

# MULRC Media Law Resource Center

## MEDIA LAW LETTER

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## MLRC's Annual Dinner November 12, 2008

### *Panel Discusses The Presidency and the Press*

On November 12, 2008, over 600 MLRC members and friends gathered at the Grand Hyatt Hotel in New York City for MLRC's Annual Dinner. Coming just one week after the presidential election, the dinner program featured a very timely discussion on the Presidency and the Press. Panelists Michael Beschloss, David Gergen, Joe Lockhart, and moderator Martha Raddatz, discussed the issue in light of the recent campaign and also from a historical perspective.

MLRC Chair Ralph Huber introduced the program with the following remarks: *It wasn't so long ago that what the public learned about our presidents and their administrations was largely based on the interplay between the national press corps and the president or his press secretary. New technology certainly has changed that equation. On the one hand, technology has turned us all into citizen journalists, and made it possible to report on statements and other activities which are not necessarily meant for widespread public consumption, and which now end up on a vast array of sites, such as YouTube.*

*We all recall the stir created by Candidate Obama's remarks last April, recorded at a San Francisco fundraiser, where he described people from small town Pennsylvania as being bitter and clinging to guns and religion. Will this phenomenon cause our President to become more guarded or isolated? Or on the other hand, to what extent will the Obama Administration use new journalism to bypass the establishment media in the way his campaign succeeded in using new media to reach the public in their fundraising and get out the vote efforts.*

*His team has already rolled out a website, change.gov, which will allow the President-Elect to communicate directly with 300 million Americans without the filter or interpretation of the press. We've invited key figures, insiders from past administrations, as well as astute outside observers, to talk about the evolving relationship between the presidency and the press.*



Left to right: Michael Beschloss, David Gergen, Martha Raddatz and Joe Lockhart

**Michael Beschloss:** *A lot of people in the media, and even those of us who are not, are going to talk an awful lot about President Obama's first 100 days, and it's an interesting measure, but in history it really doesn't have too much bearing on the way that a president looks, either to his own generation or to later historians. So I would say, read it, listen to it, but take it with a little bit of a grain of salt.*

*Video of the Dinner now available. [Click here](#)*

**MLRC's Annual Dinner November 12, 2008**



**Joe Lockhart**

*(Continued from page 3)*

**Joe Lockhart:** *Barack Obama was clearly the most compelling story in this cycle, and maybe even in a generation, and without a long record or history, did not get the scrutiny that some others did. But again, I don't think it was because the press all got together and decided we're going to give him a free ride.*

**Martha Raddatz:** *And do you think the press has a responsibility then to say somehow we've got to be fairer? That he may be a compelling story, but we still have to approach this campaign in a different way?* **Joe Lockhart:** *Well, you know, far be it from me to tell the press what their responsibility is. I tried that. It didn't work.*

**Martha Raddatz:** *Is there anything that McCain could've done better, David?* **David Gergen:** *Yeah. Run a good campaign.... At the end of the day, I certainly do not believe that John McCain lost the election or that Barack Obama won the election, because of the tone and tenor of the press coverage.*



**Martha Raddatz**



**Michael Beschloss and David Gergen**

**David Gergen:** *The press corps plays an invaluable role, and holding people accountable, and I can tell you from having worked inside, it makes everybody else inside stay on their toes, because they realize they have to answer questions. And if you shut the press out, you get very sloppy and lazy in your policymaking. It's when you have to answer questions that you really are in fact are more responsive, in a variety of ways, and you act in a more responsible fashion.*

**Michael Beschloss:** *Blogs are wonderful, and bloggers, and I read them, and I'm addicted to a lot of them, but you know, take my example about Nixon and Agnew in 1968. I don't think a blogger, if they had existed then, would have had the motivation or the resources to find out that Spiro Agnew was on the take, and that person probably could not have gotten their call returned to do the kind of digging that Martha Raddatz does ....*



**Michael Beschloss**



## A Tribute to Cam Devore



At the Annual Dinner MLRC Chair Ralph Huber marked the passing of Cam Devore with the following words.

As I'm sure most of us know, the First Amendment community lost one of its dearest and most respected advocates when Cam DeVore passed away suddenly two weeks ago. So let me draw your attention to the supplement to your program, which is a wonderful tribute from two of Cam's longtime colleagues, Victor Kovner and Bruce Johnson. Cam was clearly one of the media bar's finest minds.

His contributions to the body of First Amendment law are significant, but Cam was so much more than the sum of his extraordinary accomplishments in the development of law. He also had such a wealth of energy and sparkle, with a Western smile and sensibility. He was a genuine leader, that rare man whose achievements are great, but whose ability to bring us all along with him was even greater. He mentored countless lawyers in the media bar, many of whom are in the room here tonight, and we will all miss him.

## Expletive Deleted: High Court Considers FCC Indecency Rules

By Jerianne Timmerman

On election day, the Supreme Court heard oral argument in a case examining the Federal Communications Commission's rules restricting "indecent" material on broadcast television and radio. *FCC v. Fox Television Stations, Inc.*, No. 07-582 (argued Nov. 4, 2008).

As everyone is aware, the past few years have seen a significant crackdown on allegedly indecent broadcast programming, including programming containing expletives. The FCC's recent, stricter indecency enforcement policies – including finding the use of even fleeting expletives actionably indecent – have raised a myriad of administrative law and constitutional questions.

Given the focus of the oral argument, the Court appears unlikely to resolve in the *Fox* case the fundamental constitutional issues implicated by the FCC's indecency regulatory regime.

### *FCC's About-Face on Fleeting Expletives*

Federal law prohibits the broadcast of "obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464. Thirty years ago, the Supreme Court, by a slim 5-4 majority, upheld the differential treatment of indecency in the broadcast media in comparison to all other electronic and print media. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court based its decision on the supposed unique pervasiveness and accessibility (especially to children) of the broadcast media. However, the *Pacifica* Court stressed the narrowness of its decision and specifically stated that it was *not* ruling that an occasional expletive would justify any sanctions against broadcasters.

Consistent with *Pacifica*, the FCC for decades adhered to the position that fleeting expletives were not actionable under its indecency rules. However, in 2004 the FCC reversed course, concluding that even the fleeting use of certain expletives was actionably indecent and profane. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 19 FCC Rcd 4975 (2004) (use of the phrase "fucking brilliant" by the singer Bono during a live broadcast).

The FCC applied its new policy on fleeting expletives in a number of subsequent cases, including two broadcasts on the Fox network of the Billboard Music Awards. In those two cases, the FCC found that the fleeting use of "fuck" and "shit" in live programming was indecent and profane. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2690-95 (2006). Fox appealed this order to the Second Circuit Court of Appeals.

### *Appeals Court Reverses FCC*

In June 2007, the Second Circuit overturned the FCC's new indecency policy on the use of fleeting expletives. In a 2-1 decision, the appeals court found that the FCC had made a 180-degree turn regarding its treatment of fleeting expletives without providing a reasoned explanation justifying the about-face. Thus, the court concluded that the agency's fleeting expletive policy was arbitrary and capricious and invalid under federal administrative law.

The court refrained from deciding the constitutional challenges raised by broadcasters. However, the court engaged in a lengthy discussion of the constitutional issues raised by the FCC's indecency regulations, which had been fully briefed. The court strongly indicated its skepticism about the constitutionality of the fleeting expletive policy and, more broadly, about the FCC's current indecency regulatory regime.

### *Broadcasters' Arguments before Supreme Court*

In its petition for certiorari, the FCC specifically dwelled on the Second Circuit's *dicta* as to the constitutionality of the fleeting expletive policy and the agency's broader authority to regulate indecency. But having sought Supreme Court review on the basis of these constitutional issues, the FCC in its brief asked the Court to essentially ignore the First Amendment and focus narrowly on whether the agency gave a reasoned explanation for its fleeting expletives policy.

The broadcast networks argued both that FCC had failed to give a reasoned explanation for its change in policy and that the policy itself violates the First Amendment. Numer-

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## Expletive Deleted: High Court Considers FCC Indecency Rules

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ous *amici* supported the network parties, including commercial and noncommercial broadcasters, former FCC Commissioners and officials, state broadcaster associations, members of the creative community and various free speech advocacy groups. Other advocacy groups, including the Parents Television Council and Morality in Media, the National Religious Broadcasters, and some members of the U.S. House of Representatives, filed amicus briefs supporting the FCC.

While the broadcast networks focused on the constitutional and administrative law aspects of the case, the National Association of Broadcasters and the Radio-Television News Directors Association filed an amicus brief stressing the practical effects on broadcasters of the FCC's indecency enforcement policies. NAB pointed out that the FCC's recent indecency decisions have been inconsistent and appear to be based on the agency's subjective view of the value of the program content. For example, the FCC found that an unedited broadcast of the Steven Spielberg film "Saving Private Ryan" containing repeated expletives was not actionably indecent. In contrast, however, the agency found that the expletives in a Martin Scorsese documentary about blues music aired by a community college's noncommercial television station were actionably indecent.

NAB explained to the Court that the FCC's inconsistent and arbitrary application of its stricter expletive policy has had and will continue to have a chilling effect on broadcast content that is not indecent. Broadcasters are understandably concerned about the potential for very high indecency fines that could financially cripple local stations. This chilling effect has only been compounded by Congress' ten-fold increase in the maximum forfeiture allowable for violating the FCC's indecency rules – which in June 2007 went from \$32,500 to \$325,000 per violation.

NAB's brief included numerous instances – which were cited by counsel during oral argument – of broadcasters engaging in self-censorship and declining to air even non-indecent content due to the lack of clear guidance from the FCC. For example, in 2006 a Vermont public radio station forbade a legislative candidate from participating in a broadcast debate because he had previously referred to two students as "shits" and the station wanted to avoid potential exposure to a fine. It is precisely small, local broadcasters

such as these that can least afford fines or the cost of "delay" technologies to censor live programming.

Broadcasters have also been prejudiced by the manner in which the FCC has enforced its indecency policies. As discussed in detail in NAB's brief, the FCC has in some cases delayed issuing final decisions in indecency cases, thereby preventing judicial review. For instance, the FCC has failed to act on oppositions to the notice of apparent liability issued in March 2006 regarding the broadcast of the Scorsese documentary about the blues.

The FCC has also delayed the processing of stations' license renewal applications due to the existence of mere unproven indecency complaints against stations – a practice that greatly complicates the ability of owners to sell their licenses. The FCC has further required licensees to toll the statute of limitations on pending indecency complaints as a condition for license renewal and assignment. In the case of some license assignments, the FCC has even gone so far as to require an escrow of the potential forfeiture amount for the as yet adjudicated complaints.

To avoid adverse indecency determinations and massive fines, certain broadcasters have additionally agreed to settle indecency complaints in "voluntary" agreements that mandate substantial self-censorship, even when there is only a preliminary suggestion that indecent material may have been broadcast. For instance, as part of a 2004 consent decree, one broadcaster was required to take steps to discipline employees "materially participating" in the broadcasting of allegedly indecent content if it receives a preliminary indecency finding such as a notice of apparent liability.

Finally, NAB argued that the FCC's arbitrary and standardless application of its indecency rules runs contrary to core First Amendment principles. The Supreme Court has repeatedly held that government officials with the power to suppress speech must have their discretion limited by meaningful standards.

### ***Oral Argument Limited in Scope***

During oral argument on November 4, all of the Justices focused almost exclusively on the administrative law aspects of the *Fox* case. Constitutional considerations mainly arose as they related to the administrative law standard of review; that is, when a decision of an agency has such con-

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stitutional implications, should a higher or more stringent standard of review be applied or should the “normal” administrative law standards apply?

Chief Justice Roberts and Justice Scalia asked the most questions; they seemed particularly inclined to defer to the FCC and find that the agency had given an adequate explanation for its change in policy. Justice Kennedy – the Court’s most consistent First Amendment advocate – said very little throughout the argument.

### Outcome Likely Limited – At Least for Now

In light of the oral argument, the outcome in *Fox* will most likely be a narrow decision focused on administrative law issues. If the Court were to find that the FCC did supply a sufficient explanation for its reversal of policy regarding fleeting expletives, then the parties will probably find themselves back at the Second Circuit arguing about the constitutionality of the agency’s policy. Certainly one panel of the Second Circuit, as discussed above, has already indicated its opinion about the constitutionality of the FCC’s policy.

In any event, it seems likely that the constitutionality of the FCC’s fleeting expletive policy – or indeed its entire indecency regulatory regime – will be back before the Supreme Court in a case where those issues must be considered. If the Court declines to address the constitutional issues in the current *Fox* case, that case may well return in the

future following another detour to the Second Circuit. In addition, the government recently requested the Supreme Court to review the Third Circuit’s reversal of the FCC’s decision imposing liability on CBS for Janet Jackson’s Superbowl wardrobe malfunction.

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**Chief Justice Roberts and Justice Scalia asked the most questions; they seemed particularly inclined to defer to the FCC**

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Given that the FCC has also cracked down on sexually explicit images, as well as language, there are additional

indecency cases currently working their way through the courts. Briefs have been filed in ABC’s appeal to the Second Circuit of the FCC’s decision finding indecent an episode of *NYPD Blue* briefly showing a woman’s buttocks. The FCC is attempting to enforce indecency penalties against Fox in the federal district court for the District of Columbia for the airing of an episode of the reality show *Married by America*, which involved sexually suggestive content and pixilated nudity.

In sum, it appears likely that the fundamental First Amendment issues implicated by the FCC’s regulation of allegedly indecent programming on broadcast radio and television will be receiving substantial judicial attention in the near future.

*Jerianne Timmerman is Senior Vice President and Deputy General Counsel of the National Association of Broadcasters.*



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## Supreme Court To Hear Appeal in Campaign Law Case

### *Is Anti-Clinton Documentary Electioneering Communication or Core Political Speech?*

The Supreme Court this month indicated it will hear a case that raises the interesting question of whether a polemical political documentary can be regulated as an “electioneering communication” under the Bipartisan Campaign Reform Act of 2002 (BCRA). *Citizens United v. Federal Election Commission*, No. Civ. A.07-2240, 2008 WL 2788753 (D.D.C. Jul 18, 2008), *probable jurisdiction noted by 2008 WL 3849398* (U.S. Nov 14, 2008).

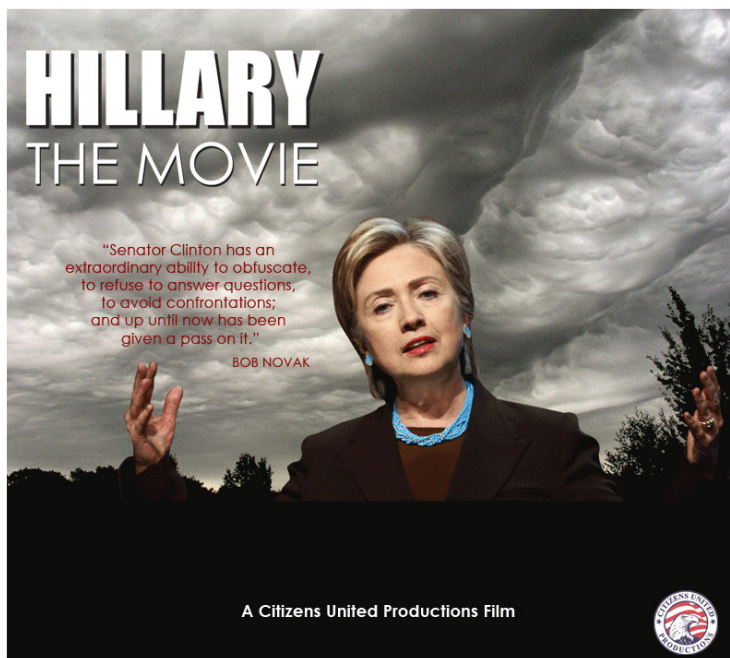
Citizens United, a conservative political advocacy group, and the producer of the documentary, had argued that the documentary was core political speech. A three-judge district court panel comprised of Judges Raymond Randolph, Royce Lamberth and Richard Roberts disagreed, finding the documentary to be “express advocacy” to vote against Hillary Clinton and therefore subject to BCRA’s campaign advertising regulations. *See* 530 F. Supp. 2d 274 (D.D.C. 2008) (denying motion for preliminary injunction), *appeal dismissed*, 128 S.Ct. 1732 (U.S. Mar 24, 2008).

