Lords in their 1999 and 2006 decisions in *Reynolds v. Times* and *Jameel v. Wall Street Journal Europe* comes a dozen years after the Supreme Court of Canada firmly rejected the *New York Times v. Sullivan* constitutional privilege defense in *Hill v. Scientology*.

This reflects an evident Canadian preference for English authority in the common law of libel and maintains the traditional approach of strict liability that keeps the onus on the defendant to establish a successful defense. Fault and falsity are presumed for any defamatory publication and need not be proven by the plaintiff. The new “public interest responsible journalism” defense, like truth and fair comment, must be proven by the defendants, with a focus on their own conduct and the public interest in publishing the story. As stated by Justice Sharpe:

As I see it, this defence represents a natural extension of the law as it has been developing in recent years, an incremental change “necessary to keep the common law in step with the dynamic and evolving fabric of our society”. It amounts to a sensible half-way house between the two extremes of the traditional common law no-fault liability on the one hand, and the traditional qualified privilege requirement for proof of malice on the other. The public interest responsible journalism defence recognizes that in relation to matters of public interest, the

traditional common law unduly chills freedom of expression but, at the same time, rejects the notion that media defendants should be afforded a license to defame unless the innocent plaintiffs can prove deliberate or reckless falsehood. It rights the common law imbalance in favour of protection of reputation and creates a proper balance between that value and freedom of expression.

Background

The case involved a series of articles published following the September 11, 2001 attacks. The plaintiff was an Ontario Provincial Police (“OPP”) officer who went to New York City with his pet dog and took part in canine search operations at Ground Zero. When he refused to return to duty, claiming he was providing essential help, OPP officials termed him a “renegade,” and a media battle ensued, with a great deal of public sympathy shown toward the officer, Danno Cusson.

Intrigued that there might be more to the story, the *Citizen* investigated it. New York police officers at the scene were interviewed and said they had been led to believe that Cusson was a trained canine officer with the Royal Canadian Mounted Police. In fact, neither he nor his dog had had formal training.

During a six-week jury trial in March and April 2006, five New York police officers testified in support of statements in the stories. Unusually, the trial was bilingual, and judge and jury spoke both French and English; the plaintiff spoke French as his first language although the *Citizen* is an English-language newspaper. Faced with some 151 questions on over 30 passages from the articles, the jury found the newspaper had proved most, but not all, of the libel stings were true and denied a defence of fair comment.

Damages of \$100,000 were awarded against the newspaper and another \$25,000 against an OPP superintendent quoted in the story – even though no malice was found.

The newspaper had argued a “traditional” qualified privilege defense, i.e., that the articles were in the public interest and there was a reciprocal duty and interest for their publication. The judge rejected the defense, finding there was no “compelling moral or social duty” for the articles.

(Continued on page 25)

Ontario Court of Appeal Recognizes Defense of “Public Interest Responsible Journalism”

(Continued from page 24)

Court of Appeal Analysis

The Court of Appeal also rejected this defense and, because it had not been argued at trial, ruled against allowing the defendants the new *Reynolds/Jameel* defense. While admitting that *Jameel* had not yet been decided at the time of trial, the court held *Reynolds* had really changed the law in England by enunciating the responsible journalism standard. The court held the newspaper was bound by its choice to rely on the traditional qualified privilege defense and would not be given another “bite at the cherry”. This result echoed the one in *Reynolds* itself, where the *Times* was denied the new defense on the facts of that case. Certainly, the result seems most unfair, and consideration of an appeal to the Supreme Court of Canada is currently underway.

The court set out the “non-exhaustive list of 10 factors” that Lord Nicholls described in *Reynolds*. However, consistent with *Jameel*, the court held that the defense should not be adopted in a “slavish or literal fashion” but rather in a “manner that best reflects Canada’s legal values and culture”.

The defence rests on the broad principle that where a media defendant can show that it acted in accordance with the standards of responsible journalism in publishing a story that the public was entitled to hear, it has a defence even if it got some of its facts wrong. That standard of responsible journalism is objective and legal, to be determined by the court with reference to the broader public interest. The non-exhaustive list of 10 factors from *Reynolds*, applied in the manner directed in *Jameel*, provides a useful guide. The defence is plainly intended to shift the law of defamation

away from its rigidly reputation-protection stance to a freer and more open discussion on matters of public interest and should be interpreted accordingly...In assessing whether the media has met this standard, the court will consider the 10 factors outlined by the House of Lords in *Reynolds*, or such of them – or any other factors – as may be relevant in the circumstances. As *Reynolds* and subsequent authorities have noted, these factors are not a list of hurdles that the media defendants must negotiate; rather, they are indicia of whether the media were truly acting in the public interest in the circumstances.

The new defense finally brings Canada (or certainly the Province of Ontario) into the mainstream of developments in libel law more protective of press freedom. While the victory proved pyrrhic for the *Ottawa Citizen*, media interveners (*The Globe and Mail*, Canadian Newspaper Association and Ad IDEM/Canadian Media Lawyers Association) helped pave the way for future cases. The defence may soon be properly christened, with a number of trials and appeals pending that will raise the issue.

Brian MacLeod Rogers, Barrister and Solicitor, in Toronto was co-counsel for the media interveners (The Globe and Mail, Canadian Newspaper Association and Ad IDEM/Canadian Media Lawyers Association) with Peter Jacobsen and Adrienne Lee of Bersenas Jacobsen Chouest Thomson Blackburn LLP. Rick Dearden and Andrew Kidd of Gowling Lafleur Henderson LLP acted for the Ottawa Citizen defendants at trial and on appeal. Ron Caza and Marie-France Chertrand of Heenan Blaikie LLP acted for the plaintiff, Danno Cusson.

