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# MLRC Media Law Resource Center MEDIALAWLETTER

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Reporting Developments Through November 30, 2010

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# MLRC 2010 Annual Dinner

## *Looking Back, Looking Forward: The Changing Business of News*

MLRC members and friends celebrated the organization's 30<sup>th</sup> Anniversary at the Annual Dinner on November 10<sup>th</sup> at the Grand Hyatt in New York. Chairman of the MLRC Board of Directors Kenneth Richieri began the evening with a tribute to MLRC's founders, current and former Directors, Defense Counsel Section Executive Committee Members, and the Trustees of the MLRC Institute.

### Changing Business of News

The evening's panel featured Jill Abramson, Michael Kinsley, Jonathan Klein and moderator, Jonathan Alter. The panelists, who each brought decades of experience working in media, discussed the biggest changes they experienced in their business over the years and what they anticipated may be on the horizon. The discussion ranged from the future of print media to how social networking has led to a more sophisticated audience. The panelists also commented on current trends such as the localization of news, the rise of mobile apps, and the increase in opinion-based journalism. A transcript of the dinner panel is available [here](#).

Alter is a columnist with Newsweek, where he has worked for over 25 years. He is also a contributing correspondent to NBC News, and the author of "The Promise: President Obama, Year One."

Abramson is managing editor of The New York Times, a position she has held since 2003. She is co-author of "Strange Justice: The Selling of Clarence Thomas" and "Where They Are Now: The Story of the Women of Harvard Law 1974."

Kinsley is currently a columnist with POLITICO. He has worked in cable news, print journalism and online media. He was co-host of CNN's "Crossfire" from 1989 to 1995, and went on to found Slate in 1996.

Klein served as president of CNN/U.S. from 2004 to 2010. Prior to joining CNN, he founded The FeedRoom, a broadband video company, and was an executive vice president at CBS News.

**"The panel we've chosen tonight, "Looking Back, Looking Forward: The Changing Business of News," was designed to echo our 30<sup>th</sup> Anniversary by giving some perspective on the changes we've experienced over the last 30 years and by providing some predictions of what we can expect in the next 30."**





**Left to right: Jonathan Alter, Michael Kinsley, Jill Abramson, Jonathan Klein**

All photos by Chris Fargo, CWT Productions







**“If you look over the last 30 years, the changes in the media have been cataclysmic...The metaphor is, a Jackson Pollock painting where things are just getting thrown against a canvas to see what sticks. Fortunes have been made and lost, and first principles have been tested.”**

**“There is another model which I wish would get some traction, and that’s a non-profit model...ProPublica is the best current model**

**for that, but there should be 10 ProPublicas out there that billionaires who are interested in the media and have enough money could start to subsidize. And then, you could see a situation where they could have subscriptions and it could be partly... reader subsidized as well.”**

**- Jonathan Alter**

**“It’s a philosophy of leadership of the *Times* [to be] unafraid of new frontiers.. just about any way you want it, we’re going to deliver it.”**

**“One thing that hasn’t changed is that if you have good lawyers standing with you, it means a lot.”**

**“There is still worry on the part of sources inside the government that there can be really terrible repercussions if you talk to reporters.”**

**- Jill Abramson**



**MR. ALTER:** So how do we--and this is kind of a cosmic question--but how do the people in this room cope with a world where media is like oxygen?

**MR. KINSLEY:** Well, I don't know how they do it professionally, but just personally, as people who read newspapers, we're all going to have to get used to reading them differently. I think--I mean, it's obvious to me, at least, that paper is going away.



**“Reporting is expensive and...increasingly seen as generic and fungible and kind of dull unless it’s flecked with opinion, at least in the world of cable news. I mean, one of the amazing changes in our neck of the woods in cable news has been this acceptance of opinion as part and parcel, a mainstay of what a news channel ought to be providing.”**

**“The audience, when they come to us on television, is already better informed than they ever were... Thanks to the blogosphere and all of its offshoots, you’ve got to acknowledge how aware your audience already is.”**

**“Well, you know, at CNN, we always wanted to be the most trusted name in news. You can easily be supplanted by friends or people you’re following on Twitter, [which is a] big challenge that the – certainly the cable news industry, but I think all news institutions are dealing with right now.”**

**“Trusted brands, reliable brands, thrive in a fragmented environment. So that should be a clue to people about what’s a safe harbor.”**

**- Jonathan Klein**





**MLRC Founding Members attending the Annual Dinner (left to right): R. Bruce Rich, Bruce Sanford, Henry R. Kaufman, Larry Worrall, Victor Kovner and Chad Milton**



**MLRC Board Members (left to right): Ralph Huber, Henry Hoberman, Elisa Rivlin, Kenneth Richieri, Susan Weiner, Karole Morgan-Prager, Kurt Wimmer and Eric Lieberman**





**DCS Board and presidents emeriti (left to right): Dean Ringel, Bob Latham, Kelli Sager, Robert Nelson, Nathan Siegel and Elizabeth Ritvo**



**MLRC Institute Trustees (left to right): Kenneth Richieri, Andrew Mar, Stephanie Abruytn, Mary Kate Woods, Michael Quinn, Jay Ward Brown, Henry Hoberman**



# MLRC Launches International Media Law Project

At MLRC's Annual Dinner, Chairman Kenneth Richieri announced the launch of a new MLRC international initiative. He noted: "Thirty years is a significant milestone for any organization and the MLRC Board felt it was important to mark that achievement in a meaningful way. In your program you'll find a description of the International Media Law Project, which we are officially launching tonight. The project has as its overarching goal the promotion of free speech and press rights worldwide by linking MLRC members with lawyers in developing countries, expanding access to MLRC programs for press lawyers in developing countries, and ultimately creating a global media bar. You'll be hearing more about this project in the coming years. And I want to encourage all of our members to participate and lend their talents to this important initiative."

## International Media Law Project — FAQ

MLRC has played an important role in these efforts by supporting a strong and united media law bar. Although challenges remain, MLRC and its members have helped to develop a generation of lawyers able to vigorously defend the rights of the media and have provided those lawyers with an armory of resources with which to fight those battles. But media law in many parts of the world remains undeveloped and often in crisis. The rights of a free press, or even free speech itself, frequently do not exist or, in some nations, are severely curtailed by repressive regimes. From the lack of free speech and press protections to the wholesale censorship of the press and the Internet, the global legal framework for journalists and free expression is often far less supportive than we are accustomed to at home. Increasingly, this lack of global freedom matters to all of us because of how interconnected our world has become through the Internet.

The media law bar has an opportunity to promote internationally the rights we have won at home. It is with that purpose we are proud to announce MLRC's 30<sup>th</sup> Anniversary project, the MLRC International Media Law Project ("IMLP"). The MLRC IMLP will have three goals:

**1. Create partnerships.** MLRC member firms and companies will have the opportunity to sponsor lawyers in developing countries as new MLRC international members. These new international attorneys or law firms will have the opportunity to work closely with their sponsors, permitting each to learn new ideas for defending the press and advocating for free expression from the other.

**2. Expand access and interaction.** Sponsoring firms will underwrite MLRC dues for these new MLRC international members in developing countries at a reduced annual rate. These new dues will be earmarked to provide travel scholarships for our new international members to attend MLRC events, permitting current MLRC members to make valuable new global contacts and providing new international members access to MLRC resources.

**3. Creation of a global media bar.** Through gradual expansion of the MLRC through the IMLP program, all MLRC members will benefit by the opportunity to learn from lawyers in other countries, and to have defense-savvy colleagues to consult in the event our members need help in those countries.

To identify, recruit and support new International members in developing countries, MLRC will form an IMLP Task Force comprised of current MLRC firms and companies that are interested in spearheading this undertaking. After identifying potential new international members, the Task Force will work to match them with sponsoring MLRC members. Please contact David Heller ([dheller@medialaw.org](mailto:dheller@medialaw.org)) if you are interested in marking our 30<sup>th</sup> year by joining our new MLRC IMLP Task Force or becoming a founding sponsor.

*MLRC inadvertently omitted from the 2010 MLRC Dinner Program this message of support from AXIS Pro celebrating our 30th Anniversary. We apologize to our friends at AXIS PRO and thank them for their longstanding support.*

While times change, our commitment remains resolute.



In 1980, Media/Professional Insurance served as a founding member of what was then called the Joint Media Coordinating Council – within a month it became the Libel Defense Resource Center.

Today, AXIS PRO celebrates the 30th anniversary of the Media Law Resource Center. Proudly supporting its efforts since the start, here's to the next 30 years.

**AXIS PRO**  
PROFESSIONAL-MEDIA-TECHNOLOGY

## **MLRC UPCOMING EVENTS**

### **California Chapter Luncheon Meeting**

December 15, 2010 | Southwestern Law School, Los Angeles, CA

### **MLRC/Southwestern Media & Entertainment Law Conference**

January 20, 2011 | Los Angeles, CA

### **MLRC/Stanford Legal Frontiers in Digital Media Conference**

May 19-20, 2011 | Stanford, CA

### **MLRC London Conference**

September 19-20, 2011 (In-house counsel breakfast Sep 21st) | London, England

### **MLRC Annual Dinner**

November 9, 2011 | New York, NY

### **DCS Meeting & Lunch**

November 10, 2011 | New York, NY



*The 8th Annual Entertainment & Media Law Conference Presented by the  
Media Law Resource Center and Southwestern Law School's Biederman Entertainment and Media Law Institute*

## **SCRIPTS, LIES & VIDEOGAMES**

**Thursday, January 20, 2011**

**Southwestern Law School, Los Angeles**

[Schedule](#) | [Registration](#)

**Co-Sponsored by**

**Chubb Group of Insurance Companies, Davis Wright Tremaine LLP, Doyle & Miller LLP  
Hiscox USA, Leopold Petrich & Smith, Sidley Austin LLP**

### **Trademarks, Transformations, and Touchdowns:**

#### **Recent Issues in Clearing Motion Picture, Television, and Videogame Content**

The panel will address clearance issues arising out of recent developments in trademark and right of publicity law. Topics will include the tension between intellectual property rights and the First Amendment; differences in clearance practices among various industries (motion picture, television, videogame, insurance).

**Moderator:** Robert Rotstein (Mitchell Silberberg & Knupp)

**Panelists:** Christopher Cosby (Activision), Donald Gordon (Leopold, Petrich & Smith)  
and Elizabeth Masterton (Twentieth Century Fox)

### **Ripped (Off) from Real Life?**

The panel will examine libel in fiction and address how to vet movies and TV shows that depict, or were inspired by, real people, things and events. Topics will include: What constitutes libel in fiction? What is actionable product disparagement? How can you advise your clients to minimize the risk?

**Moderator:** Patricia Cannon (NBCU Television Group)

**Panelists:** Robyn Aronson (MTV Networks), Stephen Rohde (Rohde & Victoroff )  
Jody Zucker (Warner Bros. Television)

### **Issues with Development and Distribution of Video Games**

The panel will focus on the development and distribution of video games, looking at the process from the perspective of developers, publishers, rightsholders and distributors. Topics will include: How is video game development and distribution the same and how is it different from traditional television and movie production and distribution? How do development and distribution issues vary if the game is a MMORPG, a console game, or a casual game? How do the different business models (freemium, subscription, episodic, etc.) impact development and distribution? How has mobile gaming and the iPad impacted gaming? What about the Wii and Kinect? What about social networking?

**Moderator:** Kraig Baker (Davis Wright Tremaine)

**Panelists:** Heidi Holman (Microsoft), Daniel O'Connell Offner (Loeb & Loeb)  
Seth Steinberg (Digital Arts Law)

# Ninth Circuit Affirms Judgment and Verdict in Surfer Libel Case

By Elijah Yip

In a memorandum opinion, the Ninth Circuit affirmed the judgment and verdict in a defamation jury trial involving a surfing magazine and the authors of two pieces published in the magazine. [\*Craig Elmer Chapman, aka Owl v. Journal Concepts, Inc., et al.\*](#), No. 09-16303, D.C. No. Civil No. 07-00002 JMS/LEK (9th Cir. Oct. 27, 2010).

The plaintiff, Craig Elmer “Owl” Chapman (“Chapman”) is a surfer and shaper of surfboards living on the North Shore of Oahu, Hawaii, which is reputed as the “mecca” of surfing. Chapman is known as an icon of the “soul surfing” era in the 1970’s. In the summer of 2007, *The Surfer’s Journal* (“TSJ”), a magazine whose readership consisted predominantly of surfers, published an article about Chapman. The author wrote about his adventures in ordering a custom surfboard from Chapman to capture the legend behind Chapman. The issue of TSJ in which the article appeared also contained liner notes in which the publisher of TSJ shared his impressions of Chapman and reprinted anecdotes and commentary on Chapman from people who knew him.

Chapman sued, *inter alia*, TSJ, its publishers, and the author of the subject article. The trial in the lawsuit involved only Chapman’s defamation claim. Prior to trial, the court had determined by summary judgment that Chapman is a general purpose public figure who must satisfy the “actual malice” standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964). An eight-day jury trial was held. Before submission of the case to the jury, the trial court granted Defendants’ Rule 50(a) motion for judgment as a matter of law with respect to two of the allegedly defamatory statements at issue in the trial. With respect to the remaining allegedly defamatory statements, the jury found that they were substantially true, and thus returned a verdict in favor of Defendants on all counts of defamation.

On appeal, Chapman argued that the trial court erred by: (a) finding him to be a general purpose public figure subject to the actual malice standard; (b) excluding evidence relating to his drug use; (c) excluding evidence relating to the life and

work of William S. Burroughs, the author of novels to which allusions were made in the article; (d) granting judgment as a matter of law as to two of the allegedly defamatory statements; and (e) denying his motion for a new trial. The Ninth Circuit rejected each argument on appeal.

The Ninth Circuit found it unnecessary to reach the public figure issue because the jury’s finding that the allegedly defamatory statements were substantially true disposed of the defamation claims without having to reach the issue of fault. On the two evidentiary issues, the court held that the drug references were properly admitted to show the publisher’s state of mind, and that the references to Burroughs’ life and works were properly excluded because they were unnecessary to provide context to the article.

In regard to the two allegedly defamatory statements that were disposed of by judgment as a matter of law, the court found no credible evidence in the record to support Chapman’s theories that they were false. Chapman had argued that, after publication of the magazine, the publisher created a tape recording of an interview containing the statements to corroborate Defendants’ argument that the statement was actually made instead of fabricated by the publisher.

The court held that the interview could not have been scripted and “staged” because of its off-the-cuff nature and the high degree of consistency between the statements on the recording and those appearing in the liner notes despite the fact that the person being interviewed was illiterate. As for the other defamatory statement, the court held that the gist of the statement was captured in quotation of the statement in the liner notes.

Finally, the district court affirmed the denial of Chapman’s motion for a new trial because the issue was not properly raised on appeal, and, in any event, there was sufficient evidence in the record to support the jury’s verdict.

*Appellees-Defendants Journal Concepts, Inc., dba The Surfer’s Journal, Steve Pezman, and Jeff Johnson were represented by Jeffrey S. Portnoy, Esq. and Elijah Yip, Esq. of Cades Schutte LLP of Honolulu, Hawaii.*



# D.C. Circuit Affirms Summary Judgment for Washington Post on Libel Claim

## *Articles About “Hoarder” Were Substantially True or Not Defamatory*

The D.C. Circuit Court of Appeals affirmed summary judgment for the Washington Post on libel claims over two newspaper articles that described plaintiff as a “hoarder” and discussed mental health issues surrounding obsessive accumulation of possessions. *Shipkovitz v. Washington Post Company, et al.*, No. 08-7126, 2010 U.S. App. LEXIS 22093 (D.C. Cir. Oct. 22, 2010) (Sentelle, Griffith, Silberman) (per curiam).

The court held that the statements in the articles were either true or not defamatory. In dicta, the court went on to find that the articles were not entirely protected by the fair report privilege because some of the statements went beyond summarizing official documents and proceedings.

### Background

The plaintiff Samuel Shipkovitz sued over two *Washington Post* articles published in 2006. The first was entitled *Fighting to Remain Engulfed in Junk: As Task Forces Move in, Hoarders Strike Back in Court*; the second, *Hoarder's Eviction Didn't Violate Rights, Judge Says*. The articles discussed plaintiff's lawsuit over the condemnation of his condominium as well as state mental health efforts to deal with hoarders. Among the statements at issue were that that plaintiff “works sporadically and has had long periods of unemployment”; “there was rubbish, debris, paper, ... [and] bags” crammed “from floor to ceiling”; and that researchers are studying hoarding's “association with mental illness, brain dysfunction, and obsessive-compulsive disorders.” Plaintiff also sued for false light over the publication of an accompanying photograph.

In 2008, the district granted summary judgment to the newspaper, holding the statements and photograph at issue were true, not defamatory or fair reports of government proceedings. The newspaper included in its exhibits to the motion photographs taken by local investigators and it was clear, according to the court, that plaintiff's apartment was filled with “massive amounts of junk.” In addition, the

discussion of mental health problems associated with hoarding could not reasonably be read to imply that plaintiff himself was mentally ill. Lastly, the false light complaint over publication of a photograph was treated as a libel complaint and dismissed on similar grounds.