#### **Background**

At issue is a political documentary entitled “Hillary: The Movie.” Citizens United describes the movie as follows: “If you want to hear about the Clinton scandals of the past and present, you have it here! Hillary The Movie is the first and last word in what the Clintons want America to forget!” The movie is sharply critical of Clinton and features commentary by more than 20 conservative journalists and commentators, including Dick Morris, Ann Coulter, Newt Gingrich, Tony Blankley, Dick Armey and Bay

Buchanan. Among other things, Clinton is described as “driven by power,” “steeped in sleaze,” “expert at not saying what she believes,” and “divisive.”

The movie was released in January 2008 when Hillary Clinton was the front runner for the Democratic Party’s presidential nomination. At the same time, Citizens United brought a declaratory judgment action alleging that BCRA was unconstitutional on its face and as applied to the extent it would treat the documentary as “electioneering communications,” subject to the law’s campaign advertising restrictions and financial disclosure requirements.



#### **District Court Ruling**

The three-judge district court panel first rejected Citizen United’s facial challenge to BCRA. The court noted that Citizen United was asking it to overrule the Supreme Court’s decision in *McConnell v. FEC*, 540 U.S. 93 (2003). “Only the Supreme Court may overrule its decisions,” the district court noted.

On the as applied challenge, the district held that the claim was subject to the test announced by the Supreme Court in last year’s decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007). In *Wisconsin Right to Life*, Chief Justice Roberts stated that a campaign advertisement could not be considered “express advocacy” under BCRA unless it “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”

After reviewing the movie and script in detail, the court concluded that the movie was “susceptible of no other in-

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## Supreme Court To Hear Appeal in Campaign Law Case

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terpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her. The Movie is thus the functional equivalent of express advocacy.” *Citizens United*, 530 F. Supp. 2d at 279-80.

BCRA provides for a direct appeal to the Supreme Court. Citizens United appealed the denial of the preliminary injunction. In March 2008, the Supreme Court denied the appeal “for want of jurisdiction,” presumably because it was a non-final order. In July 2008, the district court granted summary judgment to the Federal Election Commission and Citizens United renewed its appeal. On November 14, the Supreme Court noted probable jurisdiction to hear the appeal.

### Issues on Appeal

In its brief to the Supreme Court, Citizens United raises three questions for the Court:

- (1) Given the First Amendment's liberty and privacy guarantees and the government's authority to regulate elections, where is the line at which the government may compel disclosure as to independent communications touching on elections?
- (2) In determining whether a communication may only be “interpret[ed] ... as an appeal to vote for or against a specific candidate,” *WRTL II*, 127 S. Ct. at 2667, can a communication constitute this “appeal to vote” absent a clear plea for action that can only be understood as a call to vote for or against a candidate?
- (3) May a feature-length movie be regulated as a campaign “ad,” or is it different in kind and protected from regulation by the First Amendment?

As to the third issue, Citizens United’s brief argues:

Feature-length documentary movies are different in kind from “ads.” The FEC has not shown that movies pose the same dangers as the ads targeted by Congress in passing BCRA, which ads were subsequently relied upon by this Court in *McConnell*. The FEC argues that “the *McConnell* record included evidence of broadcast advocacy longer than the traditional 30 or 60-second spot, such as paid, 30-minute ‘infomercials.’ ” In fact, however, the district court pointed out that such infomercials had not been included in the studies upon which the court relied. *McConnell v. FEC*, 251 F. Supp. 2d 176, 305-06, 316-17 (D.D.C. 2003) (op. of Henderson, J.). Moreover, even a thirty-minute infomercial is different in kind from a feature-length film that has a compendium book, is shown in theaters, and is sold on DVD.

Unlike “ads,” movies are not imposed unawares on a captive audience that has chosen to watch a different program. Rather, movies must be selected by a willing viewer. And unlike the ads in *McConnell*, the FEC has not shown that movies were an “electioneering” problem giving rise to a Congressional remedy, 540 U.S. at 127 n. 20, a showing the FEC is required to make. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Feature-length movies were nowhere at issue in *McConnell*. Whether they are subject to regulation as “electioneering communications” remains a substantial question that this Court should decide.

*Citizens United is represented by James Bopp Jr. of Bopp, Coleson, and Bostrom in Terre Haute, Indiana.*

## Supreme Court Denies Certiorari Petitions in Media and Internet Cases

### *Damon v. Moore*

The Court declined to review the First Circuit's decision in *Damon v. Moore*, a libel case growing out of the movie "Fahrenheit 9/11." 520 F.3d 98 (1st Cir. Mar. 21, 2008), *cert. denied*, 129 S.Ct. 175 (U.S. Oct. 6, 2008). The First Circuit affirmed summary judgment dismissing a libel claim brought by an injured Iraq War veteran against filmmaker Michael Moore and the producers of his movie. Moore used a 16 second news interview clip in the movie with plaintiff speaking about the pain of his injuries. Plaintiff alleged this created the false impression that he endorsed the anti-war position of the movie.

The First Circuit disagreed. "Taking the documentary as a whole, no reasonable member of the military or veteran community could possibly view Damon's appearance in the documentary as being disloyal to the United States.... Damon makes no statements in opposition to the war effort, nor was his interview manipulated in such a way to imply that he was 'attacking the war aims of the United States.'"

The questions presented in plaintiff's petition were: (1) Can a court, when applying state defamation law, disregard the rights and responsibilities of active serviceman in the United States military during a time of war? (2) Did respondents' non-consensual use of active serviceman's name and image in anti-war, anti-commander in chief documentary that was nationally and internationally distributed contravene the rights and responsibilities under the Uniform Code of Military Justice and invade a realm of protection under state defamation law?

### *Steinbuch v. Hyperion Books*

The Court declined to review the Eighth Circuit's decision in *Steinbuch v. Hyperion Books*, a case involving claims for disclosure of private facts. See 518 F.3d 580 (8th Cir.), *cert. denied*, 129 S.Ct. 223 (U.S. Oct. 6, 2008). The Eighth Circuit affirmed dismissal of invasion of privacy claims against all but one defendant in a case over a fictional book allegedly based on the author's real life Capitol Hill sexual escapades. The author, Jessica Cutler gained notoriety writing about her relationships on the blog *Washingtonienne*, which was the basis for her fictional book of the same name. The plaintiff, a former Senate counsel, sued the book author, Hyperion, Disney, HBO and Time Warner for invasion of privacy and intentional infliction of emotional distress, alleging the

book revealed intimate details about him. The district court dismissed the suit for failure to state a claim and lack of jurisdiction over the defendants. The Eighth Circuit affirmed, except as to publisher Hyperion, finding that plaintiff was entitled to take discovery to try and establish general jurisdiction over it in Arkansas.

The questions presented in plaintiff's petition were: (1) Was petitioner denied his right to rely on Arkansas' long-arm jurisdiction statute ... based on Disney's self-serving affidavit denying all jurisdictional facts without being afforded any meaningful opportunity for jurisdictional discovery? (2) Did the Eighth Circuit err in remanding for jurisdictional discovery only on theory of general jurisdiction, based on its conclusion that petitioner could not assert specific jurisdiction because he was not a resident of Arkansas and finding that petitioner had not yet shown general jurisdiction over Hyperion, as decision is wholly contrary to *Keeton v. Hustler*? (3) Did the Eighth Circuit err in upholding dismissal of petitioner's action against HBO for failure to state a claim when petitioner sued for injunctive relief to prevent HBO from producing and airing a television series based on *The Washingtonienne* that would expose him to further violations of his right to privacy?

### *Wood v. Del Giorno*

The Court declined to review a Louisiana appellate court decision affirming summary judgment and dismissing a libel suit filed by a radio talk show guest against a radio show host and station. *Wood v. Del Giorno*, 974 So. 2d 95 (La. App. Dec. 19, 2007), *cert. denied*, 129 S.Ct. 159 (U.S. Oct. 6, 2008). The plaintiff, an animal rights advocate, appeared on a broadcast discussing "canned hunts" – where animals are kept in captivity and hunted and killed by paying customers. The plaintiff and defendant engaged in a heated exchange. Among other things, defendants stated: "The man is a fraud." "Everything you've said so far is out-and-out lying." "You're an idiot." The references to plaintiff as a fraud and liar could not be understood as accusing plaintiff of actual criminal conduct. In context, the statements were rhetorical hyperbole. Moreover, plaintiff was a public figure with respect to discussion of the canned hunt issue and there was no evidence of actual malice.

The questions presented in plaintiff's petition were: (1) Did the court below err in determining that statements alleged by plain-

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## Supreme Court Denies Plaintiffs' Certiorari Petitions in Media and Internet Cases

(Continued from page 11)

tiff to be defamation per se: "Well, every fact you've presented so far is out-and-out lying," which is factual statement but completely false as provable upon documents filed in evidence with district court, and "This man is a fraud. He's an absolute fraud," were "merely opinions or hyperbole, rather than facts, and are therefore not actionable as defamation"? (2) Was the court below in error in simply presuming that defendant was a media defendant and thus entitled to qualified privilege, even though plaintiff provided evidence from the transcript of the radio program attesting that defendant, after having finished for that day, simply intruded onto radio program where plaintiff was to present information to listeners, and from letter written by station manager to plaintiff's wife, and other letters as well, relating that defendant was acting as individual and not in his capacity as employee of the station?

### *Doe v. MySpace*

The Supreme Court declined to hear an appeal of the Fifth Circuit's decision applying Section 230 of the Communications Decency Act to dismiss negligence claims against social networking website MySpace. *Doe v. MySpace*, 528 F.3d 413 (5<sup>th</sup> Cir.), *cert. denied*, 2008 WL 4218722 (U.S. Nov. 17, 2008). The case involved a lawsuit filed by a parent against the site after her 14 year old daughter was sexually assaulted by a man she met through the website. The Fifth Circuit held that the negligence claims were barred by the CDA, notwithstanding plaintiff's allegation that they were only seeking to hold MySpace liable for its failure to implement safety measures to protect minors. These "allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."

The questions presented in plaintiff's petition were: Does Section 230 of the 1996 Communications Decency Act, which preempts state law claims against interactive service providers that "treat" them as publisher of third-party's communications, preclude petitioner's negligence and gross negligence claims against MySpace and News Corporation for failing to employ adequate safeguards to protect children who use MySpace's social networking website from sexual predators when petitioner's claims were not based on harm caused by content communicated via MySpace's website?

### *New York Law Publishing Co. v. Doe*

Finally, the Supreme Court declined to review a Third Circuit decision, denying a media motion to intervene and obtain information about a sealed case. *New York Law Publishing, et al. v. Doe, C.A.R.S. Protection Plus, Inc. et al.*, 543 F.3d 178 (3<sup>rd</sup> Cir. May 30, 2008), *cert. denied*, 2008 WL 4177279 (U.S. Nov. 10, 2008). In a short decision, the Third Circuit affirmed a District Court order sealing an entire case. The court ruled that it was not an abuse of discretion to seal the records even though there was no notice to the public and press and the District Court made no on-the-record findings to justify closure. See *MLRC MediaLawLetter* Oct. 2008 at 9 for a thorough discussion of the case.

The questions presented in the media cert. petition were: (1) Whether the Third Circuit's blanket sealing of an entire case, including its very existence, is facially and/or presumptively unconstitutional under the First Amendment.

(2) Whether the Third Circuit's blanket sealing of an entire case—dockets, judicial records and judicial proceedings—is contrary to this Court's precedents and decisions of other circuit courts of appeals and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

(3) Whether the Third Circuit erred and disregarded this Court's precedents by failing to require that both the trial and appellate court give the general public and press notice and the opportunity to be heard before sealing judicial records and closing court proceedings, and by failing to require an articulation of specific, on-the-record findings for each record and each proceeding that there is an "overriding interest" justifying closure and that no less restrictive alternatives exist.

(4) Whether the Third Circuit erred and disregarded this Court's precedents when it refused to allow Petitioners to intervene in the proceedings below for the limited purpose of asserting their rights of access to judicial records and proceedings under the First Amendment and common law.



## Prior Restraint Against The Orange County Register Vacated

### *Newspaper Allowed to Report on Class Action Trial*

A California appellate court lifted an order against The Orange County Register that prohibited it from reporting on trial testimony in a \$100 million class action lawsuit brought by delivery workers against the newspaper. *Freedom Communications v. Gonzalez et al.* 167 Cal.App.4th 150, 83 Cal.Rptr.3d 861 (Cal. App. Sept. 29, 2008) (Sills, Aronson, Ikola, JJ.).

The appellate court held that it was an impermissible prior restraint under both the United States and California Constitutions.

#### **Background**

The Orange County Register is the defendant in a lawsuit brought by current and former newspaper carriers for unfair labor practices. They allege that the newspaper wrongly classified them as independent contractors in order to deny them the meal breaks, overtime pay, minimum wage, and other benefits to which they were entitled as full-fledged employees. The plaintiffs sought a sweeping order barring The Register from reporting on any aspect of the litigation, any of the attorneys involved, or anything related to the newspaper's financial condition. The trial court rejected this request, but it issued its own sua sponte order enjoining the newspaper from reporting on the trial testimony of any witness.

The trial court judge, David Velasquez, justified the gag order as one of several related measures put in place to prevent witnesses from being influenced by the testimony of others. The order also barred non-expert witnesses from the courtroom except during their own testimony, prohibited witnesses from discussing their testimony with other witnesses, and prevented the parties from disclosing to non-expert witnesses the testimony of any other witness.

The Register, however, along with a large coalition of news organizations and First Amendment rights groups, challenged the gag order and filed a request for an emergency stay on the grounds that the order constituted a prior restraint that plainly violated the freedom of press guaranteed by the First Amendment.

#### **Decision**

In its unanimous decision directing the trial court to vacate its order, the three-judge panel indicated that this case was not even a close case. It wrote: "Because petitioners' entitlement to the relief requested is so obvious that no purpose could be served by plenary consideration of the issue, we issue a peremptory writ of mandate in the first instance."

Citing *Nebraska Press Ass'n v. Stuart* (1976), the landmark decision in which the U.S. Supreme Court struck down an order preventing a newspaper from reporting about a criminal defendant's confession, the California appellate court said that the gag order here was presumptively invalid. "A prior restraint is the most serious and the least tolerable infringement on First Amendment rights," it said, noting that Justice Blackmun said in *CBS v. Davis* (1994) that such an "extraordinary remedy" is only available "where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive means."

The California appellate court said that the United States Supreme Court has only identified two such exceptional circumstances in which a prior restraint might be unavoidable: to prevent the disclosure of troop movements during wartime (*Near v. Minnesota*, 1931) and to prevent the dissemination of information that could lead to a nuclear holocaust (*NY Times v. U.S.*, 1971, Brennan, J. concurring).