Bulletin 2007 No. 3 (Feb. 2007):

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Supreme Court of Canada to Hear Case on Fair Comment Defense to Libel

Media Coalition Argues for Broadening Defense

By Brian MacLeod Rogers

For the first time in nearly 30 years, the Supreme Court of Canada will consider the libel defense of “fair comment” in a case from British Columbia – *WIC Radio Ltd. and Mair v. Simpson*. The appeal will be heard on December 4, 2007.

In *WIC Radio*, a well-known, outspoken radio commentator, Rafe Mair, delivered his editorial of the day strongly criticizing the position taken by the plaintiff as a family-rights/family-values activist in opposing the teaching of tolerance towards homosexuality in the school system, with comments such as:

The trouble is people who don't want violence often unwittingly provoke it, and Kari Simpson is, thank God, permitted in our society to say exactly what she wishes, but the other side of the free speech coin is a public decent enough to know a mean-spirited, power mad, rebel rousing and, yes, dangerous bigot when they see one.

The case was tried by a judge alone. The judge dismissed the claim. She ruled that a key implied meaning for the broadcast was that the plaintiff, Kari Simpson, “would condone violence” but found that the defense of fair comment applied and that the plaintiff had failed to prove malice as the dominant motive.

However, the BC Court of Appeal reversed, using particularly opaque reasoning. *Simpson v. Mair and WIC Radio Ltd.*, 2004 BCSC 754 (June 4, 2004). After pointing out that fair comment could not protect “imputations of fact”, the court held:

The learned judge's conclusion...as to the defamatory meaning of these words excludes any further consideration of fair comment because there is no evidentiary foundation for a finding that the appellant would condone violence.

This might mean that the imputation was either an unproven statement of fact or a comment unsupported by facts. Whatever the interpretation, this point had not been raised on the appeal nor addressed by either the court or counsel during oral argument. One of the grounds on which the Supreme Court of Canada granted leave for the appeal was whether an appellate court should reverse a decision on grounds that were neither raised nor argued on the appeal.

This will be the first common law libel appeal heard by the

Court since it rejected *New York Times v. Sullivan* in *Hill v. Scientology* in 1995. The last case involving fair comment was decided in 1979 in *Cherneskey v. Armadale Publishers*. A majority of the Court then imposed a subjective test of “honest belief” in published comment, which required provinces to pass legislation in order to permit letters to the editor and the like to be safely published in the media.

Since the case offers a rare opportunity to re-examine the traditional defense of fair comment, eight media organizations successfully sought leave to intervene jointly in the case as a “Media Coalition,” and both the Canadian Civil Liberties Association and the B.C. Civil Liberties Association have also intervened to raise constitutional arguments about freedom of expression.

The Media Coalition sees this case as an opportunity to clarify and strengthen law protecting free expression and, in particular, opinions and “value judgments” about matters of public interest. Such expression is at the core of the *Canadian Charter of Rights and Freedoms* protection for free speech, and yet too many judges and juries are taking a narrow approach to what constitutes an opinion and applying a “fairness” standard that has no place in a democratic society's need for vigorous public debate.

The defense should be as broad as possible and be termed “comment,” dropping the adjective “fair” to avoid misunderstanding. The Supreme Court of Canada's previous rejection of a public interest qualified privilege defense for the media means that the defense of “comment” is particularly critical to protecting discussion about political matters and other topics of public interest in Canada. The question is whether the court will see this case as a chance to set the law straight.

Brian MacLeod Rogers (Toronto) is counsel for intervener, Media Coalition (Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, British Columbia Association of Broadcasters, RTNDA Canada/The Association of Electronic Journalists, Canadian Publishers' Council, Magazines Canada, Canadian Association of Journalists and Canadian Journalists for Free Expression). Dan Burnett of Owen Bird (Vancouver) is counsel for the Appellants, WIC Radio Ltd. and Rafe Mair. Lianne Potters acts for the plaintiff Kari Simpson. Robert Holmes of Holmes & King (Vancouver) represents intervener, British Columbia Civil Liberties Association, and Professor Jamie Cameron (Osgoode Hall Law School of York University) with John McCamus and Matthew Milne-Smith of David Ward Phillips & Vineberg LLP (Toronto) acts for the Canadian Civil Liberties Association.

Sullivan v New York Times in England a Historical Perspective

By David Hooper

Witnessing the award of the William J Brennan Jr. Defense of Freedom Award to David Fanning a few weeks ago reminded me of the letter that I have received from Justice Brennan on 17 March 1993, a copy of which is reproduced below.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.
RETIRED

March 17, 1993



David Hooper, Esq.
Biddle & Co.
1 Gresham Street
London EC2V 7BU
England

Dear Mr. Hooper,

Thank you very much for your note of March 8 and the enclosed copy of the *Derbyshire* decision. I have found the opinion most interesting and gratifying.

Sincerely,

I had sent the judge a copy of the decision of the House of Lords in *Derbyshire County Council -v- Times Newspapers Limited* [1993] 1 All ER 1011 in which I had been involved. It was the first case in which serious consideration had been given in Great Britain to *New York Times Co. v. Sullivan*, 376 US 254 (1964).

The Derbyshire case marked the recognition of the importance of the free discussion of public affairs unfettered by over-harsh and oppressive libel laws. It was the case that laid the foundation for the subsequent case of *Reynolds -v- Times Newspapers Ltd* [2001] 2AC 12 and *Jameel -v- Wall Street Journal* [2007] EMLR 14. It is a case that rewards examination to see the dichotomy but also such similarities as exist between the First Amendment and the British Common Law approaches.

The Sunday Times had written a series of articles questioning the propriety of links between the Council's pension fund and companies run by a local businessman. The headlines indicate the nature of the articles.