### D.C. Circuit Decision

In a short per curiam decision, the court affirmed, holding that the challenged statements were either substantially true or nondefamatory.

“The articles accurately described the condition of Shipkovitz's condominium and the disposition of his suit against Arlington County. The record also supports the *Post's* statement about Shipkovitz's “sporadic[]” work history. Arguable inaccuracies about the format of Shipkovitz's court filings and the removal of Shipkovitz's property from the condominium are minor and immaterial. The article's discussion of research on the potential link between hoarding and mental illness does not imply that Shipkovitz is himself mentally ill.”

The court went on to note that “to the extent the district court concluded that the fair report privilege shields *all* of the *Post* articles' contents, our precedents do not support this conclusion.” Information about plaintiff's work history and research about the potential link between hoarding and mental illness did not summarize any official proceedings. *Citing Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 740, 250 U.S. App. D.C. 346 (D.C. Cir. 1985) (rejecting fair report privilege where “nothing in the article gives the reader any reason to believe that the allegedly defamatory statement is intended as a summary of an NTSB finding”). However, any error by the district court as to the fair report privilege did not affect the disposition of the case.

*The Washington Post Company and reporter Brigid Schulte were represented by Kevin Baine and Stephen Joseph Fuzesi, Williams & Connolly LLP, Washington, DC. Plaintiff acted pro se.*

# Supreme Court of Kentucky Dissolves Temporary Injunction as an Impermissible Prior Restraint on Speech

By Richard M. Goehler

In Hill v. Petrotech Resources Corporation (2010 – SC-00182-1), the Supreme Court of Kentucky recently decided an issue of first impression in Kentucky – whether a court may enjoin the expression of certain thoughts and opinions before a final adjudication determining that the expression is unprotected by the federal or Kentucky Constitution. The Court ruled that the trial court’s “broad-sweeping and vaguely worded injunction against future expression before final adjudication of its defamatory character” constituted an improper prior restraint on speech in violation of the First Amendment of the United States Constitution and Section Eight of the Kentucky Constitution.

Writing for the Court, Justice Daniel Venters opined that “[g]iven the heavy prescription against the constitutionality of any prior restraint of expression, the issuance of the temporary injunction was an abuse of the circuit court’s discretion . . .” Accordingly, the court vacated the temporary injunction as an impermissible prior restraint on speech.

The facts in Hill v. Petrotech Resources Corporation involved a business investment dispute. Petrotech Resources is an oil and gas drilling company that financed its operations from time to time with investments by members of the general public. One such investor became dissatisfied with the conduct of Petrotech and sought the return of his investment by retaining H.C. “Blue” Hill, a company known for its “highly aggressive collection techniques.” According to the Court’s recitation of the background facts in its opinion, Hill’s techniques included contacting Petrotech’s customers and posting accusations on the internet that Petrotech was engaged in illegal conduct.

In response to Hill’s activities, Petrotech filed a complaint alleging defamation and invasion of privacy. In addition, Petrotech filed a motion for temporary injunction seeking to enjoin Hill from making further defamatory comments. The trial court granted Petrotech’s motion for temporary injunction prohibiting Hill from making further defamatory

comments. Hill moved for interlocutory relief in the Kentucky Court of Appeals, but the Court of Appeals allowed the injunction to remain in effect. Ultimately, Hill petitioned the Supreme Court of Kentucky for relief from the injunction.

As indicated above, the Supreme Court of Kentucky held that both the United States Constitution and the Kentucky Constitution forbid the issuance of an injunction to restrain allegedly defamatory speech until the falsity of the speech had been finally adjudicated in the trial court. Since there had been no final determination of that issue, the Court granted Hill’s petition for relief and vacated the trial court’s injunction as an impermissible prior restraint.

The Kentucky Supreme Court then went on to rule that there were specific circumstances in which prospective restraints on speech would be allowed in defamation cases. Recognizing that false, defamatory speech is unprotected by the First Amendment, the Court stated that it was adopting the “modern rule” that defamatory speech may be enjoined “only after the trial court’s final determination by a preponderance of the evidence that the speech at issue is, in fact, false, and only then upon the condition that the injunction be narrowly tailored to limit the prohibited speech to that which has been judicially determined to be false.”

It is important to note that Judge Venters’ opinion expressly emphasized that the Court’s application of this “modern rule” did not apply to “injunctions that may relate to media defendants, public figures, and matters of public interest.”

Citing New York Times v. Sullivan and its progeny, Justice Venters noted that “[a]n entirely separate set of rules is implicated when the litigation involves these parties and issues.”

*Dick Goehler is an attorney at Frost Brown Todd LLC practicing in the firm’s First Amendment, Media & Advertising law group. Frost Brown Todd has offices in Ohio, Kentucky, Indiana, Tennessee and West Virginia.*



# NJ Press Association Asks State Supreme Court to Abolish Presumed Libel Damages

By Bruce S. Rosen

The New Jersey Press Association has asked the New Jersey Supreme Court to abolish presumed damages in defamation claims and reverse a recent appellate decision granting presumed damages to a private plaintiff. [W.J.A. v. D.A.](#), No. A-0762-09T3 (NJ App. Sept. 27, 2010). At issue in the case was a website created by plaintiff's nephew accusing plaintiff of having sexually molested him as a minor.

The [NJPA brief](#), in seeking to intervene and support a grant of certification, excoriates the Appellate Division for its "seemingly offhanded" holding that public discussions of child sexual abuse does not involve a matter of public concern, which the NJPA said "is stunning, to say the least."

New Jersey law provides for libel damages upon a showing of "concrete damages," while slander per se has been hanging by a thread since 1994, when the New Jersey Supreme Court declared such damages all but dead and against the trend of modern tort law in *Ward v. Zelokovsky*, 136 N.J. 516. At the *WJA* summary judgment proceeding, plaintiff, who could not show damages, attempted to get around the requirement of concrete damages by arguing that Internet postings were slander. While the appellate panel rejected that proposition, as did a previous appellate panel in *Too Much Media v. Hale*, (the blogger shield case now before the NJ Supreme Court), the court said that the concrete damage requirement should not apply where there are private parties and no matter of public concern.

While acknowledging the trend away from presumed damages, the appellate panel decision, authored by Pauline Sapp-Peterson, essentially ruled that because the New Jersey Supreme Court had not yet ruled on whether presumed damages are prohibited for private plaintiffs, and such damages are permitted under the U.S. Supreme Court's ruling in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 US

749 (1985), the plaintiff deserved a remedy. "[D]ismissal of the action at [summary judgment] – merely because plaintiff has presented no proof of actual damage – provides defendant with a license to defame. If there has been a wrong, there should be a remedy, and the time honored approach of allowing such a case to be decided by a jury, which may then assess a proper amount of damages based upon their experience and common sense, does not offend us."

The NJPA brief argued, on the other hand, that "Permitting the recovery of presumed damages, at least in the absence of actual malice, is an anachronism of the common law. The time has arrived to end this 'oddity of tort law.'" This is compelled not only by logic, but also by the sweeping free speech protections contained in Article 1, § 6 of the New Jersey Constitution."

With a lesser level of fault and burden of proof, allowing presumed damages "perpetuates the ability of a jury to punish unpopular speech and opinions in the guise of presumed damaged without necessarily achieving the true purpose of the tort of defamation – compensation of a plaintiff whose reputation has been injured," the NJPA brief stated.

The NJPA brief pointed out that under a *Dunn & Bradstreet* analysis, the website at issue was clearly expression of the defendant's opinions on child abuse and comments on the findings of the trial judge, complaining about the inadequacies of the judicial system in redressing his grievances.

The Court will likely decide whether to take the case by January 2011.

*Bruce Rosen is a partner at McCusker, Anselmi, Rosen & Carvelli, in Florham Park, NJ. The NJPA is represented by Thomas J. Cafferty, Nomi I. Lowy and Lauren James-Weir of Gibbons P.C. in Newark, N.J. Neither Plaintiff's counsel, Stanley L. Bergman, nor Defendant's counsel Timothy L. Hinlicky, both of Egg Harbor Township, practice media law.*

## NM Court to Address Standard of Proof for Actual Injury in Private Figure Libel Cases

On October 18, the New Mexico Supreme Court agreed to review a case presenting the issue of proof of damages in private figure libel cases. In August, a divided New Mexico appeals court held that proof of humiliation or mental anguish is sufficient to prove "actual injury" and proof of injury to reputation is not required. [Smith v. Durden](#), 2010-NMCA-097 (N.M. App. August 23, 2010). The plaintiff, an Episcopal reverend, sued several members of his church for distributing an anonymously written letter accusing plaintiff of inappropriate acts with minors. The trial court granted defendants motion for summary judgment, finding that plaintiff failed to show actual injury to reputation. The appellate court reversed, holding evidence of mental anguish and humiliation was sufficient to show actual injury.

# Washington Court Grants Anti-SLAPP Motion, Awards Fees, Costs

By Bruce E.H. Johnson and Ambika K. Doran

A court in the Western District of Washington has issued the second federal decision interpreting Washington's new anti-SLAPP statute, granting the defendants' special motion to strike and their request for attorneys' fees and costs. The first such ruling was *Aronson v. Dog Eat Dog Films, Inc.*, --- F. Supp. 2d ----, 2010 WL 3489590 (W.D. Wash. Aug. 31, 2010), discussed in the September 2010 *MediaLawLetter*.

In *Castello v. City of Seattle et. al.*, a Seattle Fire Department employee, Steven Castello, filed a lawsuit against two co-workers (among others), arising from two sets of statements: those the co-workers made in complaints to fire department investigators, co-workers, and command personnel about Castello; and those they made in an interview with a local television station about the incidents, in the context of the story's broader focus on unrest and low morale within the fire department. Castello claimed these actions constituted harassment, defamation, defamation by implication, and false light invasion of privacy.

Looking to cases interpreting California's analogous anti-SLAPP statute, the court found the defendants had shown by a preponderance of the evidence that their statements fell within the statute's ambit.

*First*, the statements internal to the fire department—those that led to and were made during the investigation of Castello's conduct—were made “in connection” with an “official proceeding authorized by law,” i.e., an agency's investigation of misconduct.

*Second*, the defendants' statements to the television station fell within the statute because a local news broadcast is a “public forum” and because both an emergency medical worker's emotional and psychological stability and the broader topic of the story were issues of public concern. Moreover, *all* of the statements fell within the statute's “catch-all provision” because they were “lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern.”

The court found Castello failed to show a probability of prevailing on the merits by clear and convincing evidence. He did not identify any provably false statements (indeed, the court found the Complaint failed to adequately specify which statements formed the basis of the plaintiff's claims under Fed. R. Civ. P. 12(c)). The statements were privileged because they were made during a quasi-judicial proceeding, by public officers authorized to act on the matter communicated, and between persons sharing a common interest. They were also privileged under Washington's older anti-SLAPP statute, which protects communications made to a government agency regarding matters of concern to that agency. Castello failed to show that the defendants had acted with actual malice, as he was required to do. And he also failed to show damages.

Notably, the court denied Castello leave to amend because “[i]n effect, granting Defendants' motion to strike the defamation claims under RCW 4.24.525 has rendered futile any further amendment of Plaintiff's complaint.” It also awarded the defendants their attorneys' fees and costs, and each a \$10,000 penalty under the anti-SLAPP statute. It dismissed the only non-defamation claim (harassment) under Fed. R. Civ. P. 12(c).

*Bruce E.H. Johnson is a partner, and Ambika K. Doran is an associate, at Davis Wright Tremaine LLP in Seattle. They represented one of the defendants, Mitzi Simmons.*



# Nevada Supreme Court Reinstates Newspaper's Motion For Attorney Fees

## *Chinese Language Newspaper Won Libel Trial; Sought Attorney Fees*

In an interesting decision, the Nevada Supreme Court held that a trial court abused its discretion by summarily denying a newspaper defendant's post-trial motion to recover attorney fees and costs. [\*Chinese American Chamber of Commerce v. The Southern Nevada Chinese Weekly et al.\*](#), No. 54554 (Nev. Nov. 19, 2010). The newspaper had sought to recover \$175,000 in attorney fees and costs after trial.

### Background

In 2003, the Chinese American Chamber of Commerce of Nevada and its president, Travis Lu, sued The Southern Nevada Chinese Weekly for libel, interference with prospective business advantage, trade libel and injurious falsehood over two newspaper articles. The first article was about alleged misconduct in the Miss Chinatown Las Vegas Beauty Pageant which was sponsored by plaintiff. The article stated it sought comment from plaintiff, but received none. The second article questioned whether plaintiff was a true non-profit organization or acting as a business.

The case went to trial in 2010. After a three-day trial, the jury returned a verdict for the newspaper. According to a news report, the jury found that the articles were not defamatory and the plaintiff did not appeal the verdict.

The newspaper moved for post-trial attorney fees and costs under [NRS 18.010 and 18.020](#) which provides for recovery of attorney fees for claims "brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010 (2)(b) states in relevant part that:

The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to [Rule 11](#) of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

### Nevada Supreme Court Decision

The Supreme Court held that the trial court abused its discretion by denying the newspaper's motion for fees without "appropriate consideration."

CACC forced Chinese Weekly to defend itself during an arduous discovery process against numerous allegedly defamatory statements. This suggests that CACC may have filed frivolous claims, hoping that one would stick. In enacting NRS 18.010, the Legislature condemned this type of abusive tactic. It is unclear from the record whether or not the dismissed claims were groundless. However, the district court failed to follow NRS 18.010, and thus abused its discretion, in not considering the dismissed claims at all.

The case was remanded to the trial court to make specific findings on the newspaper's motion for attorney fees and costs.

# Section 230 Applies to Forwarded Email

## *Defendant Was User of an Interactive Computer Service*

The New Jersey federal district court granted summary judgment to non-media libel defendants, holding that the forwarding of an allegedly defamatory email was shielded by Section 230 of the Communications Decency Act. *Mitan v. A. Neumann & Associates*, No. 08-6154, 2010 U.S. Dist. LEXIS 121568 (D.N.J. Nov. 17, 2010) (Brown, J.) (unpublished). The court reasoned that under the terms of the CDA, defendant was a “user of an interactive computer service,” and he cannot “be treated as the publisher or speaker of any information provided by another information content provider.” See 47 U.S.C. § 230(c)(1).

### Background

Plaintiff Keith Mitan sued A. Neumann & Associates, LLC, a New Jersey-based business brokerage firm and its principal officer for forwarding an email entitled: “MITAN ALERT!!! HAVE YOU SEEN THESE PEOPLE?” The “alert” included a picture of plaintiff and other family members and stated that the family engaged in a wide variety of illegal business practices.

The email thread came from a Virginia broker and included a message warning about the business practices of plaintiff’s brother, Ken Mitan. The defendant forwarded the message to other brokers and lawyers and added his own note stating about the brother Ken Mitan: “He is our guy, a known convicted federal felon. Tried several deals before with other companies, supposedly tried the out-of-the-country store before . . .”

Plaintiff alleged that defendant republished the defamatory email alert and that it was false and defamatory as to him because he had not engaged in any criminal conduct. Defendant moved for summary judgment on numerous grounds, including Section 230.

### Section 230 Analysis

The court first addressed plaintiff’s argument that

defendant waived a Section 230 defense by failing to plead it in his answer and only raising it on a renewed motion for summary judgment.

The court noted that while a motion for summary judgment is not the most appropriate way to raise a previously unpled defense of immunity, under the facts allowing the defense would not cause unfair surprise or prejudice. Among other things, the court noted that plaintiff was a lawyer and had faced a Section 230 defense in related libel cases he had brought in other jurisdictions.

On the merits, the court reviewed both the policy behind the CDA and the definition of an interactive computer service

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**As the downstream Internet user who received an email containing defamatory text and simply hit the forward icon on his computer, defendant was shielded by the CDA.**

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provider to hold that “these provisions provide immunity from common law defamation claims for persons who republish the work of other persons through internet-based methodologies, such as websites, blogs, and email.” *Citing, Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006) (holding that CDA immunity extended to individuals who republished on the Internet defamatory statements originally made by others in email and internet postings); *Novins v. Cannon*, No. 09-5354, 2010 WL 1688695, at \*2--3 (D.N.J. Apr. 27, 2010) (same).

The plaintiff appeared to argue that CDA immunity should not apply because the original source may have been a print newsletter, rather than an interactive computer service. However, regardless of the original source of the Mitan Alert, it was undisputed that defendant received the Mitan Alert via the Internet (email) and republished the same via the Internet (email). Here defendant was not the “information content provider” within the meaning of the CDA.

Therefore “as the downstream Internet user who received an email containing defamatory text and simply hit the forward icon on his computer,” defendant was shielded by the CDA.

*Plaintiff acted pro se. Defendants were represented by Harry V. Osborne, Evans, Osborne & Kreizman, LLC, Ocean, NJ.*

# Illinois Court Grants Summary Judgment in Right of Publicity Case

*Advertising agency may rely on apparent authority of talent agency*

By Blaine Kimrey and Bryan Clark

In her recent opinion in [\*Abbs v. Lily's Talent Agency, et al.\*](#), Case No. 07-CH-34634, Judge Kathleen M. Pantle of the Circuit Court of Cook County, Ill., ruled that an advertising agency and an advertiser were not liable for violating the Illinois Right of Publicity Act, 765 ILCS 1057/1, *et seq.*, in light of incontrovertible evidence that the talent agency authorizing the use was the plaintiff's apparent agent. In granting summary judgment for defendants Noble & Associates ("Noble") and Gerber Products Company ("Gerber"), Judge Pantle determined that Lily's Talent Agency ("Lily's") had apparent authority to act on behalf of plaintiff Brandon Abbs ("Brandon"). This ruling is important for attorneys defending right of publicity claims because it demonstrates how an advertising agency may reasonably rely on the apparent authority of a talent agency without confirming that authority directly with the talent.