By contrast, the interest in this case not compelling. The court wrote: "This case law makes clear that the danger the trial court sought to avert by its prior restraint here – the risk that witnesses in a civil trial might be influenced by reading news reports of the testimony of other witnesses – cannot possibly justify the censorship imposed."

Furthermore, the appellate court concluded that there were less restrictive alternatives available to the trial court to protect plaintiffs' fair trial rights without violating *The Register's* First Amendment rights. The trial court could have admonished witnesses to avoid all news accounts about the trial. Since the gag order only applied to *The Register*, and not to other publications covering witness testimony at the trial, such a measure would likely have been far more useful. The failure of the trial court to implement a less intrusive procedure to protect plaintiffs' interests led the court to strike down the gag order as an unconstitutional prior restraint.

In vacating the trial court order and emphasizing its plain error, the California appellate court concluded by quoting from Justice Black's concurrence in the Pentagon Papers case: "Every moment's continuance of [a prior restraint] amounts to a flagrant, indefensible, and continuing violation of the First Amendment."

*Kelli L. Sager, Alonzo Wickers IV, and Jeff Glasser of the Los Angeles office of Davis Wright Tremaine LLP represented Freedom Communications. The class action plaintiffs were represented by Daniel J. Callahan, Javier H. Van Oordt, and Jill A. Thomas, Callahan & Blaine, Santa Ana, CA.*



## New Jersey Appellate Panel Restricts Fair Report Privilege

### *Privilege Denied for Preliminary Pleading; Amicus Support Sought*

By Bruce S. Rosen

*Fair Report Privilege*

A New Jersey Appellate Division panel cut the fair report privilege to its core by eliminating the privilege for first filed complaints. *Salzano v. North Jersey Media Group, Inc.*, 2008 WL 4876654 (N.J. App. Nov. 12, 2008) (Cuff, Fisher, Miniman, JJ.).

While the ruling has sewn confusion and apprehension in New Jersey newsrooms, review will be sought in the New Jersey Supreme Court by defendant North Jersey Media Group Inc, publisher of *The Record*, the *Glen Ridge Voice* and northjersey.com. The New Jersey Press Association and several other media entities say they will seek to intervene in support of both the Petition for Certification and stay, which must be filed with the Supreme Court by December 12.

#### **Background**

The case involved coverage of a complaint filed by counsel for a U.S. Trustee in U.S. Bankruptcy Court in New Jersey against Thomas John Salzano, son of the former managing director of NorVergence, a Newark, N.J. telecommunications firm that had been the subject of a Federal Trade Commission Complaint and was forced into Chapter 7. The complaint charged the younger Salzano with fraudulent transfer (“diversion, conversion and misappropriation”) for accepting \$200,000 in checks from NorVergence that was used to put a down payment on a home, and utilizing a company American Express card for almost \$300,000 worth of expenses for restaurants, clubs and travel, even though he never worked for the company. Salzano later explained that these expenses were part of his father’s support obligations to his mother and he and his siblings, and claimed he was innocently dragged into the dispute.

A recent college graduate, Salzano filed suit *pro se* alleging libel and associated torts after North Jersey Media Group’s publications reported that he was charged with having “stolen” the NorVergence funds. The trial court dismissed the complaint with little analysis, apparently under the fair report privilege. The trial court also ruled that the news story on the complaint was a matter of public concern.

The appellate court agreed that the “sting” of the news story was essentially the same as the bankruptcy complaint, and that the report was a fair and accurate description of the trustee’s allegations. However, the court then stated that the New Jersey Supreme Court, in *Costello v. Ocean County Observer*, 136 N.J. 594 (1994) “determined” (and “adopted” the theory) that the fair report privilege does not apply to preliminary pleadings, a point of law argued by Oliver Wendell Holmes as a Massachusetts Supreme Court Justice in the 1884 decision *Cowley v. Pulsifer*, 137 Mass. 392, 295 and as set forth in the Restatement of Torts at Section 611(e).

In actuality, *Costello’s* discussion of the “preliminary pleadings” exception, which revolves around the Restatement of Tort’s examination of the privilege, was purely theoretical: “Neither party, however, has raised that issue. Further given our holding that the fair report privilege does not apply because the article [regarding Costello] was not a “full, fair and accurate” report, we need not resolve that thorny issue.” *Costello*, 136 N.J. at 611.

Defendants argued that the initial pleadings exception should not apply, and the statement in *Costello* was not only *dicta*, but should especially not apply when the initial pleadings were filed by the government. Restatement Section 611 states that indictments are actually considered protected “official proceedings” (comment d), and arrests are protected “official acts”(comment h); actions taken by the government, including lawsuits filed by a government agency are seemingly protected by comment d.

The *Salzano* Court rejected any limitation on the exception, rejecting the notion that government agencies or prosecutors can be trusted and pointing to “the abuses of the McCarthy era,” in support of that rejection without further explanation. Moreover, the court then took issue with whether the bankruptcy complaint was even a government document because it was “filed by a law firm retained by another lawyer who was appointed by the United States Trustee.”

The court did however, agree that the Salzano complaint was a matter of public concern requiring application of the

*(Continued on page 15)*

**New Jersey Appellate Panel Restricts Fair Report Privilege**

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actual malice standard. Defendants had argued that plaintiff failed to plead actual malice in his complaint with specificity as set forth in *Darakjian v. Hanna*, 366 N.J. Super. 238 (App. Div. 1994). Oddly, without even citing or acknowledging *Darakjian*, the Salzano court agreed that plaintiff’s pleading was inadequate and gave him leave to file an amended complaint, but then the court attempts to undercut *Darakjian* by warning the trial court (and by extension future trial courts) that when it considers the amended pleading alleging actual malice, it should also take into account “that information regarding defendants’ state of mind is not always accessible to a defamation plaintiff absent discovery.” *Darakjian* had acknowledged the difficulty of obtaining this information but said that in fair report cases a factual basis for actual malice was required under previous New Jersey Supreme Court cases.

*Bruce S. Rosen and Kathleen A. Hirce of McCusker, Anselmi, Rosen & Carvelli, P.C., in Florham Park, NJ represent North Jersey Media Group. Thomas John Salzano represented himself.*

*Media Entities interested in adding their names to the Amicus Brief can contact Tom Cafferty, Esq., the NJPA’s general counsel at [tcafferty@njlegallink.com](mailto:tcafferty@njlegallink.com)*

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## Kentucky Fair Report Privilege Requires Attribution

### ***Court Also Finds Sufficient Evidence of Negligence and Actual Malice for Trial***

A Kentucky federal district court denied summary judgment on fair report grounds, finding – for the second time in a libel and false light case – that the privilege was not applicable to a newspaper article about a medical misconduct investigation *Trover v. Paxton*, No. 4:05CV-014-H, 2008 WL 4542730 (W.D. Ky. Oct. 9, 2008) (Heyburn, JJ.).

Last year the court applied a “knowledge requirement” to the Kentucky fair report privilege, holding that a publisher must know that it was reporting on government activities for the privilege to apply. In its most recent decision, the court held that the publisher must also attribute its report to the official proceeding for the privilege to apply.

Having denied the newspaper’s fair report privilege defense, the court went on to find sufficient evidence of falsity, negligence and actual malice for the libel and false light claims to go to trial.

#### ***Background***

The plaintiff in the case, Dr. Phillip Trover, was a radiologist at the Regional Medical Clinic in Madisonville, Kentucky. One of plaintiff’s colleagues, Dr. Neil Kluger, wrote a scathing letter of complaint about plaintiff to the Clinic’s chief of staff, with copies to the state licensing board and state health inspector general. Among other things, the letter accused plaintiff of failing to prevent a patient’s death and misreading x-rays and mammograms, it questioned his judgment, mental stability and requested that he be fired.

The allegations and subsequent investigations were covered by the local press. In 2004 and 2005, the *Madisonville Messenger*, owned by Paxton Media Group LLC, published a series of articles and editorials on the matter as it was developing. In 2005, Trover sued Kluger and Paxton Media for defamation, false light invasion of privacy, intentional infliction of emotional distress, and tortious interference. Six months after the lawsuit was filed, the state suspended Trover’s license, many of the complaints were substantiated and he was fired from the Clinic.

The Kentucky district court dismissed most of the claims against Paxton, finding the allegations to be true or protected by the fair report privilege as accurate summaries of state proceedings. The case was narrowed to defamation and false light claims over a single newspaper article which republished allegations from the Kluger letter.

Although the Kluger letter was included in the official investigatory files, the court held that the republication of the letter’s allegations could only be privileged if the newspaper had actual knowledge that it was part of an official proceeding. *Trover v. Kluger*, No. 4:05CV-014-H, 2007 WL 528419 (W.D. Ky. Feb. 14, 2007). The Kluger letter was attached to a legal complaint but the newspaper had apparently reviewed the letter separately. No Kentucky state court had ever considered this question and the state’s fair report statute, KRS 411.060, contains no “knowledge” requirement. Nevertheless the court reasoned that the privilege should not apply on public policy grounds.

... courts have found that the policy behind the privilege is one of allowing the press to freely serve as a kind of “government watchdog.” Here, Paxton Media could not be serving as a “government watchdog” in publishing the March 6 article for the simple reason that it did not know it was reporting on the activities of the government. *Id.* at \*9.

#### ***Fair Report Requires Attribution***

In the court’s latest decision, it found insufficient evidence that the newspaper knew the Kluger letter was part of a government investigation. The newspaper had a copy of the letter addressed to the Clinic’s chief of staff and the editor and reporter testified that they both believed the letter was part of an investigation. This statement was however of belief to be “startlingly short” of showing actual knowledge at the time of publication, according to the court.

*(Continued on page 17)*

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***the fair report privilege did not apply  
because the article did not explicitly source  
the allegations to an official investigation***

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## Kentucky Fair Report Privilege Requires Attribution

*(Continued from page 16)*

But even if the newspaper had the necessary knowledge, the court held that the fair report privilege did not apply because the article did not explicitly source the allegations to an official investigation. Instead, the article attributed the allegations to the Kluger letter, but did not state that the letter was part of an official investigation. Thus, according to the court, the article was not a fair and accurate summary of an official proceeding.

Kentucky state courts have not considered this issue, but the federal district court concluded that “Kentucky courts would adhere to the policy underlying the fair reporting privilege. This purpose and policy requires proper attribution so that the reader can judge the veracity of statements, which the privilege protects from the normal scrutiny of defamation.” 2008 WL 4542730 at \*5.

### *Negligence and Actual Malice*

The district court then went on to address issues of fault on plaintiff’s claims. In a previous decision, the court held that plaintiff was a private figure. Plaintiff’s expert witness, David Boeyink, Ph.D., an associate professor at Indiana University’s School of Journalism, testified that the newspaper was negligent because prior to publication it failed to contact plaintiff, Dr. Kluger and other parties whose allegations were contained in the letter. The district court agreed, finding that given the serious nature of the

allegations, the newspaper’s failure to contact could violate the standard of care under the circumstances.

Calling it a “close question,” the court also found sufficient evidence of actual malice for the plaintiff’s false light claim based on “the number of statements published, the seriousness of the allegations, the ease with which any single statement could have been removed from the article, and the attitude [the editor] displayed in his deposition.” With respect to the latter, the court found it significant that the editor testified that “he did not care whether the statements in the Kluger letter were true, but was only concerned with accurately reporting the statements themselves.”

The court also noted that plaintiff had submitted sufficient evidence to raise an issue of falsity, though the decision provides no factual discussion for this issue. Finally, the court dismissed plaintiff’s claim for lost wages and relocation expenses. Plaintiff failed to show that these alleged special damages were proximately caused by the newspaper article since his license was suspended and he was fired based on the Clinic’s and state’s investigation.

*Paxton Media is represented by Jeremy S. Rogers and Jon L. Fleischaker, Dinsmore & Shohl LLP, Louisville. Plaintiff is represented by Allen W. Holbrook, Charles E. Mountjoy, Frank Stainback, Jr., of Sullivan, Mountjoy, Stainback & Miller, P.S.C., Owensboro, KY; and Byron Lee Hobgood, Franklin, Gordon & Hobgood, Madisonville, KY.*

***For More Information About the Fair Report Privilege See***

### **MLRC’s State by State Guide**

An outline of case law from each state, focusing on the types of government proceedings and information held to be within the scope of the privilege

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## **Georgia Court Tosses Right of Publicity Claim Against Magazine**

### ***Publication of Nude Photos Related to Matter of Public Interest***

A Georgia federal district court dismissed a right of publicity lawsuit brought against *Hustler Magazine* by the estate of a deceased female model and wrestler. *Toffoloni v. LFP Publishing Group, d/b/a Hustler Magazine*, No. 1:08 CV 421, 2008 WL 4559866 (N.D. Ga. Oct. 6, 2008) (Thrash, J.). The court held that the publication of the photos related to a matter of public interest and was therefore protected by the First Amendment, notwithstanding the court's personal view that publication was "distasteful and offensive."

In 2007, Nancy Benoit and her son were the victims of a murder suicide perpetrated by her husband, professional wrestler Chris Benoit. *Hustler* obtained nude photographs of Nancy Benoit taken 20 years ago and in March 2008 published the photos with an article about her murder.

Benoit's estate sued *Hustler* for violation of the right of publicity and the photographer for breach of contract and related claims. *Hustler* moved to dismiss for failure to state a claim, arguing that the photos were incidental to a news article on a matter of public interest. Plaintiff argued that the photos were not incidental to the article, but rather part of *Hustler's* business of publishing nude photographs of women and therefore purely commercial.

The district court found no dispute that Benoit's death was a legitimate matter of public interest. Therefore the publication of the photos was not merely commercial even though the "defendant (like nearly all journalistic outlets) no doubt seeks to profit from its publications." Moreover, under Georgia law, the publication of gratuitous and sensational photographs are protected when published with a legitimate news article. *Citing Waters v. Fleetwood*, 91 S.E.2d 344 (1956).

*Hustler Magazine* was represented by Barry Armstrong, McKenna Long & Aldridge in Atlanta. Plaintiff was represented by Richard Decker, Decker Hallman Barber & Briggs in Atlanta.

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## Connecticut Appellate Court Stiffs Inmate Affirms Summary Judgment on Viagra Libel Claim

The Connecticut Court of Appeals affirmed summary judgment in favor of the Tribune Television Company (WTIC FOX 61) and Outlet Broadcasting, Inc. (WVIT NBC-30) in a libel suit brought by a convicted murderer who claimed that his reputation had been damaged by television news reports that stated he was suing the state for Viagra. *Mercer v. Cosley et al.*, No. AC 28960 (Conn. App. Sept. 16, 2008) (Flynn, Beach, Dupont, JJ.).

### Background

On May 25, 2005, WTIC and WVIT aired news reports about Connecticut Governor Jodie Rell's order that the department of social services stop providing Viagra and related drugs to sex offenders through the state's medical assistance programs. The reports named plaintiff as a prisoner who had demanded such drugs. The plaintiff argued that the news broadcasts were defamatory because they recklessly mischaracterized his request. He had sued the state for testosterone gel and/or a urology consultation, but maintained that he had never sought Viagra.

### Substantial Truth

The court examined the two transcripts separately and concluded that, contrary to the prisoner's claim, both news reports were, in fact, true, either literally or substantially.

FOX 61's broadcast stated, in relevant part, that "forty-two year old Eugene Mercer, an inmate at the Osborne Correctional Facility for the last twenty years, is suing the medical services director for denying him erectile dysfunction drugs." The court concluded that the plaintiff could not

prove his claim because he admitted in his complaint against the television companies that he had a pending lawsuit against officials of the Department of Correction for discrimination on the basis of disability "for their failure to diagnose and treat HIV-hypogonadism and/or erectile dysfunction." It wrote: "On the basis of the record before us, we conclude that not only were FOX-61's statements substantially true, they literally were true when viewed in combination with the plaintiff's pleadings, which he had put in the public domain. Truth is an absolute defense to an allegation of libel."