“REVEALED: SOCIALIST TYCOON’S DEALS WITH A
LABOUR CHIEF”

and

“BIZARRE DEALS OF A COUNCIL LEADER AND THE
MEDIA TYCOON”

The tycoon himself received libel damages from the paper but it was not all plain sailing and he was later, like a number of distinguished UK libel litigants, to end up in jail convicted of a number of serious sexual offences. The interest of the case, however, was that the Council, following a dubious ruling in *Bognor Regis UDC -v- Campaign* [1972] 2 All ER 61 was suing for libel. In *Bogner* a local Council received damages of £2,000 over a leaflet savagely attacking it. (This case had made Bognor Regis well-known to law students of the time. The town was otherwise better known for featuring in the reputed last words of King George V who was advised by his doctor to recuperate at the seaside town. “Bugger Bognor” observed the King before going to meet his maker.)

The *Bognor* decision conflicted with the only other attempt in the previous 100 years on the part of a Council to sue for libel, *Manchester Corporation -v- Williams* [1891] 1QB 94 where in similar circumstances, namely, a local citizen writing to a newspaper accusing his Council of bribery and corruption, the claim of the Council had been struck out.

(Continued on page 29)

Sullivan v New York Times in England a Historical Perspective

(Continued from page 28)

House of Lords Decision in Derbyshire

In argument before the House of Lords in *Derbyshire* there was considerable discussion of the *Sullivan* case and it had some impact on the decision of the House of Lords. In fact, the House of Lords adopted the approach of the Supreme Court of Illinois in *The City of Chicago v. Tribune Co.*, 307 Ill 595 (1923) where Chief Justice Thompson observed in ruling that the City could not maintain an action of damages for libel

“Every citizen has a right to criticise an insufficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements and where the public service or due administration of justice is involved he shall have the right to speak his mind freely”.

While it was noted by the House of Lords that the decision in the *Chicago* and *Sullivan* cases related most directly to the provisions of the American Constitution concerned with securing freedom of speech, there was a striking endorsement of the principles of *Sullivan* when it was observed that

“The public interest considerations which underlay (those decisions) are no less valid in this country. What has been described as “the chilling effect” induced by the threat of civil actions for libel is very important.”

This was an important recognition of the chilling effect of libel actions and it was elsewhere noted in the judgment

“In a free, democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism”.

The case was also significant for the cop-out approach which was followed in a number of other cases over the next decade that there really was no very much difference between Article 10 of the European Convention of Human Rights and the English Common Law regarding freedom of speech. This came as news to a number of lawyers but it got around the thorny problem of the fact that at the time the United Kingdom had adhered to the Convention but had not enacted it into domestic law and, of course, this predated the Human Rights Act 1998. It was therefore noted that

“In the field of freedom of speech there was no difference in principle between the English law on the subject and Article 10 of the Convention”.

Because of the recognition of the importance of the *Sullivan* case and the reference to the chilling effect of libel actions, I sent the Judgment to Justice Brennan. Only in the United States would one receive such a gracious response signed by a man of such distinction under the signature Wm J Brennan Jr. We would have given him at least a peerage and a seat in the House of Lords.

David Hooper is a partner at Reynolds Porter Chamberlain.



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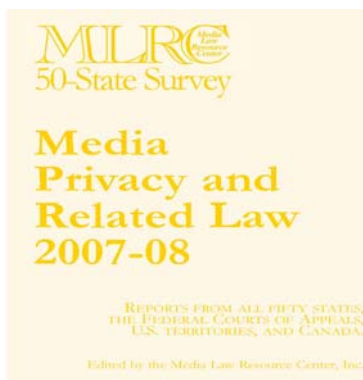
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Police Raid of Journalist's Home Violated Article 10, ECHR Rules

Major Victory for Press Freedom in Europe

At press time, the European Court of Human Rights released a decision in favor of journalist Hans-Martin Tillack on his complaint over a police raid of his home and office. *Tillack v Belgium*, No. 20477/05 (ECHR Nov. 27, 2007).

Background

In March 2004 Belgian police raided the home and office of Mr. Tillack, then Brussels correspondent for the German news magazine *Stern*, and seized his computers and documents. They were acting on a complaint from the European Commission's Anti-Fraud Office (OLAF). OLAF is responsible for investigating administrative fraud in the European Union.

Tillack had published a number of articles criticising OLAF. The articles were based on leaked information, and OLAF claimed, despite the lack of any evidence, that Tillack had obtained the information by bribing an EU official. Its real goal, however was to identify the leak in its administration by obtaining access to Tillack's files. Tillack was never charged with bribery or any other criminal offence..

After his files were seized, Tillack challenged the Belgian authorities' action before the national courts to protect his sources and to have his files returned. He also filed a petition with the European Court of First Instance (CFI) for interim measures to prevent OLAF from obtaining any information or documents from the Belgian police. These motions were denied.

Tillack then filed a petition with the European Court of Human Rights in Strasbourg alleging a violation of Article 10, the right to free expression.

ECHR Judgment

In its judgment, released in French, the Court first affirmed the principle that the protection of journalists' sources is fundamental to press freedom. It ruled that under the facts the search and seizure of Tillack's files was an unjustified interference with his Article 10 right of free expression. The court awarded Tillack damages of €10,000 and €30,000 in costs.

Next month's MediaLawLetter will have a more detailed report on the decision from Tillack's counsel at White & Case.

Ian Forrester, QC, Thierry Bosly, Werner Derijcke, Christoph Arhold, Nathalie Flandin, Juliette Siaens and Muriel Alhadeff of White & Case in Brussels represented Hans Martin Tillack.

French Court Dismisses Case Against Wikipedia Over Encyclopedia Entry

In an interesting ruling this month, a French court dismissed a privacy claim against user-generated online encyclopedia Wikipedia over an anonymously posted entry that described plaintiffs as gay activists. The court found that under the circumstances, Wikipedia was not responsible for content created by third parties.