In *Abbs*, Deborah Abbs ("Deborah") filed suit on behalf of her minor son, Brandon, asserting a claim under the Illinois Right of Publicity Act against Brandon's former agent, Lily's, advertising agency Noble, and advertiser Gerber. In December 2000, Lily's and Noble arranged for a photo shoot involving Brandon and other children. From January 2001 to January 2004, Gerber used photos of Brandon consistent with the terms of the release signed by Deborah at the photo shoot, and Noble paid the requisite fees to Lily's under the contract. In October 2003, Lily's authorized Noble to extend Gerber's use of Brandon's photos through January 2007, and in February 2005, Lily's invoiced Noble for an additional two-year package usage. Gerber continued to use Brandon's photos in accordance with the terms of those extensions, and Noble paid the requisite fees to Lily's.

During the period that Gerber was using Brandon's image, Deborah contacted Gerber on several occasions to

inquire about advertisements using her son's image and to request copies. However, she never demanded or requested that Gerber stop using Brandon's image and she never suggested that Lily's was no longer Brandon's agent. In fact, in a 2005 e-mail to Gerber, Abbs referred to Lily's as Brandon's agent.

In 2006, Abbs filed suit in Illinois state court against Lily's, claiming that Brandon had not been paid by Lily's for all uses of his image and seeking an equitable accounting. She subsequently amended the complaint to include a claim under the Illinois Right of Publicity Act, adding Noble and

Gerber as defendants. On March 26, 2010, Judge Pantle granted summary judgment to Noble and Gerber on the use of Brandon's image from 2001 to 2004 but held that there was a genuine issue of material fact as to whether Lily's had apparent authority to authorize the use of the photos from 2004 to 2007. Noble and Gerber sought reconsideration of the Court's ruling as to the use from 2004 to 2007. On August 12, 2010, Judge Pantle granted the motion for reconsideration and entered summary judgment for Noble and Gerber. Judge Pantle

entered final judgment for Noble and Gerber on October 15, 2010, after denying a subsequent motion for reconsideration filed by Abbs. The lawsuit is now on appeal.

One of the key issues was whether Deborah's contacts with Gerber — in which she failed to demand or request that Gerber stop using Brandon's photos and failed to assert that Lily's was no longer Brandon's agent — were sufficient to foreclose a claim by her that Lily's lacked apparent authority. "Apparent authority in an agent is the authority which the principal knowingly permits the agent to assume, or the authority which the principal holds the agent out as

*(Continued on page 20)*

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**This ruling is important for attorneys defending right of publicity claims because it demonstrates how an advertising agency may reasonably rely on the apparent authority of a talent agency without confirming that authority directly with the talent.**

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possessing. It is the authority which a reasonably prudent person, exercising diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess." August 12 Order, at p. 3 (citing *Gilber v. Sycamore Muni. Hosp.*, 156 Ill. 2d 511, 523 (1993)). Here, Judge Pantle held that Lily's was Brandon's agent when it arranged the original usage agreement for the period of 2001 to 2004. By failing to note the cessation of the agency relationship and by referring to Lily's as Brandon's agent in communications with Gerber as late as 2005, Deborah "created the appearance of authority in Lily's." August 12 Order, at p. 4. Because Noble and Gerber relied on this apparent authority (and Lily's actions consistent with that apparent authority) in using Brandon's photos, they could not be liable for violating the Illinois Right of Publicity Act.

In reconsidering her earlier decision, Judge Pantle noted that in determining whether a genuine issue of material fact exists, "the court should ignore personal conclusions, opinions and self-serving statements and consider only facts admissible in evidence under the rules of evidence." August 12 Order, at p. 3 (citing *Certified Mechanical Contractors, Inc. v. Wight & Company*, 162 Ill. App. 3d 391, 402 (2d Dist. 1987)). Judge Pantle noted that she had erred in her earlier ruling by relying on speculation as to certain facts (such as whether Deborah contacted the right entity within Gerber to lodge a complaint) to determine that a genuine issue of material fact existed as to apparent authority. Judge Pantle ultimately concluded that Deborah presented no evidence that she made any attempt to challenge the perception that Lily's was Brandon's agent and thus, summary judgment for Noble and Gerber was appropriate.

Although it is largely fact driven, the *Abbs* decision could serve as a helpful tool for any lawyer addressing a right of publicity claim that involves relationships among talent agency, advertising agency, and advertiser. Here, the Court ultimately determined that the advertising agency and the advertiser could not be held liable when they reasonably relied on representations of authority from the plaintiff's apparent agent.

*Blaine Kimrey is a partner at Lathrop & Gage LLP in Chicago. He is lead counsel for Noble & Associates and Gerber Products Company in Abbs v. Lily's Talent Agency, et al., Case No. 07-CH-34634 (Circuit Court of Cook County, Ill.). Bryan Clark is an associate at Lathrop & Gage LLP in Chicago and is second chair counsel on this matter.*



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# Alaska Online Newspaper Obtains Senate Candidate's Employment Files in Public Records Suit

## *Records Show Candidate Lied About Using Computer to Rig Political Poll*

By John McKay

A lawsuit by an online news organization to obtain records concerning the Republican nominee for Alaska's U.S. Senate seat may have made the difference in the outcome of the election. [\*Alaska Dispatch v. Fairbanks North Star Borough \(Complaint\)\*](#).

The employment-related documents obtained as a result of a public records suit filed by Alaska Dispatch (AlaskaDispatch.com) show that the Tea Party-backed Republican candidate, Joe Miller, had been disciplined two years ago while working as a part-time assistant Borough attorney in Fairbanks. The records show Miller snuck onto the computers of his law department co-workers to rig a political poll he was conducting, then tried to cover his tracks by erasing items from their hard drives, and lying about what he had done and his attempts to cover it up.

As of this date, the race remains too close to call, with incumbent U.S. Senator Lisa Murkowski poised to become the only person to win a write-in bid for U.S. Senate other than Strom Thurmond in 1954.

The release of the damaging documents on October 26, 2010, and related news stories, coupled with the arrest by Miller's private security detail of Alaska Dispatch's editor as he sought to question the candidate after a public forum, significantly contributed to a precipitous decline in the lead Miller had commanded in the polls up to the final weeks of the campaign.

Miller's lawyers (who also represent Alaska's ex-governor Sarah Palin, who endorsed and campaigned for Miller) aggressively argued that the court should not address the matter until after the November 2 election. The court rejected this argument, granting Alaska Dispatch's motion to expedite the request for release of the records. Miller's lawyers then made a last ditch argument that due process required that they be given an opportunity to conduct discovery before any expedited hearing.

In particular, they demanded a right to take a dozen or more depositions of journalists who had made requests for the records, Borough employees who had custody of them, and the former Borough mayor and others who Miller accused of

colluding with the press to leak information damaging to his campaign. This would have effectively "run out the clock" so that the documents, had they come out at all, would have been released at most a day or two before the election.

In response to news stories that broke while the public records case was pending, Miller, who had refused to answer questions about his "personal life" from Alaska reporters, acknowledged to CNN Chief National Correspondent John King in an interview that he had been disciplined in March 2008 for an incident involving unethical behavior and misuse of Borough computers for politicking. He attempted to minimize the misconduct, suggesting that he had simply used an office computer over his lunch hour for personal business.

A follow-up story by the Dispatch showed that even this explanation was deceptive, because Miller, as a part time employee, did not get a lunch hour; instead, he came in early so he could surreptitiously use his colleagues' computers when they left for lunch. Miller was caught when he tried to cover his tracks by erasing the caches from his co-worker's computers and inadvertently erased their passwords, Westlaw search history, and other information. In the released documents, he admits lying about the incident and trying to cover it up, and is quoted blaming his co-workers in the legal department for leaving their computers unsecured.

The Borough's ordinances prohibit release of material from employees' personnel files, or disciplinary records, but the judge agreed with the Alaska Dispatch's arguments that state law supersedes local ordinances if there is a conflict, and that state law requires a balancing of the public's interest in disclosure against any government or individual privacy interests in secrecy. The Dispatch cited earlier decisions of the Alaska Supreme Court holding that a "personnel records" exception should be construed narrowly, and that those engaged in public service or seeking high office have diminished expectations of privacy.

Miller had also asserted at times during his campaign that he would like to be able to talk about the circumstances under which his employment with the Borough legal department was terminated (he claimed it was entirely voluntary), but

*(Continued on page 22)*

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that he was precluded from doing so because of ethical obligations arising from the attorney client privilege. Miller demanded that his former client/employer completely waive its privilege with respect to substantial matters on which he had represented the Borough. The Dispatch asserted that this claim was a pretense, and that the Borough's waiver was unnecessary because Professional Conduct Rule 1.6(b)(5) allows an attorney to disclose client confidences or secrets to the extent reasonably necessary to assert claims or defenses in a controversy with the former client. The state bar association issued an informal opinion supporting the Dispatch's position on this.

Among other things, Miller's lawyer argued that equitable relief should be denied because the press, having filed suit to obtain information in arguably confidential documents, should have come to the court for permission before including some of that information in stories based on Borough sources while the suit was pending. The Dispatch's attorney responded that it is the duty of reporters to continue pursuing news stories even when related legal issues end up in court.

Miller's counsel also argued that whether a document is or is not a public record should be determined by the nature of the document, and its status at the time it is created, without regard to whether someone identified in the document later runs for Senate or otherwise becomes the subject of public interest. The court agreed with the Dispatch that the fundamental interest in our democracy of having an informed electorate makes it appropriate to consider the individual's present status when a balancing of public and private interests is permissible. "Individuals who run for

office expect that their past will be researched and revealed," the judge stated, "and thereby lose their previously established expectation of privacy in those documents."

Miller's counsel had argued that the Dispatch's approach could be used to make available confidential records such as complaints made against a judge, or the birth certificate of the president of the United States. Although the Alaska Dispatch was not arguing for disclosure of documents categorically exempted by public records laws, it noted that there would be an outcry by supporters of Miller if the President were the party who had intervened in a public records suit to assert his privacy rights, and sought to depose citizens seeking his birth

certificate to discover their motives and explore who was behind their attempts to obtain the records, as Miller sought to do in this case. The court agreed that the requester's motives for obtaining public records were not relevant.

Miller also argued that HIPAA prohibited disclosure of anything from his employment files relating to medical or mental health issues, citing provisions of the definitions of "protected health

information." The Dispatch noted, however, that Miller's counsel had omitted from the definitions cited and arguments to the court that portion of the applicable federal rules, 45 C.F.R. 160.013, that exclude individually identifiable health information in employment records held by a covered entity in its role as an employer.

*The Alaska Dispatch was represented by John McKay, Law Office of D. John McKay, of Anchorage. Joe Miller was represented by Thomas Van Flein, Clapp, Peterson, Van Flein, Tiemessen and Thorsness, LLC, of Anchorage. The Fairbanks North Star Borough was represented by Borough Attorney René Broker.*



**Attorney John McKay, second from left, and Alaska Dispatch founder and editor Tony Hopfinger, right, talk to Anchorage Police after Hopfinger was arrested and handcuffed by private security guards while attempting to ask U.S. Senate candidate Joe Miller questions as Miller was leaving a town hall meeting.**

Photo: Bill Roth / Anchorage Daily News. Used with permission.



# Washington Supreme Court Vacates Order Preventing Release Of Police Records In High-Profile Fatal Shooting Of Four Sheriffs Officers

By Bruce E.H. Johnson, Eric M. Stahl  
and Sarah K. Duran

In a unanimous opinion, the Washington Supreme Court held November 18 that police records may not be categorically withheld from the public, even in the face of a claim that disclosure threatens the suspect's fair trial rights. The court confirmed that defendants who claim that adverse publicity threatens their right to an impartial jury must provide specific evidence demonstrating such a threat, and that courts must consider alternative means to assure fair trials before withholding public records.

The case is [\*Seattle Times Co. v. Serko\*](#), \_\_P.3d \_\_, 2010 WL 4652409 (Nov. 18, 2010). It arose from a public records request by a Times reporter for police investigative records stemming from last year's fatal shootings in the Seattle area of four police officers by Maurice Clemmons. Clemmons was killed by a police officer two days after the shootings, which sparked a massive manhunt for him and made national news.

The Pierce County Sheriff's Office had agreed to provide the records, but release was blocked by the seven defendants who were charged with crimes related to the shooting. The defendants argued that the Public Records Act ("PRA"), RCW 42.45 *et seq.*, did not require release of the records and that making the records available to the public would endanger their constitutional right to a fair trial.

In a May 20 order, Pierce County Superior Court Judge Susan Serko blocked release of the records. Judge Serko held that "the extraordinary level of local, state and national attention that this story garnered for days and weeks following the November 29, 2009 event" was sufficient to deny disclosure under the Sixth Amendment.

The Supreme Court's ruling vacated Judge Serko's May 20 order, finding it failed to hold the defendants' claims of adverse publicity to sufficient scrutiny. Among other things, the opinion held that records could be withheld on the basis of a defendant's Sixth Amendment fair trial rights only if the court finds "with particularity that it is more probable than not that unfairness or prejudice will result from the pretrial disclosure." The Court agreed with the Times' argument that a defendant's fair trial rights does not allow for categorical

nondisclosure of police investigative records, but rather may be withheld only after the judge has reviewed each document. In doing so, the Court reaffirmed its prior holding in *Cowles Publishing Co. v. Spokane Police Department*, 139 Wn.2d 472, 479, 987 P.2d 620 (1999). The Court also relied on *State v. Bassett*, 128 Wn.2d 612, 616-17, 911 P.2d 385 (1996) to hold that the trial judge must consider alternatives to disclosure, such as careful questioning of jurors, cautionary jury instructions, a continuance of the trial date, sequestration of the jury or a change of venue.

The Supreme Court also rejected the defendants' argument that the prosecutor had a duty to assert PRA objections in response to a records request. "[S]uch a

requirement would run counter to the PRA's policy of openness, as evinced by its mandate that exemptions be narrowly construed." *See* RCW 42.56.030.

In addition, the Court found that police records cannot be withheld under the PRA on the ground that they are the prosecutor's work product. The Clemmons defendants had argued that the records at issue were properly withheld because the records are the prosecutor's work product and therefore exempt from disclosure under the PRA. The

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**The court confirmed that defendants who claim that adverse publicity threatens their right to an impartial jury must provide specific evidence demonstrating such a threat, and that courts must consider alternative means to assure fair trials before withholding public records.**

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Supreme Court held that there is “no authority for the ... contention that an investigator from a law enforcement agency is merely an arm of the prosecutor’s office for purposes of a work product analysis.”

Finally, the Court held that a decision by Pierce County Judge Bryan Chushcoff to seal records used during the trial of Clemmons’ sister, LaTanya Clemmons, was improper because he failed to engage in analysis required under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982) and to show a “compelling interest which overrides the public’s right to open administration of justice.” Under *Ishikawa*, the relevant factors for sealing court records are (1) the need, as shown by the proponent; (2) the opportunity afforded to those present when a sealing motion is made to object to the suggested restriction; (3) whether sealing is both the least restrictive means available and effective in protecting the interests threatened; (4) a weighing of the competing interests of the parties and the public; and (5) whether the sealing order is no broader in its application or duration than necessary to serve its purpose. Chushcoff’s order lacked any of this analysis. The records are among the more than 2,000 records that Serko had previously ordered withheld from public access.

*Mr. Johnson and Mr. Stahl are partners and Ms. Duran is an associate with DCS member firm Davis Wright Tremaine LLP in Seattle. They represented the Seattle Times Company in this matter. Gregory Link of the Washington Appellate Project argued the case on behalf of Clemmons defendant Darcus Allen.*

### **MLRC Upcoming Events**

**[MLRC/Southwestern Media  
& Entertainment Law Conference](#)**  
January 20, 2011 | Los Angeles, CA

**MLRC/Stanford Legal Frontiers  
in Digital Media Conference**  
May 19-20, 2011 | Stanford, CA

**MLRC London Conference**  
September 19-20, 2011  
(In-house counsel breakfast Sep 21st)  
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# Velcro Suit Does Not Stick: Court Dismisses Copyright Claims Against *Bruno*

By Lincoln D. Bandlow

This past August, a federal district court in Los Angeles dismissed a copyright infringement lawsuit filed against the makers of the motion picture *Bruno* in which the plaintiff alleged that a scene in the film which featured the lead character wearing a suit made of Velcro infringed on a scene from plaintiff's script which also included a character who wore a suit made of Velcro. [\*Musero v. Mosaic Media Group\*](#) (C.D. Cal. Aug. 9, 2010) (Anderson, J.) On Defendants' motion to dismiss, the court took judicial notice of the two works, examined them and found that there was no similarity in protectible expression but, rather, the only similarity was in generic, unprotectible ideas. The case demonstrates that when there is no dispute as to the works at issue, on an early motion, a court can examine the works and dismiss a copyright infringement claim based on unprotectible expression.