The plaintiff's claim against NBC-30 failed on similar grounds. In the part of its broadcast about Mercer, NBC-30 stated: "He's a convicted killer. But he wants his Viagra, and the state doesn't want to buy it for inmates." Although Mercer argued that the distinction between testosterone gel and Viagra presented a triable issue of fact, the court disagreed. It ruled that it's not necessary for a defendant "to prove the truth of every word of the libel." Since the effect on the listener would have been the same had NBC-30 substituted testosterone gel for Viagra in its report, the court found that it was a distinction without a substantial difference. It held that summary judgment was therefore appropriate.

Finally, the court rejected plaintiff's claim of "judicial bias," finding he failed to demonstrate the "manifest injustice" necessary to prove this claim.

*William S. Fish, Jr. and Paul Guggina of Hinckley Allen Snyder LLP in Hartford represented the defendants. Plaintiff acted pro se.*

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**LEGISLATIVE UPDATE:****House Passes Libel Tourism Bill; Chance of Senate Passage Slim**

By **Bruce D. Brown** and **Laurie A. Babinski**

The House of Representatives took an affirmative step toward combating the phenomenon known as “libel tourism” this year with the passage of a bill proposing to bar enforcement of foreign defamation judgments that are inconsistent with the First Amendment. While the bill has little chance of moving in the Senate before the 111th Congress is gavelled in this January, its passage signals Congress’ desire to finally address an issue that has taken on increasing urgency as geographic boundaries in publishing and broadcasting become largely irrelevant.

Rep. Steve Cohen (D-Tenn.) introduced the bill, [H.R. 6146](#), on May 22 seeking to protect American authors and publishers who are hauled into court overseas by a foreign plaintiff for making allegedly defamatory statements. These plaintiffs, dubbed “libel tourists” because they are often not residents of the country in which they sue, bring their cases in plaintiff-friendly jurisdictions overseas to get around First Amendment-based constraints posed by American defamation law. In his introduction of the bill, Rep. Cohen emphasized that “[t]his phenomenon threatens to undermine our Nation’s core free speech principles. . . . American authors and publishers should not be forced to restrict their speech to comport with more limited foreign standards.”

The Cohen bill provides: “Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment concerning defamation unless the domestic court determines that the foreign judgment is consistent with the first amendment to the Constitution of the United States.” On September 27, the House passed the bill on suspension. The bill currently sits on the Senate calendar awaiting consideration.

H.R. 6146 was not the only libel tourism bill to be introduced in the 110th Congress. Two nearly identical bills, both named the “Free Speech Protection Act of 2008,” were also introduced earlier this year. Both bills are more heavy-handed than the Cohen bill. Neither [H.R. 5814](#), which was introduced by Rep. Peter King (R-N.Y.) on April 16, nor S. 2977, which was introduced by Sen. Arlen Specter (R-Pa.) on May 6, requires an American sued overseas to wait until successful foreign plaintiffs bring enforcement proceedings in the United States. Instead, the bills allow American authors to seek a declaratory judgment in a United States as soon as a libel suit is filed against them overseas. This preemptive mechanism is made possible by an explicit grant of jurisdiction in United States courts over foreign libel litigants based only on the

fact that the “libel tourist” has sued an American citizen.

In addition, the bills allow Americans to obtain substantial damages against foreign libel litigants. Not only can Americans seek an amount equal to any foreign defamation judgment entered overseas, they can also seek litigation costs and attorneys fees as well as damages “due to decreased opportunities to publish, conduct research, or generate funding.” The bill further provides for treble damages if Americans can prove by a preponderance of the evidence that foreign libel litigants “intentionally engaged in a scheme to suppress First Amendment rights.”

All three bills were introduced on the heels of the New York legislature’s April 28 passage of the “[Libel Terrorism Protection Act](#),” N.Y. C.P.L.R. § 5304, aimed at protecting American authors against foreign defamation judgments. Inspired by author Rachel Ehrenfeld, who was sued for libel in England by Saudi Sheikh Khalid bin Mahfouz because of statements made in her book about terrorism financing, the Act gives New York courts jurisdiction over foreign litigants based on their defamation suits abroad regardless of whether enforcement of any resulting judgment is sought in the United States. It directs courts to bar enforcement of foreign defamation judgments if they do not measure up to the federal and New York state constitutions.

Sens. Specter and Joe Lieberman (I-Conn.) shone a spotlight on the need for a solution to libel tourism this summer with an op-ed in the *Wall Street Journal* drawing an analogy to the era of *New York Times v. Sullivan* when “opponents of civil rights were filing libel suits to silence news organizations that exposed state officials’ refusal to enforce federal civil rights laws.” The Senators continued: “Now we are engaged in another great struggle – this time against Islamist terror – and again the enemies of freedom seek to silence free speech. Our legislation will help ensure that they do not succeed.” See Arlen Specter and Joe Lieberman, Op-Ed., *Foreign Courts Take Aim at Our Free Speech*, *Wall St. J.*, July 14, 2008, at A15.

Despite the Senators’ appeal, neither of these two bills is likely to proceed any further during the 110th Congress either. H.R. 5814 remains in the House Judiciary Committee’s Subcommittee on Courts, the Internet, and Intellectual Property. S. 2977 is stalled in the Senate Judiciary Committee.

*Bruce D. Brown is a partner and Laurie A. Babinski is an associate at Baker & Hostetler LLP in Washington, D.C.*

## The Accidental Libel Tourist

### Illinois Enacts “Libel Terrorism Protection” Law

By Samuel Fifer

Though international comity is often a signal of goodwill between nations, there is an alarming trend of “libel tourism” on the rise that few in the media would find welcome. Libel tourism describes a situation where a plaintiff, typically a public person, such as an actor, brings a defamation (or privacy) suit outside the U.S. to avoid First Amendment protections conferred on U.S. broadcasters and publishers that would make the plaintiff’s litigation prospects poor if she were to bring suit in the U.S.

While there has been a smattering of case law in the past decade or so that has erected a post-judgment barrier to enforcement of such noxious imports, two states have enacted laws that would allow preemptive strikes against these libel tourists and create a category of protection more formidable than case law. Ironically, such statutes have as one of their features a less exacting standard for minimum contacts, sufficient to hale the defendant (but really, the complaining party) into court to defend against a declaratory action that the publication in question is not actionable under domestic law. Clearly, the unspoken understanding is that the suit must be brought in the U.S. and played by First Amendment rules.

This trend can be seen most recently in the unfortunately named “Libel Terrorism Protection Act,” signed into law by New York’s Governor David Paterson on March 31, 2008, which spawned an Illinois bill of the same name that was signed into law by Governor Rod Blagojevich August 19, 2008. Both the U.S. House and Senate have attempted to enact similar legislation, which would make the reduced personal jurisdiction requirements federal law, but would also allow the defendant to sue the plaintiff for damages to her reputation in the form of treble damages, with the merits of such a claim to be determined by a jury. However, it remains to be seen whether Congress will put this legislation back on the table in the coming term.

#### Case History

The courts have over the years loosened the requirements for “minimum contacts.” In *Calder v. Jones*, the U.S. Supreme Court held that the plaintiff, actress Shirley Jones, should have the ability to bring a defamation suit in California based on an article published in the *National Enquirer* that had been written

in Florida and circulated nationally. 465 U.S. 783 (1984). This case established that circulation of a publication would be sufficient for personal jurisdiction, extending domestic options for those bringing defamation suits without endangering the First Amendment protections of the press.

The same day as *Calder*, the Supreme Court also held in *Keeton v. Hustler Magazine, Inc.* that minimum contacts for personal jurisdiction would be satisfied when the party was not a resident of the state in which the suit was brought, where it was fair (under traditional due process notions) for the defendant to expect to be sued anywhere. 465 U.S. 770 (1984). Thus, the Court would allow a more lenient approach to minimum contacts if the injury occurred in a specific state, decisions which seem to have paved the way for the new Illinois law.

The concept of refusing to honor a foreign-procured defamation judgment in the U.S. is happily not new. In *Bachchan v. India Abroad Publications Incorporated*, 585 N.Y.S.2d 661 (1992), the New York Supreme Court refused to grant comity to the British court’s finding for £40,000 in damages against a New York news service that had reprinted an article appearing in *Dagens Nyheter*, a Swedish daily newspaper. Not surprisingly, the British jury did not apply the standard for defamation established in *New York Times Co. v. Sullivan* that requires that a plaintiff prove that an article about a public figure was published with “actual malice,” that is, with knowledge of falsity or reckless disregard for the truth of the matter. 376 U.S. 254 (1964).

The *India Abroad* case was an early example of how to beat back libel tourism. A much more recent case of libel tourism, and the one that spurred the creation of the New York law, started with *Funding Evil: How Terrorism is Financed-and How to Stop It*, a book in which Rachel Ehrenfeld, a noted counterterrorism expert, alleged that Saudi billionaire Khalid bin Mahfouz had financial ties to terrorist groups. Only 23 copies of the book were sold in Britain, enough to satisfy their minimum contacts requirement and ensure that the case would be tried in a forum notoriously sympathetic to defamation plaintiffs.

Ms. Ehrenfeld had attempted to preemptively countersue bin Mahfouz in the U.S., but New York courts, supported by the Second Circuit, dismissed her case for lack of personal jurisdiction over the defendant (i.e., the person complaining about the publication at issue), *Ehrenfeld v. Mahfouz*, 518 F.3d 102

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**The Accidental Libel Tourist**

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(2d Cir. 2008). In an attempt to protect American authors from defamation actions abroad, as well as pecuniary sanctions, the New York legislature responded with legislation a mere 28 days after the Second Circuit’s decision, and the Illinois legislature followed suit soon after by creating an amendment to the Illinois Code of Civil Procedure’s “long-arm” provisions.

The pertinent segments of the Illinois law, 735 ILCS 5/2-209, read as follows:

(b-5) Foreign defamation judgment. The courts of this State shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of Illinois or, if not a natural person, has its principal place of business in Illinois, for the purposes of rendering declaratory relief with respect to that resident’s liability for the judgment, or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to this Code, to the fullest extent permitted by the United States Constitution, provided:

(1) the publication at issue was published in Illinois, and

(2) that resident (i) has assets in Illinois which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in Illinois to comply with the foreign defamation judgment.

The provisions of this subsection (b-5) shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to, on, or after the effective date of this amendatory Act of the 95<sup>th</sup> General Assembly.

(7) the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this State first determines that the defamation law applied in the

foreign jurisdiction provides at least as much protection for freedom of speech and the press as provided for by both the United States and Illinois Constitutions.

Illinois and New York have now opened the door to allow pre-emptive strikes against potentially defamatory libel suits abroad. However, the proposed federal legislation would go further, and to a potentially dangerous degree. House bill H.R. 6146, which was passed unanimously, prohibits domestic courts from granting comity to foreign judgments of defamation against a public figure or about a matter of public concern, unless the judgment was made in compliance with First Amendment safeguards. However, a more aggressive House bill, H.R. 5814, which bears a more striking resemblance to the Senate’s attempt in S2977, was never passed. S2977 likewise was introduced in May of 2008, read twice, but never made it

out of the Senate Judiciary Committee.

This version of the “Free

Speech Protection Act of 2008” would grant the ability to sue for treble damages and the low bar set for a jury to find these damages applicable, and could potentially trigger a cold war between different countries’ legal systems and standards for libel. This makes a clear statement that the U.S. will relax requirements so that a potential libel plaintiff can be sued – for purposes of obtaining a declaratory judgment – almost anywhere in the U.S., and that the standard for minimum contacts for this purpose is now greatly relaxed.

However, that is applicable only if the suit is brought within the borders of the U.S. This creates an odd paradox in which on one hand, the former jurisdictional requirements are greatly expanded, while at the same time strengthening the walls to keep foreign judgments out. This next Congressional term will see the question raised of whether the more internationally punitive federal legislation will make it through the halls of Congress, and if so, what the judicial response will be.

*Samuel Fifer is a partner at Sonnenschein Nath & Rosenthal LLP in Chicago. Thanks to Sara Feinstein, University of Chicago Law School Class of 2008 and Sonnenschein Summer Associate, Class of 2007.*

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***Illinois and New York have now opened the door to allow pre-emptive strikes against potentially defamatory libel suits abroad.***

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## Ninth Circuit Affirms Summary Judgment for Video Game Maker in Trademark Suit

### *First Amendment Trumps Strip Club's Trademark Claim*

The Ninth Circuit affirmed summary judgment to the makers of Grand Theft Auto in a trademark infringement action brought by a Los Angeles strip club against the popular video game for allegedly using its logo and trade dress in a video game without authorization. *E.S.S. Entertainment 2000 v. Rock Star Videos*, No. 06-56237, 2008 WL 4791705 (9<sup>th</sup> Cir. Nov. 5, 2008) (Gibson, Graber, O'Scannlian, JJ.).

The plaintiff, the proprietor of the Play Pen Gentlemen's Club, asserted claims for trademark infringement and unfair competition under both the Lanham Act and California state law, arguing that a virtual strip club in the video game created a likelihood of confusion among consumers. The Ninth Circuit disagreed, finding that the First Amendment protected the defendant from liability for trademark infringement.

#### **Background**

The Grand Theft Auto video game series, notorious for its use of vulgarity and violence lampoons life in crime-inflicted cities, characterizing them with a cartoonish mix of virtual liquor stores, casinos, strip clubs, and a slew of other similarly seedy establishments. At issue in this case was the virtual depiction of one such adult business, a strip club called the Pig Pen that appeared in the Grand Theft Auto: San Andreas video game. The video game makers had photographed various locations in Los Angeles as inspiration for the game's virtual city of "East Los Santos."

ESS, the owner and operator of the Play Pen Gentleman's Club in downtown L.A., claimed that Rockstar, the video game producer, adapted the name of its strip club and used its logo and building design in the game without its approval. As a result, ESS maintained that consumers would be confused into thinking that Play Pen was somehow associated with Pig Pen. Rock Star disputed any likelihood of confusion and also maintained that it was protected by the affirmative defense of nominative fair use and the First Amendment. The district court granted summary judgment to Rock Star on First Amendment grounds.

#### **Nominative Fair Use**

Even if it infringed ESS' trademark, Rockstar argued that it was protected from liability by the doctrine of nominative fair use. The court noted that nominative fair use "protects those who deliberately use another's trademark or trade dress 'for the purposes of comparison, criticism, or point of reference.'" Here, however, since Rockstar used "Pig Pen," a variation of plaintiff's Play Pen mark, the Ninth Circuit affirmed the district court's finding that this affirmative defense was not applicable.

#### **First Amendment**

Rockstar argued that its artistic adaptation of plaintiff's mark was protected by the First Amendment. The Ninth Circuit agreed, adopting the two-prong test used by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). It said: "An artistic work's use of a trademark is not actionable 'unless the [use of the mark] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless [it] explicitly misleads as to the source or the content of the work.'" Moreover, while the *Rogers* test is traditionally applied to uses of a trademark in the title of an artistic work, the court found that "there is no principled reason why it ought not also apply to the use of a trademark in the body of the work."

