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LDRC Libel Defense Resource Center

LIBELLETTER

October 1995

BUSINESS WEEK INJUNCTION MADE FINAL BUT DOCUMENTS AT ISSUE UNSEALED AND PUBLISHED

Business Week Motion for Expedited Appeal in 6th Circuit Granted

Business Week, which had been subject since September 13th to an injunction barring it from reporting on the supporting documents to a filed motion, found itself permanently enjoined on October 3 from publishing the documents in its possession, but able to publish nonetheless when the judge unsealed the underlying and disputed materials on the same day.

And on October 13th, Judge Merritt, Chief Judge for the Sixth Circuit Court of Appeals, granted the motion of McGraw-Hill (publisher of *Business Week*) for an expedited appeal on the permanent injunction. The oral argument of the appeal has been set for December 6, 1995. McGraw-Hill's motion for expedited review had been opposed by Bankers Trust, which argued, *inter alia*, that the issue was moot and that the unsealing of the documents made expedited review unnecessary.

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LDRC ANNUAL DINNER: THURSDAY, NOVEMBER 9 AT 7:30 P.M. HONORING JUSTICE HARRY A. BLACKMUN

If you haven't reserved seats for the LDRC Annual Dinner, please do so NOW! LDRC will be presenting the *William J. Brennan, Jr. Defense of Freedom Award* to Justice Harry A. Blackmun. Justice Blackmun will deliver the keynote address at the Dinner.

THURSDAY NIGHT, NOVEMBER 9
THE SKY CLUB
200 PARK AVENUE, 56TH FLOOR
7:30 P.M.
COCKTAILS WILL BEGIN AT 6:00

PLEASE NOTE THE CHANGE IN NIGHT AND LOCATION FROM PRIOR YEARS. THE CHANGE WAS MADE TO ACCOMODATE JUSTICE BLACKMUN'S SCHEDULE. YOU WILL BE VERY LONELY AT THE WALDORF ON WEDNESDAY NIGHT. WE WON'T BE THERE!

LDRC DEFENSE COUNSEL SECTION ANNUAL MEETING AND BREAKFAST

ALL DCS MEMBER FIRM ATTORNEYS INVITED
Friday, November 10, 1995
7:00 a.m. to 9:00 a.m.
Crowne Plaza Manhatten Hotel
Samplings Restaurant
1605 Broadway at 49th Street
New York City

The cost for the breakfast is $30 per person. If you have not already done so please send in your reservation form as soon as possible!

Bring your colleagues. All lawyers in DCS member firms are encouraged to come. It is a meeting to review LDRC projects and proposals for 1995, 1996 and beyond.

AUVIL DISMISSAL AFFIRMED BY NINTH CIRCUIT

The Court of Appeals for the Ninth Circuit has affirmed the dismissal of the class action product disparagement suit against CBS's "60-Minutes" by the federal district court for the Eastern District of Washington. Auvil v. CBS "60 Minutes", No.93-35963 (9th Cir. Oct.2, 1995) The Ninth Circuit panel agreed with the lower court that the plaintiffs had failed to meet their *Hepps* burden of proving that the statements in the broadcast alleged to be disparaging were false. And the Court of Appeals refused to accept plaintiffs' argument that it should be left to a jury to decide if the "overall message" of the report was false, even if the statements within the report were not provably false.

The panel did not reach the issue raised by defendants on appeal: whether the "of and

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SUPREME COURT UPDATE

Petition Denied: ***McKnight v. American Cyanamid Co.,*** unpublished (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3248 (10/02/95, No. 94-1942). (See LDRC *LibelLetter June*, 1995 at p. 1.) The United States Court of Appeals for the Fourth Circuit held that a contractual dispute between two pharmaceutical companies over American Cyanamid's (the larger firm) efforts to market a drug developed by the smaller company was not a public controversy since it is not an issue that would potentially affect the public. Therefore, the court held, the larger firm is not a public figure for purposes of the libel counterclaim against the smaller company's executive officer. The court then reinstated the libel counterclaim for further proceedings under standards applicable to private individuals. The questions presented by the petition were: (1) Is respondent an all-purpose public figure? (2) Is respondent a limited-purpose public figure with respect to speech about its corporate conduct in marketing a hypertension drug used by hundreds of thousands of people throughout the country?

New Petitions Before the Court:

Heller v. Bowman, 420 Mass. 517, 651 N.E.2d 369 (Mass SupJudCt 1995), *cert. filed*, 64 U.S.L.W. 3167 (09/11/95, No. 95-393). (See LDRC *LibelLetter* June, 1995 at p.3.) In a case arising out a union election campaign during which a worker superimposed a photo of the face of a female candidate for president over lewd photos of nude women and distributed it to other union workers, the Massachusetts Supreme Court held that the candidate was neither a limited-purpose public figure nor a general purpose public figure. Thus, the union worker responsible for the doctored photos was not entitled to the protection of the First Amendment against the candidate's claim for intentional infliction of emotional distress. The questions presented by the petition are: (1) Under *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), may a state constitutionally impose tort liability for a pure expression of opinion totally devoid of false statements of fact made during a union election campaign when the expression was made as political satire? (2) May candidate for presidency of 8,700 member union constitutionally be deemed not to be a public figure? (3) Does First Amendment ever permit states to impose tort liability for pure expression of opinion utterly devoid of false factual statements? (4) May states constitutionally impose tort liability for infliction of emotional distress based on judicial determinations imbued with unconstitutional viewpoint discrimination?

Turf Lawnmower Repair Inc. v. Bergen Record Corp., 139 N.J. 392, 655 A.2d 417 (NJ SupCt 1995), *cert. filed*, 64 U.S.L.W. 3183 (09/05/95, No. 95-424). (See LDRC *LibelLetter* May, 1995 at p. 1,7, 11). The New Jersey Supreme Court had held that the actual malice standard applies to cases in which the allegedly defamatory statements, if proved, would constitute violation of the New Jersey Consumer Fraud Act. Although the investigative newspaper reporter may have been negligent or grossly negligent in preparing news story which alleged plaintiffs routinely cheated their customers, plaintiffs failed to show that the reporter ever doubted that the plaintiff's conduct constituted fraud, therefore failing to establish actual malice in the reporting. The questions presented by the petition are: (1) Does decision which allows media defendants to create their own defense and control the applicable standards of liability violate plaintiff's rights to equal protection of the law? (2) Did court's failure to consider individual libel plaintiff's claim as distinct from corporation's claim violate the individual plaintiff's right to equal protection of the law? (3) Can the court's decision finding no actual malice be sustained in light of *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990) and *Harte Hanks v. Connaughton*, 491 U.S. 657 (1989)?

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CLASS ACTIONS UNDER THE TELEPHONE CONSUMER PROTECTION ACT FAXED MATERIAL: WHAT IS AN UNSOLICITED ADVERTISEMENT?

The Telephone Consumer Protection Act, 47 U.S.C. Section 227, enacted in 1991, makes it unlawful, *inter alia*, to use a "telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." Section 227(b)(1)(C). It also authorizes a private right of action for any violation of the Act and the recovery of actual monetary loss from such a violation or the sum of $500 for each violation, whichever is greater. Section 227(b)(3). Section 227(b)(3) also provides that if the court finds that the defendant violated the Act willfully or knowingly, the court may, in its discretion, increase the amount of the award to an amount equal to, but not more than, three times the damages otherwise available under the provision.

Section 227(a)(4) defines an "unsolicited advertisement" to be "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."

Two recent class action suits filed under these provisions deserve note.Indeed, the fact that the plantiffs' bar believes that this statute is fruitful area for class action claims is in and of itself worth noting. These cases will both undoubtedly test the definition of "unsolicited advertisement," and First Amendment limits on the statute's reach.

Chaudery & Chaudery, P.C. v. Bonneville International Corporation d/b/a KDGE/KZPS, filed in the district court of Tarrant County, Texas in early October, relies on this statutory provision in filing a class action claim against a broadcaster which faxed notices to listeners about a station contest. In addition to claiming violations of the Telephone Consumer Protection Act, the complaint alleges invasion of privacy, trespass to chattels, negligence and gross negligence. Alleging that the violations were committed willfully and knowingly, the complaint seeks up to three times the actual or statutory damages.

The plaintiff seeks injunctive relief as well, prohibiting the defendant from using the fax (or other statutorily prescribed device) to send any further unsolicited advertisements. The complaint also seeks a TRO seeking to preserve defendant's databases and all other relevant documents for the case.

The fax at issue notifies the recipient of the station contest, the rules of the contest and other information that will help the recipient win the contest by listening to and identifying certain material on the station. At the bottom of the fax is a note that suggests both an apology if the recipient asked to be removed from the station's list and a means for deleting ones name from the mailing list.

Danis v. St. Louis Argyle Television d/b/a KTVI Television and BMIS Inc., filed last summer in the circuit court of the County of St. Louis, Missouri, concerns a faxed newsletter. The newsletter, entitled the ST. LOUIS ENTERTAINMENT, was the creation of BMIS, Inc. (Business Marketing and Information Services, Inc.) and the station, and contained a variety of articles on what was happening in St. Louis, a weather forecast for the weekend, a sports calendar, and some advertisements for commercial entities, for the station and for BMIS. It also had a small legend at the bottom of the first page indicating how to delete or add ones name to the fax list for the publication.