## Facts

The motion picture *Bruno* chronicles the exploits of gay Austrian fashion model and talk show host Bruno, portrayed by actor Sacha Baron Cohen, who travels the world in search of fame and fortune, all the while exploring various stereotypes and public attitudes regarding homosexuality. In one scene early in the film, Bruno dons a suit made entirely out of Velcro to a fashion show, only to have an entire rack of clothes become attached to him, stumble out on to the show's runway and then be escorted away by Italian police.

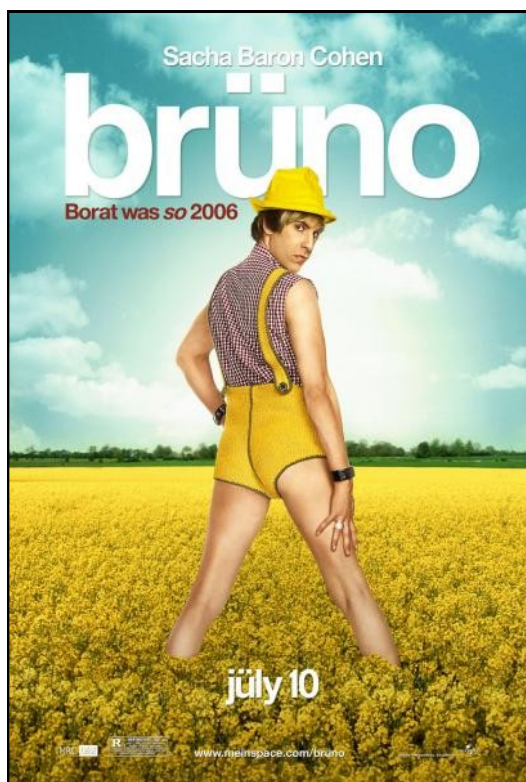
Plaintiff John J. Musero, III, wrote a screenplay titled *Himbos*, which is a fictional heterosexual romantic comedy, set in Los Angeles, about a group of men who use extreme measures to try to seduce women. At the crux of Plaintiff's lawsuit was the allegation that the above-referenced scene from *Bruno* purportedly included aspects of one of the scenes in *Himbos*. In that single scene in *Himbos*, one of the several heterosexual male characters wears a suit made of Velcro to a costume party at a mansion in Los Angeles. The Velcro suit sticks to various objects, including several cats, a rabbit, a canopy, and two other costumes at the party, causing mayhem, and leading the wearer of the suit to fall in a pool. Plaintiff alleged claims for copyright infringement and breach of implied contract, contending that he had submitted his script to the makers of the film and that the film infringed upon his Velcro suit idea in violation of the Copyright Act.

## Defendants' Motion

Defendants brought a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). Under well-established Ninth Circuit law, "when the copyrighted work and the alleged infringement are both before the court, capable of examination and comparison, non-infringement can be determined on a motion to dismiss." *Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9th Cir.1945) (citations omitted). Because Plaintiff had not attached either of the works to the Complaint, Defendants submitted both the *Himbos* screenplay and a dvd of *Bruno* to the Court and asked the Court to take judicial notice of the works. *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994) (overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir.2002)) (documents "whose contents are alleged in a complaint and whose authenticity no party questions, but

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**A federal district court in Los Angeles dismissed a copyright infringement lawsuit filed against the makers of the motion picture *Bruno* in which the plaintiff alleged that a scene in the film which featured the lead character wearing a suit made of Velcro infringed on a scene from plaintiff's script.**

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which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss”).<sup>1</sup>

Defendants then asserted that Plaintiff's claim of copyright infringement had to be dismissed because an idea, and *scenes a faire* inevitably flowing from it, are not copyrightable. In other words, Plaintiff could not show that the allegedly copied aspect of the scene in *Himbos*, namely, the idea of a man wearing a Velcro suit that sticks to items other than Velcro and results in comic mayhem, is deserving of copyright protection. Rather, as Defendants asserted, this was either a mere idea not subject to copyright protection, or an idea combined with aspects that naturally and inevitably

flow from that idea and thus any additional aspects added to the idea were rendered unprotected *scenes a faire* or were barred from protection under the merger doctrine.

To state a claim for copyright infringement, the plaintiff must allege: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work *that are original*.” *Feist Publications, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 361 (1991) (emphasis added). For the purpose of the motion, Defendants assumed that Plaintiff had a valid copyright in his screenplay as a whole, such that first prong of the test is satisfied.

The second prong, however, requires a plaintiff to allege that “the infringer had access to plaintiff's copyrighted work and that the works at issue are substantially similar *in their protected elements*.” *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (emphasis added). As is often done in motions addressing copyright infringement claims (particularly in a motion to dismiss), Defendants assumed for purposes of the motion only the truth of Plaintiff's allegation that Defendants had access to the *Himbos* screenplay. Even with that assumption, a plaintiff cannot state a valid copyright infringement claim where substantial similarity is lacking. See, e.g., *Funky Films Inc. v. Time Warner Entertainment Co.*, 462 F.3d 1072, 1082 (9th Cir. 2006);

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1. Defendants also requested that the Court take judicial notice of a video from a 1984 edition of *Late Night With David Letterman* in which Letterman wore a suit made entirely of Velcro and the suit stuck to various objects (there, a wall and a basketball) for comedic effect. Defendants argued that the comic and highly public use of a Velcro suit by Letterman in 1984 and, in particular, Letterman's use of a Velcro suit that sticks to non-Velcro items confirmed that “wearing a suit of Velcro leading to mayhem” is nothing more than a non-protectable idea in the public domain, not original expression that could be protected. Plaintiff objected to the request for judicial notice, but the Court ultimately did not rule on the request or the objection. Rather, as set forth below, the Court held that the “Velcro suit leading to mayhem” concept was not protectable, regardless of the previous Letterman iteration of the concept.

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*Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010).

To assess substantial similarity, the court must apply the objective “extrinsic test.” *Funky Films*, 462 F.3d at 1077. “In applying the extrinsic test, this court compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters.” *Id.* (quotation marks and citation omitted). Moreover, in applying the extrinsic test, the Court “must take care to inquire only whether the *protectable elements, standing alone*, are substantially similar.” *Funky Films*, 462 F.3d at 1077 (citation omitted) (original emphasis). This requires the Court to “filter out and disregard the non-protectable elements in making [the] substantial similarity determination.” *Id.* The protectable elements must demonstrate “not just similarity, but substantial similarity, and it must be measured at the level of the concrete elements of each work, rather than at the level of the basic idea, or story that it conveys.” *Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1179 (C.D.Cal. 2001) (quotation marks omitted); see also *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985).

Defendants contended that the only “similarities” were at the level of the basic idea, namely, a man wearing a Velcro suit that sticks to non-Velcro items, resulting in mayhem. The concrete elements of each of the two scenes in which the idea is used, however, were so dissimilar to each other as to render Plaintiff’s claim of copyright infringement invalid. For example, in Plaintiff’s screenplay, the heterosexual character Nate wears a Velcro suit to a costume party at a mansion in Los Angeles. Nate walks around the party wearing his suit, and various other characters comment on it. Later, various animals, including several cats and a rabbit, attach themselves to the Velcro suit. Nate’s suit then sticks to a canopy, pulling it down and knocking over statues, plants and decorations. In the ensuing mayhem, Nate gets attached to a waiter and falls into a pool.

In stark contrast, in the *Bruno* film, the gay character Bruno attends an actual fashion show in Italy, wearing a Velcro suit. He goes backstage during the event. His suit sticks to a curtain, he crashes into a clothes rack, and his suit sticks to the clothes. He then crashes through another curtain and ends up near the runway. He is confused for a few moments and then stands up and starts walking on the runway. A security officer tries to pull him off, but is unable to do so. Various members of the audience react to this, and Sacha Baron Cohen, the actor playing the character, is actually arrested by Italian police.

Defendants argued that the only element common to the two scenes at issue is the idea of a man wearing Velcro suit that sticks to non-Velcro items, with comic results and, thus, Plaintiff was suing only on the basis of a non-protectable idea. Moreover, in the context of fictional plot lines, courts have declined protection to even well developed ideas. See, e.g., *Funky Films*, 462 F.3d at 1081 (finding no protection for similar plots involving “the family-run funeral home, the father’s death, and the return of the prodigal son, who assists his brother in maintaining the family business”); *Kouf v. Walt Disney Pictures & Tele.*, 16 F.3d 1042, 1044-45 (9th Cir.1994) (finding no protection for similar plots of shrunken kids and the “life struggle of kids fighting insurmountable dangers”); *Berkic*, 761 F.2d at 1293 (finding no protection for similar plots of “criminal organizations that murder healthy young people, then remove and sell their vital organs to wealthy people in need of organ transplants” and the general story of the “adventures of a young professional who courageously investigates and finally exposes, the criminal organization”). Defendants pointed out that the elements that form the alleged basis for the complaint, namely the idea of a comic character wearing a Velcro suit that sticks to non-Velcro items, and the mayhem that ensues, amounted to nothing more than a plot concept combined with unprotected *scenes a faire*, or “situations and incidents which flow naturally from [the] basic plot premise” of a character wearing such a suit. See *Berkic*, 761 F.2d at 1293. In other words, given the basic premise of a comic character wearing such a suit, it is natural and inevitable that the scene in question will include objects sticking to the suit, and resultant mayhem. See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1177 (9th Cir. 2003) (finding that “the sequencing of first performing [a magic] trick

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and then revealing the secrets behind the trick is subject to the limiting doctrines of merger and *scenes a faire*.”); *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996) (holding similarities of a “dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur nurseries, and uniformed workers... are classic *scenes a faire* that flow from the uncopyrightable concept of a dinosaur zoo”).

Moreover, Defendants asserted that the claim was additionally barred by the doctrine of “merger” because Plaintiff’s sticky Velcro suit idea was inseparable from the alleged elements of expression, such as items sticking to the suit, and subsequent mayhem. “[W]hen the idea and the expression are indistinguishable, or ‘merged,’ the expression will only be protected against nearly identical copying.” *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994).<sup>2</sup>

### Plaintiff’s Opposition

In his Opposition, Plaintiff did not dispute the authenticity or the admissibility of the evidence in front of the Court necessary to rule on the motion, namely, the *Himbos* script and the *Bruno* film. Rather, Plaintiff argued over how the purportedly similar scenes could be described and asserted that “specific protected elements that Plaintiff put into his script are the *same elements* that the Defendants have taken and used in their movie.”

On Reply, Defendants pointed out that the Ninth Circuit had just recently confirmed while the motion was pending that “a finding of substantial similarity between two works can’t be based on similarities in unprotectable elements.” *Mattel, Inc. v. MGA Entertainment, Inc.*, --- F.3d ---, 2010 WL 2853761, \*10 (9th Cir. 2010). Rather, “[w]hen works of art share an idea, they’ll often be ‘similar’ in the layman’s sense of the term.... but that’s not the sort of similarity we look for in copyright law.” *Id.* Likewise, Defendants contended, the allegedly shared idea of wearing a Velcro suit that sticks to seemingly non-Velcro items, leading to different kinds of comedic chaos, cannot be a valid basis for a finding of substantial similarity.

Defendants reiterated that the concrete elements of the works were very different. Some of the concrete elements in the *Bruno* Velcro scene, for example, include a gay protagonist (a) almost getting trapped in his vehicle when his suit sticks to the car’s seats, and then clumsily walking down the street because his arm has become Velcro-attached to his leg; (b) intruding into an actual fashion show in Milan without permission, (c) conducting unscripted interviews while wearing a Velcro suit in the back-stage area of the event, (d) causing commotion after clothes, shoes, a curtain and other items get stuck to his Velcro suit in that back-stage area, (e) tumbling wildly on to the stage, shrouded by the articles that are stuck to him and then performing an unauthorized walk down the runway while wearing the Velcro suit with the items stuck to it, and (f) disrupting the actual fashion show, being grabbed off the stage, and getting arrested by Italian police.

None of those elements were present in the *Himbos* scene, in which (a) a heterosexual character attends a private, fictional Los Angeles house party as part of his effort to pick up women, (b) the guests are wearing strange

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2. Plaintiff had also asserted state law claims for breach of implied contract and breach of an implied covenant of good faith and fair dealing. Defendants also moved to dismiss those claims on the grounds that they were pre-empted by federal copyright law, relying in part on the recent decision by the Ninth Circuit in *Montz v. Pilgrim Films & Television, Inc.*, 606 F.3d 1153, 1158 (9th Cir. 2010). The *Montz* decision, however, was recently accepted for *en banc* review by the Ninth Circuit. Ultimately, the District Court did not rule on the issue of whether these state law claims were preempted because, having granted the motion to dismiss the copyright infringement claims, the Court declined to exercise supplemental jurisdiction over the remaining state law claims.



costumes, (c) various animals, especially cats and rabbits (presumably Velcro props), and a canopy attach to the Velcro suit, causing the character to fall into a pool, dragging a waiter with him. Likewise, none of those elements were used in *Bruno*.

Plaintiff asserted that “both characters attend an event in Fashion Week” but this was simply not true. Although the characters in *Himbos* did discuss and later attend a Los Angeles fashion show, the Velcro scene at issue in *Himbos* had nothing to do with any fashion show or fashion event. Plaintiff further stated that “both characters get caught to numerous items that have no Velcro on them, such as curtains, garments, furniture, and other objects.” This omitted the fact that the main “objects” that stick to the Velcro suit in *Himbos* were cats, rabbits, and a canopy, which provided the highlights of that scene (and no curtains or furniture stick to the *Himbos* suit).

In the *Bruno* scene, by contrast, the focal point is that clothes and shoes from clothes racks in the backstage area of a fashion show, as well as a curtain, get stuck to the gay “interviewer” who, having fallen onto the stage wearing various garments and shoes stuck to him, attempts to walk down the actual fashion show runway without permission, as if this bizarre accidental “outfit” is somehow just the latest fashion statement, only to be hauled off, arrested and have his antics shut down the event.

Plaintiff contended that “both scenes attract the attention of the surrounding models, security officers / event organizers, and other alarmed and serious fellow Fashion Week attendees, which highlight the characters’ clumsy and humorous ill-advised actions as they try to escape their Velcro-gathered clutter.” As Defendants pointed out in reply, however, that description may have held true to a great extent for the *Bruno* Velcro scene but it simply did not describe the scene in *Himbos*. In fact, the *Himbos* Velcro scene was not set at any “Fashion Week,” or any fashion event at all, but rather at a private costume party at a Los Angeles mansion.

Moreover, in addition to the focus on animals getting stuck to the Velcro suit (which was not remotely any part of *Bruno*), the Velcro scene in *Himbos* included various conversations among the comically-costumed characters, following multiple side stories with a completely different sequence of events in an entirely different setting in comparison with *Bruno*. The *Bruno* Velcro scene, in contrast, includes hardly any dialogue, and the focus is almost entirely upon the main character, who provides extensive narration for the scene (and there was no narration in *Himbos*). There were no friends or other characters wearing unusual costumes or conversing in the *Bruno* Velcro scene, and the climax does not involve the protagonist falling into a pool, as in the *Himbos* Velcro scene.

Plaintiff argued that “both characters cause mayhem due to their inadvertent attachment to everything around them.” Defendants pointed out, however, that in fact, the situations, the reasons for the mayhem, and the nature of the mayhem, were all entirely different. In *Bruno*, the mayhem is caused by the fact that the protagonist is a notorious interloper who illegally crashes an actual, non-scripted fashion show. He disrupts the entire event by walking down the runway without permission, leading the organizers to turn off all of the lights, and causing the police to arrest him. In contrast, in *Himbos*, the protagonist merely makes a fool of himself, falling into a pool at a private, fictional house party to which he has been invited, and then quietly slinks away to avoid further embarrassment.

Plaintiff also argued that the inverse-ratio rule lowers the requirement for proving substantial similarity, and Plaintiff alleged that one of the Defendants had purportedly admitted to reading the *Himbos* screenplay while working on *Bruno*. Defendants countered that not only had this defendant not admitted any such thing (nor was it included as an allegation in the complaint), but that even assuming any allegedly reduced standards under the inverse-ratio rule, there was still no actionable similarity of protectible expression.

### **The Court’s Ruling**

On August 9, 2010, Judge Percy Anderson of the Central District in Los Angeles granted Defendants’ motion

and dismissed the lawsuit. Judge Anderson held that “[w]ith regard to the plot, or sequence of events, in the two Velcro scenes, the Court finds that there are few similarities between the two works once the unprotectable elements are filtered out of the analysis.” The Court agreed that although both Velcro scenes “involve a character wearing a Velcro suit who becomes stuck to a variety of objects and subsequently causes ‘mayhem,’ this basic plot idea is not protected by copyright law.”

Citing *Berkic*, *Williams* and other decisions, the Court noted that copyright does not protect the basic or general ideas for a story. The Court filtered out the idea of a Velcro suit and additionally concluded that:

[t]he expressive elements that Plaintiff alleges he added to this idea – a character who wears a Velcro suit to a public event, gets stuck to a number of objects, falls and causes mayhem – are scenes a faire which flow naturally from the idea of a Velcro suit and are therefore unprotectable; a character who wears a suit that starts sticking to everything around him will inevitably try to ‘unstick’ himself and, in the process, fall and cause mayhem.