The Ninth Circuit had previously used the *Rogers* test in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir.2002) (quoting *Rogers*, 875 F.2d at 999). Mattel, the maker of Barbie dolls, sued MCA for trademark infringement for releasing a song called "Barbie Girl." In that case, the Ninth Circuit held that the First Amendment protected the record company because the song was a commentary about Barbie and the values she supposedly represents.

On appeal, ESS conceded that the video game was artistic and that the *Rogers* test applied. However, ESS argued that the use of the Pig Pen mark in the game had no artistic relevance and was explicitly misleading. ESS argued that the Game was not "about" its Play Pen club the way that

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## Ninth Circuit Affirms Summary Judgment for Video Game Maker in Trademark Suit

(Continued from page 23)

“Barbie Girl” was “about” the Barbie doll in MCA Records. Secondly, it argued that also unlike the Barbie case, where the trademark was a cultural icon (Barbie), the Play Pen is not a cultural icon.

The Ninth Circuit disagreed. Discussing the issue of artistic relevance the court said:

the level of relevance merely must be above zero. It is true that the Game is not “about” the Play Pen the way that Barbie Girl was about Barbie. But, given the low threshold the Game must surmount, that fact is hardly dispositive. It is also true that Play Pen has little cultural significance, but the same could be said about most of the individual establishments in East Los Angeles. Like most urban neighborhoods, its distinctiveness lies in its “look and feel,” not in particular destinations as in a downtown or tourist district. And that neighborhood, with all that characterizes it, is relevant to Rockstar's artistic goal, which is to develop a cartoon-style parody of East Los Angeles. 2008 WL 4791705 at \* 4.

The court also rejected ESS’s claim that the use of the Pig Pen mark was explicitly misleading. “Both San Andreas and the Play Pen offer a form of low-brow entertainment; besides this general similarity, they have nothing in common.” There was no evidence that the setting of the strip club in the game was anything other than generic or that the club had anything to do with the overall objective of the game. Furthermore, there was no reason to believe that a strip club owner would have any involvement with a video game.

Still, ESS insisted that the strip club could become a significant part of the game because players are free to ignore the game’s storyline and spend as much time as they want in the Pig Pen. But the court didn’t buy it. “Fans can spend all nine innings of a baseball game at the hot dog stand; that hardly makes Dodger Stadium a butcher’s shop,” it said.

*Rockstar Games, Inc. and Take-Two Interactive Software, Inc. were represented by Russell Frackman of Mitchell Silberberg and Knupp LLP in Los Angeles. E.S.S. Entertainment was represented by Robert F. Helfing of Sedgwick, Detert, Moran & Arnold LLP in Los Angeles.*

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## Court Dismisses Rock Group's Publicity and Trademark Claim Over Use of Song in Video Game

### *Use in Guitar Hero Is Expressive and Protected By First Amendment*

A Michigan federal district court granted summary judgment dismissing right of publicity, trademark and related claims brought by a rock band against the makers of the popular video game Guitar Hero. *Romantics v. Activision Publishing, Inc.*, 574 F.Supp.2d 758 (E.D. Mich. 2008) (Edmunds, J.). The court held that the video game was expressive and protected by the First Amendment.

#### **Background**

The plaintiffs, members of the group The Romantics, sued over the use of their 1980 song "What I Like About You" in the video game "Guitar Hero Encore: Rock's the 80's." Guitar Hero, distributed by Activision Publishing, is a video game series that allows players to pretend they are playing guitar in a rock band, choosing characters, costumes, and guitars, and then simulating the guitar play of various songs.

Defendant Activision had obtained a license to use the song from the copyright owner EMI Entertainment and recorded its own version of the song for use in the video game. The game does not claim The Romantics are performing the song, rather it is described as a song "made famous by The Romantics." Plaintiffs conceded that they owned no rights in the song, but nevertheless sued for violation of their right of publicity, trademark and related state law claims for the alleged use of their "sound." In December 2007, the district court denied the plaintiff's motion for a preliminary injunction and in August 2008 granted summary judgment to defendants.

#### **District Court Decision**

The district court began by noting that while Michigan has recognized a general right to publicity, *see, e.g.*, *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir.1983), the state has never recognized a right of publicity in the sound of a voice, even if distinctive. Moreover, even if Michigan did recognize such a claim, the court found it would fail here since the song was not used to promote a product.

The court specifically rejected the Ninth Circuit's case law on sound-alike cases in *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir.1988), and *Waits v. Frito-Lay*, 978 F.2d 1093 (9th Cir.1992). California law had "little, if any, persuasive force" and applied only to instances where a singer's voice was "distinctive and widely known." Here, plaintiffs failed to establish that their "sound" is distinctive.

The court also found that even if the defendants had a cognizable publicity claim under Michigan law, it would be barred by the First Amendment since the video game was an expressive work protected by the First Amendment. *Citing, e.g. Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir.1989). The court noted that numerous courts have held that video games are expressive works protected by the First Amendment, and it included Guitar Hero in that category noting with apparent familiarity that gamers select their character, costumes, and guitar and can progress from small to progressively larger venues like an up and coming band. Plaintiffs' publicity claims were also preempted by the Copyright Act since the alleged right in the "sound" of the song "is equivalent to the right in a sound recording protected by the Copyright Act."

#### **Lanham Act and Unfair Competition**

Plaintiffs' Lanham Act and state unfair competition claims were similarly barred by the First Amendment. The court again applied the *Rogers* test under which "the public interest in free expression should prevail if the use of the celebrity's image has artistic relevance, unless it is used in such a way that it explicitly misleads as to the source of the work." Applying the test, the court noted that the game had artistic merit and did not explicitly mislead the public about the song's source. The court dismissed as hearsay plaintiffs' proffered evidence of confusion which included second hand statements from fans and screen shots of fan blogs.

*Defendants were represented by Herschel Fink and Brian Wassom, Honigman, Miller, Detroit. The Romantics were represented by William Horton of Cox, Hodgman; and Elizabeth Favaro*

## THE OTHER SIDE OF THE POND

### UK and European Law Update

By David Hooper

#### *The BBC and a Case of Booky Wooky Nooky*

The BBC has had a dire few weeks following the broadcast on radio of some intrusive telephone calls by two highly paid presenters, the comedian Russell Brand and amongst other things author of his best-selling memoirs “*My Booky Wooky*” and the talk show host Jonathan Ross, who, to the disgust of most licence payers, the BBC has seen fit to pay £6 million a year.

In a moment of questionable sanity they decided it would be hilarious to call one of our many national treasures, Andrew Sachs, the 78 year-old actor best known for playing the hapless Spanish waiter Manuel in the comedy series *Fawlty Towers*. In a series of messages left on Mr. Sachs’ answer phone Ross and Brand joked in graphic language which would have made the FCC blush, about Brand having had sex with Sachs’ granddaughter hitherto best known for being part of a group unfortunately known as the Satanic Sluts.

This humor was supplemented by further jokes that Sachs might perhaps commit suicide when he heard this – and by a spoof apology for the graphic language. The only surprising fact was that only two people, one of who was Sachs, complained about the original broadcast. However, once the matter had been taken up by the *Daily Mail* 42,000 complained and the BBC’s conduct was the subject of strong criticism in Parliament.

Bearing in mind that the programme had been pre-recorded, that it was intrusive, that it had unacceptable sexual content and there had been a failure to obtain informed consent from Sachs, it was little surprise that heads at the BBC rolled with the head of that particular channel (Radio 2) resigning, followed by the relevant Head of Compliance. Everything that could have gone wrong did so. An inexperienced producer was in charge of the program and appeared to be in serious conflict of interest in that he was taking instructions from Brand’s production company.

The hapless Head of Compliance simply decided that the program was “very funny” and his boss, to whom he referred the program, rather unwisely did not listen to the program properly, if at all, and scarcely distinguished herself by approving it by simply sending a message back “yes” on her Blackberry. The BBC Trust condemned the program as “a deplorable intrusion with no editorial justification.”

The BBC faces a further regulatory inquiry from Ofcom, the independent regulatory authority for UK communications companies, all previous inquiries having been in the nature of self-flagellation. Brand left the program and Ross was suspended for three months without pay, seemingly a saving to the long-suffering licence payers of £1.5 million.

The upshot may well be stricter penalties for such breaches of the Broadcasting Codes and tougher controls at the BBC to prevent such non-compliance. We shall have to see what Ofcom has to say about the matter but the whole sorry story seems a classic on what can go wrong when the proverbial tail of popular and powerful entertainers wags the regulatory dog. What was also interesting about the controversy was the generational divide. If you were under 30, you tended to think the programs were indeed harmless fun and that all the moaners should get a life. Whereas for the over-30s, no penalty for Brand and Ross was too severe.

#### *Mr Justice Eady and the Law of Privacy*

At the Society of Editors conference, Paul Dacre, Editor-in-Chief at Associated Newspapers, launched another controversy. He attacked Mr. Justice Eady on the basis that he had a near virtual monopoly over privacy cases, that he was inexorably and insidiously imposing a privacy law in this country and that his judgments were arrogant and amoral.

As with the BBC controversy, this produced predictable divisions. The trenchant views of the *Daily Mail*, the voice of middle England, are anathema to many including readers of the Guardian. The controversy therefore soon turned into an opportunity to express equally trenchant views about Paul Dacre. The peg upon which Dacre had hung his criticism was the fact that in his view Mr. Justice Eady was to be criticised for having simply described the “*perverted and depraved*” conduct of Max Mosley as simply “*unconventional*.”

Predictably the legal profession – or at any rate that part which regularly appears before Mr. Justice Eady – rallied to his defense pointing out that the law of privacy has its base in the Human Rights Act 1998 and that the Court of Appeal has upheld his judgments and that Dacre was being disingenuous when he argued that the whole question of privacy should be referred to Parliament. Parliament, the lawyers claimed, had spoken when the Human

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Rights Act was passed and it is judges who have to decide cases rather than Parliament.

However, it is striking that the cases deciding the important balance between the right to privacy and freedom of speech are for the most part being decided by one man and that cases are now being decided differently to the way they were decided a few years ago. There are grounds for arguing that the pendulum may have swung too far. Privacy in mainland Europe is not just a civil matter but also a criminal offence carrying substantial jail sentences. The English courts do need to decide where there is to be clear blue water between the English law of privacy and that enforced in Europe.

The problem in this country is that the tabloid press are considered for too long to have been grossly intrusive and the serious press are paying the penalty for it. When the debate is stripped of its strong feeling about either Mr. Justice Eady or Paul Dacre, the issue is well put

by Hugh Tomlinson QC that we are gradually moving from a position where

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***we are gradually moving from a position where previously anything could be published unless it was forbidden, to the opposite where nothing can be published unless it was justified***

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previously anything could be published *unless it was forbidden*, to the opposite where nothing can be published *unless it was justified*.

What the courts do not perhaps appreciate is the very real danger of worthwhile investigative journalism being inhibited by the very considerable legal expense now likely to have to be incurred whenever information may be said to be private. This is not just about celebrity culture but also about the exposing of crooks like Robert Maxwell. The debate will doubtless continue, but people should be under little doubt that in the balancing exercise between Articles 8 (Privacy) and 10 (Freedom of Speech) privacy is coming out on top by some distance with the level of public interest necessary to justify publication of private information being set to a very high level.

Whether Mr. Dacre is correct to hope that Parliament would provide a safeguard against this development of the law is open to question. The House of Commons Culture, Media and Sport Select Committee is now looking into media issues including privacy, freedom of speech and conditional fees. Written submissions are required by January 14, 2009 but the terms in which they request such information do not encourage optimism about the protection of the freedom of press.

### *JK Rowling – Murray v. Big Pictures (UK) Limited*

The House of Lords has refused permission to the photographic agency to appeal the decision permitting the author JK Rowling to bring privacy proceedings in respect of unauthorised photographs of her child in a public place. The thinking of the House of Lords appears to have been that as this was a preliminary ruling on the facts, namely that the case should not be struck out and should proceed to trial, the case did not raise sufficient points of general importance to merit the hearing in the House of Lords.

The extent therefore to which the law of privacy can engage the taking of unauthorised photographs in a public place and the potential conflict between *Campbell –v- MGN Limited* [2005] UKHL 61 and the *Princess Caroline of Hannover* [2004] EMLR 21 case remains to be clarified. A legal challenge which is, however, proceeding, is that being made to the European Court of Human Rights by Max Mosley notwithstanding his success in obtaining an

award of £ 6 0 , 0 0 0 against News Group Newspapers. Max Mosley – a

man now best known to us for the ruling that his Germanic S&M orgy was not Nazi-themed - complains that the newspaper should have approached him for comment prior to publishing this story.

This would have given him an opportunity of seeking an injunction in the courts which he would probably have obtained from Mr. Justice Eady who in fact declined subsequently to make such an order simply because by that stage the allegations have been so widely broadcast in the press and on the internet and that it was too late to put that particular genie back into the bottle. If Mosley is successful in this claim, it will become that much more difficult for the media to publish exposés and the number of applications for prior restraint made to judges at their homes on Saturday afternoon to prevent publication of private information in the Sunday newspapers will increase considerably.

### *Sienna Miller – Increasing Level of Privacy Damages*

The actress, Sienna Miller, has successfully brought a number of actions against the publishers of syndicated photos which were said to chronicle an alleged relationship with American actor Balthazar Getty. She also brought a claim in harassment. Photo-

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## UK and European Law Update

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graphs which were said to be pursuit photos, were taken in London, Los Angeles and Ibiza and included pictures of her topless on a boat in Italy. By agreement she was awarded £35,000 damages against News Group in November 2008 and a total of £53,000 against the photographic agency Big Pictures (UK) Limited in July and November 2008 as well as £15,000 from the *Daily Star*.

She also secured an agreement from News Group and the picture agency about the taking of and publication of photographs on her doorstep or in buildings which were not open to the public. The cases show the increasing level of damages in privacy cases with the court no doubt having in mind the value of such unauthorised intrusive pictures of celebrities.

Interestingly, one of the matters in the terms of reference of the House of Commons Culture Committee (see above) is whether damages in privacy cases should be merely compensatory or whether they should take into account the profit being made by the media. What is unfortunate is that this type of intrusive behavior is muddying the water for the media which do have a legitimate reason for publishing private information.

### Production of Journalist's Notes

There has been an interesting decision by Mr. Justice Tugendhat on November 21, 2008 (*Mitchell –v- Briscoe* [2008] EWHC 2852) in a libel action being brought by a mother against her daughter, a part-time judge and an author in respect of her book called "Ugly" which alleges child abuse.

The defense wanted the notes of the *Daily Mail* journalist who had interviewed other members of the family about the allegations of abuse. The application failed primarily on the basis that the judge took the view that these notes were wanted principally as ammunition to attack the credibility of various witnesses at the trial. In order for such notes to be disclosed, cogent evidence is required to show that they would be likely to support the case of the applicant and that they were necessary to assist in disposing fairly of the claim.

The judge also underlined the need for caution before making an order for the production of such journalists notes, because of the element of confidentiality that exists in respect of what is said to a journalist. Such notes could have been ordered to be produced on different facts and in such circumstances the probability would be that the judge would permit the notes to be redacted to protect sources where appropriate.

### Libel Statistics

In their annual survey, the legal publishers Sweet & Maxwell published figures suggesting a fall in the number of defamation cases which they say recently peaked at 74 in 2005-6 but fell to 59 in 2007-8. Their statistics relate to libel claims which resulted in the issue of proceedings. Many libel claims are now settled at an early stage without the need for proceedings because of the legal costs involved. In terms of percentage, celebrities seem to be bringing more cases. They accounted for 11 (17%) of the 66 cases in 2004-5. That has now risen to 19 (32%) of the 59 cases in 2007-8.