A Motion to Dismiss has been filed in the case, arguing that 47 U.S.C. Section 227, by its terms, does not prohibit unsolicited facsimile transmissions of news and editorial products, even if they contain some advertising material; that to apply the law to such material would violate the First Amendment and the free speech provisions of the Missouri Constitution.

These cases suggest that this statute is one worth mentioning to clients. Reported decisions under this statute are noted on the next page. Please let LDRC know of any others of which you are aware.

LDRC ANNUAL MEETING FOR MEDIA MEMBERS

Thursday
November 9, 1995
5:15 p.m.
Rogers & Wells
200 Park Avenue
50th Floor
New York City

This year's annual meeting for our media organization members will take place at the offices of DCS member firm Rogers & Wells. It will be held in the same building where the Annual Dinner is taking place. We hope to conclude the meeting before the cocktail party gets underway.

STRATTON OAKMONT v. PRODIGY SETTLED

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TEL CON PROTECTION ACT: REPORTED DECISIONS

Destination Ventures, Ltd. v. F.C.C. 844 F.Supp. 632 (D.Or. 1994), *aff'd*, 23 Med. L. Rptr. 1446 (1995).

The Ninth Circuit affirmed the District Court of Oregon's finding that 47 U.S.C. §227 was constitutional. In this case, a business that used facsimile ("fax") machines for advertising purposes and its clients who wanted to continue receiving these "unsolicited advertisements" challenged the constitutionality of the statute under the First and Fifth Amendments. For a statute restricting commercial speech to be constitutional, it must: implement a substantial governmental interest; directly advance that interest; and be narrowly tailored to achieve the desired objective. Board of Trustees v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388(1989). Congress has a constitutionally valid interest in protecting consumers from "unsolicited advertisements" transmitted by facsimile ("fax"). Transmission of advertisements by fax places an unfair monetary burden on the advertisement's recipient and interferes with recipient's use of their own fax machine. Also, 47 U.S.C. §227 is worded narrowly so the specific intent of Congress to relieve consumers of these burdens is achieved. Since Congress has a specific interest to protect and the statute focuses on that issue, Congress' goal is achieved and the Act is constitutional.

Lutz Appellate Services, Inc. v. Curry 859 F.Supp. 180 (E.D.Pa. 1994)

The United States District Court for the Eastern District of Pennsylvania ruled that facsimile transmissions regarding employment possibilities at the faxing company are not "unsolicited advertisements" and therefore do not violate 47 U.S.C. §227. While the plaintiff's tried to show these types of transmissions qualify under the statute because positions of employment are property, the court determined that the ordinary definitions of the words in the statute must be used when applying the statute. Since jobs are not typically thought of as property, employment opportunity notices sent by facsimile do not qualify as "unsolicited advertisements".

Forman v. Data Transfer, Inc. 1995 WL 590172 (E.D.Pa. 1995)

Denying the plaintiff's motion for class certification, the court ruled that since liability would be determined by the facts of each individual plaintiff's case, a class action would not avoid the possibility of multiple actions with inconsistent results. Plaintiff's class would consist of "all residents and businesses who have received unsolicited facsimile advertisements" from the defendant. Rule 23(b), Class Actions, requires the court to find "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Even as a class action, it would be necessary to examine the facts of each individual case to determine whether 47 U.S.C. §227 has been violated. Therefore, class certification in this instance would not be practical.

AUVIL DISMISSAL

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concerning" requirement from libel is applicable in a disparagement case. On an earlier motion by CBS, the district court had held that it did not apply. 800 F. Supp. 928, 20 Media L. Rep. 1361 (1992). It had been hoped that the Ninth Circuit would put to rest the notion of a potentially substantial disparagement plaintiff class.

The court rejected plaintiffs' argument that the possibility of a jury finding a provably false message implied in the overall broadcast was sufficient to defeat a summary judgment motion by defendants on the issue of falsity. The court, drawing from state libel law, stated that under Washington law defamatory meaning may not be imputed to true statements: "The defamatory character of the language must be apparent from the words themselves." An attempt to elicit an implied message and then prove that false was "unprecedented and inconsistent with Washington law."

It would also raise free speech concerns:

"Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability. Furthermore, such uncertainty raises the spectre of a chilling effect on speech."

In a footnote (FN 11) to that section, the panel observed that accepting the plaintiffs' position would afford them the liberty of constructing an overall message that lent itself to proof of falsity; in effect, a straw man that could be easily knocked down by the plaintiffs in fulfillment of their *Hepps* burden.

As to whether a preponderance of the evidence or convincing clarity was the standard of proof in proving falsity, the court observed in footnote 5 of the opinion:

"The Washington courts have not answered directly the question of whether to use a preponderance of the evidence or convincing clarity standard of proof in proving falsity. Compare Haueter v. Cowles Pub. Co., 811 P.2d 231 (Wash. Ct. App. 1991) (preponderance of the evidence standard) with Herron v. King Broadcasting Co., 776 P.2d 98 (Wash. 1989) (clear and convincing standard). We do not decide which standard should be used in this context because we find that the growers failed to meet the more generous preponderance of the evidence standard in proving falsity of the CBS Broadcast."

Counsel for CBS were Cam DeVore and Bruce Johnson of Davis Wright Tremaine in Seattle, Washington and Susanna Lowy and Anthony Bongiorno of CBS Inc.

SCIENTOLOGY UPDATE: PRELIMINARY INJUNCTION GRANTED BY CALIFORNIA COURT

In the most recent development in the series of cases brought by the Church of Scientology against its critics, Judge Ronald Whyte of the Northern District of California has preliminarily enjoined Dennis Erlich, a critic of the Church of Scientology, from "all unauthorized reproduction, transmission, and publication of any of the works of L. Ron Hubbard that are protected under the Copyright Act of 1976." *See Religious Technology Center v. Netcom On-Line Communication Services, Inc., Erlich, et al.* Although the order went on to provide that the injunction did not "prohibit fair use of such works," Judge Whyte found that Erlich's fair use defense was unlikely to overcome the Church's copyright claim in the underlying action.

While Judge Whyte was the first of three federal judges to enter *ex parte* seizure orders against Scientology critics under § 503(c) of the Copyright Act, 17 U.S.C. 503(c), he was the last to rule on the motions for preliminary injunctions, and he was the only one to conclude that the "posting" of the church documents was likely to constitute copyright infringement. *See LDRC LibelLetter* (February, at 1) (reporting on seizure and entry of temporary restraining order on February 10, 1995); *LDRC LibelLetter* (September, at 1) (reporting on denial of preliminary injunctions in *Religious Technology Center v. Wollersheim et al.* and *Religious Technology Center v. Lerma et al.*).

On a positive note, Judge Whyte vacated the writ of seizure, and ordered the return of all material taken from Erlich. He also found that the Church had not established a likelihood of success on its trade secrets claim. Finally, he rejected the Church's application to expand the temporary restraining order and its motions for contempt against Erlich and for sanctions against Erlich's counsel, Carla Oakley, of D.S.C. member firm, Morrison and Foerster. What follows is a brief summary of the court's fair use opinion, along with some other developments in the related cases.

Religious Technology Center v. Netcom et al., No. C-95-20091 (N.D. Cal.)

Judge Whyte began his discussion of the plaintiff's copyright claim by holding that the Church had proven a likelihood of success on the issue of ownership of all but one of the works in question, rejecting Erlich's argument that there were defects in registration or chain of title from the author of the works, L. Ron Hubbard, to the Religious Technology Center or Bridge Publications, Inc. Slip op. at 6-9. He then moved on to consider Erlich's fair use defense under § 107 of the Copyright Act. *See* 17 U.S.C. § 107.

With respect to the first fair use factor, the purpose of the defendant's use, the court found that Erlich's stated purpose of provoking discussion regarding "Scientology philosophies" weighed in his favor, as criticism is one of the examples of fair use cited in the preamble to § 107. Because the use had consisted principally of simply posting the documents with little added commentary, Judge Whyte found that it was only minimally transformative, however. Slip op. at 10-11. (It should be noted that Judge Whyte did not consider whether Erlich's posting of the Church documents might have been illustrative of prior and subsequent criticisms he and others had made of Scientology doctrine, that is, the transformative element might not have been missing but might have been found in the ongoing discussion that included the use.)

Judge Whyte rejected the Church's claim that Erlich was precluded from a fair use defense because he had acted in bad faith, finding that while the unauthorized manner in which Erlich had obtained some of the unpublished documents (from an anonymous Internet posting and through an anonymous package mailed to him) weighed in the plaintiffs' favor, it was not dispositive in the analysis. *Id.* at 12-13. On balance, the court ruled that the first factor favored Erlich, although only slightly. *Id.* at 13.

Judge Whyte held that second fair use factor, the nature of the copyrighted work, favored the plaintiff, at least with respect to the AT tracts, which he ruled were unpublished. *Id.* at 14. While recognizing that Congress, in amending § 107 in 1992, intended to correct the misimpression that the unpublished nature of a work creates a *per se* ban against its fair use, Judge Whyte found that the amount of permissible copying is reduced in such instances. Given Erlich's alleged posting of all or nearly all of the AT documents at issue, the court found that this factor weighed heavily in the Church's favor. *Id.* at 13-15.