Having filtered out these elements, the Court went on to examine the other expressive elements of the works, such as characters, themes, setting, mood, pace and dialogue, finding that these elements were not similar in protectible expression. As to the characters, they did not share any similarities: whereas “Bruno” was “a self-proclaimed fashion expert who has his own television show and attends a fashion show in Milan conduct interviews with the people backstage,” the protagonist in *Himbos* was “a salesman at Macy’s who manages to sneak into a series of events during Los Angeles’ Fashion Week in an effort to meet fashion models.”

The Court found that the themes and setting were also different, with *Bruno* being about “a series of outrageous misadventures [occurring] in the lead character’s quest for stardom” with a Velcro suit scene that “takes place at an actual fashion show during Milan Fashion Week” whereas *Himbos* was about “events that take place when a group of friends, in an effort to meet fashion models, sneak into events” and the Velcro suit scene “does not take place at a fashion show; [rather] it takes place at a party held at a private mansion.”

Finally, the Court held that there was no similarity in the pace, mood or dialogue of the two scenes at issue. As for the pace, the Court noted that the scene in *Bruno* “unfolds in linear fashion and is centered only on the actions of the lead character” whereas “the build-up of events in the ‘Himbos’ scene is stretched out over the course of a party, during which there are flashes to scenes involving other characters.” Moreover, the moods of the scenes were different “insofar as the ‘Bruno’ character is not the least bit shy or ashamed to get up after his fall and model his Velcro suit, but the ‘Himbos’ character hurries to leave the party after the scene at the pool.” Finally, the dialogue in the two scenes shared no similarities at all.

Given this lack of similarity of the two scenes, the Court held that the works were not substantially similar. As for Plaintiff’s contention that the burden on similarity was somehow lowered by operation of the “inverse ratio rule,” the Court rejected the argument, finding that even if that rule were applied, Plaintiff had “failed to show that the two scenes share concrete, articulable elements that are subject to copyright protection.” Finding that there were no additional facts that Plaintiff could allege to cure these deficiencies, the Court dismissed the copyright claims without leave to amend. The action was thereafter settled, so there will be no appeal of the decision.

*Lincoln D. Bandlow is a partner at Lathrop & Gage LLP in Los Angeles where he practices intellectual property and media litigation. Bandlow, Russell Smith and Michael Cleaver of SmithDehn LLP and Ashish Kumar, Siddharth Vedula, Preethi Venkataramu of SDD Global Solutions Pvt. Ltd. represented the defendants. Stephen Doniger and Scott Burroughs of Doniger / Burroughs, APC represented plaintiff.*

# Australian Court Holds Headlines Not Copyrightable

By R. David Hosp

A recent decision out of a Federal Court in Australia offers rare clarity regarding the application of copyright law to newspaper headlines. The protectability of headlines has become an important issue recently as bloggers, search engines and aggregators have developed redistribution models using third-party headlines in links and summaries online. While several cases have been filed in various jurisdictions, few courts have ruled on the merits of the copyright issue.

In September, the Australian Federal Court in New South Wales issued a decision in [\*Fairfax Media Publications Pty Limited v. Reed International Books Australia Pty Limited\*](#) (2010) FCA 984, finding that headlines generally are not covered under Australian copyright law.

## Background

The case addressed an on-line service known as ABIX, by which defendant Reed delivers to internet subscribers a summary of articles published in various different third party newspapers and magazines. ABIX copies the articles' headlines and bylines and includes a summary of the article authored by Reed employees. Fairfax, the plaintiff, publishes the Australian Financial Review (AFR). Roughly half of the articles published in the AFR are summarized in Reed's ABIX service.

Fairfax brought suit alleging that each individual headline was a separate copyrightable work, the copying of which constituted infringement. Fairfax asserted alternatively that Reed infringed the copyright in the article itself because the article includes the headline as part of the work. It also claimed an infringement in both the compilation of the articles in each edition, and the final layout of each addition. With respect to each of these individual works.

## Headlines Are Not Separate Works

The Court first dealt with the question of whether headlines are themselves separate copyrightable works, and concluded that they generally are not. The Court acknowledged that some creativity is employed in the creation of many headlines, but found that they are "simply

too insubstantial and too short to qualify for copyright protection as literary works." The Court did not rule out entirely the possibility that some headlines might be "of extensive and such a significant character" that they might want a finding of copyright protection in an individual case, but found that was not warranted with respect to any of the headlines specifically identified in the case.

## Copying Headline Does Not Infringe Copyright In Article

The Court then addressed the question of whether the copying of a headline violated copyright in the article itself, rejecting the claim for two reasons. First, it found that, because headlines are often written by individuals other than the author of the article itself, in order for the article and headline together to be considered a single work, it would have to be a work of joint authorship. Under Australian law, in order for a work of joint authorship to qualify for copyright protection, each author must be identified, and the work contributed by each author must be inseparable from the work as a whole. Fairfax had failed to identify each individual author in the works in question, the Court found, or to offer a justification for that failure.

Second, the Court found that, even if each article together with its headline could be considered a singular work, the reproduction of the headline would not amount to a copying substantial enough to constitute infringement.

## Copying Headlines Does Not Infringe Rights In Compilation or Final Edition

Next, the Court addressed the question whether the reproduction of the headlines infringed the copyright in either the compilation of articles used in each edition, or in the final edition as printed. The Court accepted that both the combination of articles, headlines and bylines in each edition was a copyright work of joint authorship. Nor was it disputed that the whole of each edition of the newspaper constituted a separate copyrightable work. However, with respect to both the compilation of articles and the actual edition, this Court found that the originality in the works

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resided in the, “skill, judgment, knowledge, labor or expense involved in gathering, selecting and/or arranging material included in the compilation.” The Court found that Reed did not reproduce the actual arrangement of the articles in question, and therefore had not infringed the copyright in that particular work.

#### **Fair Dealing Defense Available**

Finally, the Court found that, even had Fairfax stated a claim for infringement in the first instance, the defense of fair dealing would have been available to Read. The Court commented on Reed’s own contribution, skill and effort in drafting the abstracts of the newspaper articles, and held that the commercial nature of Reed’s conduct did not preclude its reliance on the fair dealing defense.

#### **Rare Guidance On Important Issue**

The Court’s decision is one of the first in any jurisdiction to specifically address the question of what copyrights lie in newspaper headlines. The Scottish case of *Shetland Times Limited v. Wills* [1997] SSR 604; (1996) 27 IPR 71, left open the possibility that some headlines might qualify for protection, but expressed similar reservations with respect to the copyrightability of headlines. Similarly, case law in the United States regarding the copyrightability of “titles” generally casts significant doubt on the copyrightability of newspaper headlines, but that caselaw has not yet been specifically applied to newspaper headlines.

However, shortly before publication of this article, the High Court of England and Wales published an opinion in [\*The Newspaper Licensing Agency Ltd v. Meltwater Holding BV\*](#), [2010] EWHC 3099 (Ch), specifically disagreeing with the Australian court and granting copyright protection to headlines under EU law. The judge has granted leave to appeal. It seems, then, despite the apparent clarity offered by the Court in *Fairfax*, the debate is far from over.

*R. David Hosp is a partner at Goodwin Procter LLP in Boston. Fairfax was represented by barristers Richard Cobden SC and Christian Dimitriadis; and solicitors firm Minter Ellison. Reed was represented by barristers David Catterns QC and C. Moore; and solicitors firm Mallesons Stephen Jaques.*



## **UPCOMING EVENTS**

### **California Chapter Luncheon Meeting**

December 15, 2010  
Southwestern Law School  
Los Angeles, CA

### **MLRC/Southwestern Media & Entertainment Law Conference**

January 20, 2011  
Los Angeles, CA

### **MLRC/Stanford Legal Frontiers in Digital Media Conference**

May 19-20, 2011  
Stanford, CA

### **MLRC London Conference**

September 19-20, 2011  
(In-house counsel breakfast Sep 21st)  
London, England

### **MLRC Annual Dinner**

November 9, 2011  
New York, NY

### **DCS Meeting & Lunch**

November 10, 2011  
New York, NY



## Other Side of the Pond: Developments in UK and European Media Law

# Super Injunctions; Phone Hacking; Costs; Libel Tweets; Libel Reform; Damages in Ireland

**By David Hooper**

There have been a number of cases this month when the courts have shown a determination to keep super injunctions within clearly defined limits and have tried to strike a balance between the need to protect private information and the need for open justice. Super injunctions were being too readily handed out by the courts and not only could you not report the private information or what had been said in court, but on occasion you could not even mention that who had brought the case.

There have very recently been a number of cases where it has been alleged that the respondent was in effect blackmailing the claimant by threatening to expose details of their relationship unless he or she were paid a substantial sum of money or at any rate indulging in a bit of kissing and telling.

### **Prior Notification**

The issue first arises when there is a question as to whether the defendant should receive notice of the proceedings and the extent to which the court may feel it appropriate to delay the moment when the media are entitled to report the proceedings. Even in privacy cases the presumption remains in favour of open justice but there had been a number of cases where the court has been concerned lest the defendant should pre-empt the order of the court, for example, by tipping off the press and getting the private information into the public domain.

In [DFT v TFD](#) 2010 EWHC 2335, Mrs Justice Sharp indicated that it could be appropriate to restrain the publication of any private or confidential information without giving prior notice to either the respondent or the media. This would normally be where there was a need for a short period to enable the ex parte order to be served upon the respondent and to prevent the respondent being tipped off or being in a position to frustrate the order of the court by disclosing the confidential information to the press.

This should normally only be a holding measure and the court should review any reporting restrictions as the case develops. The decision of Sharp J followed a similar decision by the Court of Appeal in [ASG v GSA](#) 2009 EWCA Civ 1574, making it clear that in court will prohibit any publication of the existence of the case either to the respondent or to the media if there is a real risk particularly in such blackmail cases of the respondent simply going to the media and publishing a story.

In [TUV v Persons Unknown](#) 2010 EWHC 853 Eady J indicated that the need for prior notification should be addressed according to the facts of each case. He considered that the extent to which the media would need to be served with prior notice of the claim and concluded that it was not necessary to give notice to every media group which *might* be interested. It was sufficient to give notice only to those media groups who were already believed to have shown interest in publishing this story.

### **Anonymizing Information or Parties**

If the court is persuaded to grant an injunction restraining the publication of the confidential material, the court is likely to want to ensure that the information should be anonymized so that the litigation does not directly or indirectly bring that information into the public domain. Accordingly the courts have ruled that no information should be published beyond what was in the court's judgement required to avoid unnecessary identification of the parties where appropriate. The court has recognised that it is important not to discourage blackmail victims from seeking relief from the court in such cases and the court has recognised its obligation to protect the article 8 rights of such persons.

The law reports have become filled with alphabet soup cases where the parties are known only by a random collection of three letters. In [DFT -v- TFD](#) Sharp J considered the principle of anonymity. She recognised that

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this derogated from the principle of open justice. The court had to be satisfied that anonymity was necessary on the facts of the case and that there was a real risk that the private or confidential information which the order was intended to protect would enter the public domain if the parties were named. She noted that any blackmail element would bring extremely strong public interest considerations into play and would probably justify an order for anonymity. There was a similar decision by Tugendhat J in [AMM v HXW](#) 2010 EWHC 2451.

The issue has very recently arisen in a case concerning the ex-lover of one of the Take That group. The nature of her case was apparent from the text she circulated "why should I continue to suffer financially for the sake of loyalty when selling my story will sort my life out?" The pop star succeeded in getting a privacy injunction, but the original order for anonymizing the case and preventing the media reporting who had obtained the order was reversed by the Court of Appeal in [Ntuli v Donald](#) 2010 EWCA 1276.

Mr Justice Eady had felt that the original order for anonymization was justified on the basis of the serious consequences for the claimant and his children, particularly when set against the motives of the defendant and, of course, circumstances do change. English courts may well grant the injunction until the issues are more clearly defined. In the Court of Appeal Kay LJ noted that Article 6 prescribes a test of strict necessity in the context of publicity being permitted to be restricted in the interests of justice. On the facts it allowed the name of the rock star to be published.

A similar conclusion was reached by Mr Justice Tugendhat in the case [JIH –v- News Group Newspapers](#) 2010 EWHC 2818 & 2979. This concerned revelations about the private life of a Premier League footballer. Nowadays it seems no self-respecting star does not have a privacy injunction muzzling reports of his off field activities. Initially an anonymity order was made. However upon review the judge ordered that the football player's name *could* be published. That is presently subject to appeal so we will have to wait to learn who Mr JIH may be.

The judge considered that the general principle of open justice provided in that case sufficient general public interest for publishing a report of the proceedings which identified the claimant to justify any resulting curtailment of the rights of the claimant and his family to respect for their private and

family life. The test is one of necessity requiring a high standard to show that the object of obtaining justice in the case would be rendered doubtful if anonymity was not granted. The case shows how the balance between the conflicting rights of private family life and open justice are reconciled. Although the claimant would be identified, all necessary protection was given to the private lives of the applicant and his family. Any judgement in such a case would not spell out the private facts concerning the applicants life which he sought to protect. The judgement of the court would refer only to the framework of the claim and not its detail. Any sections of the media which required to know what they could and could not publish about the individual would be permitted to see the subject matter of the claim in a confidential schedule but in order to do so they would be bound by the orders protecting confidentiality made by the court.

My colleagues under the editorship of Keith Mathieson have on the last few weeks published *A Handbook on Privacy* and to reflect its fast development they are setting up a Privacy blog of which I can give particulars to anyone who would like to email me.

### Phone Hacking

I have earlier written about the litigation arising out of the habit of the then Royal Correspondent of the News of the World of hacking into messages left on voice mail to secure his salacious revelations. In [Phillips v News Group Newspapers Ltd](#) 2010 EWHC 2952 an order was obtained requiring that the one time jailed investigator should be ordered to disclose the identity of those at the newspaper to whom he handed information he had obtained from hacking into the telephone of the claimant, who at the time worked for the publicist Max Clifford, a notorious purveyor of kiss and tell stories. He was also required to disclose the identity of the persons who instructed him to investigate persons connected with Clifford.

This may well be targeted at discovering how much David Cameron's Chief of Communications, Andy Coulson, knew about the matter. He was, until his resignation, editor of the News of the Screws. Not surprisingly the investigator raised an issue of the privilege against self-incrimination. However

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the court made the disclosure orders relying on section 72 Senior Courts Act 1981 which provided that the court could effectively override the privilege against self-incrimination in proceedings relating to rights pertaining to intellectual property which for these purposes included technical or commercial confidential information

### **Libellous Tweeting in the World of Cricket**

The case of [Cairns v Modi](#) 2010 EWHC 2859 applied well-known principles to the world of tweeting. The allegations are to do with the sporting world of a New Zealand cricketer being accused by a leading Indian cricketing official of being involved in match fixing. The tweet had on the face of it a very limited publication within the jurisdiction of the British courts. Expert evidence was gathered on both sides. The defense suggested that no more than 100 followers would have heard the words and possibly as low as 35. The claimant put the figure at nearer 800 and in this they were assisted by Dr Godfrey of *Godfrey v Demon fame* aka the Don Quixote of libel internet litigation.

Mr Justice Tugendhat declined to strike the case out on abuse of process grounds, even though the readership of the defamatory words was very small. He was prepared to accept that there were legitimate grounds for bringing the claim in England, as the sensational nature of the allegations meant that they would have received a wide currency beyond the small number of tweets. He was also of the view that it was not appropriate to try as a preliminary issue the extent to which the tweet had been read.

The judge also took into account the fact that rather than there being scope for an argument that any damages recoverable would be out of all proportion to the costs of litigation the claimant was simply seeking a vindication and to clear his name. The number of publishees was therefore not determinative of any abuse of process argument. The upshot of this is that tweets are recognized by the court as potentially fertile grounds for libel litigation. Furthermore the court is aware of the growing impact of tweeting and the effect authoritative tweets can have on people's reputation. The case also shows that if a claimant is prepared to forego a claim for damages and to argue that they are simply seeking to vindicate their reputation, they may well receive some measure of sympathy from the court.

### **Costs Consultation**

At the heart of the problem for defendants are the enormous costs which defendants risk being ordered to pay if they defend a case unsuccessfully. Following up on the report by a Lord Justice of Appeal, Sir Rupert Jackson on which I have written earlier, the Ministry of Justice has published a [consultation paper](#) seeking comments on his proposals for the reform of costs in civil litigation by 14 February 2011. Comments are sought on whether success fees or premiums for After The Event insurance policies should be recoverable from defendants, whether there should be a 10% increase in the level of damages to compensate for the cost reduction measures, whether there should be proposals for altering the rules relating to the shifting of costs and whether there is any scope for damage-based contingency fees along the lines of the American model, although damages are considerably less here. The government will publish its response to the results of the consultation in the spring of 2011 and will introduce primary legislation, if it is necessary, in spring 2011.

### **Libel Reform**

The government has published in the Ministry of Justice [structural reform plan the timetable for libel reform](#). In March 2011 a Defamation Bill will be published. There will be a relatively short period of consultation between March and June 2011. Any necessary amendments to the Defamation Bill will be debated in the longer period between July 2011 and April 2012. The UK law of libel should change by 2012.