According to news reports, civil court Judge Emmanuel Binoche ruled that Wikipedia is a webhost within the meaning of France's e-commerce law (Loi No. 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique). Under this law, providers of online "communi-

cation services" are not responsible for third party content unless they have actual knowledge of illegal content – or fail to remove such content promptly upon learning of it. "Web site hosts," the judge ruled, "cannot be liable under civil law because of information stored on them if they do not in fact know of their illicit nature."

The plaintiffs had claimed that they complained to Wikipedia by e-mail and that it failed to promptly remove the posting. The judge ruled that Wikipedia removed the posting in a timely manner once it had actual knowledge of the complaint.

New Zealand Supreme Court Rules Public Interest Trumps Privacy in Video Confession Case

In an important decision, the Supreme Court of New Zealand ruled that public interest in the administration of justice trumped privacy rights in a case involving the broadcast of a suppressed murder confession. *Rogers v. Television New Zealand Limited* (SC 68/2006) [2007] NZSC 91.

In a 3-2 decision, the Court affirmed a decision allowing Television New Zealand (TVNZ) to broadcast a police videotape of a confession that had been suppressed at trial. The underlying facts were compelling. In 1994, a woman was brutally murdered. In 1995, Lawrence Lloyd was found guilty of manslaughter and spent seven years in prison. That conviction was later set aside based on evidence that Lloyd's nephew, Noel Rogers, committed the crime.

Rogers was charged with the murder and appeared to confess to the crime in a videotaped statement where he described in detail how he cut the victims throat "like a sheep." That confession was later ruled inadmissible and Rogers was found not guilty by a jury. The police gave a copy of the videotape to TVNZ. Rogers filed suit against TVNZ to enjoin it from broadcasting the tape arguing that it would violate his right to privacy.

Although the majority decision expressed some criticism of the police for releasing the video, it found that

had no relevance to whether the tape could be broadcast. Instead, the public interest in the open administration of justice outweighed any claimed privacy interest. "Any public perception that the courts are adopting a defensive attitude by limiting or preventing access to court records would tend to undermine confidence in the judicial system," the court stated. Moreover, the majority rejected the argument that the media could "misuse" the tape.

"Concerns were also expressed that TVNZ might wish to present the video or selected aspects of it in a sensationalist rather than a dispassionate and balanced way. That argument invites the Court both to speculate and to enter into the murky waters of presentational censorship and editorial control. I would decline the invitation. ... Matters of presentational and editorial judgment should be left where they belong. If it transpires that there are concerns about how the videotape has been used, they can be addressed by recognised causes of action or by reference to the Broadcasting Standards Authority."

TVNZ was represented by William Akel, of Simpson Grier-son in Auckland.

MLRC's Projects and Finances Reviewed at 2007 Annual Meeting

MLRC's annual meeting was held on November 7, 2007 at the Hyatt Hotel in New York. The meeting was called to order by Ralph Huber, Chairman of the MLRC Board of Directors. Ralph welcomed everyone to the meeting.

Elections

Ralph explained that the Board now consists of eleven members. Formerly it consisted of nine members, but last year, the bylaws were amended to increase the number of directors in total to eleven, and to provide that one of the eleven voting directors was to be the president of the Defense Counsel Section.

Due to the staggered terms of the directors, five current directors were up for reelection: Henry S. Hoberman of ABC, Inc.; Marc Lawrence-Apfelbaum of Time Warner Cable Inc.; Stephen Fuzesi, Jr. of Newsweek, Inc.; Kenneth A. Richieri of The New York Times Company; and Kurt Wimmer of Gannett Company, Inc.

Ralph made a motion to approve the reelection of the directors. Dale Cohen seconded the motion. All present voted in favor and Sandy Baron, Executive Director of MLRC, voted the 34 proxies (which had been retained and were brought to the meeting) in favor.

After their reelection, Ralph congratulated the Board of Directors. Ralph then announced the other directors of the Board: Dale Cohen of Cox Enterprises, Inc.; Ralph P. Huber, Chairman, of Advance Publications, Inc.; Karole Morgan-Prager of The McClatchy Company; Elisa Rivlin of Simon & Schuster; and Susan E. Weiner of NBC Universal, Inc. Ralph then praised the Board for its work.

Financial Report

Ralph introduced Kenneth Richieri to provide the financial report. Ken began by explaining that MLRC operates on a calendar fiscal year and that as a result, the financial report for the twelve months ended August 31, 2007, was not particularly meaningful in terms of evaluating the fiscal year's performance of MLRC. New York law, however, requires that the company provide a financial report to its membership that covers a twelve month period ending within six months of the Annual Meeting, hence the August 31st date.

He next reported that as of August 31, 2007, MLRC has net assets of almost \$1.4 million, which is more than \$150,000 ahead of the net assets on August 31, 2006, when it

was \$1.26 million. Ken reported that the organization is very stable financially, as evidenced by its ability to grow net assets during a twelve month period in which it had one time expenses related to moving offices. Those expenses that have increased over the prior year are primarily attributable to additional staff hired with the approval of the Board, and the Board has been urging Sandy to consider how best to use the resources available to the organization to expand MLRC's reach and projects.

Ralph then reported that additional members had been brought in in the past year. Sandy added that in order to bring in more new members, it is most effective when current members themselves spread the word about the organization. She also noted that the value of the organization is evident in that when lawyers move firms or companies, they encourage their new entities to join MLRC.

Executive Director's Report

Ralph next introduced Sandy's Executive Director's report. Sandy began her report by encouraging anyone with an idea for a project, whether for an article or a conference, to let MLRC know. She next thanked the directors for their work throughout the year. Sandy reported first about the London Conference on International Media Law. This conference included 200 delegates from all over the world. Sandy reported that the reception at the Tower of London was one of the most spectacular MLRC has ever had, and thanked Hiscox Media for hosting it. She also thanked the planning committee for their work on the conference and then asked MLRC Staff Attorney David Heller to provide a report of the conference.