With respect to the third fair-use factor, the amount and substantiality of the use, Judge Whyte rejected Erlich's argument that because some of the works were parts of larger collections, the percentage of the work copied should be calculated on the basis of the entire registered collective work. Having determined that the proper denominator was the individual pieces of the larger collections, all or nearly all of which had been posted by Erlich, Judge Whyte found that the third fair-use factor also strongly favored the plaintiffs. *Id.* at 15-17.

Finally, the court found that the fourth factor, the effect of the use on the plaintiff's market, favored Erlich, observing that "[t]he demand of those seeking out the Church's religious training will hardly be met by Erlich's postings." *Id.* at 18. Judge Whyte noted that any suppression of demand for the Scientology works caused by the criticism itself was not part of the consideration. *Id.* at n.19. He also rejected the Church's argument that the postings were sufficient to allow the creation of competing religious groups.

Although the fair use analysis thus resulted in a 2-2 tie, Judge Whyte nevertheless rejected the fair use defense: "In balancing the various factors, the court finds that the percentage of plaintiffs' works copied combined with the minimal added criticism or commentary negates a finding of fair use." *Id.* at 19.

The court's fair use analysis is troubling for several reasons. For one, the fashion in which Judge Whyte determined the amount and substantiality

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of the taking is problematic. In rejecting Erlich's argument that the amount taken should have been measured against the entire collective work in which the document had first appeared, Judge Whyte relied on cases involving collections of works by various authors on unrelated or only marginally related topics, such as individual articles published in a scientific journal or an ad parody contained in a magazine. If, however, the various documents posted by Erlich were — as in the *Lerma* and *Wollersheim* cases — pieces of integrated instructional courses or policy manuals prepared by the Church or L. Ron Hubbard, the more appropriate analogy would appear to be chapters in a single-author textbook, in which event the percentage of the work copied *should* have been calculated on the basis of the entire text.

Even allowing, however, that Erlich had copied all or nearly all of the copyrighted work, in holding that "other factors are not sufficiently in Erlich's favor to overcome th[e] third factor," *id.* at 20, Judge Whyte appears to have greatly understated the significance of the fourth factor, which the Supreme Court has characterized as "undoubtedly the single most important element of fair use." *See Harper & Row*, 471 U.S. 539, 566 (1985). In fact, in cases involving copying of substantial portions of a work it is the superseding effect on the market for the original work, as much as the amount taken, that argues against a finding of fair use. That is, it is not the third factor in isolation, *but in combination with the fourth factor.*

In *Netcom*, however, Judge Whyte found for Erlich on the fourth fair-use factor, holding that Erlich's copying was unlikely to impair the market for the original. *Id.* at 19. Coupled with the fact that Erlich's use was critical and noncommercial, this should have been sufficient to support a finding of fair use.

Such a holding would have reflected an understanding that copyright's essential purpose is to advance human knowledge, and that the limited monopoly awarded to authors is designed only as a means to this goal and not as an end in itself. Insofar as Erlich's actions increased public knowledge about the Church without interfering with the market for the Church's copyrighted works, a finding of fair use would have better served the interests promoted by copyright.

As to the Church's trade secrets claim, Judge Whyte denied the motion for a preliminary injunction, holding that the Church had failed to show a likelihood of success on the merits because the material posted by Erlich was already generally known to the public. *Id.* at 32. He also held that the Church had failed to establish its trade secrets claim with sufficient specificity to satisfy an alternative ground for injunctive relief, namely "serious questions going to the merits of its trade secrets claim and that the balance of hardships tips in its favor." *Id.* at 33.

Despite the denial of injunctive relief, Judge Whyte held open the possibility that the Church might ultimately prevail on the trade secrets claim if it sufficiently defined the nature of its trade secrets, suggesting that it remained an open question "whether previous public disclosures of parts of the Advanced Technology works are sufficient to destroy the secrecy of the entire work." *Id.*

Religious Technology Center v. Wollersheim et al., Civ. Action No. 95-K-3143 (D. Colo. 1995)

As reported in the September *LibelLetter*, at pp. 9-10, the individual defendants in this action — Lawrence Wollersheim and Robert Penny — are former members of the Church who manage a computer bulletin board and post a newsletter on Scientology. They established a nonprofit corporation, F.A.C.T.NET, also a defendant in this suit, in order to follow current controversies regarding Scientology. The suit was brought after Arnaldo Lerma, defendant in the Virginia action discussed here as well (see column 3), posted various Scientology documents obtained from open court records onto the F.A.C.T.NET bulletin board.

On September 12 Judge Kane issued an oral ruling denying the Church's motion for a preliminary injunction, vacating the seizure order, and ordering the Church to return, at its expense, all materials seized from defendants. The court also required defendants to maintain the status quo with respect to the copyrighted materials at issue, restricting them to making any but fair use of these materials. Although the plaintiffs refused to comply fully with the court's order, Judge Kane declined to hold them in contempt, instead issuing a modified opinion on October 3. What follows is a brief summary of the events leading to Judge Kane's new order.

On September 13, the Church filed an emergency motion for a stay pending appeal of Judge Kane's original order, which was granted by the Tenth Circuit on the same day. Judge Kane then filed a written memorandum on September 15, clarifying and memorializing his prior oral ruling. On September 18, the Tenth Circuit lifted the temporary stay and denied the Church's motion for a stay pending appeal but ordered Exhibit 8 of the defendants' appendix, which contained some of the AT material at issue in the case, to be placed under seal. The Church then made two motions to the Supreme Court for a stay. The first, to Justice Breyer, circuit justice for the Tenth Circuit, was denied on September 20, slip op. at 4; the second, addressed to Justice Souter on September 21, was denied on October 2. *See* 1995 WL 574523 (U.S.).

On September 22, the Church returned the defendants' computer equipment but retained all the floppy disks, hard drives, and CD ROMs that contained AT materials. With the exception of the CD ROMs, which could not be copied, they informed the court that they had provided duplicate disks containing all files other than those containing AT materials. The Church argued that with respect to these files the court's order violated the Free Exercise Clause because it required them to disobey the Church's prohibition against "furnishing copies of the AT materials to anyone who has not fulfilled the required spiritual and ethical prerequisites and any apostates of the religion." *Id.* at 7.

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"HEINOUS CRIME" TRADING CARD BAN: UNCONSTITUTIONAL

A Magistrate Judge in the Federal District Court for the Eastern District of New York has ruled that a local county law that made it a misdemeanor to sell to minors trading cards which depict a "heinous crime, an element of a heinous crime, or a heinous criminal and which is harmful to minors" is unconstitutional. *Eclipse Enterprises, Inc. v. Thomas Gulotta*, CV 92-3416 (ADS) (Oct. 6, 1995) Plaintiff , publisher of "True Crime" trading cards brought the challenge; Nassau County, New York, sought to defend the law as an appropriate exercise of its power to protect the welfare of children.

While not ground-breaking in its analysis, the decision of the Magistrate Judge is quite thoughtful and laced with basic common sense. The Magistrate Judge concluded that the law was (1) not narrowly tailored; (2) overbroad, and (3) void for vagueness.

While stating that the protection of the physical and psychological well-being of minors was a compelling governmental interest, the court found as well that children were still entitled to significant First Amendment rights. Government regulation of speech, even to minors, had to be narrowly tailored. Content based regulation, such as this law -- even when directed toward the protection of minors -- was presumptively invalid and subject to the highest scrutiny.

The court found that no evidence was presented to support a causal connection of any kind between this genre of trading cards and juvenile crime or the impairment of the morals of minors. The county's witnesses testified that no study, scientific or otherwise, had ever been conducted on the affect of such cards on minors.

The only analysis presented were of violence and television, a decidedly different medium. Even as to those, however, the Magistrate Judge found the "evidence of a causal relationship is contradictory and inconclusive....The only obvious conclusion to be drawn is the clear difference of opinion over this sensitive issue." Slip op. at 9-10.

Nor had the county justified the distinction between trading cards and other forms of media, such as books and magazines.

The law was overbroad in sweeping within its reach "virtually all discussion of history, politics, and current events." (Slip op. at p. 11) regardless of context, or even how incidental or pervasiveness the elements of violence in the discussion might be.

With defendant's experts unable to agree amongst themselves as to which trading cards would come within the statute's provision of "harmful to minors", the court also found that the statute was void for vagueness.

The county may well file objections with the district court judge to the magistrate judge's report, but the soundness of his reasoning and conclusions should leave little for them to challenge or for the district court judge to reject.

EAVESDROPPING STATUTES: WHOSE LAW GOVERNS?

Virtually all of the states have eavesdropping statutes that govern the taping of telephone conversations. While the majority of states authorize the taping of such conversations by one party to the call, ten states require that all parties consent to any such taping. Thus, interstate calls can cause some concern to counsel, if one party to the call is in a so-called "all-party" consent state, while another is in a "one-party" consent state. The Federal Wiretap Statue, 18 U.S.C. Section 2510, et seq., which does not require all-party consent, does not govern in such inter-state calls. It provides a minimum standard on the subject, but allows states to require stricter standards. See, "Recording Interstate Telephone Calls: So You Think You Know What Law Applies?", by Stuart F. Pierson, *LDRC LibelLetter*, December 1994.