### **The Speech Act Bites**

That the Speech Act can create problems for English claimants seeking to sue American defendants was highlighted in the case of [Metropolitan Schools v Design Technica](#) 2010 EWHC 2411. Earlier the claimants had had an unsuccessful crack at Google when it failed to establish that there could be a liability on the search engine acting in no more than the role of a facilitator for the publication of the words complained of. Nevertheless believing that the allegations suggested that its courses relating to computer games design work were a scam or fraud intended to deceive, the Claimant persisted in its litigation against the

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American based corporate defendant.

The claimant wished to vindicate its reputation and to nail the lie. It asked Mr Justice Tugendhat to grant a declaration of falsity and to award sufficiently high damages which they could point to as a vindication of their reputation, even though the damages would not be recoverable. The judge accepted their arguments and granted the declaration of falsity and the relatively high damages of £50,000 bearing in mind that there was no proof of any specific loss having been suffered by the company and that a company in the nature of things cannot have injured feelings. The claimant pointed to the fact that the website of Design Technica claimed 2 million unique visitors and the claimant argued that in consequence this allegation posted on my website was bound to be damaging.

The case underscored the very different approaches each side of the Atlantic and that litigation may still continue against American defendants. If that happens, US based defendants are likely like Design Technica not to participate in the litigation if they are confident that they do not have assets in the United Kingdom. The differences and pyrrhic nature of the victory were neatly summarized by Dave Heller "if the United Kingdom claimant came to the United States and tried to enforce the default judgement, the US company would have the full benefit of the Speech Act. Moreover, even if the United Kingdom claimant did not come to the USA, the US company could under the statute seek a declaration of unenforceability." See "[The Price of Online Discussions](#)," The Guardian, Oct. 28, 2010.

### A Very Irish Case

Some of us, if we had on a business trip and walked naked into the bedroom of the female company secretary albeit under the influence of somnambulism, might hesitate to sue for libel. Not so Donald Kinsella the former deputy chairman of Kenmare Resources who took exception to the disagreeable and unfeeling gloss that his employers put on this incident in a press release which led to his resignation. Far from discovering that he did not have a leg to stand on, he found that the jury agreed that the meaning of the press release was that he was being accused of making improper sexual advantages and awarded him €9 million in compensation with a further 1 million Euros thrown in by

way of aggravated damages.

The company's counsel described the award which was five times higher than the award, being appealed, of €1.87 million to Monica Leech in respect of a false allegation of an extra marital affair with a minister as "*off the Richter scale*". The Judge with the historic name of Mr Justice Eamon de Valera appeared stunned at the size of the award asking the foreman of the jury to correct him if he was mistaken in what he thought he had just heard. The award is being appealed but on the basis that the company has to make an on account payment in respect of damages of 500,000 Euros. Irish libel reform has a steep learning curve ahead of it.

### Do Customers of Cuttings Agencies Need a Copyright Licence?

There has very recently (26 November) been an interesting decision by Mrs Justice Proudman in the [Newspaper Licensing Agency Limited \(and other newspapers\) –v- Meltwater Holding BV](#) [2010] EWHC 3099. Meltwater was a cuttings agency and the issue (para 34 of the Judgment) is whether under Section 17(1) and (2) Copyright Designs and Patents Act 1988 the end-user needed a licence from the Newspaper Licensing Agency either by making a copy of a particular article or simply by clicking on the link to view the material. The Judge held at paragraph 45 of her Judgment "*by clicking on a link to an article the end-user will make a copy of the article within the meaning of Section 17 and will be in the possession of a infringing copy in the course of business within the meaning of Section 23*".

This, on the face of it, looks like a good victory for the Newspaper Licensing Agency and the newspapers it represents. However, the Judge has given permission to appeal and has indicated in paragraph 13 of the Judgment there is separate litigation in the Copyright Tribunal as to the reasonableness of the licence of the Newspaper Licensing Agency. This litigation therefore has some way to run and it is not impossible that the Court of Appeal might take a slightly different view and that it is implicit in the licence given by the NLA to the cuttings agency that their customers should be able to view the cuttings for their own purposes as opposed to making copies and circulating them around the office.

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



# Protecting Whistleblowing Sources in Canada

## *Supreme Court Extends Case-by-Case Approach for Source Protection*

**By Brian MacLeod Rogers**

In a double-barrelled decision, [\*Globe & Mail v. Canada \(Attorney General\)\*](#), 2010 SCC 41, the Supreme Court of Canada both extended its case-by-case approach for protecting journalists' confidential sources to include civil proceedings in Quebec and struck down a publication ban relying on its well-developed *Dagenais/Mentuck* test for such discretionary bans. As a result, the issue of protecting the journalist's source was sent back to Quebec Superior Court for reconsideration under the newly articulated guidelines.

Quebec operates under a Civil Code, rather than the common law, but the Court made it clear the same approach to confidential sources should apply throughout Canada: an application of Wigmore's four-part test for disclosure of confidential information that seeks to balance the competing interests of full evidentiary disclosure and protection for journalists' sources, as first articulated by the Court in *R. v. National Post*, 2010 SCC 16. That case dealt with a search warrant and assistance order executed on a newsroom in the course of a criminal investigation where the documents sought were an alleged forgery and envelope that might disclose its perpetrator. As expected, the Court was more generous in its approach to protecting sources when the journalist is a third-party witness during civil proceedings. The Court stressed that the information sought must be not only relevant but necessary.

If relevant information is available by other means and, therefore, could be obtained without requiring a journalist to break the undertaking of confidentiality, then those avenues ought to be exhausted. The necessity requirement, like the earlier threshold requirement of relevancy, acts as a further buffer against fishing expeditions and any unnecessary interference with the work of the media. Requiring a journalist to breach a confidentiality undertaking with the source should be done only as a last resort. [para. 63]

In respect of the publication ban at issue, the Court explicitly adopted the law developed by the United States Supreme

Court in *Smith v. Daily Mail Publishing Co.*, 443, U.S. 97 (1979) and *Bartnicki v. Vopper*, 532 U.S. 514 (2001), quoting from Justice Stevens: "A stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." On that basis, the Court set aside a publication ban designed to prevent a *Globe & Mail* journalist (who also happened to be the same journalist whose source was at issue in the case) from publishing stories about confidential settlement discussions in the civil proceedings.

### Facts of Case

These proceedings are yet another legacy of the infamous Sponsorship Scandal that *Globe & Mail* reporter, Daniel Leblanc, helped uncover. Millions of dollars in federal government funds had been misspent and misdirected in Quebec following the nearly successful 1995 Referendum on Quebec sovereignty. Leblanc had relied on a confidential source within the federal government whom he called "MaChouette" ("my little cabbage") for a series of articles that helped expose the scandal and to lead to a public inquiry. He later wrote a book entitled *Nom de Code: MaChouette: L'enquete sur le Scandale des Commandits (Codename: My Little Cabbage: The Sponsorship Scandal Investigation)*. This is the prime example of a confidential source being relied on by a journalist to expose abuse of public funds in Canada in recent years. The stories led to the Gomery Inquiry, a high-profile Royal Commission into what had gone wrong.

In addition to various criminal charges, the federal government also commenced civil proceedings in Quebec against individuals and businesses involved. In turn, one of the companies, Groupe Polygone, countered that the government had waited too long and had missed a limitation period. In an attempt to show the government's prior knowledge, the company pointed to Leblanc's articles and sought to expose his confidential source. To do this, it obtained court orders to examine federal government employees and others in an effort to identify MaChouette. Concerned that these efforts were going to identify Leblanc's source, the *Globe & Mail* challenged the court orders and

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sought to put a stop to the company's efforts. Leblanc testified in that proceeding and faced cross-examination by Groupe Polygone's lawyer that included questions he objected to as irrelevant or potentially breaching journalist/source privilege. The judge's ruling requiring Leblanc to answer the questions was the basis for the appeal to the Supreme Court on protecting sources.

Shortly after those rulings, Leblanc wrote a story for the *Globe & Mail* that revealed the substance of settlement negotiations between the company and the government – the information came from unauthorized government source. The same judge who had ruled against him on the journalist/source issue ordered a publication ban against Leblanc prohibiting any further reporting on confidential settlement negotiations. He did so without giving the *Globe & Mail* any chance to make submissions. This was the publication ban set aside by the Supreme Court.

### Journalist/Source Privilege

Perhaps the most challenging part for the Court was finding a basis for the Wigmore case-by-case approach to journalist/source privilege under Quebec civil law and procedure and its *Charter*. In essence, the Court found a gap in the codified law and relied on a comparison to police/informer privilege to accomplish this. The Court then applied the *National Post* reasoning to the very different context of a journalist testifying in civil litigation. It summarized the proposed test:

In summary, to require a journalist to answer questions in a judicial proceeding that may disclose the identity of a confidential source, the requesting party must demonstrate that the questions are relevant. If [so], then the court must go on to consider the four Wigmore factors and determine whether the journalist/source privilege should be recognized in the particular case. At the crucial fourth factor, the court must balance (1) the importance of disclosure to the administration of justice against (2) the public interest in maintaining journalist/source confidentiality. This balancing must be conducted in a context-specific manner, having regard to the particular demand for disclosure at issue. It is for the party seeking

to establish the privilege to demonstrate that the interest in maintaining journalist/source confidentiality outweighs the public interest and the disclosure that the law would normally require.

The relevant considerations at this stage of the analysis, when a claim to privilege is made in the context of civil proceedings, include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist is a party to the proceedings; and, perhaps most importantly, whether the information is available through any other means. As discussed earlier, this list is not comprehensive. [paras. 65, 66]

The Court referred favourably to the Ontario Court of Appeal's decision in the earlier case involving reporter Ken Peters of *The Hamilton Spectator* (*St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182) and was critical of the failure of the judge at first instance to undertake the required analysis. On that basis, the issue was remitted back to Quebec Superior Court, after noting: "If Mr. Leblanc's answers were almost certain to identify MaChouette then, bearing in mind the high societal interest in investigative journalism, it might be that he could only be compelled to speak if his response was vital to the integrity of the administration of justice." [para. 69]

One can easily foresee yet another appeal to the Supreme Court after the judge carefully follows the test and still rules that disclosure is required. Stay tuned.

### Publication Ban

The Court was similarly critical of the judge at first instance over his handling of the publication ban, especially his failure to give the *Globe & Mail* an opportunity to be heard. However, the reasoning for setting aside the ban may prove to be the most important aspect of the Court's decision. Not surprisingly, the Court found that confidentiality of settlement negotiations was a matter of "utmost importance", but the Court focused on the parties to the negotiations. They were the ones responsible for maintaining confidentiality. "Nothing in the record suggest[ed] that Leblanc was anything other than a beneficiary of the source's desire to breach confidentiality"; there was no proof that Leblanc and the

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Globe & Mail were party to any illegal acts.

There are sound policy reasons for not automatically subjecting journalists to the legal constraints and obligations imposed on their sources. The fact of the matter is that, in order to bring to light stories of broader public importance, sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process. History is riddled with examples. In my view, it would also be a dramatic interference with the work and operation of the news media to require journalists, at the risk of having a publication ban imposed, to ensure that the source is not providing the information in breach of any legal obligations. A journalist is under no obligation to act as legal adviser to his or her sources of information.

Such a legal policy is consistent with what has come to be known as the U.S. “*Daily Mail* principle”. [para. 84-85]

The Court then went on to cite *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) and *Bartnicki v. Vopper*, 532 U.S. 514 (2001) of the U.S. Supreme Court in support of courts allowing publication of information about important public issues even where it has been intercepted by others unlawfully.

The Court then applied the *Dagenais/Mentuck* framework to determine whether a publication ban should have been ordered; this test was first developed by the Court for discretionary bans in 1994. The fact that settlement discussions were going on was a matter of public record since that was the basis given for adjourning trial proceedings in late August 2008. As a result, a publication ban did not appear “necessary to prevent a serious risk to the administration of justice”. Further, the deleterious effects of the ban were serious: “There is clearly an overarching public interest in the outcome of this dispute, and barring the Globe & Mail from publishing the information that it obtained in this regard would prevent the story from coming to light. In other words, upholding de Grandpre J.’s order would be to stifle the media’s exercise of their constitutionally mandated role.” [para. 97] As a consequence, the ban was set aside.

## Conclusion

The orders of Justice de Grandpre were clearly suspect, dispensed with rough justice in an attempt to move the case along despite the interference of pesky media interlopers. While there is some very helpful language supportive of investigative reporting, the weakness of the Wigmore test for protecting sources is obvious. The trial judge just has to weigh in the balance the competing interests in exercising his or her discretion. While “infused with *Canadian Charter* values”, the test does not invoke direct constitutional protection for confidential sources. It is very much “situation specific”, even though the court notes: “The public’s interest in freedom of expression always [will] weigh heavily in the court’s balancing exercise.” [para. 24]

On the other hand, the *Dagenais/Mentuck* approach to discretionary publication bans has been given renewed endorsement. The Court’s refusal to apply that approach to the statutory ban on reporting bail hearings under section 517 of the *Criminal Code* (*Toronto Star v. Canada*, 2010 SCC 21), gave rise to a growing concern that it was being shunted aside – this appears unjustified. However, the most important aspect of this case for those in the media will be the ringing endorsement for its role in exposing public wrongdoing through the use of whistleblowers who choose to breach their duties of confidentiality.

The Court recognized that such sources were essential to the news media in playing their “constitutionally mandated role”. There is no obligation on a journalist to verify the legality of a source’s information, and in any event, “the breach of a legal duty on the part of a source is often the only way that important stories, in the public interest, are brought to light.” [para. 98] These words bear repetition and will be very useful in future cases.

*Brian MacLeod Rogers is a barrister and solicitor in Toronto, Canada. Appellant, Globe & Mail, was represented by William Brock, Guy Du Pont, David Stelow and Brandon Wiener; Respondent, Attorney General of Canada, was represented by Claude Joyal; Respondent, Groupe Polygone, was represented by Patrick Girard, Louis Belanger, Q.C. and Frederic Pierrestiger; Media Interveners, were represented by Christian Leblanc, Marc-Andre Nadon and Chloe Latulippe; Intervenor, Canadian Civil Liberties Association was represented by Jamie Cameron, Christopher Bredt and Cara Zwibel; Intervenor Barreau du Quebec, was represented by Michel Paradis, Francois-Olivier Barbeau, Gaston Gauthier and Sylvie Champagne.*

## Illinois Court Upholds Reporters Privilege in Hate Crime Suit

By Damon E. Dunn

A civil defendant, Paul Hoffman, moved unsuccessfully to depose *Chicago Tribune* and *Winnetka Talk* reporters about interviews they conducted with the plaintiffs, Margaret and James Horstman. [\*Horstman v. Hoffman\*](#), No. 09-4863 (Ill. Cir. Nov. 16, 2010) (Duncan-Brice, J.).

The case concerned a dispute between neighbors in an upscale Chicago suburb that started over construction parking during the Horstmans' home renovation. It escalated to include physical altercations, a misdemeanor battery conviction for Hoffman and various police reports concerning alleged stalking, property damage and other incidents between Hoffman and Mrs. Horstman. The Horstmans eventually sued Hoffman under the Illinois Hate Crimes Statute, alleging that Hoffman's conduct stemmed from his belief that Mrs. Horstman is Jewish.

After the complaint was filed, two different newspapers interviewed the plaintiffs about their case. An article by reporter Christopher Peterson was published in the *Winnetka Talk*, a Pioneer Press newspaper owned by Sun-Times Media, LLC, under the headline "Couple Alleges Anti-Semitic Harassment." A separate article by reporter Jeff Long, headlined "Winnetka Couple Alleges Anti-Semitism" was published in the *Chicago Tribune*.

Hoffman responded with a counterclaim against the Horstmans, including claims for intentional infliction of emotional distress, defamation and false light. Hoffman alleged that the plaintiffs sought to generate the publicity through their litigation, including the resulting press coverage. Hoffman also alleged that, after the articles were published, threatening comments were posted on the newspaper websites, he received an anonymous death threat, and his family received harassing telephone calls.

After Hoffman deposed both Mr. and Mrs. Horstman, he subpoenaed the two newspapers for source documents regarding their interviews. The reporters and their newspapers objected under the Illinois Reporters Privilege Act. Hoffman then moved to divest the privilege and take the reporters' depositions.

Hoffman's motion argued that the circumstances giving rise to the interviews, the plaintiffs' motives, and their demeanor at the interviews were relevant. He asserted that it is imperative that individuals who have been wrongly accused of bigoted behavior and have received alarming threats (he alleged that he was told "he should fry in [his] home when [he] is sleeping") be able to investigate the sources of information that resulted in dissemination of such false accusations and that, if the requested information were withheld, then individuals could use the press as a vehicle to harm others without any accountability.

The newspapers argued as a threshold matter that the sought after information was not relevant to a meritorious claim. Indeed, they challenged the validity of Hoffman's underlying claims as a matter of law. The newspapers pointed out that most of the quotes Hoffman complained of originated from court pleadings rather than the interviews and the fair report privilege protected a fair abridgment of the plaintiffs' complaint. Moreover, even if the court pleadings and interviewees' own statements accused Hoffman of being an anti-Semite, the Illinois Supreme Court had found such speech is not necessarily defamatory *per se*, citing *Imperial Apparel, Ltd.*, 227 Ill.2d 381, 402 (2008) (dismissing "anti-Semitic" advertisement after finding "epithets aimed at ethnic or religious groups fall within the protection of the first amendment").