### Claims Against The Guardian

The Guardian has continued to show itself willing to stand firm against claims which it considers unjustified. The Guardian's reputation in this field was cemented by its successes against the MPs Jonathan Aitken, who ended up in jail for perjury, and Neil Hamilton. Matthias Rath has recently dropped his libel action against the

Guardian and has been made the subject of an initial order

to pay £200,000 costs with more to come. He had been unhappy with The Guardian's criticism of the claims that he was making about his nutritional supplements as a means of combating Aids.

The Guardian also enjoyed a measure of success in the defense of the claim brought by Tesco Stores Limited concerning their tax avoidance schemes. The paper secured a helpful ruling on the operation of the offer of amends defense in that that store was required to reach a prompt decision as to whether or not it would accept the offer of amends, which ultimately it did. The case was settled for what appeared to be a modest payment of a sum by way of damages to the charity of Tesco's choice.

More alarming, however, was the size of Tesco's legal bill, a copy of which appears to have found its way into the hands *Private Eye* magazine. The bill which includes Carter-Ruck's fees and also those of Tesco's tax lawyers and accountants as well as their barristers clocked in at £800,000 plus VAT. It was fortunate that the case was settled at an early stage. The bill does not appear to include a Conditional Fee Agreement. If the report in *Private Eye* is correct and that senior partners were charging £500 and junior partners £400, it does underscore the fact that claimant's libel litigation is not inexpensive in this country.

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***In terms of percentage, celebrities seem to be bringing more cases***

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## UK and European Law Update

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### **Baby P**

A case which has recently ended at London's Central Criminal Court (where John Mortimer's Rumpole of the Bailey practised) has brought into very sharp focus how strict English contempt of court laws interact with the Internet. The case concerned the most horrific torture of a toddler involving acts of breathtaking cruelty by a mother and her partner. The case caused a particular scandal because police and welfare agencies had visited the family on 60 occasions and had failed to note the shocking injuries to the child. Mother and partner were convicted of causing the death of the child.

However, there are no less than three court orders prohibiting the naming or description of the convicted defendants or the child or indeed any other young person involved in that or related cases nor can one give the dead child's name.. So strict are the gagging orders that it would be unwise to say more than that it is believed these orders are in place to prevent prejudice to an upcoming abuse trial. However, the case has become a political issue particularly in view of the track record of the North London Haringey Council responsible for the welfare of the child. A few years back they were similarly neglectful regarding a murdered 8 year old. The frontline media have obeyed the orders but a little judicious Googling soon turns up the name in a minute or so, plus photograph and address of the perpetrators.

Not only do countless blogs and a hitherto unknown online newspaper breach the court orders but there is a militant lynch mob out there exposing the perpetrators by Internet and text and encouraging prisoners to kill them. The Attorney General is struggling to enforce compliance with the court orders by the mainstream media, but this case will, when all the related proceedings are concluded, doubtless lead to a reexamination of how effective contempt of court laws can be in the face of a concerted Internet campaign.

It is unlikely in the extreme that we will adopt the anything-goes-approach that seems to prevail in the United States which we feel puts a fair trial at risk and we are not comfortable with sequestered juries or detailed voir dire. Watch this space.

### ***ECHR Decision on Police Libel Claim***

In this country it is not unusual for police officers who are criticised to bring actions assisted by the Police Federation. On occasions those officers are not in fact named, but are identifiable as

members of a particular squad attached to a particular inquiry. It would be interesting therefore to see if the recent decision of the European Court of Human Rights in *Godlevskiy –v- Russia* [application 14888/03] makes bringing such actions more difficult.

There the activities of a local narcotics unit had been criticised in the *Orlovskiy Meridian* as being too cozy with those they were meant to be investigating. Thirteen members of the unit were awarded damages, but this was held by the European Court to be a violation of Article 10, concerning legitimate comment on a matter of public interest and that it was not accusing individuals of criminal conduct but rather promoting an ongoing debate.

### ***While in Europe***

The prize for the most bizarre piece of threatened litigation must undoubtedly go to French President Sarkozy. He was reported by Reuters on October 21<sup>st</sup> as having threatened a claim through his lawyer Thierry Herzog against the French publishers K&B unless they withdrew its Sarkozy doll with a voodoo manual giving instructions as to how one stuck pins into the model of Sarkozy. Had the claim been brought in England, one might have been unable to resist the observation that he would have only have felt a small prick, but perhaps the Gallic sense of humour is different.

### ***D Notices***

The history of D Notices is, according to an article which appeared in *The Times* of October 24, 2008, to be described in a book entitled *Secrecy and the Media* by a former secretary to the D Notice Committee, who, members of the MLRC may recollect, addressed the 2003 MLRC London Conference, the admirable Rear-Admiral Nick Wilkinson. D Notices are part of an agreed self-regulating procedure to prevent damage to national or military security by the inadvertent publication of details of security operations or military secrets (see [www.dnotice.org.uk](http://www.dnotice.org.uk).)

Sad to relate, the no doubt brilliantly and cautiously written history has itself run foul of the D Notice Committee and its present incumbent as secretary and of the monolithic Ministry of Defence. The upshot is that Rear-Admiral Wilkinson's book has been delayed for some months and he has been required to end his narrative at 1997 rather than 2004, thereby removing the last 5 chapters and any need to discuss the mendacity of the Blair years.

*David Hooper is a partner with Reynolds Porter Chamberlain in London.*

## New York Court Grants Permanent Injunction Against Harry Potter Companion Book

### *Defendant Appropriated too Much of Rowling's Creative Work*

By Dale Cendali and Claudia Ray

On September 8, 2008, the United States District Court for the Southern District of New York issued a permanent injunction on behalf of plaintiffs Warner Bros. Entertainment Inc. and J.K. Rowling, barring defendant RDR Books from publishing its planned book entitled *The Lexicon*. *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (Patterson, J.).

The court held that plaintiffs had established a *prima facie* case of infringement as to the seven books in the *Harry Potter* series of novels and also as to two companion books authored by plaintiff Rowling, *Quidditch Through the Ages* and *Fantastic Beasts and Where to Find Them*. The court also held that defendant had failed to show that its use of plaintiffs' works was a fair use because it "appropriates too much of Rowling's creative work for its purposes as a reference guide."

#### **Background**

Plaintiff J.K. Rowling is the author of the *Potter* novels, which tell the story of a young boy named Harry Potter and his friends as they battle the evil Lord Voldemort while also attending the Hogwarts School of Witchcraft and Wizardry. Rowling's work is "filled with magical spells, fantastical creatures, and imaginary places and things." The seven-book series has achieved both popular and critical success, and has been credited with encouraging children to read books.

Rowling has also authored two short companion books (collectively, the "Companion Books"), *Quidditch Through the Age*, which tells the story of an imaginary sport, "quidditch," that Harry Potter and his friends play at Hogwarts, and *Fantastic Beasts and Where to Find Them*, an A-to-Z encyclopedia of the fantastical creatures in the *Harry Potter* universe. The proceeds from the Companion Books (more than \$30 million to date) have been donated to char-

ity. Rowling has stated on a number of occasions that once the *Harry Potter* series was completed (which occurred upon publication of the seventh book in July 2007), she intended to publish a "*Harry Potter* encyclopedia," the proceeds of which would also be donated to charity.

Plaintiff Warner Bros. Entertainment Inc. is the owner of the film rights to the *Harry Potter* series, and has released five films, with a sixth due out in November 2008.

Defendant RDR Books is a Michigan publisher. Authorship of the *Lexicon* is attributed to Steven Vander Ark, the

owner of "The Harry Potter Lexicon" website (the "Website"), a

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**Defendant "appropriates too much of Rowling's creative work for its purposes as a reference guide"**

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popular *Harry Potter* fan site that Vander Ark founded in 1999. As the court noted, the Website includes, among other things, indexed A-to-Z lists of the characters, creatures, places, spells and magical items from the *Harry Potter* works, fan art, commentary, timelines, forums, and interactive data, which are drawn primarily from Rowling's works.

As the court discussed, RDR's president, Roger Rappoport, contacted Vander Ark in August 2007 about writing a *Harry Potter* encyclopedia after reading a newspaper article about him. The court noted that Vander Ark was aware of Rowling's public statements regarding her plans to write a *Harry Potter* encyclopedia and had previously stated that publishing such a book would violate Rowling's intellectual property rights, and that he would never do so except with her permission. The court also noted that Vander Ark changed his mind after meeting with Rappoport, who assured him that publication of content from the Website was legal and agreed to add an atypical clause to the publishing contract for the *Lexicon*" providing that RDR would defend and indemnify Vander Ark in the event of any lawsuits.

The court found that Vander Ark created the *Lexicon* using the encyclopedia sections of the Website. It contains descriptions of all of the persons, places, spells and creatures from Rowling's *Harry Potter* works in an A-to-Z for-

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## New York Court Grants Permanent Injunction Against Harry Potter Companion Book

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mat. The information included in the entries includes descriptions of the subject's attributes, and role in the story, relationship to other characters and events, as well as the events involving the subject of the entry. The entries generally but not always include references, including chapter references for the novels. The *Lexicon* also includes a small amount of material from third-party sources, including "sporadic" etymological references.

The court noted that RDR and Vander Ark had planned to rush the book to market by late October 2007, in part to capitalize on the interest generated by the publication of the final *Harry Potter*. Some of RDR's marketing materials mischaracterized Rowling's previous statements about the Website, giving the impression that she supported publication of the *Lexicon*.

Rowling's literary agency first learned of the *Lexicon* upon seeing an ad for it on a publishing industry website. In September 2007, plaintiffs' counsel sent a letter to Vander Ark, copied to RDR, stating that the *Lexicon* appeared to infringe Rowling's copyrights and asking that RDR cease its publication efforts. RDR replied, promising to look into the matter, and meanwhile continued marketing the book. An exchange of letters followed. On October 31, 2008, after RDR refused to delay publication or provide a copy of the manuscript, plaintiffs commenced an action against RDR Books in the Southern District of New York, alleging copyright infringement, as well as various other claims under federal and state law, and seeking both injunctive relief and damages.

On March 5, 2008, the court consolidated the scheduled evidentiary hearing with a trial on the merits, pursuant to Fed. R. Civ. P. 65(a)(2). The pretrial orders narrowed the issues to be tried to (i) plaintiffs' claim for copyright infringement and statutory damages and (ii) defendant's defenses of copyright fair use, copyright misuse and unclean hands. A bench trial was held from April 14 to 17, 2008. On September 8, 2008, the court issued an opinion finding that RDR had infringed Rowling's copyrights and rejecting its fair use defense.

### Substantial Similarity

In considering whether the *Lexicon* infringed plaintiffs' works, the court first noted that there was no dispute that

the *Lexicon* had copied Rowling's works, as Vander Ark had admitted that he created and updated the book's content using notes that he took while reading Rowling's works as well as unauthorized scanned, electronic copies of those works.

In deciding whether the copying rendered the *Lexicon* substantially similar to plaintiffs' works, the court examined whether it was quantitatively and qualitatively substantial. As to the first prong, the quantitative extent of the copying, the court relied on the Second Circuit's decision in *Castle Rock v. Carol Publishing*, 150 F.3d 132, 140 n.6 (2d Cir. 1998) in noting that it would consider the amount of copying not only of the direct quotations and close paraphrasing, but also all of the other protectable expression. The court also noted that where, as here, the copyrighted work was "wholly original," a lower quantity of copying would support a finding of substantial similarity.

The court then concluded that plaintiffs had shown that the *Lexicon* copied a sufficient quantity of the *Harry Potter* series and the Companion Books to support a finding of substantial similarity where most of its 2,437 entries "contain direct quotations or paraphrases, plot details, or summaries of scenes from one or more of the *Harry Potter* novels" and the copied expression was "entirely the product of the original author's imagination and creation." 575 F. Supp. 2d at 535. The court noted that the copying was "even more substantial" as to the Companion Books. Although they were only 59 and 56 pages long, the *Lexicon* reproduced a "substantial portion of their content, with only sporadic omissions, across hundreds of entries." *Id.*

The court also found that the second prong was satisfied, concluding that despite the dissimilarity in the overall structure of the *Lexicon* and plaintiffs' works, the copying of Rowling's creative, original expression was qualitatively substantial where "the plotlines and scenes encapsulated in the *Lexicon* are appropriated from the original copyrighted works." 575 F. Supp. 2d at 538.

### Derivative Work

The court next addressed plaintiffs' claim that the *Lexicon* was an unauthorized derivative work. The court rejected that argument, concluding that because the *Lexicon* was structurally different and did not recast the original

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## New York Court Grants Permanent Injunction Against Harry Potter Companion Book

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material in another medium to tell the same story, it was not a derivative work. 575 F. Supp. 2d 539.

### Fair Use

Having found that plaintiffs had established a prima facie case of copyright infringement, the court turned to RDR's affirmative defense of fair use. It began with the first statutory fair use factor, whether and to what extent the new work is transformative, meaning whether it merely supersedes the objects of the original creation or instead adds something new with a further purpose or character. 575 F. Supp. 2d at 541. The court found that the purpose of the *Lexicon* was transformative in that it used material from the original works to make information about the "intricate" world of the *Harry Potter* series accessible to readers as a reference guide.

It concluded that this transformative purpose distinguished the *Lexicon* from the "Seinfeld" trivia book at issue in *Castle Rock*, which the Second Circuit had found simply repackaged the television program to entertain viewers. 150 F.3d at 142. The court also found that, notwithstanding plaintiffs' assertion that the *Lexicon* did not add any significant analysis or commentary, it did offer some new insights regarding plaintiffs' works. But the court found that the book was transformative of the Companion Books to a much lesser extent because they could also be used for reference purposes.

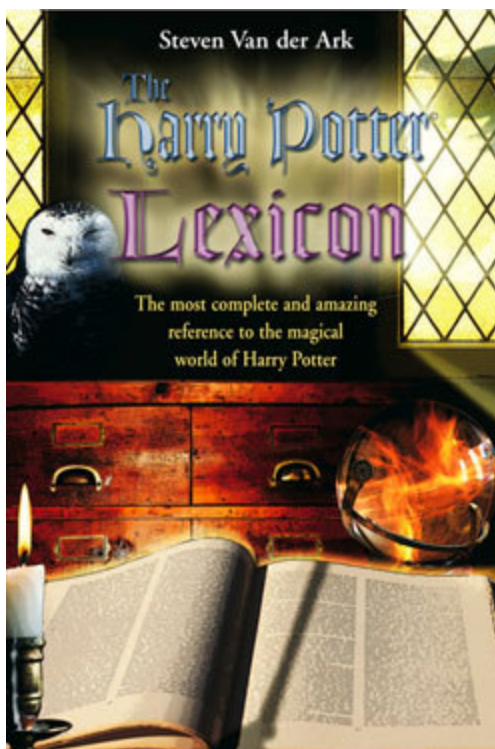
Ultimately, the court concluded that the book's transformative character was diminished by the fact that it was not consistently transformative because it engaged in verbatim copying beyond what was reasonably necessary to achieve its transformative purpose. 575 F. Supp. 2d at 544. The court also concluded that the *Lexicon* lacked transformative character where its value as a reference guide lapsed, as in some of the longest entries which contained few or no citations.

The court also considered the commercial nature of the *Lexicon*, noting that the commercial nature of RDR's use of plaintiffs' works weighed against a finding of fair use. It also considered what it called the "subfactor" of whether defendant had acted in good faith. The court found that RDR was entitled to proceed with its marketing efforts based on a reasonable belief that its use was a fair use, and that Vander Ark's use of unauthorized electronic copies of plaintiff's works was insufficient to support a finding of bad faith where he did not obtain any material that was not already available to the public. The court concluded that this subfactor only weighed slightly in favor of plaintiffs because defendant reasonably believed that its use was fair.