A New York Supreme Court Justice recently faced this issue directly in *Krauss v. Globe International, Inc.*, 10/5/95 NYLJ 29 (col.1), when the New York resident Plaintiff sought to amend the complaint in his pending libel case to include causes of action against the Defendants, Globe International, Inc. and Globe Communications Corp, publishers of The Globe Magazine, based upon the taping of telephone conversations between Plaintiff, both a New York resident and in New York at the time of the calls and individuals in Pennsylvania. New York is a one-party consent state (New York Penal Law Section 250.00 et seq.); Pennsylvania is a two-party consent state (18 Pa. C.S. Section 5701- 5725). The court concluded that New York law should govern, and refused to allow the amendment to the complaint.

Krauss' original libel complaint stems from an article *The Globe* published on March 15, 1992, alleging the plaintiff had encounters with a Philadelphia prostitute. Krauss, besides being the ex-husband of Joan Lunden, is a newspaper columnist, television producer and author. During discovery, Plaintiff learned that conversations he had while he was located in New York with a prostitute and a reporter, both of whom were in Philadelphia, were recorded by the other participant.

Concluding that under both Pennsylvania and New York law the cause of action, were there to be one for eavesdropping, would be actionable in tort, the court found that the rule of lex loci delicti, or the law of the place of injury, would apply. Here the court found that the Plaintiff sustained his injury in New York and its law must be applied to determine the sufficiency of the proposed amendments to the complaint. As a result, the motion to amend was denied.

Plaintiff sought to add causes of action under the federal statute which the court denied as well.

"SARCASTIC TONE" NOT ENOUGH FOR LIBEL CLAIM

New York Supreme Court Justice Stuart Cohen has dismissed an immigration attorney's libel claim against network-owned WCBS in New York City where the defamatory meaning was alleged to arise, in part, from sarcastic tone and use of slow-motion video. Finding the statements at issue substantially true, non-actionable opinion, or lacking defamatory meaning, the court refused to allow slow-motion video technique to imply criminality in the absence of a clear charge nor a sarcastic tone to render a true statement false. The October 11 decision in *Torres v. CBS News* dismissed all of the plaintiff's libel claims, as well as his complaint of false light invasion of privacy, a tort that is not recognized in New York. See NYLJ, Oct. 11, at 26.

The plaintiff, Peter Torres, was filmed by WCBS reporters using a hidden camera. On the videotape, Torres was seen selling the reporters, who portrayed themselves as immigrants, a booklet prepared by the attorney entitled "Visa Lottery Informational Booklet" for $50. In fact, most of the information contained in the booklet was available from the government at no charge. The broadcast segment then showed an interview with the Director of the Mayor's Office for Immigrant Affairs, who upon examining the booklet declared that those seeking visas did not need any special booklets or forms, and when told of the attorney's $50 charge for this information exclaimed: "This is ridiculous!"

When the segment concluded, Roseanne Colletti, the reporter of the segment, told the anchor on the air that "they are taking your money for no good reason. You can do it all on your own for free." Ernie Anastos, the anchor, replied that such booklets are sold to "illegal aliens who are susceptible, vulnerable.

The complaint strained to attach defamatory meaning to the news broadcast by dint of the reporter's "sarcastic tone," the use of slow motion video of the Plaintiff accepting payment for his booklet, and the "cross-talk" or banter between a reporter and anchor that concluded the segment.

As to the plaintiff's contention that the reporter's tone of voice was defamatory, Judge Cohen found that while her "tone of voice might not be to his liking, as he had admitted that the factual matter [of the sale of the booklet] is true ... the statement is true and therefore non-actionable."

On the contention that the use of slow motion video "creates the appearance of an illegal transaction," the court noted that no specific language in the report had actually accused the plaintiff of criminal activity, nor did plaintiff articulate how a reasonable viewer would understand that it had. Dismissing this claim, Judge Cohen observed that "the court may not strain to find some defamatory interpretation where none exists," citing *Cohn v. NBC*, 50 NY2d 885, 887, 6 Media L. Rep. 1398 *aff'g* 4 Media L. Rep. 2533 (1980).

Judge Cohen dismissed other of the libel claims as non-actionable opinion under the New York Court of Appeals decision in *Immuno A.G. v. Moor Jankowski*, 77 NY2d 235, 18 Media L. Rep. 1625 (1991) stating that: "The dispositive inquiry is whether a reasonable reader could have concluded that the challenged statements were conveying facts about the plaintiff."

Under this analysis, the remarks of the city official, the court held that a statement such as "This is ridiculous" was incapable of being proven true or false and was understandable by the reasonable viewer an "an impromptu reaction elicited by a reporter." The anchor's comments that "illegal aliens are susceptible, vulnerable" was also held to be a statement of protected opinion. In addition to the fact that this language was loose, figurative, and incapable of being verified, the court looked to the context in which it was made. He found that the relationship of the anchor's role to this story signaled to the viewer that the anchor was merely voicing his opinion: he was not featured in the report, played no part in the substantive broadcast and only introduced the piece at the beginning and then reacted to it at the end. Judge Cohen held that "the impression created was that of someone who was responding personally to the content ... and not of someone who was reporting the facts."

Charles Glasser (NYU '96) is a former LDRC intern.

ALSO OF NOTE:

Jones v. The Globe International, Inc., Civil No. 3:94:CV01468(AVC)(D.Conn. Sept. 26, 1995)

Brought by the press agent for Marla Maples Trump against The Globe, Star and The National Inquirer, plaintiff was suing over articles concerning his arrest and conviction in connection with his theft of Mrs. Trump's shoes and other personal property. By his own admission, he had a psychological and sexual relationship with her shoes.

The court granted summary judgment for defendants on a variety of grounds. Of some note, however, are grounds of **substantial truth**, based in large part on testimony in and the conviction at his criminal trial, and the application of the **incremental harm doctrine** to various other statements in the articles.

FIRST AMENDMENT SURVEYS:

*** *TV News Director***
*** Newspaper Publishers**
***Viewers**
*** LDRC Members**

Two recent surveys were reported out last month on First Amendment issues that are of interest to media lawyers.

One came out of the Newspaper Association of America (NAA), reporting the preliminary results from over 100 responses to a survey sent by NAA to U.S. newspapers. While noting that access issues were the biggest challenge to newspaper reporting, the responding publishers commented on the growing insensitivity of their public to First Amendment issues. Privacy and security concerns seem to overcome free speech instincts among the readership, although interest in the reporting communities ran high for editorials on issues such as flag-desecration legislation, television violence, cyberspace pornography, and talk-radio censorship.

While 50% of the respondents reported that they had lobbied legislatures, it was mostly with regard to access to information issues.

One respondent expressed concerns about the high cost of libel litigation, with another stating that small newspapers must back off from issues to avoid expensive litigation.

A second survey came out of **Broadcasting & Cable** magazine, which surveyed 75 television station news directors. The survey showed that the average number of news employees has risen over recent years, as has the actual number of news hours on the air. The majority of news directors anticipated higher news budgets next year, and had received higher budgets this year than in the last year.

29.3% either program news on a cable channel or plan to; 26.7% are involved in a news-on-demand service for interactive tv trials. 76% of the respondents reported that their stations had Internet Web sites, and 60% were either involved in or planning an online news service for PC users.

Only 6.7% reported that their station had been sued for libel in the past year. And only 5.3% reported avoiding a story because of the threat of a libel suit. More stations reported being pressured by management to avoid a story for fear of losing advertising (12%) than as a result of a threat of a libel suit (2.7%). 64% of the stations carried libel insurance.

The reporting stations covered the gamut of markets fairly evenly. Almost 83% of them were network affiliates (including 4% to Fox).

LDRC has done a rough compilation of statistics using information contained in the 31 member litigation logs received as of last month. While LDRC and it members have rightly expressed concern about non-libel issues in recent cases, the information from the logs reveals that libel was still an issue, if not the issue, in most of the reported cases.

Out of 111 cases, 92 had a libel claim, 35 contained a privacy issue, and seven actions were brought for emotional distress. In addition, 5 interference with a contract and four unfair trade practice actions were filed. Three cases each were brought for conspiracy and conversion, while two each were brought with fraud, RICO, and/or violation of wiretap claims.

The logs indicated 25 new lawsuits had been filed against the media so far in 1995, while in 1994, 29 new cases were reported.

In September, **Broadcasting and Cable Magazine** also printed the results of a survey, conducted by Frank N. Magid Associates, in which 1008 local television news viewing adults were asked to rank their trust in 15 institutions.

Seventy-five percent of the viewers report they watch local television news every day, which ranked third in the survey. The Supreme Court ranked first, followed by local police in second place. In eighth place was network news, and cable television was in 10th place. State political organizations ranked last, with US Congress and local political organizations in 13th and 14th places, respectively.

The survey reported that 93% agreed that a politician's stand on issues is important, although 74% of the viewers feel campaigns are sensationalized by local television.

PLEASE SEND LDRC COMPLETED LITIGATION LOGS. THEY ARE VERY VALUABLE SOURCES OF INFORMATION FOR STATISTICAL AND RELATED ANALYSIS. A COPY OF THE FORM IS ATTACHED.

THANK YOU.