David began his report by thanking everyone on the Board who contributed to the conference and commented that it was great to have people from all over the world attending. David highlighted a new session at the conference on Asian Media Law and reported that MLRC will be keeping in contact with the lawyers to learn more about their issues. He then reported on the series of articles that were written in connection with the conference and included topics such as privacy law developments and publishing in Ireland. David reported on various sessions held at the conference, such as a session on privacy law, one on digital media issues and an in-house counsel breakfast. The London 2009 conference will be held on October 1 and 2, 2009 and will be on a Thursday and Friday instead of a Monday and Tuesday due to Yom Kippur.

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MLRC's Projects and Finances Reviewed at 2007 Annual Meeting

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Sandy next reported on the upcoming Conference held at and with Southwestern Law School in Los Angeles, which is now an annual event in the last week in January. Last year's conference focused on the legal challenges of integrating traditional media and entertainment in a digital environment. This year's conference theme will be "Avoiding Digital Fault Lines" and is to be held on January 31, 2008 in Los Angeles. Everyone is encouraged to attend.

Sandy then reported on the California Chapter, which brings together MLRC members, both in-house and outside counsel, who represent the various media in California. The Chapter would like to start video conferencing with non-Los Angeles members. Sandy reported that the MLRC members in Northern California have proposed that MLRC consider a set of sessions in the Bay Area that would bring together MLRC's traditional members with those who are engaged primarily, if not exclusively, in digital publishing. She is working with a small task force in analyzing whether, and if so, how, to create such a set of sessions in 2008.

Sandy next discussed upcoming meetings on 'Managing the Materials.' These meetings – two of which have been held in New York largely with in-house counsel and two in Washington – have focus on all the documents that companies produce and store electronically, such as emails, correspondences, telephone records, etc. and those that reflect the business operations of media companies, but are held by third parties. Sandy reported that the meetings address how to locate and manage these documents, document retention policies and related issues. She reported that a third round of these sessions should be held in December and that there will be a mini-version of it at the California Chapter in December.

Sandy reported on the Task Force on Credentialing. This is going to move forward and will focus on the legal issues that are relevant to credentials ranging from high school sports to professional sports and other event coverage.

She also discussed the Model Shield Law Project, which was organized before the federal shield law was introduced. The Model Shield Law, and the legal research that was done in connection with that project, has been used by those working on adoption of shield laws in nine states. A Task Force, which started with the Model Shield Law, has also been reviewing the proposed federal bills and their various modifications.

Sandy thanked MLRC Staff Attorney Maherin Gangat for her help on all of the shield law matters. Sandy reported

that the coalition building used in the shield law project was also useful in fighting right of publicity bills, for example in Connecticut, where the coalition had to battle Paul Newman and New York, where it is being spearheaded by the Marilyn Monroe estate. Although the Motion Picture Association of America keeps tabs on right of publicity bills, members should let MLRC know of any bills percolating in their area.

Sandy thanked the Newsgathering Committee for their great work on producing comments to the Department of Justice's proposal that plea agreements be removed from the PACER system. She thanked Steve Zansberg, his colleague Michael Berry, Bruce Rosen and his colleague, former MLRC Fellow Katie Hirce, for producing comments to the DOJ proposal so quickly.

Sandy then urged everyone to consider joining the ALI, and then the MLRC ALI Task Force. The ALI will be working on a Restatement (Third) of Torts on Privacy soon.

Sandy concluded her report by thanking everyone and expressing that she looks forward to working with everyone next year. Ralph thanked Sandy for being able to mobilize coalitions so quickly to respond to issues and also thanked her for the different programs that MLRC hosts.

Defense Counsel Section Report

DCS President Peter Canfield began his report by inviting everyone to the DCS Breakfast on Friday, November 9, 2007. He reported that membership in DCS is strong, both in terms of numbers and their contributions to MLRC projects and materials, which have been strong in the past year. Peter reported that new committee chairs will be coming on this year and that the Executive Committee will be Dean Ringel as President, Kelli L. Sager as Vice President and Robert D. Nelson as Secretary.

MLRC Institute

Ralph next called for a report on the MLRC Institute. Sandy explained that the MLRC Institute, a 501(c)(3) sister organization to the MLRC, and is engaged in developing First Amendment educational projects for the public. This year, with a grant from the McCormick Tribune Foundation, the Institute was able to hire a Fellow. The Institute has been working on the Speaker's Bureau, which sends a lawyer and a news person into venues across the country to speak on the reporter's privilege. The next topic will cover issues related to publishing online. Sandy explained that the Speaker's Bureau is meant to be grassroots and held in small venues.

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MLRC's Projects and Finances Reviewed at 2007 Annual Meeting

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New Business

Before calling for any new business, Ralph took a few minutes to speak about the roots of the MLRC as the Libel Defense Resource Center and how important the organization is. Ralph

explained that the MLRC is an important voice for most major issues that effect the media and that it is on a national, and increasingly international, level. He then thanked Sandy for her work. Sandy announced the planning board meeting for next September's NAA/NAB/MLRC Conference on Thursday, November 8, 2007. Ralph then called for new business and there being no new business, the meeting was adjourned.

Defense Counsel Section Reviews Projects and Goals at Annual Meeting

Dean Ringel Incoming DCS President; Nathan Siegel Joins as Treasurer

The Defense Counsel Section's annual meeting was held on November 9, 2007 at the offices of Proskauer Rose LLP in New York. DCS Executive Committee President Peter Canfield called the annual meeting to order, welcomed everyone to the breakfast and thanked them for attending.