Turning next to the third factor, the court considered the amount and substantiality of defendant's use. The court framed the question as whether the amount and value of the original expression used was reasonable in relation to the *Lexicon*'s transformative purpose of creating a complete A-to-Z guide to the *Harry Potter* world. It found that in order to fulfill its purpose as a reference guide, it was reasonably necessary for the *Lexicon* to make considerable use of the original works. The verbatim copying and close paraphrasing, however, weighed against RDR, given that in many instances the copied material was a colorful literary device or distinctive description. The court noted that such language was of great quality and importance, what Rowling had described as "the plums in [her] cake." 575 F. Supp. 2d at 547.

The verbatim copying of this "highly aesthetic expression" raised a significant question as to whether it was reasonably necessary to achieve the purpose of the *Lexicon*. It concluded that although it was difficult to draw a line, the copying in the *Lexicon* was of the sort that might be expected from a copyright owner, not a third party, and was substantial enough to tip this factor against a finding of fair use. The court noted that the analysis was easier with respect to the Companion Books, as the *Lexicon* "takes wholesale from these short books." 575 F. Supp. 2d at 548.

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## New York Court Grants Permanent Injunction Against Harry Potter Companion Book

(Continued from page 32)

Because its purpose as to them was only slightly transformative, the amount and substantiality of the material copied from those works weighed more heavily against a finding of fair use.

The court then considered the second statutory fair use factor, the nature of the copyrighted work. It noted that it is well-settled that creative and fictional works are generally more deserving of protection of factual works. The court found that in creating the *Harry Potter* works, Rowling “has given life to a wholly original universe of people, creatures, places, and things.” 575 F. Supp. 2d at 549. Such “highly imaginative and creative” material is close to the core of copyright, particularly where, as here, the defendant’s work was not consistently transformative.

Finally, the court considered the fourth statutory factor, the effect of the defendant’s use on the potential market for or value of the original work. It noted that courts must consider not only the primary market for the copyrighted work, but also the current and potential market for derivative works based on it. Both plaintiffs and defendant had presented expert testimony on the issue of market harm to the *Harry Potter* works, but the court concluded that such testimony was not relevant because the *Lexicon* was not a derivative work and therefore was allowed to compete with Rowling’s planned encyclopedia.

The court also found that there was no basis for concluding that publication of the *Lexicon* would impair sales of the *Harry Potter* novels, as it found that reading the *Lexicon* would not serve as a substitute for reading the original works given the *Lexicon*’s transformative purpose as a reference guide.

Nevertheless, the court found that publication of the *Lexicon* could harm sale of the Companion Books. Given that those books had been taken wholesale, consumers who bought the *Lexicon* would have little reason to purchase either of the Companion Books. In light of this market harm, the court found that the fourth factor weighed in favor of plaintiffs. The court also found that the fourth factor favored plaintiffs because the *Lexicon* would impair the market for derivative works based on plaintiffs’ works that they might license, such as musical productions based on the songs and poems in the *Harry Potter* works. The court concluded that defendant unfairly harmed this market by copying the songs and poems verbatim.

Weighing all of the fair use factors together, the court concluded that defendant’s use of the *Harry Potter* works was not a fair use. The first factor did not completely favor RDR because the *Lexicon* was not completely transformative. As compared to the third factor, the amount and substantiality of the use, the balance weighed against a finding of fair use. The creative nature of the *Harry Potter* works also weighed against fair use, as did the harm to the market for the Companion Books. The court concluded that although reference guides to literary works should generally be encouraged, they should not be allowed to “plunder” copyrighted works.

### Conclusion

Having rejected defendant’s fair use defense, the court concluded that a permanent injunction was warranted given the presumption of irreparable injury that followed from a finding of infringement, as well as the evidence that publication of the *Lexicon* would harm Rowling as a writer (by impairing her incentive to write her own book), the charities to whom she would have donated the proceeds from sales of such work, the public (by preventing it from enjoying such work), and the sales of the Companion Books.

The court found that the only harm to defendant from issuing an injunction would be loss of the opportunity to sell an infringing book, which was not the sort of harm that courts recognized in balancing the equities. The public interest favored injunctive relief to prevent the misappropriation of the copyrighted work, but weighed against it to the extent it might deter the creation of transformative works. On balance, the court concluded that because the *Lexicon* took too much of Rowling’s works for its purpose as a reference guide, injunctive relief was warranted. The court also awarded plaintiffs the minimum statutory damages award for each infringed work, concluding that a higher amount was not warranted given that the *Lexicon* had not yet been published.

*Claudia Ray is partner with O’Melveny & Myers LLP in New York. Dale M. Cendali of O’Melveny & Myers represented the plaintiffs. RDR Books was represented by David S. Hammer of New York and Robert A. Handelsman of Chicago, Illinois.*



## Minnesota Federal Court Enjoins Law Restricting Exit Polling

### *100 Foot Ban Not “Narrowly Tailored” to Prevent Disruption at Polls*

By Brian T. Markley

On October 15, 2008, Judge Michael Davis, the Chief Judge of the United States District Court for the District of Minnesota, preliminarily enjoined the enforcement of Minnesota’s so-called “Lingering Statute” (Minn. Stat. § 204C.06(1)) against the exit polling activities of six media plaintiffs, American Broadcasting Companies, Inc., The Associated Press, Cable News Network, Inc., CBS Broadcasting Inc., Fox News Network, L.L.C. and NBC Universal, Inc. *American Broadcasting Companies, Inc. v. Ritchie*, 2008 WL 4635377 (D. Minn. 2008).

#### **Background**

Properly defined, “exit polling” refers to the collection of data from a random sample of voters at a sample of polling places on election day. To collect this data, exit poll reporters approach voters in a scientifically predetermined pattern (e.g., every fourth voter, every fifth voter) as they leave the polling place after they have voted and ask them to fill out a short, anonymous questionnaire.

One polling reporter is assigned to each of the polling places randomly se-

lected for the polls. The reporter typically stands just outside the exit of the building in which the polling place is located unless election officials insist otherwise. Polling reporters wear badges clearly identifying them as representatives of the plaintiff news organizations and are instructed to be courteous and businesslike and not to obstruct voters or interfere with the election process in any way. Courts have consistently found that these exit polling activities are protected by the First Amendment.

Minnesota’s Lingering Statute provides in relevant part that: “An individual shall be allowed to go to and from the polling place for the purpose of voting without unlawful interference. No one except an election official or an individual who is waiting to register or vote shall stand within 100 feet of the building in which a polling place is located.”

Ritchie was not the first case in which Minnesota’s Lin-

gering Statute was challenged. In 1988 some of the same plaintiffs challenged an earlier version of the law in *CBS, Inc. v. Growe*, 15 Media L. Rep. 2275 (D. Minn. 1988). The version of the law at issue in *Growe* prohibited anyone within 100 feet of the entrance to a polling place from “ask [ing] a voter how the voter intends to vote or has voted.” The court in *Growe* held, among other things, that this prior version of the law was a content-based restriction on speech and was not narrowly tailored to address Minnesota’s stated interest in preventing disruption at polling places.

The current version of the Lingering Statute, unlike the version at issue in *Growe*, includes no direct reference to particular speech or activity. On its face it prohibits anyone (other than election officials and voters) from standing within the 100-foot zone. Thus, defendants in *Ritchie* argued that the law was distinguishable from the version enjoined in *Growe* and other exit polling cases because it was “content-neutral” and thus subject to a lower level of constitutional scrutiny.

#### **District Court Decision**

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**Judge Davis determined that although the law was content-neutral, it was not “activity neutral.”**

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In reaching its decision, Judge Davis agreed with defendants – Minnesota Attorney General Lori Swanson and Minnesota Secretary of State Mark Ritchie – that the amended version of the Lingering Statute is “a content neutral law restricting the place of expression in the form of exit polling.” However, the court also cited relevant legislative history indicating that notwithstanding its apparent content neutrality, the law was intended to be enforced against some activities and not others.

For example, the court noted that the Secretary of State’s representatives had testified in legislative hearings that the law need not be applied to prohibit schoolchildren from playing on school grounds within 100 feet of the polling building and had urged that election officials should use their “common sense” when enforcing the law. They also testified that the law was intended to “empower election judges to make people move [from near the polling place]

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**Minnesota Federal Court Enjoins Law Restricting Exit Polling**

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that shouldn't be there," such as "folks from interest groups like Moveon.org or others."

Based on this legislative history, Judge Davis determined that although the law was content-neutral, it was not "activity neutral." The court also concluded that the Lingering Statute was not "narrowly tailored" to serve Minnesota's stated interest in preventing disruption at the polls – a requirement applicable under any constitutional standard. In particular, the court observed that election officials "already have the authority to prohibit disturbances at polling places without banning all exit polling activities with the 100-foot radius."

The court also found "no evidence ... that exit polling in any way has a detrimental effect on the orderly and corruption-free polling place." In addition to these findings, the court determined that the Lingering Statute failed to provide

"ample alternatives" for plaintiffs' protected speech. Citing plaintiffs' uncontroverted evidence, the court found that exit polls conducted 100 feet from polling places "produce substantially less reliable results" than those that are conducted closer to the polling place.

The court also determined that plaintiffs would face "irreparable harm" in the absence of an injunction, particularly given the First Amendment interests at stake, and that "the balance of harms" tipped in plaintiffs' favor. Specifically, the court concluded that plaintiffs' potential loss of First Amendment rights outweighed any burden faced by defendants, including having to provide a new set of election day requirements to Minnesota's 30,000 election workers.

*Susan Buckley, Brian T. Markley and Kayvan Sadeghi of Cahill Gordon & Reindel LLP represent the plaintiffs in this case.*

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## Colorado Supreme Court Points Sheriffs and Police Chiefs to Release Redacted Records Upon Completion of Internal Affairs Investigations

By Adam Platt and Steve Zansberg

On November 10, 2008, Colorado's Supreme Court issued a ruling in a case involving access, under the state's open records statutes, to records of an internal affairs investigation concerning the wrongful arrest of two unnamed men who had earlier had their arrest records sealed. *In Re: Freedom Colorado Information, Inc., d/b/a The Gazette*, No. 08SA151, 2008 WL 4838413 (Colo. Nov. 10, 2008).

In the process of ruling that the names of two wrongfully arrested young men should not be disclosed, the Court issued a sweeping new interpretation of the records statutes and practically mandated sheriffs and police chiefs to release redacted versions of completed internal affairs files, using minimal redactions to ensure the maximum amount of information is disclosed that sheds light on the conduct of governmental agencies and officials.

### Background

The case arose out of a request by the Colorado Springs-Gazette (*The Gazette*) to inspect the Internal Affairs Investigation Files ("IA files") of a Sheriff's Deputy, Shawn Moncalieri, who was terminated following his wrongful arrests of two young men, who are brothers, John Does I & II. After the brothers were released and cleared of wrongdoing, a District Court Judge granted the Does' request that their arrest records be sealed pursuant to Colorado's sealing statute, which provides for the sealing of "official action" arrest records when all charges are dismissed before trial or there is an acquittal. *See* § 24-72-308, C.R.S. (2008). The Does also received \$40,000 from the county in settlement of their threatened lawsuit over the wrongful arrests and detention.

Notified of the Gazette's request to inspect the IA file, Deputy Moncalieri opposed the request, asserting that disclosure would violate his right of privacy. In response to Moncalieri's concerns, the Sheriff refused to permit inspection of the IA files.

At the subsequent hearing on *The Gazette's* petition, District Court Judge G. David Miller granted the Does' mo-

tions to intervene. The Does' attorney argued that the previous Court order (entered by a different judge) sealing the brothers' arrest records deprived the court of subject matter jurisdiction to entertain *The Gazette's* request. Judge Miller rejected that argument, ruling that IA files are "criminal justice records" that fall outside of the reach of the state's sealing statute (which is expressly limited to "records of official actions") and thus are unaffected by the previous order.

Proceeding with the analysis directed by the Colorado Court of Appeals' 2006 decision in *ACLU v. Whitman*, 159 P.3d 707 (Colo. App. 2006), Judge Miller applied the balancing test set forth in *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980): (1) whether there was an asserted expectation of confidentiality; (2) whether the information is "highly personal and sensitive" and its "disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities;" and, (3) whether there is a "compelling state interest" in disclosure. *See id.*

Judge Miller found that the IA files contained no "highly personal and sensitive" information except for easily redacted incidental references to addresses, social security numbers and birth dates. Weighing heavily in favor of access, on the other hand, was the public's "legitimate interest in knowing how law enforcement officers behave while doing their jobs, and how their superiors respond when claims of misconduct are raised and later validated by investigation." *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Department*, --- P.3d ---, 2008 WL 483414, at \*4 (Colo. Nov. 10, 2008) (quoting district court order). That public interest became "absolutely compelling when taxpayer dollars" were required to settle claims premised upon the officers' misconduct. *Id.*

Moreover, Judge Miller found the Does' interest in anonymity became "subordinated to the public interest of full disclosure when they chose to hire an attorney and assert a claim for monetary damages out of taxpayer funds." *Id.* Judge Miller ordered the release of the entirety of the IA files with the redaction of only addresses, social security numbers and birth dates, but not the names of John Does I & II.

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## Colorado Supreme Court Points Sheriffs and Police Chiefs to Release Redacted Records Upon Completion of Internal Affairs Investigations

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The John Does filed a petition for an emergency writ to the Colorado Supreme Court, which issued a Rule to Show Cause why the district court had not “exceeded its subject matter jurisdiction and/or abused its discretion in this matter by ordering the release to the press of information previously sealed” under the sealing statute. The Parties then briefed that issue.

### *The Good, The Bad, And The Unexpected*

Months after the briefing was completed, and without oral argument, the Court rather unceremoniously rejected the Does’ jurisdictional argument: because the sealing statute was limited exclusively to “records of official actions” it did not divest the District Court of jurisdiction to determine *The Gazette’s* request to inspect records that were *not* such records. Having dispensed with the only issue it had identified in its Rule to Show Cause (and upon which any briefing had been invited), the Colorado Supreme Court next proceeded to issue a sweeping new interpretation of Colorado’s Criminal Justice Records Act, treating the case as a direct appeal, with no briefing on the issues addressed.

Surprisingly, the Court found that Judge Miller had erred in applying, *de novo*, the Court’s analysis in *Martinelli* – even though it was required by *ACLU v. Whitman*, 159 P.3d at 710, *cert. denied*, 2007 WL 1395311 (Colo. 2007). (Notably, the opinion does not even mention or acknowledge the *Whitman* precedent.) Thus, the Supreme Court found the trial court had usurped the role of the records custodian. On this basis the Court remanded the action to the trial court with directions to the Sheriff to now, on his third attempt, exercise his discretion in deciding which portions, of any, of the IA files should be disclosed.

### *Unexpected: New Standard for Release of Criminal Justice Records*

Writing for a unanimous Court was Justice Gregory Hobbs, who also authored the Court’s 4-3 majority opinion upholding a prior restraint in the Kobe Bryant rape prosecution. *See People v. Bryant*, 94 P.3d 624 (Colo. 2004). According to the Court, *Martinelli*, which enunciates an ad hoc balancing test for determining whether claimed

“confidential” information in the Government’s hands should be disclosed, does not apply to criminal justice record requests. *See id.* at \*3. Rather, decisions on these requests are “consigned to the exercise of the *custodian’s* sound discretion.” A district court may only review “for abuse of discretion” and may not “redo the custodian’s balancing of the interests.” *Id.* at \*\*4, 8 (emphasis added).