SCIENTOLOGY

(Continued from page 6)

Judge Kane dispensed with the constitutional challenge by observing that it was the Church's attorneys, and not the Church, that was being ordered to return the material, so that there was no interference with the free exercise of the plaintiff's religious beliefs. *Id.* at 8. Nevertheless concern with a possible free exercise challenge in the future, coupled with the fact that AT material had been included in the exhibit sealed by the Tenth Circuit, led Judge Kane to reconsider his prior order.

In the modified order, Judge Kane directs the Church attorneys to deliver the relevant material into the custody of the court, rather than to the defendants. Judge Kane also appointed the defendants' computer expert as a special master to examine all these materials. As the defendants had been unable to operate their computers with the replacement hard drives installed by the plaintiffs, the Court also directed the defendant's expert to attempt to create replacement drives for defendants, after first deleting the AT materials at issue.

It is unclear from the opinion how much of the material that plaintiffs refused to return was in fact under seal, or how complicated it would have been to isolate and withhold that material from what was returned to defendants. What is clear is that plaintiffs' defiance of the original order did not result in any immediate penalty.

***Religious Technology Center v. Lerma et al.*, Civ. Action No. 95-1107-A (E.D. Va.)**

As reported in last month's *LibelLetter*, Judge Brinkema denied the Church's motion for preliminary injunctions against both Arnaldo Lerma and the *Washington Post* and vacated the seizure and temporary restraining orders entered against Lerma, ordering the return of all material seized from him. Mr. Lerma, a former Scientologist who obtained various Church tracts from an unsealed court record, was an initial source to the *Post* for these materials. Subsequently, the *Post* independently obtained copies from the same court files.

The ruling on the *Post*'s motion was issued on August 30; the ruling on Lerma' s motion was delivered from the bench on September 15. The Church appealed to the Fourth Circuit and obtained a temporary stay of the September 15 order pending receipt of Judge Brinkema's written opinion, which has not been issued as yet.

On September 26, 1995, the *Washington Post* filed a motion for summary judgment, in which the *Post* argues that the defects in the Church's copyright and trade secrets claims that had been identified by the court in its prior ruling are in fact fatal to both claims. On October 2, Mr. Lerma filed a motion for partial summary judgment on the trade secrets claim, incorporating the arguments made by the *Post*. In addition to these motions, Lerma has also filed a motion to compel the Church to produce complete copies of the AT documents at issue.

The *Post* argues that the copying by the Clerk of the allegedly copyrighted material from the court files in a related case was either not an infringement of copyright or was a protected fair use for the purpose of news gathering, and that the inclusion of quotations from these files in the *Post*'s August 19 was also a fair use.

As to the copying of the court file, the *Post* argues that it cannot be liable as a primary infringer because the file was copied by the Clerk of the Court and it cannot be liable as a contributory infringer because there is no primary infringer, it being inconsistent with First Amendment principles and the right of access to impose liability on the Court Clerk for copying an unsealed public record. Additionally, and as Judge Brinkema acknowledged in her August 30 opinion, the copying was protected as a fair use for the purpose of news gathering.

As to the quotations contained in the August 19 article, the *Post* argues that all four fair-use factors favor the defense: the use was transformative, namely to report on matters of public interest; the underlying work is factual or informational, and thus entitled to a lesser degree of protection; the amount used was minimal in proportion to the underlying work; and the presence of these limited quotations in no manner impaired the plaintiff's market for the works. Additionally, the *Post* argues that the filing of a copyright claim in order to suppress unfavorable commentary is a misuse of the copyright privilege.

The *Post* offers several grounds on which the trade secrets claims fail: (1) the material is not secret, having both been posted on the Internet and been available in unsealed public records; (2) religious scripture does not qualify under Virginia's definition of trade secrets; and (3) the documents do not derive any economic value from their secrecy.

Many of these arguments were cited favorably by Judge Brinkema in her August 30 opinion, in which she characterized the plaintiff's likelihood of success on the merits as "far from a foregone conclusion."

Judge Brinkema has scheduled a hearing on both motions for November 9, in order to allow partial discovery.

Dennis Erlich is being represented by Carla Oakley, of D.S.C. member firm, Morrison and Foerster. Lawrence Wollersheim, Robert Penny, and F.A.C.T.NET are being represented by Tom Kelley, of D.S.C. member firm Faegre & Benson. Arnaldo Lerma is being represented by represented by Lee Levine, Michael Sullivan, Elizabeth Koch, Jay Brown, and Merril Hirsh, of D.S.C. member firm Ross, Dixon & Masback. The Washington Post is being represented by Christopher Wolf, Charles Sims, and Scott Eggers, of D.S.C. member firm Proskauer Rose Goetz & Mendelsohn.

LIBEL JURY TRIAL WON IN MISSISSIPPI

A Case Study

By Thomas A. Wicker

The Southern Sentinel, Inc., a weekly newspaper in North Mississippi, won a jury verdict in *Charles Elliott, M.D., et. al. v. The Southern Sentinel, Inc., et. al.*, Civil Action No. 93-128, in the Circuit Court of Tippah County, Mississippi. The case arose out of an August 19, 1993, story concerning the suicide death of Elliott's wife, Suzanne, in October, 1989. The story detailed the suspicions and questions raised by Suzanne Elliott's father, Kelly Drewery, concerning his belief that Dr. Elliott was involved in the death, or knew who was. The Plaintiff alleged that the story accused him of murder. By a margin of ten to two, the jury rejected this argument. This article examines the newspaper's tactics in presenting a defamation case to a jury.

Media defendants in Mississippi, like those in other states, have come to depend to a large extent on the summary judgment process to minimize expense and avoid jury trials which tended to be sympathetic to plaintiffs. The decision of the Mississippi Supreme Court reversing a summary judgment in *Stegall v. WTWV-TV, Inc.*,609 So.2d 348, 20 Media L. Rptr. 1280 (Miss. 1992), has resulted in reluctance on the part of trial court judges in this state to grant summary relief in defamation cases. In *Stegall*, a candidate for public office was reported to have been under federal indictment for fraud. The newscaster had confused the candidate with a relative who had the same last name, who had held the post in question, and who had been indicted in a federal corruption probe. Based upon a dispute as to whether or not local election officials had mentioned the distinction between the candidate and his indicted relative to the newscaster earlier on the day of the election, the Mississippi Supreme Court reversed the trial court's finding that no genuine issue of material fact existed relative to the question of actual malice in connection with an "election update" during live coverage of the state's general election results.

The same trial judge was assigned the *Southern Sentinel* case, and the newspaper was therefore aware that prospects for the favorable conclusion of the case by summary judgment were remote. Accordingly, the newspaper focused its efforts, from the beginning of the litigation, on how best to present the case to a rural Mississippi jury that was likely to be less than sympathetic to media defendants, and to be favorably disposed to local plaintiffs. In order to place these tactics in context, a brief summary of the background of the case is in order.

THE FACTS

At 1:30 p.m. on October 1, 1989, the Plaintiff, Dr. Elliott, discovered his wife's body when he came home during his shift at the local hospital's emergency room. Elliott ran to the house of his brother, Bobby Elliott, which was located one house away. Dr. Elliott's nephew, Rob Elliott, an investigator with the district attorney's office, went to Dr. Elliott's residence and, upon observing the body, called the local sheriff. The coroner, Dr. Dwalia South, was notified by the sheriff's department. Dr. South had been, some years before, one of Dr. Elliott's partners in the practice of medicine.

Upon arrival, both Dr. South and the Sheriff determined that the cause of death was suicide. The body was lying face down on a white carpet, with the right hand completely under the body, holding a .38 caliber revolver. The only blood was pooled directly beneath the body, with no evidence of smearing or other indication that the body could have been moved after the gunshot. There was a suicide note in the handwriting of the decedent, which was illegible at the end due to an overdose of the tranquilizer, Xanax. Based upon empty packets of the drug, it appeared that as much as ten times the recommended dose of the drug had been ingested sometime prior to death. Had the decedent not shot herself, it was surmised that she would have likely died of the overdose.

The conclusion of all law-enforcement personnel was that the case was one of unquestioned suicide. This conclusion has never been called into doubt by any of the numerous other law enforcement officials who have played a part in examining the case.

However, Suzanne Elliott's father, Kelly Drewery, began to question the cause of death shortly after his daughter's funeral. According to the coroner's death report, the last time Suzanne had been seen alive was when Dr. Elliott left for the emergency room at the local hospital at 7 a.m. that morning. The coroner estimated the time of death at approximately 10 a.m. Following the funeral, Drewery questioned persons at the hospital who recalled Dr. Elliott leaving during the morning in question. He related these conversations to the coroner, Dr. South, who contacted Dr. Elliott and asked him about the time he last saw his wife alive. Dr. Elliott confirmed that he had gone home to talk with his wife at approximately 9:30 a.m., and that they had talked for a brief time before his return to the hospital at approximately 9:45 a.m. (the hospital is located approximately one mile from the Elliott's residence). Based upon this information, Dr. South amended the report of death to indicate that the last time seen alive was 9:30 a.m., and that the time of death was approximately 10 to 11 o'clock a.m. Drewery was provided a copy of the amended report.