Peter commented that the DCS is one of the most active bars that he has ever been in and that it is a hallmark of the MLRC organization. He expressed appreciation for the great participation by the committees and thanked everyone for their work throughout the years, while encouraging others to get involved.

Peter then mentioned the new business item to be voted on at the end of the meeting: when to hold the annual meeting of the DCS next year. He announced the choices, all of them in and around the MLRC dinner, as Thursday or Friday morning at 7 AM, Thursday at lunch, or Wednesday at lunch.

President's Report & Election of Treasurer

The first order of business was the succession of the DCS Executive Committee. The 2008 Executive Committee will be: Dean Ringel, President; Kelli L. Sager, Vice President; and Robert D. Nelson, Secretary. Next Peter reported that the executive committee had nominated for Treasurer Nathan Siegel of Levine Sullivan Koch & Schulz. No other nominees for the membership had been received and by a voice vote, Nathan was approved as Treasurer. Peter then thanked Sandra Baron, Executive Director of the MLRC, and the MLRC staff.

Executive Director's Report

Sandy began her report by thanking the current emeritus James Stewart, who is rotating off of the Executive Committee, for his work. She praised his six years of active participation and thanked him for his work on the **PANIC BOOK**. Sandy then turned to Dean to thank Peter for his work as President. The DCS thanked Peter for his service and Sandy announced that Peter will serve as Emeritus.

Conferences & Programs

Sandy began her report with the London Conference, held in September. She introduced David Heller of the MLRC to provide an overview of the conference. David reported that it was the largest international conference to date, with about 200 delegates from a diverse group of nations. He highlighted a new session at this year's conference on Asian media law and expressed hope that it grows in the future. He next discussed the series of articles that were published as a Bulletin for the conference, which included an article on privacy law developments in Europe. David reported that the conference was a success due to active participation and MLRC will be back in London in 2009.

Sandy reported that the next MLRC conference, "Avoiding the Digital Faultline," at Southwestern Law School in Los Angeles, will concern contracts, union and guild agreements, and user generated content on the internet. She mentioned the California Chapter, also held at Southwestern Law School, which brings together California lawyers in media practice. She urged anyone interested in participating to contact

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Defense Counsel Section Reviews Projects and Goals at Annual Meeting

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MLRC and she thanked David Kohler of the Donald E. Biederman Entertainment and Media Law Institute, and Tamara Moore, Administrator, for all that they do in connection with the conference at Southwestern and the California Chapter.

Sandy thanked the New Legal Developments Committee for their help with choosing this year's Pre-Dinner Forum topic. Anyone with a suggestion for a forum topic for next year was also encouraged to contact MLRC. She also mentioned other sessions held by MLRC, including an upcoming session on "Managing the Materials." This session addresses how to deal with the huge amounts of materials being created both inside an organization and by third parties. A session will be held at the next California Chapter meeting in December and Sandy is looking to hold the conference in other parts of the country where there is interest.

Sandy next addressed the current shield law efforts by the MLRC, headed by MLRC staff attorney Maherin Gangat. The Model Shield Law Task Force, a small team set up by the large membership group involved with the shield law, has not only developed a Model Shield Law, but has also provided advice and research on the current proposed federal shield law.

Sandy then addressed the proposed right of publicity statute in Connecticut. MLRC created a coalition that helped to defeat the bill, and is acting in similar way to defeat a proposed bill in New York state. She warned the members to keep an eye out for these types of bills and encouraged all to let MLRC know of any pending bills.

Sandy encouraged everyone to continue looking for cases (including non-media) and legislation in their states and to let MLRC know of any amicus efforts members are engaged in and to continue sending briefs and ideas for the *Media-LawLetter*. She then introduced the MLRC staff and thanked them and the entire DCS.

Committee Reports

Peter then asked for the reports from the committees.

Advertising & Commercial Speech Committee

Nancy Felsten reported that the committee is looking to discuss the intersection of advertising and the First Amendment. She reported that the committee is currently editing articles on the new prescription drug ad rules, regulation of what

children have access to, commercial speech: confusion in the court, and gorilla and buzz marketing. The committee believes these articles will be published in the next two months.

ALI Task Force Committee

Tom Leatherbury first explained that the committee gets involved in any ALI project that relates to the First Amendment. He reported that the focus of the Task Force was on language in two ALI projects – one on enforcement of foreign judgments and two, on international intellectual property. The Task Force members had been concerned that gains made in decisions in American courts with respect to enforcement of international judgments not be undone by ALI reporters. This project has been a success. The committee is currently waiting for the ALI to go public with its drafting of the Restatement of Torts (Third) on privacy. Finally, all were encouraged to join ALI.

Conference & Education Committee

Mary Ellen Roy reported that the planning board meeting on Thursday, November 8, went well and that the committee is open to ideas and volunteers. Mary Ellen noted that the Virginia Conference will be held in a new location next year, near Dulles International Airport in Chantilly, VA.

Employment Law Committee

John Henegan reported that the committee is working with MLRC staff attorney Eric Robinson on two papers on independent contractor issues and on the accommodation of religion in the workplace. John also noted that the committee had produced "A Basic Guide to Employment Defamation and Privacy Law," written from the business prospective, counseling employees on defamation and privacy issues. It was designed to be given to non-lawyers who deal with employment matters. The booklet is available on the MLRC website for download, or it can be purchased from MLRC for \$3.00 per copy.

Entertainment Law Committee

Kate Bolger reported that the committee holds teleconferences every 6-7 weeks with about 12-16 participants who handle entertainment, as well as media law matters. She also

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Defense Counsel Section Reviews Projects and Goals at Annual Meeting

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reported that many members are writing for the *MediaLawLetter* and that Laurie Michelson is putting together an article comparing copyright infringement tests by the circuits.

Ethics Committee

Bob Bernius reported that the committee has been publishing regular articles in the *MediaLawLetter* and working on future articles.