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The newspapers also argued that Hoffman's belief that the offending quotes derived from the interviews rather than the plaintiffs' court pleadings was simply conjecture and that evidence supporting his theory could be obtained from other sources. Although the defendant deposed both plaintiffs regarding their newspaper interviews, the inquiry was limited to a few non-probing questions with little follow up. The newspapers argued that Hoffman simply refused to accept the plaintiffs' answers and was now fishing for impeachment material.

### **The Court's Ruling**

Judge Duncan-Brice denied the motion in a written memorandum order. The court first struck at the heart of the case by finding the information was not directly relevant to a "meritorious claim." The court stated that "As required by the Act, courts must scrutinize the merits of a defamation claim before piercing the reporter's privilege premised on such a claim." It then agreed with the newspapers that both articles primarily reported on the allegations in the complaint and the Horstmans' feelings and personal history. The court stated that "If the source of the assertions is the complaint itself, then defendant could not possibly have a claim against plaintiffs for the reporters' fair statement of the complaint."

Proceeding through the plaintiffs' alleged statements, the court found that they were either nondefamatory descriptions of the Horstmans' feelings (e.g. being "deeply shaken" by the dispute) or substantially true or privileged commentary on the defendant's assault conviction and the filing of the lawsuit. For instance, the court held that the statement that "Peggy Horstman never heard an ethnic slur directed toward her when she was growing up in the tiny-north central Illinois community of Amboy, even though she belonged to the only Jewish family" could not be defamatory because "it merely recounts the facts about Mrs. Horstman's upbringing, contains no reference to defendant, and otherwise does not fall into the five categories of defamatory *per se* language."

The court also agreed that the defendant failed to establish that the reporters' testimony was essential to a specific public interest. The court stated "it is clear to this Court that the defendant is seeking the reporters' testimony in order to impeach the Horstmans testimony given during their depositions in which they claim they did not make certain statements to the reporters. However, even in the context of civil discovery, it is well established that a party cannot engage in a fishing expedition to ascertain whether they can state a claim."

Finally, the court agreed with the newspapers that the defendant did not demonstrate that the information regarding the interviews was not obtainable from any alternative source. Although the defendant deposed both plaintiffs, "his inquiry about the interviews was limited."

The court also found the "special witness" doctrine shielded the reporters from the "harassing and disrupting effect" of a subpoena. Citing *People v. Palacio*, 240 Ill.App.3d 1078 (4th Dist. 1993), the court explained that the defendant's failure to meet the requirements of the Act also meant that he failed to overcome the special witness doctrine which requires that a subpoenaing party overcome "essentially the same steps" required to divest the Reporters Privilege.

*Damon E. Dunn of Funkhouser Vegosen Liebman & Dunn Ltd. represented the Winnetka Talk reporter and Sun-Times Media, LLC. Natalie J. Spears and Kristen C. Rodriguez of Sonnenschein Nath & Rosenthal LLP represented the Chicago Tribune and its reporter. Paul Hoffman was represented by Jeremiah P. Connolly and Rachel D. Kiley of Bollinger, Ruberry & Garvey.*

# First Amendment Protects Amazon's Customers' Choices of Expressive Material from Disclosure to North Carolina's Department of Revenue

By Laura R. Handman and Elizabeth Soja

Thanks to a lawsuit filed in March by Amazon.com, the North Carolina Department of Revenue will not have access to the reading, listening and viewing choices of hundreds of thousands of Amazon's North Carolina customers. In October, a federal court in Washington held that an information request issued by the Department as part of a tax audit of Amazon violates the First Amendment and the Video Privacy Protection Act (VPPA). *Amazon.com LLC v. Lay*, No. 10-CV-00664 (W.D. Wash. Oct. 25, 2010). As a result, Amazon can continue to protect both its own First Amendment rights to sell – and the rights of its customers to buy anonymously – expressive material.

## Background

Like other Internet retailers and consistent with Supreme Court interpretation of the Commerce Clause, Amazon does not collect sales tax, absent a nexus or presence in the state. Customers are obligated to pay a use tax if no sales tax is collected, but such obligations are rarely enforced. In late 2009 and early 2010, the Department of Revenue issued a series of information requests to Amazon as part of a tax audit to determine whether Amazon has an obligation to collect sales tax. These requests included a staggering demand: that Amazon turn over “all information for all sales” for all North Carolina customers for the past seven years. Amazon complied and provided records for nearly 50 million transactions – the majority of which involved the purchase of books, movies, and music – but, per its policy, Amazon refused to disclose the names and addresses of its customers. Amazon contended that furnishing this additional customer information, in combination with the information about the specific product purchases, would reveal the personal reading, viewing and listening choices of its customers. The additional information served no valid purpose since Amazon had already provided the information necessary to determine the amount of any sales tax. The Department of Revenue continued to press Amazon for the additional information and threatened to bring a state enforcement proceeding in order to

compel Amazon to produce the identifying customer data.

## The Lawsuit

Amazon filed a preemptive federal lawsuit in the Western District of Washington in April of this year, seeking a declaration that the Department's request for “all information for all sales,” including the names and addresses of Amazon's North Carolina customers as well as the titles of the expressive material they purchased, violated the First Amendment. In response to Amazon's lawsuit, the Department publicly declared that “information revealing personal consumer preferences, such as [book titles](#) . . . [was] not required to calculate the tax due.” Outside the public eye, the Department categorically reserved its right to compel production of the same information about customers and their expressive choices in the future. Amazon's complaint also alleged that compliance with the Department's demands would result in a violation of the Video Privacy Protection Act, 18 U.S.C. § 2710, and the Washington state constitution.

Several months after Amazon filed its lawsuit, the American Civil Liberties Union moved to intervene in the lawsuit on behalf of seven Amazon customers (six anonymous) whose expressive choices would have been disclosed had Amazon complied with the Department's request in full. The intervenors argued that efforts to obtain personally identifiable data and purchase records from Amazon and other online retailers threatened their privacy and First Amendment rights, and their declarations submitted in support of the motion provided detail as to how the Department's actions had already chilled the exercise of the intervenors' First Amendment freedoms. The court granted the intervenors' motion and the Amazon customers were permitted to intervene as plaintiffs.

## Amazon's First Amendment Arguments

In July, the Department of Revenue moved to dismiss the

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lawsuit and, three days later, Amazon moved for summary judgment. Amazon argued that bookstores, music stores and video stores, whether on Main Street or on the Internet, provide constitutionally protected forums for the exchange of ideas. Naturally, some individuals wish to remain anonymous as they browse and purchase expressive material, and the First Amendment right to express oneself anonymously is well-established. Many of Amazon's North Carolina customers want to remain anonymous for a variety of reasons; for example, online purchases of expressive materials that could be considered sensitive, personal, controversial or unpopular potentially reveal intimate facts about the purchaser. Amazon cited several such works purchased by anonymous North Carolina customers, including books dealing with topics such as divorce, infertility, alcoholism, mental health and sexuality.

Drawing on case law primarily borne out of disputes over subpoenas and search warrants that implicated the First Amendment, Amazon argued that, where the government's demand for private information collides with First Amendment rights, the government must make a heightened showing of need, demonstrating both a compelling interest in the requested information and a sufficient nexus between that information and the underlying inquiry or investigation. The government must also show that there is no less restrictive alternative.

Amazon argued that there was no compelling interest in forcing Amazon to identify specific customers who purchased specific books, music, and DVDs, because Amazon had already given the government all financial and transactional information relevant to the Department's assessment of Amazon's sales tax liability and, as the Department had conceded, there had been no decision to enforce a use tax against Amazon's customers. Amazon argued that, in addition to failing to show a compelling need for the information sought, the Department could not satisfy the second element of the heightened showing because a sufficient connection did not exist between the information and the tax investigation of Amazon.

Additionally, Amazon noted that other courts have applied a heightened standard to booksellers' customer lists and have consistently held that a third-party seller of expressive works should not be forced to reveal the reading lists of unsuspecting buyers in response to a government

demand. See, e.g., *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570 (W.D. Wis. 2007) (refusing to compel disclosure of Amazon's customer names where titles of expressive works had already been produced in response to a federal grand jury subpoena in connection with investigation of third party seller for tax evasion).

### The Opinion

On October 25, 2010, Judge Marsha J. Pechman issued an opinion rejecting the justiciability arguments advanced by the Department in support of its motion to dismiss and granting the declaratory relief requested by Amazon. The court held that the Tax Injunction Act, 28 U.S.C. § 1341, did not bar the federal court's jurisdiction because the relief sought did not restrain the "assessment, levy or collection" of state taxes and, in any event, the state enforcement proceedings did not provide a "plain, speedy and efficient" remedy.

Because Amazon's "narrowly tailored request for relief" did not "implicate the validity of North Carolina's tax scheme," broader comity concerns also did not require the federal court to abstain. As to ripeness, the court found that the specific threats of enforcement and the ongoing chilling effect on First Amendment rights meant that Amazon and the Intervenor did not have to wait until the Department issued a summons and brought an enforcement proceeding.

Turning to Amazon's First Amendment argument, Judge Pechman granted Amazon's motion for summary judgment, holding that "Amazon and the Intervenor [] established that the First Amendment protects the disclosure of individual's reading, listening, and viewing habits," noting the intervenors' "uncontroverted statements that they fear the disclosure of their identities and purchases from Amazon to the [Department] and that they will not continue to make such purchases if Amazon reveals the contents of the purchases and their identities." Although the Department said that "it could not possibly match the names to the purchases," the court determined that the Department's "promise of forbearance [was] insufficient to moot the First Amendment issue." The court determined that the Department had not shown a "compelling need" for the information and that the "request runs afoul of the First Amendment." Furthermore, the court held that, "[e]ven assuming there is a compelling

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need” for the information, the Department’s “requests are not the least restrictive means to obtain the information” and declared in no uncertain terms: “The request is overbroad.”

The court also determined that, under the VPPA, “Amazon may not disclose records regarding its customers’ video or audiovisual purchases except in limited circumstances.”

Because the request required “Amazon to disclose the personally identifiable information about its customers to the government,” the Department’s demand ran “afoul of the VPPA.” The court rejected the Department’s argument that the VPPA only provided a cause of action against disclosure by video service providers like Amazon, and not the government entities seeking to compel such disclosure. The court did not address the Washington state constitution claims.

Finally, in defining the declaratory relief granted, the court explained that, to the extent that the Department’s request “demands that Amazon disclose its customers’ names, addresses or any other personal information, it violates the First Amendment and [the VPPA] only as long as

the [Department] continues to have access to or possession of detailed purchase records obtained from Amazon.” However, the court did not prohibit “the [Department] from issuing a new request for information as to only the names and addresses of Amazon’s customers and general product information, assuming that [the Department] destroys any detailed information that it currently possesses.” As to the intervenors’ complaint, the court noted “that much of the declaratory and injunctive relief sought overlaps with the declaratory relief issued by this order” and that “any broader relief” would be improper.

*Plaintiff Amazon.com is represented by Laura R. Handman, Robert G. Scott, Jr., Steven P. Caplow and Elizabeth Soja of Davis Wright Tremaine LLP. Defendant North Carolina Department of Revenue is represented by Kay Linn Miller Hobart and Tiare B. Smiley of the North Carolina Department of Justice and Michael D. McKay, Krista Kay Bush and Thomas M. Brennan of McKay Chadwell, PLLC. Intervenors are represented by Aden J. Fine, Sarah A. Dunne, Mariko Hirose and Katherine Lewis Parker of the American Civil Liberties Union and Venkat Balasubramani of Focal PLLC.*

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## Ninth Circuit Sides with Booksellers and Media Coalition Plaintiffs in First Amendment Challenge to Furnishing and Luring Statutes

By Paul Southwick

The Ninth Circuit recently ruled that Oregon’s “furnishing” and “luring” statutes violated the First Amendment because they criminalized a substantial amount of constitutionally protected speech. *Powell’s Books v. Kroger*, Nos. 09-35153, 09-35154 (7th Cir. September 20, 2010).

### Background

The Oregon Legislature enacted the statutes to stop child sexual abuse in its early stages by criminalizing conduct that exposes minors to sexually explicit materials intended to lure

them into sexual conduct. ORS § 167.054, the furnishing statute, criminalizes providing children under thirteen with sexually explicit material. ORS § 167.057, the luring statute, criminalizes providing minors under eighteen with visual representations, explicit verbal descriptions, or narrative accounts of sexual conduct intended to sexually arouse the minor or the provider.

The plaintiffs were the Association of American Publishers, American Booksellers Foundation for Free Expression, Comic Book Legal Defense Fund, Freedom to Read Foundation, a number of booksellers, including Powell’s Books, comic book publisher Dark Horse Comics,

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non-profit health organizations, the ACLU and a concerned grandmother. The booksellers and literary associations feared prosecution under the statutes for distributing and selling books and other materials to minors that describe or depict sexual conduct. The plaintiffs filed their complaint in U.S. District Court in Portland, OR. On December 12, 2008, the District Court ruled that the statutes were not unconstitutionally overbroad or vague.

### Ninth Circuit Decision

The Ninth Circuit examined the statutes for overbreadth by construing the reach of the statutes, inquiring whether they criminalized a substantial amount of expressive activity and considering whether the statutes were readily susceptible to a limiting construction that would render them constitutional.

The state argued that the statutes reached only the distribution of hardcore pornography or material that is obscene to minors. The state grounded this argument on the exemption from liability for material whose sexual content “form[s] merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation.”

The court disagreed with the state and found that the statutes criminalized more than hardcore pornography. The court first noted that the statutory text did not refer to “hardcore pornography” but referred to “sexually explicit material” and a “visual representation or explicit verbal description or narrative account of sexual conduct.” The court went on to list a number of books that are not hardcore pornography but that contain material that is encompassed by the statutory text, including *The Joy of Sex* and Kentaro Miura’s manga, *Berserk* (which contains sex scenes). Moreover, the court noted that the definition of “sexual conduct” in ORS § 167.057 includes the “[t]ouching of the genitals, pubic areas or buttocks of the human male or female or of the breast of the human female.” The court found that this definition would reach works like Margaret Atwood’s oft-taught novel, *The Handmaid’s Tale*.

The court also determined that the exemption from liability should be read in the conjunctive. It found that the exemption applies only when the explicit content is merely an incidental part of the entire work and “the explicit portion

of the material, and not the works as such or as a whole, serves some purpose other than arousal.” Thus, works like *Berserk* and *The Handmaid’s Tale* could potentially be covered by the statutes, even though they do not constitute hardcore pornography.

The court then considered the *Ginsberg/Miller* frameworks to determine whether the statutes criminalized a substantial amount of expressive activity, rather than permissibly restricting the access of minors to obscene materials. The court concluded that the statutes are not limited “to material that predominantly appeals to minors’ prurient interest” (in contrast with regular sexual interest) and that they “sweep up material that, when taken as a whole, has serious literary, artistic, political or scientific value for minors and thus also has at least *some* ‘redeeming social value.’”

As an example of material that is subject to the statutes but also has redeeming social value, the court discussed *It’s Perfectly Normal*, a sexual education book that contains non-obscene depictions of sexual activity. The court noted that “[w]hile their primary purpose is education rather than titillation, the images . . . are not an ‘incidental’ portion of the work as a whole . . .” and are therefore not exempt from liability under the statutes.

The court concluded that the statutes were not susceptible to a limiting instruction and because the statutes on their face reach a significant amount of non-obscene material, they are unconstitutionally overbroad.

### Recent Developments

On November 8, 2010, the state filed a petition for panel rehearing with suggestion for rehearing *en banc*. The state argues that a rehearing is warranted because the Ninth Circuit failed to certify the issue of statutory construction to the Oregon Supreme Court.

*Paul Southwick is an associate at Davis Wright Tremaine in Portland, OR. Michael A. Bamberger, Sonnenschein Nath & Rosenthal LLP, New York, New York; P.K. Runkles-Pearson, Stoel Rives, LLP, Portland, Oregon; Chin See Ming, ACLU Foundation of Oregon, Inc., Portland, Oregon represented the plaintiffs-appellants. Michael A. Casper, Oregon Department of Justice, represented the defendants-appellees.*

# MLRC's Projects and Finances Reviewed at 2010 Annual Meeting

MLRC's annual meeting was held on November 10, 2010, at the Grand Hyatt in New York. The meeting was called to order by Director Henry S. Hoberman of RHI Entertainment, standing in place of Kenneth Richieri, Chairman of the MLRC Board of Directors.

## Director Elections

The first order of business was election of directors. David S. Bralow of Tribune Company and Mary Snapp of Microsoft Corporation were nominated to be new directors. Karole Morgan-Prager of The McClatchy Company, Elisa Rivlin of Simon & Schuster and Susan E. Weiner of NBC Universal, Inc. were nominated for reelection. A motion to approve the election and re-election of the entire slate was made and seconded. All present voted in favor and MLRC's Executive Director Sandy Baron voted the 51 proxies (that had been retained and were brought to the meeting) in favor.