Drewery was not satisfied, however, and began a process of questioning the cause of death which has never really stopped. Drewery has met with investigators from the State of Mississippi's Criminal Investigation Division, with the state medical examiner, and with employees of the Louisiana State Crime Lab. He was corresponded with the local district attorney, the Attorney General for the

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LIBEL JURY TRIAL WON IN MISSISSIPPI

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State of Mississippi, the Governor, and the Circuit Judge, among others. Due to his efforts, the State of Mississippi, in 1992, opened a new investigation into the suicide. This investigation did not result in changing the finding of death by suicide. The State Medical Examiner also conducted an extensive review of the case and ruled, conclusively, that the case was one of suicide.

In the interim, rumors in the small, rural county abounded. Dr. Elliott and his relatives heard rumors, on more than one occasion, of his imminent arrest, as well as the arrest of his brother, his nephew, the sheriff, and the coroner. Rumors circulated to the effect that there had been an official coverup, and that Dr. Elliott had actually murdered his wife (though no motive was ever suggested). The newspaper largely ignored these rumors. At one point, in 1991, the newspaper, without specifically mentioning the Elliott case, ran an editorial condemning gossip and rumors. When the investigation was instituted by the State in 1992, a story was drafted, but the publisher and editorial staff decided to hold the story until a final report was issued.

In August of 1993, however, Kelly Drewery was able to convince the Jackson, Mississippi, bureau of the Associated Press to run a story about his questions. This prompted the *Southern Sentinel* to update and run its own story concerning the case. In that article, the newspaper reported that, "Kelly Drewery believes his 34 year-old daughter was murdered," and that Drewery had attempted to "prove that [Dr. Elliott] killed her or knows who did". The story also reported that Drewery believed officials had tried to cover-up the investigation because the Elliotts were a prominent, influential family in the county. It reported that Bobby Elliott was a prominent local attorney, and that Rob Elliott worked as an investigator for the District Attorney's office. The story included a number of "questions" posed by Drewery, and also quoted Dr. Elliott's first wife, Kay Cozart, to the effect that he had "threatened her" with guns in the past. (Cozart later recanted these statements). The article reported that Dr. Elliott had refused comment on the case before and didn't return the reporter's calls.

The article was published in the newspaper's August 19, 1993, issue. Suit was filed September 8, 1993, by Dr. Elliott, Bobby Elliott, and Rob Elliott, against *The Southern Sentinel*, the news editor (who authored the story), Kelly Drewery, Kay Cozart, and a fifth defendant who had no connection to the story. Prior to trial, Kay Cozart and the fifth defendant settled for nominal damages and agreements not to discuss the case further. The case was tried August 28 through September 6, 1995.

THE JURY TRIAL

The media defendants had three primary objectives in presenting the case to the jury: (1) distancing themselves from the contested issues of fact; (2) justifying the publication of the article itself; and (3) a direct appeal to the jury to support the principles of a free press.

Jury Selection

Before implementing these objectives, however, the defendants had to make certain decisions regarding the jury selection process. Ordinarily, defense counsel, particularly where a corporate defendant is involved, tend to look for conservative jurors in the selection process. An optimum juror's profile would include male, white-collar workers with at least some secondary education, and a position in lower or middle management. For the media defendants, however, it was determined that this profile was not desirable.

Jurors drawn from positions of authority in the community, with higher levels of education, tend to take for granted their access to information, and have less sympathy with media defendants as a consequence. Jurors from lower socio-economic backgrounds, however, are more dependent upon the media for information concerning law-enforcement, government and business. While surveys indicate that the media is not generally held in high regard by jurors, it was felt that the better profile in this particular case would be a younger blue-collar worker, with a high school education or equivalent. Because the plaintiffs were prominent members of the community, the defense attempted to select residents who had recently moved to the county, or who worked outside the county. Race was not a consideration. The media defendants attempted to avoid potential jurors without at least some high school education on the basis that more poorly educated jurors would have less appreciation for the abstract arguments regarding freedom of the press which would be employed. The ideal juror was a high school teacher. Unlike other college-educated panel members, teachers are more likely to be sympathetic to the press, and to share more of the concerns of the blue-collar workers.

The jury actually selected in this case matched the criteria above, including a school teacher who was ultimately selected as the jury foreperson.

THE TRIAL

A. Distance From the Underlying Controversy

In attempting to distance themselves from the controversy, the media defendants were motivated primarily be the realization that there was no possibility of presenting proof that the death of Suzanne Elliott was anything other than suicide. The questions raised by the co-defendant, Drewery, were on a par with the sort of questions raised by conspiracy theorists. Indeed, an analogy was drawn by the media defendants between Drewery, who still had questions concerning the ruling of suicide, and persons who still question the lone-gunman conclusions of the Warren Commission. The argument of the media defendants was that no matter how illogical or unfounded Drewery's questions may have appeared, he had the right to ask them and, at some point, to have them raised for consideration by the

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LIBEL JURY TRIAL WON IN MISSISSIPPI

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community. The media defendants were aided in this regard by the arguments of Plaintiffs' counsel that Drewery's questions had all been answered and were therefore not valid. The defense argued that this was tantamount to telling Drewery that he was not entitled to his opinion.

B. Justify Publication

The media defendants made it clear to the jury, from the outset, that this case was not about whether or not Dr. Elliott was guilty of murder (a case that simply could not be supported), but about the right of Kelly Drewery to question the adequacy of the investigation into his daughter's death. However, having made this declaration, the media defendants did make use of Drewery as a "stalking horse" to raise questions that might undercut the jurors pre-disposition to view the local physician favorably. The plaintiffs ultimately saw that Drewery was a sympathetic party, even though his accusations had no foundation. It was obvious that the jurors did not like the hostile manner in which plaintiffs' counsel conducted his cross-examination of Drewery, nor his cavalier dismissal of Drewery's questions. This emphasizes the premise that nothing should be taken for granted at trial. While the quantum of proof of suicide seemed overwhelming to the attorneys, law enforcement officials and the court, and while Drewery's questions therefore seemed unreasonable to these persons, the jurors brought a different background to the case against which to judge these matters. Again, the juror profile played a significant role here. Had more educated jurors, from white collar/management positions been selected, it would have been more likely that Drewery's questions would have been discounted.

Once the plaintiffs saw the impact Drewery was having on the jury they moved to nonsuit him. While the media defendants lost their stalking horse as a consequence, the damage had been done. Indeed, the unexplained dismissal of Drewery may have skewed the juror's view concerning the strength of the plaintiffs' case in favor of the defense.

Another manner in which the media defendants attempted to distance themselves from and downplay the question of suicide versus murder, was to focus upon the conduct of the investigation by law-enforcement officials who were not parties to the case. Although understandable because of the clear-cut nature of the suicide, the evidence demonstrated that the sheriff and the coroner did not "go by the book" in conducting the investigation. The coroner frankly admitted, on cross-examination, that after the initial determination of suicide she was more interested in comforting the family than in conducting an investigation. Again, while this was understandable, it left law-enforcement open to criticism. Had the coroner taken an official statement from Dr. Elliott during the initial investigation, she would have learned of the 9:30 a.m. time for last seeing the decedent alive and could have avoided the suspicions that the amended report of death raised in Drewery's mind. Had the sheriff or coroner ordered an autopsy, questions concerning the time the Xanax had been ingested could have been answered. Had either taken paraffin tests from the decedent's hands, the question of whether the marks on her hands were from gunpowder or some other source could have been answered.

In short, the media defendants, with some measure of success, were able to turn the trial into a dispute between a bereaved father and a well-meaning, but less than proficient law-enforcement hierarchy.

The media defendants' second objective, to justify publication of the story, was absolutely essential to a successful defense. The story was actually accurate in simply reporting Drewery's beliefs and questions. The problem, voiced often by plaintiffs' counsel, was in justifying why the story was written in the first place. The initial reaction of the media defendants was to argue to the judge that this was not only an irrelevant issue, but one which violated First Amendment principals by its very injection into the debate. That the media should never be required to justify, in a court of law, the reasons for a story being written and published is considered a basic tenet by those who practice in this area. However, in order to win a jury verdict, justifying the story was necessary.

In order to justify publication, the media defendants reviewed the history of the controversy repeatedly. The newspaper did not report anything concerning the manner of death, at the family's request, immediately following October 1, 1989. The newspaper did not report the fact that the report of death was amended, nor did it report the appeal of the coroner's ruling and the subsequent affirmation by the State Medical Examiner. The newspaper did not report the rumors in 1990 or 1991, despite the fact that these included widespread rumors that Dr. Elliott's arrest was imminent. Although the paper considered reporting the investigation conducted by the state beginning in 1992, a decision was made to await an official report being filed. Ultimately, when no report had been filed by August of 1993, and when the Associated Press, was running a story concerning the dispute, the *Southern Sentinel* ran its story. The question was posed to the jury, at each stage of recounting the history of the dispute, "When is it proper for your local newspaper to take note of this controversy?"

In keeping with the media defendants' first objective, this controversy was framed as one involving the conduct of the investigation by law enforcement in answering Drewery's questions, rather than one involving Drewery and his accusations of Dr. Elliott.