International Media Law Committee

David McCraw reported that many committee members were involved in the London Conference with great success. David reported that the committee is working with Eric Robinson to archive the international section of the *MediaLawDaily* on the webpage. Currently the committee is working on a list serv that will enable committee members to help each other and is considering the development of blogs by the subcommittees for each region of the world.

Internet Law Committee

Mark Sableman explained that in the past, the main activity of the committee had been to put together a compendium of substantial articles for the biennial NAA/NAB/MLRC Conference. This year, the committee is going to try to produce more articles throughout the year on practical issues, such as the impact of the *Roomates* case, user generated content, archiving, and the use of photographs.

Legislative Affairs Committee

Laurie Babinski spoke for the committee, noting that it will continue to do *MediaLawLetter* articles on state and federal issues and update the website with key legislative developments. She reported that the committee needs additional help in reporting on state issues. The committee is interested in doing a White Paper and is in the process of choosing a topic, possibly the right of publicity. Anyone who would like to contribute to the paper, or has an idea for a topic, should contact the committee chairs. The committee also has a conference call coming up.

MediaLawLetter Committee

David Tomlin reported that the Committee has been talking with MLRC about how to make the newsletter more effective in a digital environment. The various ideas discussed, however, will likely have to await an update of the software on the MLRC website. Two projects that have been discussed, however, are (1) making it possible to select individual articles from the *MediaLawLetter* to print; and (2) improving upon the searchability of the archives. David thanked David Heller for his work on the *MediaLawLetter*.

Membership Committee

Guylyn Cummins reported that the committee is focusing on California and will continue its focus there. Sandy added that James Chadwick organized a gathering of Northern California members and from that gathering came a proposal to bring together digital publishers with the traditional MLRC membership in a set of substantive sessions, possibly as early as next spring.

Model Shield Law Task Force

Nathan Siegel reported that the task force has been helping with the proposed federal shield law. He thanked Sandy and MLRC staff attorney Maherin Gangat and the MLRC for their assistance. The Task Force has been responding to amendments and changes with research on the substance and with suggestions for alternative language.

New Legal Developments

Laura Handman reported that the committee has membership from all regions of the country and has, as its goal, to spot trends and developments. These developments are intended to be the basis for MLRC Bulletins, articles, the Pre-Dinner Forum and conference topics. She noted that the committee has discussed such topics as waivers in the subpoena context, confidential sources in defamation cases, defenses to privacy acts, aiding and abetting and whether courts can review the classification of judicial records.

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Defense Counsel Section Reviews Projects and Goals at Annual Meeting

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Newsgathering Committee

Steve Zansberg began by explaining that the committee has a broad mandate, ranging from the reporter's privilege to access issues. The committee has published a compendium of state whistleblower statutes and discussion points on the use of confidential sources. With the help of Bruce Rosen and others, the committee prepared the public comments filed by MLRC on the proposal submitted by the Department of Justice and pending before The Administrative Office of the United States Courts to remove plea agreements from the PACER system. Steve also reported that a model brief on newsgathering claims is coming out soon and will include sections on how to defend against intrusion, misrepresentation and wiretap claims. The committee is also producing an updated insert for the **PANIC BOOK** on the closure of civil trials for trade secrets and other types of confidential information. In 2008, the **PANIC BOOK** will be updated. Finally, the committee is also looking into how to assert the reporter's privilege when there's no shield law.

At this point, Sandy thanked Steve Zansberg, his colleague Michael Berry, Bruce Rosen and his colleague, former MLRC Fellow, Katie Hirce for their efforts in producing the MLRC comments.

Pre-Publication/Pre-Broadcast Committee

Sam Fifer encouraged everyone to share any type of checklist they may have to handle pre-publication matters. He reported that the committee is working on an interactive educational model for the public and holds regular conference calls.

Pre-Trial Committee

John Borger reported that the committee is close to finishing a paper with a broad overview of the reporter's privilege and it should be published within the next few weeks. The committee is looking for suggestions for next year.

Trial Committee

Michael Sullivan highlighted upcoming projects, which include topics such as voir dire, jury questionnaires, expert witnesses and *Daubert* motions, opening statements (to

compliment a previous closing statement project), jury instructions, and special verdict forms. The committee is also updating the Model Jury Instruction Manual with new materials (it was last updated in 2000). Lastly, reach out if you are aware of a case tried in your neighborhood that may be of value to the committee.

Report of the California Chapter

Kelli Sager gave the report of the California Chapter. There are quarterly meetings at Southwestern Law School with conference calls to include northern California members. The last meeting had a program by Tom Burke of Davis Wright Tremaine on Section 230 and the *Roommates.com* case.

Report on the MLRC Institute

Maherin Gangat began her report on the Institute by first thanking everyone who has participated in Institute programs. The current Institute "speakers bureau" program is underwritten by a grant from the McCormick Tribune Foundation and its purpose is to educate the public on the First Amendment. The initial "speakers bureau" topic – for which the Institute prepares and provides background materials, handouts, and a powerpoint presentation – was on the reporter's privilege. The Institute is in the process of expanding to include presentational materials on publishing online. Entitled "Online News: Redefining Journalism", this topic will explore the changing concept of news and publishing online. Maherin thanked MLRC Institute Fellow John Haley for his assistance. If anyone would like to speak or knows of a venue for a speech, please contact Maherin.

New Business

Peter conducted an informal poll on changing the breakfast time. The results were evenly divided. Peter then thanked Ralph Huber, the President of the MLRC Board of Directors, for attending the meeting.

Ralph thanked the DCS for its enormous contributions to MLRC and noted that 2007 was the first year in which the DCS president served as a full voting member of the MLRC Board. Peter then concluded by thanking everyone for attending, and thanked Sandy, the MLRC staff, and Chuck Sims of Proskauer for hosting the meeting. There being no other new business, the meeting was adjourned.