So long as the custodian’s decision is supported by an “adequate rationale” of any kind it will be upheld. In order to facilitate the court’s review, the custodian must articulate its balancing of the the pertinent factors: (1) “[T]he privacy interests of individuals who may be impacted by a decision to allow inspection;” (2) “[T]he agency’s interest in keeping confidential information confidential;” (3) “[T]he agency’s interest in pursuing ongoing investigations without compromising them;” (4) “[T]he public purpose to be served in allowing inspection;” and (5) “[A]ny other pertinent consideration relevant to the circumstances of the particular request.” *Id.* at \*\* 4, 6.

### *The Bad: Privacy Interests of Wrongfully Arrested Elevated*

In remanding the case to the Sheriff to perform that balancing, the Court made clear that a paramount consideration was the John Does’ privacy interest in the nondisclosure of their identities – “the most precious of [the brothers’] private property.” *Id.* at \*11. “In a case such as this, the custodian’s redaction of the names of those falsely arrested is particularly important.” *Id.* And though the sealing statute does not prohibit the disclosure of this type of record, the “General Assembly did not intend that the names of falsely arrested persons be revealed by police when” ordered shielded in other contexts. *Id.*

While the Court’s concern for the Does’ privacy is understandable, its citing the sealing statute as the source of the brothers’ privacy interest miscomprehends the sealing statute’s function and logical limitation. That statute is designed (and plainly written) to give the wrongfully accused a clean criminal record so that future background checks will reveal no criminal record; it also authorizes them to legally deny to interviewers that they were ever arrested.

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## Colorado Supreme Court Points Sheriffs and Police Chiefs to Release Redacted Records Upon Completion of Internal Affairs Investigations

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But, of course, the sealing statute does not, and cannot, erase the historical record. Indeed, the fact that the Does are at this point anonymous is completely fortuitous. Had *The Gazette* obtained and published their names upon the initial arrests (at which time the arrest records were mandatorily open to public inspection) the subsequent entry of a sealing order could not miraculously restore their anonymity nor erase the fact of their arrest from the newspaper's archives (or Google).

### *The Good: Virtual Mandate to Release Redacted IA Files*

In a marked departure from previous case law, Colorado's Supreme Court all but established a presumption of public access to criminal justice records that shed light upon governmental conduct, effectively mandating that records custodians redact requested documents where necessary to protect privacy. "By providing the custodian of records with the power to redact ... personal information ... the legislature has given the custodian an effective tool to provide the public with as much information as possible, while still protecting privacy interests when deemed necessary." *Id.* at \*8 n. 3.

Moreover, the Court instructed, a "custodian should redact sparingly to promote the CCJRA's preference for public disclosure." *Id.* Importantly, the Court also strongly suggests that non-disclosure may only be justified where "the record is not relevant to performance of the criminal justice agency's public function, or when premature release of the information would hinder or jeopardize an ongoing investigation . . ." *Id.*

### **Conclusion**

The Supreme Court's ruling is riddled with errors both procedural and substantive: procedurally, it makes new law

in areas not identified in its Rule to Show Cause and not briefed, and it reviews the District Court's ruling *de novo* as if this were a routine direct appeal. Substantively, the decision deals a blow to the public's right to access information in criminal justice records that have been sealed, and appears to imbue crime victims with substantial new privacy rights – even those who have obtained large payments from the public.

Nevertheless, the decision is not without its silver linings. As a result of the helpful footnote discussed above, records custodians can no longer simply deny all requests to inspect IA file requests (in completed investigations) as a standard operating procedure and force records requestors to court to challenge such denials. Henceforth, police chiefs and sheriffs throughout Colorado must engage in a balancing of competing interests and must articulate reasons for denying access to *portions* of the IA files. Indeed, given the Court's clear command that a "custodian should redact sparingly to promote the

CCJRA's preference for public disclosure," reviewing courts may well find non-disclosure or heavy redaction to constitute an abuse of discretion.

So, while the Court likely erred in determining that the identities of these two John Does should not be disclosed, in doing so the Court has directed that in the future Colorado's citizens will have greater access to police and sheriff's IA files than they previously enjoyed.

*Adam Platt is an associate, and Steve Zansberg a partner, in the Denver office of Levine, Sullivan, Koch & Schulz, L.L.P. They represented The Gazette newspaper and its reporter Dennis Huspeni in the case discussed above. The El Paso County Sheriff's Office was represented by Charles Greenlee of Colorado Springs. The John Does were represented by James A. Reed of Colorado Springs.*

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**Colorado's Supreme Court all but established a presumption of public access to criminal justice records that shed light upon governmental conduct**

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## Maine Supreme Court Strikes Down Election Endorsement Statute *Law Imposed Unconstitutional Burden on Political Speech*

The Supreme Court of Maine struck down as facially unconstitutional a state statute requiring political candidates to obtain explicit permission from endorsers before publishing their endorsements in political advertisements. *Mowles v. Commission on Governmental Ethics and Election Practices*, 2008 ME 160, 2008 WL 4683722 (Me. Oct. 21, 2008). In reversing the Superior Court's ruling affirming the constitutionality of the statute, the Supreme Court concluded that the law imposed an unconstitutional burden on political candidates' free speech under the First Amendment.

### **Background**

In 2004, plaintiff Michael D. Mowles made an unsuccessful bid for a seat in the Maine House of Representatives. During the course of his 2004 campaign, Mowles obtained and publicized endorsements he received from Maine's U.S. Senators, Olympia Snowe and Susan Collins. In 2006, Mowles used those same endorsements again in his Republican primary campaign for that same seat in the state legislature against Jennifer Duddy. Although he indicated in a small font on his campaign leaflets that the supporting statements were made by the senators in October 2004, he neither asked for nor received permission from Snowe or Collins to reuse the statements in 2006.

As a result, Duddy claimed that Mowles ran afoul of 21-A M.R.S. § 1014-A, the Maine statutory provision that prevented political candidates from using endorsements without authorization. It said: "A candidate may not use an endorsement unless the endorser has expressly authorized its use. The communication must clearly and conspicuously state that the endorsement has been authorized."

### **Level of Scrutiny**

Mowles maintained that the court should apply strict scrutiny to the statute because it threatened his core political speech. The court, noting that plaintiff's speech "encompassed his own representations of his qualifications and endorsements" and involved his candidacy for elective office, agreed both that Mowles' speech was political and that strict scrutiny should be applied. It said: "If the speech being regulated is classified as core political speech, or if the regulation at issue is content-based, strict judicial scrutiny is required."

Furthermore, the court also found that the strictest possible scrutiny should be applied to the Maine statute because it was a content-

based regulation affecting "the very words that may be published by the candidate."

### **State's Interest in Accuracy**

The State argued that it had a compelling interest in ensuring accuracy and truth in the political process. While agreeing in principle with the importance of accuracy, the court cautioned against restricting the flow of information in a political campaign. The problem, according to the Maine Supreme Court, was that the statute puts the State "in the position of requiring accuracy *in advance* of a campaign statement." It wrote: "This requirement does not serve to protect voters from the confusion of a chaotic and oppressive physical voting environment. Rather, it attempts to protect voters from potentially misleading or inaccurate speech, the precise action that First Amendment jurisprudence guards against." After all, in the great marketplace of ideas, as Justice Holmes famously counselled, the cure for misleading political speech is more speech.

### **Prevention of Fraud**

The State also argued that the statute should be upheld to prevent fraud during campaigns, since false statements are capable of quickly swaying the electorate and wreaking havoc. But the court was also unwilling to accept that justification. It observed that the endorsements relied upon by the political candidate in his second attempt at the statehouse, while somewhat stale, were not fraudulent. It also noted: "With respect to political endorsements, there are myriad circumstances in which a candidate might publish an endorsement without the express authorization of the endorser and not commit a fraud on the public."

Even if the state had been able to prove that the candidate's statements misrepresented the truth, the statute was not narrowly tailored to address the state's interest. The court wrote: "The restriction on speech embodied in section 1014-A is not, however, limited in application to fraudulent or libellous statements made in the context of an election. Instead, Section 1014-A sweeps broadly enough to prohibit the use of an endorsement that was actually made."

*David A. Lourie and Zachary L. Heiden represented Michael D. Mowles, Jr. Maine Attorney General G. Steven Rowe and Asst. Attorney General Phyllis Gardiner represented the Maine Commission on Governmental Ethics and Election Practices.*

## ETHICS CORNER

## Standing Mute About Mootness and Standing?

*A Media Lawyer's Duty of Candor to the Tribunal*

By David A. Strassburger

Every lawyer must respect the duty of loyalty owed to the client unless a recognized, higher duty takes precedence. In some situations, the ethics rules of each jurisdiction elevate the lawyer's duty of candor to the tribunal above all other professional duties, and require the lawyer to make disclosures to the court that could be contrary to the client's interests.

Model Rule of Professional Conduct 3.3(a)(1) states that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. Comment 3 expands upon this principle, stating vaguely that there "are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." See also *Model Rules of Prof'l Conduct R. 3.3, cmt. 3* (1983).

Many statements to the tribunal are explicit, while others are

inherent in the existence of the proceeding itself. The very fact of filing a lawsuit carries with it the representation that the court has the authority to hear the case. If the court does not have jurisdiction to decide the action at its inception or at some point later in the case, then the lawyer's duty of loyalty may give way to the lawyer's duty of candor to the court.

Mootness and standing are two distinct but related doctrines that address whether a live case or controversy exists, without which the court lacks jurisdiction. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 191-92 (2000). In *Fusari v. Steinberg*, 419 U.S. 379 (1975), the Supreme Court confronted a mootness problem after it agreed to decide whether Connecticut's unemployment compensation system violated the constitutional guarantee of procedural due process. While the appeal was pending, the Connecticut legislature enacted legislation that materially changed the procedures in question.

The Court explained that the changes might have mooted the controversy, and remanded the action for further proceedings. *Id.* at 387, citing *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972). In a footnote, the Court remarked that counsel had failed to inform the Court of the "existence and significance" of the new legislation, further commenting that the counsel's omission was "difficult to understand." *Fusari*, 419 U.S. at 387 n.12; see also *id.* at 390-91 (Burger, C.J., concurring).

In 1994, the ABA's Committee on Ethics and Professional Responsibility alluded to the interplay between lawyer's duty to the tribunal and jurisdictional defects. *ABA Comm. on Ethics and Prof'l Responsibility*, Formal Op. 94-387 (Sept. 26, 1994) (addressing disclosure to opposing party and court that statute of limitations has run). Although the Committee found

no violation of Rule 3.3(a) by the lawyer who files a time-barred claim, the Committee explained that the result "might well be different if the limitations defect in the claim

were jurisdictional, and thus affected the court's power to adjudicate the suit."

In *Richmond v. Chater*, 94 F.3d 263 (7<sup>th</sup> Cir. 1996) then-Chief Judge Posner was more emphatic. Lawyers, he wrote, "violate their duty as officers of the court when they agree to suppress doubts about the court's jurisdiction." *Id.* at 267. Commentators are equally certain: "Clearly, attorneys must inform courts when a case is moot or non-judiciable." William H. Fortune, *A Proposal to Require Lawyers to Disclose Information about Procedural Matters*, 87 Ky. L.J. 1099, 1119 (1999).

The media lawyer's litigation practice regularly includes requests for equitable relief that may implicate mootness considerations. For example, the government has imposed restrictions on newsgathering, only to repeal them after a media challenge. *Flynt v. Weinberger*, 762 F.2d 134 (D.C.Cir. 1985). Even though one would expect the government's lawyer to raise the issue, the repeal of the restric-

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**The media lawyer's litigation practice regularly includes requests for equitable relief that may implicate mootness considerations**

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## Standing Mute About Mootness and Standing?

(Continued from page 40)

tion during the pendency of the action would implicate the media lawyer's independent obligation of disclosure to the tribunal.

A related, and more difficult dilemma arises under the "willing speaker" doctrine. As a general rule, a member of the media has no standing to challenge government's rules limiting the speech rights of those subject to the rules without first establishing his or her own standing. The media member establishes standing, and thereby jurisdiction, by pointing to a "willing speaker," i.e., someone who but for the constraint would have spoken to the media on the prohibited topic. *Pennsylvania Family Inst., Inc. v. Black*, 489 F.3d 156, 165-66 (3d Cir. 2007).

Willing speakers may exist at the outset of the lawsuit, but sometimes willing speakers change their minds. If the media lawyer has represented the existence of a willing speaker initially, he may have an obligation to disclose, and to retreat, if the willing speaker gets cold feet, undermining the court's jurisdiction. *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759, 2768 (2008) ("it is not enough that the requisite interest exist at the outset. To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (internal quotations omitted).

When the government closes a meeting that should have been open to the public, separate legal challenges can proceed on different paths, with the result in one action mooting the entire controversy. *WJW-TV, Inc. v. City of Cleveland*, 878 F.2d 906 (6<sup>th</sup> Cir. 1989) (state court's ruling that closed meeting violated state law mooted action seeking relief under federal law). The media lawyer in the pending suit may have an obligation to disclose the result in the decided action if the latter would moot the former.

Under an open records law, the eventual production of all requested documents, no matter how belated, may moot all claims. *Papa v. United States*, 281 F.3d 1004, 1013 (9<sup>th</sup> Cir. 2002) (FOIA). The media lawyer should counsel the client to reveal to his lawyer when all of the documents have been produced.

Disputes over the identity of confidential sources, too, can implicate mootness considerations and the media law-

yer's ethical duties. In *Price v. Time, Inc.*, 416 F.3d 1327 (11<sup>th</sup> Cir. 2005), *modified on denial of rehearing*, 425 F.3d 1292 (11<sup>th</sup> Cir. 2005), the district court in a libel case ordered the media defendants to reveal the identities of the confidential sources. On appeal, the plaintiff's lawyer disclosed that he learned the identity of some of the confidential sources. The plaintiff's lawyer and counsel for the media then agreed, with the blessing of the Court of Appeals, that the order compelling disclosure should be vacated as moot. 416 F.3d at 1330; *accord United States v. King*, 194 F.R.D. 569 (E.D.Va. 2000) (motion to quash subpoena based on reporter's privilege mooted in part because the source's identity was known to the parties and a matter of public record).

Candor may require disclosure, but it should not be equated with surrender, because a lawyer is never "required to make a disinterested exposition of the law." Model Rules of Prof'l Conduct R. 3.3, cmt. 4 (1983); *see also In re Thomas*, 337 B.R. 879, 892 (Bankr.S.D.Tex. 2006) ("The point is disclosure. If you know you can deal with it, why not disclose it? ... It's not an admission that you give up your rights to it. You disclose it. You explain it. You deal with it. But you chose, instead, on behalf of your client to hide it.") (internal quotation and citation omitted). Even if the action may appear moot on its face, jurisdiction may exist because the issue presented is capable of repetition yet evading review. *Davis*, 128 S.Ct. at 2769. Similarly, individuals willing to speak on Monday, but unwilling on Tuesday, may be willing again on Wednesday, or other willing speakers may come forward in a timely fashion.

It is easy to criticize lawyers who suppress doubts about the court's jurisdiction, much easier than it is to define when the jurisdictional basis for suit becomes so weakened that the lawyer's duty of loyalty to the client loses its paramount importance. Self-awareness remains the touchstone of ethical practice. The lawyer who recognizes the jurisdictional pitfalls associated with an active media law practice will be prepared to address them candidly as they arise.

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