The media defendants also justified

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LIBEL JURY TRIAL WON IN MISSISSIPPI

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publication as a means of stopping the rumors. All parties and witnesses testified, without dispute, to the widespread rumors concerning the case prior to August, 1993. However, not one witness testified to hearing any rumors, gossip or even mention of the controversy following publication of the article. In closing arguments it was suggested that the reason the rumors stopped was that the publication of the article cleared up the more fanciful questions and laid them to rest. This argument came as something of a surprise to the plaintiffs' attorneys, who argued that the filing of the lawsuit was the cause of the rumors stopping. Regardless, of the counter-argument, the media defendants were at least partially successful in suggesting that, far from damaging the plaintiffs, the story had actually laid to rest the rumors that were the cause of any actual damage to reputation which may have been suffered by them.

C. A Free Speech Appeal

Finally, the media defendants made a direct appeal to the jury regarding principles of freedom of the press. Again, the danger in handling media cases is for attorneys specializing in this area is to assume that, because the law requires no justification for publication, and because the First Amendment guarantees freedom of the press, a jury will simply accept these mandates. However, in an age of increasing issues of jury nullification, it is important to assume nothing. Accordingly, from the outset of the trial, the media defendants attempted to present evidence in a manner so as to justify the underlying principles of the First Amendment.

In *voir dire* and in opening statements, the importance of these underlying principals were repeatedly emphasized. Nothing in this regard was taken for granted, and the jury was essentially invited to join in a solemn debate of these issues. During the presentation of evidence, particularly in cross-examination of witness for the plaintiffs, testimony was elicited which showed either a disregard for the necessity of public debate on the issues, or a disdain for the opinions and questions of Kelly Drewery as being without merit. The plaintiffs were, through this strategy, placed in the position of advocating that some ideas and opinions were without value, or had less value than others. Considering that the plaintiffs were from a higher social background than most of the jurors, this had a tendency to alienate jurors further from the plaintiffs.

In opening statements, and in closing arguments, the idea was conveyed that this case was, because of the principals involved, different from the average case, and one which would require their utmost thought, attention and deliberation. The jury was ultimately asked to affirm or ratify what the founding fathers had done in adopting the First Amendment in the first instance. This objective became important to the media defendants not just as a means of justifying the law to jurors who ordinarily might not agree with the finer aspects of free speech, but had the equally desirous effect of directing their attention away from the question of whether the plaintiffs had been falsely accused of murder and a conspiracy to impede or thwart the investigation. Again, the argument and proof focused more on the failures and inadequacies of law enforcement officials, who were not parties, than on the shortcomings of the story and the impact of those shortcomings on the plaintiffs.

That this strategy ultimately prevailed owed much to the luck of the draw in the jury selection process, as well as to the failure of the plaintiffs to anticipate it. Plaintiffs counsel, like most attorneys, assumed the existence of the legal principles underlying the case and did not attempt any assault on those principles or any distinction between the responsible exercise of free speech. Rather, the plaintiffs' focus was on proving that a murder didn't occur. They missed the more important issue of whether the finding of suicide could, or should, be questioned.

The lesson, for both the plaintiff and defense bar, is to consider trying issues of law as well as fact to jurors who are more conditioned in today's society to suspect the soundness of any and all legal principals. If we are true advocates of the First Amendment and the rights of a free press, we shouldn't hesitate to defend the very basis for those rights -- even to a jury of lay people.

Thomas A. Wicker is a partner in the Tupelo, Mississippi law firm of Holland, Ray & Upchurch, P.A. He was counsel for The Southern Sentinel, Inc., in Elliott v. The Southern Sentinel, Inc., No. 93-128 (Tippah County Circuit Court, Mississippi).

LDRC WISHES TO ACKNOWLEDGE THE FOLLOWING FALL INTERNS FOR THEIR CONTRIBUTIONS TO THIS MONTH'S *LIBELLETTER:*

John Maltbie, Brooklyn Law School; Bill Schreiner, NYU School of Law; and Shawn Reichel, Cardozo School of Law

BUSINESS WEEK INJUNCTION

(Continued from page 1)

FACTUAL BACKGROUND

The issue for *Business Week* began back in September when its Cleveland bureau chief was alerted by plaintiff-Proctor & Gamble's Supervisor of Corporate Communications to an impending and newsworthy event in P&G's derivatives lawsuit against Bankers Trust. After a stringer dispatched by the bureau chief learned of a newly filed motion by P&G to amend the complaint to add a RICO claim, but failed to obtain from the district court clerk's office the proposed amended complaint, a *Business Week* editor in New York sought to obtain the documents from a long-standing source, a lawyer with Sullivan & Cromwell, counsel for Bankers Trust Company. What the Cleveland bureau chief later learned (but because of other pressing business and travel, and believing that the motion itself was not of immediate interest to the magazine, did not pass on to the editor) was that the supporting documents to the on-the-record motion were sealed under a protective order, stipulated to by the parties and "so-ordered" by the court.

The Sullivan & Cromwell source didn't know that either. He was not involved with the case, and was not told of the sealing order by the associate from whom he requested the documents. And the top documents, the motion itself, did not indicate that any of the supporting materials were under seal. Indeed, the source didn't know of the problem until after he had the documents delivered to *Business Week*. And while he denied learning about the issue even at that point, the editor testified, with telephone records to back her up, that she had called and informed the lawyer when she learned that portions of the document delivered to her were filed under seal. When she declined his request not to publish information from the documents, he sought and she confirmed that his identity would be confidential.

[See "McGraw-Hill: The Confidential Source Issue on p. 17]

When Bankers Trust and P&G learned from *Business Week* that it was planning a story that week, they sought and obtained an ex parte hearing (a telephone conference for which no transcript was kept) with the trial judge, who then issued an order enjoining *Business Week* from publishing any of the documents then under seal. The order did not indicate whether it was a TRO or preliminary injunction, it had no termination date, it made no specific findings with regard to irreparable harm -- it was a bare bones order. Indeed, there was neither a complaint, an affidavit nor certification of the inability to afford notice to McGraw-Hill. And yet astonishingly, McGraw-Hill, whose General Counsel's name and telephone number were certainly known by the counsel, was not advised or allowed to participate in the hearing. Within minutes of receiving the order from the court, however, Bankers Trust and P&G counsel faxed the order to Ken Vittor, General Counsel of McGraw-Hill.

Failing that evening to find the trial judge in order to seek a hearing on the order, and failing to get a Sixth Circuit judge to issue a stay, the next day McGraw-Hill sought a stay and expedited hearing from the Sixth Circuit. The stay was denied, by order dated September 19, on the ground that the order was a temporary restraining order and thus not appealable. An application for a staty from Justice Stevens was denied on procedural grounds the next week. While Justice Stevens noted that the trial judge failed to provide the necessary findings of fact under Fed.R.Civ.P. 65(b), he concluded that the case should be remanded to the trial judge for a hearing in order to develop a factual record.

In fact, on the very day that Justice Stevens issued his opinion, September 21, the parties were required to appear before the trial judge, Judge John Feikens, in Cincinnati, to present evidence at a permanent injunction hearing. The hearing was held over two days, the second being September 27, and the judge issued his decision on October 3. On the same day, he granted P&G's motion to amend the complaint to add RICO claims and on McGraw-Hill's application ordered that the papers should be unsealed and placed in the public record.

THE PRELIMINARY INJUNCTION DECISION

While unsealing the motion papers, he also issued a permanent injunction against *Business Week*, enjoining it from publishing the sealed documents which it had previously acquired. Thus *Business Week*, like all media, were free to obtain and publish the motion papers and their supporting documents, but *Business Week* was enjoined from publishing the documents then in its possession.

Judge Feikens' actions throughout, and certainly his decision of October 3, are enormously troubling. Without the slightest criticism for the lawyers for Bankers Trust who violated the protective order, the judge launched an attack on *Business Week* for its failure to abide by the protective order to which was clearly not a party.

Business Week is accused (and accused is clearly the right way to describe this judge's tone) of delaying the entire process by seeking appeals. Indeed, he accuses them of purposely avoiding a hearing before him and of acting duplicitously in all regards in the taking of these appeals. He never once mentions the ex parte nature of his initial order nor why it was necessary to hold it ex parte, nor his unavailability on that evening to hear McGraw-Hill on the order.

To this judge the dispute was caused by reporters who sought documents they knew or should have known were under seal, duped an unsuspecting litigation partner at Sullivan & Cromwell into releasing them, and then, with *Business Week*, covered it all up by seeking appellate review or his order rather than just face the trial judge and the magnitude of their wrongdoing.

The court finds that *Business Week*, because the Cleveland bureau chief knew of the sealing order at some point in the process, sought to obtain the documents with that knowledge. He holds that *Business Week* "knowingly violated the protective order" when it obtained the confidential materials in order to publish a news story.

As to his legal analysis, the judge does

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BUSINESS WEEK

(Continued from page 15)

not cite or discuss the prior restraint case law. Instead, he relies on *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), which held that a protective order barring litigants from revealing materials received in the discovery process would not violate the First Amendment, provided that the order did not bar dissemination of any information received independent of discovery, and that the order met the following test:

"If the judicial practice in question furthers an important or substantial governmental interest unrelated to the supression of expression and if the limitation of First Amendment freedoms is not greater than is necessary or essential to the protection of the particular governmental intereste involved, such judicial action is constitutional."