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Ethics Corner: Ethical Considerations of Internet Advertising and Networking

By Patricia Foster

An attorney is still an attorney, even online. This guiding principle should assist attorneys in their on-line activity to ensure that they do not stray outside of ethical boundaries.

The World Wide Web gained a public face in the 1990s and gave individuals and organizations the power to publish their messages to a vast audience. Early web pages were passive and relatively primitive, involving only one-way communication. Internet communication became more interactive with the advent of “web logs” or blogs, like easily-updated diaries that can include comments from the world at large.

Network sites like Facebook, MySpace, and LinkedIn expand the reach of an individual web page geometrically. These sites collect single web pages and “network” them rather than simply “host” them. The result creates a “social network” where people can be introduced, commune, communicate, and interact.

Additionally, instant messaging sites provide an online venue for one-on-one instant conversations. Real time communications also occur in cyberspace in chat-rooms that link a few or many individuals to share thoughts, information and ideas. Email has become a favored format for instant correspondence, virtually replacing pen and paper for quick, informal missives. Perhaps more than any other medium, the internet has become regarded as a casual venue for the exchange of information and ideas. Because electronic data can be readily shared, forwarded, stored, and supplemented, the ultimate message, in some sense, may be hard to control.

In sum, the burgeoning online medium provides an informal, readily accessible forum for advertising, soliciting business, and communicating. Ethical rules for attorneys limit how they may advertise, solicit business and communicate. Therein lies the tension.

Model Rule 7.1

ABA Model Rule on Professional Conduct 7.1 involves communications concerning a lawyer’s services and states,

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

ABA Model Rule of Professional Conduct 7.3 prohibits attorneys from certain direct contact to solicit prospective clients, be it by in-person, live telephone or real-time electronic means. With some exceptions, the determination for when such contact constitutes impermissible solicitation is whether the attorney is significantly motivated by pecuniary gain. The rule further requires the phrase “Advertising Material” to be included in almost every electronic communication from a lawyer seeking to represent a prospective client known to be in need of legal services in a particular matter.

Lawyers may run afoul of the ethical rules if caught up in the casual, instantaneous, somewhat impersonal give-and-take of electronic communication

ABA Model Rule of Professional Conduct 7.2 permits attorneys to advertise their services within the confines of Rules 7.1 and 7.3. However, any such advertisement must

include the name and office address of at least one lawyer or law firm responsible for its content.

The American Bar Association’s Model Rules of Professional Conduct have been adopted in some fashion by almost every state. However, states have supplemented or modified the model rules pertaining to advertising and solicitation, resulting in a diverse array of state rules. It is widely accepted that, even where the rules do not directly address electronic communication, the existing rules apply to information exchanged on the internet.

State Ethics Opinions

Some ethics opinions have focused on the role of the internet. For example, Missouri has expressly stated that lawyers’ websites are advertisements that must include requisite disclaimers. Mo Informal Ethics Opinion 2006-0005.

In North Carolina, it is permissible for a law firm to operate a virtual practice over the internet without face-to-face contact, but, the firm’s website promoting its services must comply with the rule requiring the identification of a physical address. N.C. State Bar Ethics Opinion 2005-10 (1/20/06).

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Ethics Corner: Considerations of Internet Advertising and Networking

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In Washington, a law firm is required to treat information received in response to an inquiry or solicitation on its website as confidential. Wash. Informal Ethics Opinion 2106 (2006). However, a website containing general information about a law firm is not considered a solicitation. *Id.*

Similarly, California has applied the ethical rules governing advertising to attorneys' websites but determined that they are not solicitations. State Bar of Cal. Ethics Opinion 2001-155. California has also found that although an attorney's participation in a

chat room with mass disaster victims was not a direct solicitation it was intrusive as barred by California's ethical rules. State Bar of Cal. Ethics Opinion 2004-166.

Conversely, the Philadelphia Bar Association has found that solicitation in an internet chat room, although not in-person or telephonic, was a direct solicitation prohibited by Rule 7.3. Philadelphia Bar Association Ethics Opinion 2004-5 (10/04).

As different jurisdictions review the use of different types of internet communication, expect different results. The form of online interaction may determine whether the rules governing advertising or solicitation will be applied. A posting on a firm's website could be treated as advertising, while that same message sent to members of a chat room may qualify as solicitation. Not only will results vary with the type of conduct, they will almost certainly vary by jurisdiction as each state determines boundaries of ethical behavior in the context of different rules.

As demonstrated, lawyers may run afoul of the ethical rules if caught up in the casual, instantaneous, somewhat impersonal give-and-take of electronic communication. There is little doubt that webpages intended to promote a legal practice are advertisements. The desire to publish enticing and up-to-date information on a professional website or blog must be tempered with ethical considerations regarding advertising. Ensure that the entire message is truthful and not misleading and contains all necessary disclaimers.

Networking Sites

There is less certainty as to when internet networking should be considered advertising or direct solicitation. Reportedly, hundreds of thousands of attorneys are member of LinkedIn, the social and professional networking site with more than 14 million members. To some attorneys, internet networking involves purely an extension of personal interaction

intended to develop and build relationships. To others, networking might be more directly intended to generate business from specific individuals. The applicability of the ethical rules prohibiting direct solicitation kick in somewhere on that spectrum, and attorneys would be well advised to keep their networking from crossing the line.

To avoid inadvertent conflicts, attorneys must avoid inadvertent professional relationships that might develop in chat rooms or on blogs. Attorneys must ensure that their online profiles and postings steer clear of forming the perception of an attorney-client bond.

The advent and popularity of cyberspace communication have opened new frontiers that involve legal ethical considerations. Attorneys would be well advised to remember that real ethical rules apply, even in a virtual medium.

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