Henry noted that the directors that were elected last year were entering into the second year of their two-year terms and required no re-election. Those directors included himself, Marc Lawrence-Apfelbaum of Time Warner Cable Inc., Kenneth Richieri of The New York Times Company and Kurt A. Wimmer of LIN Television Corporation. Henry also noted that in September 2010, the Board of Directors elected Eric N. Lieberman of The Washington Post to complete the term of Stephen Fusezi Jr., who was re-elected at the 2009 Annual Meeting for a two-year term but resigned as Director.

## Financial Report

Marc Lawrence-Apfelbaum presented the MLRC 2010 Financial Report and drew everyone's attention to copies of the report which had been handed out to all present. He sought a motion to approve the Financial Report, which was made and seconded. All present voted in favor of approving the Financial Report.

## Executive Director's Report

Executive Director Sandy Baron reviewed MLRC's accomplishments over the past year and plans for the upcoming year. The biennial NAA/NAB/MLRC Virginia

Conference was a resounding success, with high quality material, information and discourse. Participation by members was particularly high for the Virginia Conference, with at least one hundred MLRC members actively involved in the planning, presenting and moderating of the panels of the Conference. Sandy also expressed gratitude to the seventeen organizations and law firms that sponsored the Conference and the Chairs of the Virginia Conference: David Bralow, Tom Leatherbury, Natalie Spears and Dan Waggoner.

Planning has begun for the 2011 London Conference, which will take place September 19-20, Monday and Tuesday at Stationer's Hall. Sandy noted the importance of international media law as part of MLRC's core mission. In 2010 MLRC submitted an amicus brief to the European Court of Human Rights in *Mosley v. UK*, written by members Geoffrey Robertson and Mark Stephens on behalf of MLRC and other media and public interest groups. In the UK, MLRC submitted comments on libel law reform issues and on the issue of super injunctions. Also, in South Africa, MLRC joined a constitutional challenge to a new statute restricting publications and the distribution of audio visual works of foreign media companies.

MLRC is uniquely situated to intervene and act on behalf of media companies on international media law issues and this is an area in which MLRC can do more in the future. She invited suggestions for international issues that MLRC should be involved in.

The eighth annual Southwestern Conference will be held on Thursday January 20<sup>th</sup>, 2011 at Southwestern Law School in conjunction with the Donald E. Biederman Media and Entertainment Law Institute. The Institute has a new executive director, Steven Krone who will continue the law school's relationship with MLRC. Southwestern has hosted the California Chapter's quarterly meetings. The agenda for the Southwestern Conference is available on MLRC's website and brochures for the Conference will go out early next week. Co-chairs for the Southwestern Conference are Lou Petrich, Jennifer Dominitz and Craig Baker with David Cohen.

The fourth annual Stanford Conference on Legal Frontiers on Digital Media will be held on May 19-20, 2011. MLRC

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will host the conference through its continued partnership with the Center for Internet and Society at Stanford Law School. The Journalism and Knight Fellowship Program is sponsoring an administrative coordinator for the conference. Co-chairs for the Stanford Conference are Steve Tapia of Microsoft and Andrew Bridges of Winston & Strawn with James Chadwick of Sheppard Mullin acting as emeritus chair. She also thanked Bruce Johnson and Andy Mar who are on the planning committee. Conference planning is structured so that at least one or two of the old chairs remain on the committee for the next year's conference.

Sandy commented on the Forum on Apps and Aggregators taking place after the annual meeting and thanked Eric Lieberman, Karole Morgan-Prager, Bob Penchina and Steve Weisman and all those who participated in the planning of the forum.

Sandy drew attention to the handout of MLRC's publication list and commended MRLC's Committees for their publications and encouraged members to join committees. Contributions of three committees were highlighted: The Pre-Publication / Pre-Broadcast Committee chaired by Doug Dodd and Kai Falkenberg held substantive monthly meetings with high attendance. The International Committee held video conference meetings with participation of members around the world. The Newsgathering Committee was commended for its publications.

Over the past year, MLRC continued to work with a media coalition to support the Federal Shield Law bill. MLRC had effectively brought together 50 or 60 organizations to form the coalition. MLRC also spearheaded a coalition of members and other groups to oppose a proposed New York Right of Publicity Law. MLRC had also begun communicating with media representatives in other states on anti-SLAPP legislation.

MLRC is also creating a new State Legislation Committee headed by Laura Prather. And members were encouraged to inform MLRC of media law developments in their jurisdictions.

Sandy again thanked the members and MLRC staff.

### **Defense Counsel Section Report**

Henry Hoberman, substituting for DCS President Robert Nelon, thanked MLRC staff for their work and praised Sandy's leadership. He drew everyone's attention to the DCS Committee Report handout which outlined each committee's activities this past year. In 2011, Nathan Siegel will be the new DCS President, Elizabeth Ritvo will be Vice President,

and Robert P. Latham will be Secretary. Lou Petrich had been nominated to be the new Treasurer for 2011. Lou Petrich discussed the recent proposed Right of Publicity bill in Michigan and noted that right of publicity legislation will be a significant issue for the upcoming year.

### **Report on the MLRC Institute**

Maherin Gangat reported on the activities and projects of the MLRC Institute for the past year. She stated that the new MRLC Institute Fellow Peter Ostrovski, has been successfully working on the First Amendment Speaker's Bureau Project. The First Amendment Speaker's Bureau Project began five years ago with the objective of educating the general public about the First Amendment. She reported that the Project had received funding from the Dow Jones Foundation this year to continue and grow the Speaker's Bureau. For the Speaker's Bureau Project, MLRC sends speakers drawn from MRLC's membership, to recruit journalists to go out into public venues and discuss one of two topics: Reporter's Privilege and Publishing Online. Speakers work from materials put together by the Institute and that Peter has currently updated all the materials and is in the process of completing materials for a new third topic, Censorship.

MRLC Institute has a Facebook Page. The Institute would like to create a project where the high school students interview and tape a journalist or media figure and post their recorded interview on to the Institute page. Maherin stated that the Institute is currently in the process of drafting a proposal for this project and she thanked Henry Hoberman and Andy Mar for their help on the proposal. Maherin concluded by encouraging everyone to become fans of the MLRC Institute on Facebook and to suggest any high schools they think would be a good match for the project.

### **New Business**

Henry Hoberman reported that there will be a new dues structure for the membership next year and invited Marc Lawrence-Apfelbaum of the Finance Committee to elaborate on the changes to the due structure. Marc noted that a more rational structure will be used to determine the amount of dues to be paid by each member based on the member's company's size. The new dues structure will be phased in over time and will not go into effect for existing members for the next year and will only affect new members next year. Henry again thanked everyone for attending and closed the meeting.

# Defense Counsel Section Reviews Projects and Goals at 2010 Annual Meeting

## *Nathan Siegel Incoming DCS President; Lou Petrich Joins as Treasurer*

The Defense Counsel Section's Annual Meeting was held on November 11, 2010, in New York at the Proskauer Rose Conference Center. DCS Executive Committee President Robert D. Nelon called the Annual Meeting to order, welcomed everyone to lunch and thanked them for attending.

### President's Report

Bob Nelon noted that it has been a privilege and honor for him to serve as President of the DCS and to work with the other members of the Executive Committee, Nathan Siegel, Elizabeth Ritvo and Robert Latham. He gave special thanks to presidents emeriti, Dean Ringel and Kelli Sager for their guidance. This past year, DCS membership was very good, with all dues fully paid on time. He commended all the Committee Chairs for their work this year, and noted the Advertising Committee and the Commercial Speech Committee for both innovatively using webinars to facilitate their meetings and the Ethics Committee for their excellent contributions to the MLRC MediaLawLetter every month. He noted that the International Committee was also very effective in using the Internet to connect to its members all over the world. He reported that the Membership Committee successfully recruited new members this year. He also commended the Newsgathering Committee for producing model policies on use of electronic devices in courtrooms. He then noted that two new committees had been created this year: the Litigation Committee and the State Legislative Committee. The Litigation Committee was formed by combining the Pre-Trial and Pre-Publication Committee and Laura Prather was responsible for creating the new State Legislative Committee.

### Election of Treasurer

In 2011, Nathan Siegel will be DCS President, Elizabeth Ritvo will be Vice President, and Robert P. Latham will be Secretary. The Executive Committee had nominated Lou Petrich of Leopold, Petrich & Smith PC to be Treasurer. No other nominees for the Executive Committee had been received and, by an oral vote, the membership approved by acclamation Lou Petrich as Treasurer. Robert Nelon will hold emeritus status.

### Committee Reports

DCS Committee Chairs then presented reported on plans for the upcoming year.

### Advertising & Commercial Speech Committee

Co-chair Scott Daillard thanked co-chair Nancy Felsten for all her work and

leadership for the past two years and stated that Jill Meyer will be taking her place with Steve Baron also joining the committee. Scott reported that the committee has been meeting every other month and focusing on one topic in their webinar that's relevant to their practice. He reported that a number of topics have been developed for the next year and mentioned three topics specifically: Tips for Negotiating Contract Provisions that Govern the Data Collection of Visitor Data for Ad Network Companies, Guidelines for Designing and Evaluating Consumer Perceptions in Multi-Substantiating Challenge Advertising Claims and Emerging Issues in Mobile Advertising.

### ALI Task Force

Tom Leatherbury stated that membership on this

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### Additional Resources

[DCS 2010 Committee Activity Reports](#)

[MLRC 2010 Publications List](#)



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committee is open to members that are also members of the American Law Institute. He stated that there was no ongoing project this year, but that next year the committee's new project will be on electronic privacy. Though there is a reporter for that project, it is still in its beginning stages.

### **California Chapter**

Jean-Paul Jassy stated he is ending his three year tenure as co-chair and that the committee has not yet selected a successor. He reported that the California Chapter holds quarterly meetings with panelists discussing two or three topics concerning California or Ninth Circuit law. He emphasized that the committee also discusses topics that go beyond California law and welcomes non-California panelists to also participate in the meetings. The next project is to increase membership of in-house counsel. The committee will try to hold their meetings at the studios and not just at Southwestern Law School to encourage attendance. A meeting held at CBS proved to be successful in that regard, with high attendance from in-house counsel.

### **Conference & Education Committee**

Bob Nelon noted that this will no longer be a standing committee but invited Thomas Leatherbury to speak. Tom thanked everyone who helped with the Virginia Conference and David Bralow who is rotating off as co-chair of the Conference Committee. Tom stated that the Virginia

Conference has received positive feedback and that they are still waiting to receive the formal feedback surveys.

### **Employment Law Committee**

Co-chairs Jim Dines and David Jacobs were not present and so Bob Latham, as the executive committee liaison, spoke in their place. He reported that Jim Dines is rotating off as co-chair and that the new co-chair has not been chosen yet.

Bob reported that the committee has two upcoming projects for 2011. The first project is a survey of laws for employer indemnification of employees for defamation and invasion of privacy and the second project is a proposed publication regarding legal issues and dangers of employer monitoring of employees through new media.

### **Entertainment Law Committee**

Chair Katherine Bolger reported that the committee holds monthly phone meetings to discuss new developments in entertainment law and is in the market

for new topics to write about. In the upcoming year, the committee is seeking new members that are more geographically diverse and not just from New York and California.

### **Ethics Committee**

The Chair Timothy Conner was absent and former Chair Bruce Johnson spoke in his place. Bruce explained that the

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**Outgoing DCS president Bob Nelon.**

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purpose of the Committee was to write articles for the monthly MediaLawLetter and provide helpful advice on ethics issues to DCS members. The committee will continue to be actively involved in presenting panels and breakout sessions at the Conferences to assist in providing CLE Ethics credits.

### **International Media Law Committee**

Co-chair Kevin Goering reported that in 2011 the committee will be led by co-chairs Lynn Oberlander and Brian MacLeod Rogers, with new vice-chair Robert Balin. In the past year the committee made more progress than it ever has, by adding new members and holding regular meetings through webcasts. He commended the MLRC website for segregating international issues from other issues which has been extremely helpful. Kevin then thanked Dave Heller for his work and support of the committee and Mark Stephens and other UK members for reporting on UK legal developments. Brian MacLeod Rogers reported that the committee will continue making conference calls every six weeks and that it plans to have more themed approaches, for example focusing on media law in the Middle East or China. The committee will continue its assistance in planning the 2011 London Conference as well.

### **Internet Law Committee**

Mike Nepple, standing in place for outgoing Chair Mark Sableman, reported that a formal update on the Internet Pocket Sized Treatise will occur in February or March 2011. Mike also reported that the committee's structure would be revised and broken down into four parts.

### **Legislative Affairs Committee**

Laurie Babinski, the incoming co-chair, reported that the committee has been focusing on tracking federal legislation and for the upcoming year, will also track state legislation more fully as well. Laurie noted that the committee will continue to follow Freedom of Information and Shield Law legislation and continue to hold monthly conference calls, which she encouraged others to participate in.

### **Litigation Committee**

Co-chairs Robert Clothier and James Hemphill were absent and so Bob Latham spoke in their place. Bob noted that this was a new committee combining the Pre-publication and Pre-Trial Committees. He reported that two projects will be completed in the upcoming year. The first project is a paper on how and when to bifurcate the defense of a case and the second project is a paper on what to do when you learn new facts about an investigation in a libel suit and how to report on that matter on an ongoing basis.

### **MediaLawLetter Committee**

Co-chair Thomas Clyde thanked David Heller for his invaluable assistance in publishing the MediaLawLetter every month. He noted two new initiatives for the future. The first is to create a section on MLRC's website that will report and track the status of important pending cases to be updated on a quarterly basis. The second initiative is to reach out to the other committees to receive more of their input and join their conference calls to get a better sense of the issues they would like to have reported in the MediaLawLetter.

### **Membership Committee**

Co-chair Jay Ward Brown reported that for the next year, the committee will evaluate the effectiveness of its recruiting methods. Jay reported that the committee hopes to expand the membership of law firms by identifying potential new members and he encouraged DCS members to engage in personal outreach to recruit new members as well.

### **Model Shield Law Task Force**

Chair Charles Tobin was absent and Nathan Siegel spoke in his place. Nathan reported that next year, the committee will work on a project to analyze the question of who is a journalist and how that is defined in state shield laws. The committee will conduct a systematic study of those results to create new shield law proposals.

### **New Legal Developments Committee**

Outgoing co-chair David Sternlicht explained that the

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committee is comprised of a cross-section of the membership and that its members are mostly senior attorneys who advise Sandy and others on new legal developments and media trends. David named the possible return of the “Hot News” Misappropriation doctrine, corrections and retractions in the digital media, attacks on Section 230 and proposed legislation to regulate behavioral advertising as examples of some developments the committee is tracking.

### **Newsgathering Committee**

Co-chair Thomas Williams discussed the completion of two projects creating a model policy on the use of portable electronic devices in courtrooms and a proposed model decorum order. For 2011, the committee will analyze data collected in a study on the awards of attorney’s fees in Freedom of Information Act litigation. He solicited suggestions for the agenda for 2011. He noted that possible topics include rights of access, election related access, and judicial hearings not conducted in person.

MLRC staff attorney Robert Hawley, on loan from the Hearst Foundation, is also working with the Newsgathering Committee and access issues can also be directed to him.

### **Pre-Publication and Pre-Broadcast Committee**

Outgoing co-chair S. Douglas Dodd reported that the committee has wonderful member participation with at least fifty members. The committee meets monthly by conference call with ten to fifteen members on each call. The committee is working with the Entertainment Committee on an ongoing project on developing a best practices guide for releases. He and Kai Falkenberg are rotating off as co-chairs and the new co-chairs will be David Olsen and Ashley Messenger.

### **State Legislative Committee**

Laura Prather explained that this is a newly created committee for 2011 to track legislative developments on topics like Right of Publicity and Reporter’s Privilege at the state level. She reported that there are currently twenty members; the inaugural meeting taking place after the DCS annual meeting.

### **Report on the MLRC Institute**

Maherin Gangat reported that the new MRLC Institute Fellow Peter Ostrovski has successfully been working on the First Amendment Speaker’s Bureau Project, the goal of which is to educate the general public about the First Amendment. The Project has received funding from the Dow Jones Foundation this year to continue and expand. The Speaker’s Bureau Project sends speakers drawn from MLRC’s membership, to recruit journalists to go out into public venues and discuss one of two topics: Reporter’s Privilege and Publishing Online. Speakers work from materials put together by the Institute and that Peter has currently updated all the materials and is in the process of completing materials for a new third topic, Censorship.

Maherin also discussed an ongoing project to improve the MRLC Institute Facebook Page. One proposal is to arrange for high school students to interview and tape a journalist or media figure and post their recorded interview on to the Institute page. Maherin encouraged the membership to suggest any high schools they think would be a good match for the project.

### **New Business**

There being no business, the meeting was adjourned.



### **Upcoming Events**

**[MLRC/Southwestern Media  
& Entertainment Law Conference](#)**  
January 20, 2011 | Los Angeles, CA

**[MLRC/Stanford Legal Frontiers  
in Digital Media Conference](#)**  
May 19-20, 2011 | Stanford, CA

**[MLRC London Conference](#)**  
September 19-20, 2011  
(In-house counsel breakfast Sep 21st)  
London, England