That test, of course, is significantly easier to meet than the requirements imposed by the Pentagon Papers case, or any of the other cases that have dealt directly with prior restraints against the press. The judge concludes that the protective order in this case met a substantial governmental interest sufficient to support it because it facilitated efficient pretrial discovery of sensitive material without extensive court involvement. To preserve efficient administration of discovery, he concludes, also "necessitates that I be able to prevent *Business Week* from publishing what never would have existed independently of the discovery process."

And finally, and probably in light of the tone and substance of the rest of this judge's opinion, the most important reason for his ruling: "I cannot permit *Business Week* to snub its nose at court orders...The integrity of a court and the entire judicial system requires that its orders be acknowledged and obeyed. To make an exception for *Business Week* will render future orders of this court of questionable validity and effect."

An astonishing conclusion in an opinion that no where suggests that any responsibility for violating court orders may lay at the feet of counsel for an actual party to the order. The gaps and nonsequiturs in this judge's legal analysis are so large and so dangerously overbroad in their reach, that the result is a decision utterly contrary to all that has preceded it in prior restraint law.

In successfully seeking an expedited appeal, McGraw-Hill argues quite rightly that the interests implicated by the publication of the documents at issue are no where near the magnitude that would justify a prior restraint; that a prior restraint would not be justified even if the documents had been obtained unlawfully by *Business Week* (which it argues quite forcefully that they were not). And *Business Week* correctly argues that *Seattle Times* was a decision regarding the rights of litigants to a proceeding, the actual parties to the litigation and to the protective order; that the decision does not, and properly could not, be extended to cover third parties.

Business Week cites *Landmark Communications, Inc. V. Virginia*, 435 U.S. 829 (1978), in which the Court found that a statutory confidentiality provision could not be used to bar the press from publishing confidential judicial review proceedings. Moreover, citing this judge's own decision of the same day unsealing the documents, McGraw-Hill states that the documents are not simply discovery materials, but are now motion papers filed with the court. And, under the district court's own analysis, motion papers are not subject to *Seattle Times* reasoning but are presumptively public in nature.

Judge Feikens had concluded in the companion opinion to the permanent injunction, that there is a strong presumption of access to judicial records under both the common law and the First Amendment and that both limit a court's discretion to seal court documents. He found the discovery material, which under *Seattle Times* could be protected from public disclosure, ceases to be pretrial discovery material when it becomes part of the judicial record, such as when they are used in connection with motions seeking judicial action. Absent "extraordinary circumstances," even documents sealed when produced cannot remain sealed indefinitely. Bankers Trust counsel had given the court no "extraordinary" reason for their remaining sealed.

The court's analysis as to the presumptive public quality of motion papers is, of course, what both the *Business Week* editor and her source lawyer at Sullivan & Cromwell engaged in when they assumed that a motion to amend a complaint, and its supporting papers, were open for media inspection and news coverage.

There has been substantial amicus support for McGraw-Hill from media organizations. Currently at the Sixth Circuit, amicus papers have been filed by Bloomberg L.P., represented by Willkie Farr & Gallagher (by Richard L. Klein and Jeffrey D. Hoeh); Dow Jones & Company, The Cincinnati Enquirer, The LA Times, The New York Times Company, Newsday, Inc., The American Society of Newspaper Editors, Magazine Publishers of America, Inc., The Newsletter Publishers Association, represented by Gibson, Dunn & Crutcher (by Robert Sack and Theodore J. Boutros); and E.W. Scripps Company, The Associated Press, CBS Inc., CapitalCities/ABC, Inc., The Cincinnati Post, The Columbus Dispatch, Plain Dealer Publishing Co., Radio Television News Directors Association, Society of Professional Journalists, The Tennessean, Time Inc., represented by Baker & Hostetler (by Bruce Sanford, David Marburger and Hillary W. Rule). At an earlier stage in the case a brief was also filed on behalf of The New York Times, MPA, Time, Gannett, News-America, Newsweek, Advance Publications and the Association of American Publishers, represented by Squadron, Ellenoff, Plesent & Lehrer (by Slade Metcalf).

McGRAW-HILL: READ MORE ABOUT IT

An excellent article on this case can be found in the October 4 edition of the Wall Street Journal, starting on page 1. Coming soon is an American Lawyer article focussing, we are told, on Sullivan & Cromwell and the no-longer confidential source, partner Steven Holley.

MCGRAW-HILL: THE CONFIDENTIAL SOURCE ISSUE AND THE LIMITED SHIELD LAWS

When Linda Himmelstein, Business Week legal editor, was asked by the Business Week Cleveland bureau chief to see if she could get a copy of the P&G motion to amend its complaint against Bankers Trust, she called a relatively long-time source at Sullivan & Cromwell, the New York law firm that represents Bankers Trust in the litigation. She asked for a copy of the motion. He had one messengered over to her. What both testified that neither knew at the time, was that certain supporting documents to that motion were under a protective order. They had been filed under seal with the federal district court in which the case was pending.

When Ms. Himmelstein received the documents and began to review them with some care, she discovered that certain documents bore evidence that they were filed under seal. Ms. Himmelstein testified that she called her Sullivan & Cromwell source and told him of this fact. After an appropriate "Oh, shit", he asked that she not publish the materials. She declined. He asked that she not reveal his identity. She agreed. Indeed, as she was to testify, he had had a background or confidential source status with her in many prior conversations.

He testified that the conversation above never took place, that he did not know until asked by his partners about a messenger record of his delivery to Ms. Himmelstein that the documents were under seal, and that he had never sought nor received confidential status from Ms. Himmelstein. He took those positions, despite telephone records that support Ms. Himmelstein on the fact of the telephone call, despite the fact that her extensive notes suggest that a number of things that he told her in previous conversations were background and given on a promise of confidentiality as to his identity, and despite the fact that he was identified only after the case had become a nationally publicized matter, a fact to which he pled utter ignorance.

Ms. Himmelstein discovered, after the litigation over the prior restraint began, that the Ohio shield law does not by its terms protect magazine reporters. And the Sixth Circuit has not been hospitable to the argument that federal constitutional law supports a reporters privilege.

In order to maintain the confidentiality she thought that she had promised her source, she relied on the New York shield statute. To do that, she had to testify that her source was in New York. According to the court, it was the day after her testimony that it was learned that the lawyer-source was Stephen Holley, an extraordinarily successful litigation partner at Sullivan & Cromwell.

Ms. Himmelstein has received some criticism for identifying her source's location as New York. It has been suggested that this led Sullivan & Cromwell to begin to search its records to determine if the source was within its walls. One has to wonder why it didn't occur to the firm to do so before her testimony, and perhaps they had already begun such a search.

But more disturbing are the limits that one finds in state shield statutes. Twenty-eight states and the District of Columbia have statutory shield laws.

As evidenced in the *McGraw-Hill* case, state shield law protection may not be as complete as you might believe. For instance, the Ohio statute involved in the *McGraw-Hill* case which is directed towards "reporters" only provides protection to persons "engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news," thus leaving magazine and other periodicals without protection under the law. OH ST Sec. 2739.12. In fact, in *Deltec, Inc. v. Dun & Bradstreet, Inc.*, 187 F.Supp. 788 (D.C. Ohio 1960), the court specifically held that the protection afforded by Sec. 2739.12 applies only to newspapers and not to periodicals.

In addition, the shield laws of Alabama and Kentucky seem to suffer from a similar deficiency. Alabama's law only extends protection to those "engaged in, connected with or employed on any newspaper, radio broadcasting station or television station," which again does not by its specific terms include magazines or other periodicals. AL ST Sec. 12-21-142. Likewise, the language of the Kentucky law, which protects disclosure of sources for material "published in a newspaper or by a radio or television broadcasting station," also seems to leave magazines and other periodicals outside the protection of the law.

The shield law of Arkansas, on the other hand, does include periodicals within the protection afforded to "any newspaper, periodical, or radio station." AR ST Sec. 16-85-510. Unfortunately, the law does not seem to provide any protection for members of the television news media.

Statutes:

OH ST Sec.2739.12 (does not apply to magazines or other periodicals)

AL ST Sec. 12-21-142 (does not include magazines or periodicals within its protection)

KY ST Sec. 421.100 (does not include magazines or periodicals within its protection)

AR ST Sec. 16-85-510 (does not include television within its protection)

DID YOU MISS THE PRIOR RESTRAINT IN HOUMA, LA?

The Wall Street Journal, October 11, 1995, reported on a prior restraint in Houma, Louisiana. A local television station, having obtained with a FOIA request videotape of 4 black students assaulting a white student, had the tape confiscated on the day of intended air by the local prosecutor. The article suggests, correctly, that the seizure was undoubtedly unconstitutional. The station owner, surprised by the arrival of senior officials from the prosecutor's office with a subpoena in their hands, turned the tape over to them without an initial fight.

The tape was the product of a security camera aboard a school bus. It showed the assailants approaching the victim on the bus and assaulting him brutally, one beating him with a broomstick. The prosecutor, in what he characterized as a mistake, plea bargained with the assailants to a misdemeanor each. The judge was unaware of the videotape until the father of the victim brought it to his attention. The judge was outraged. The result was that the prosecutor is in the process of trying to re-charge the assailant who wielded the broom.

The sheriff's office, unaware of the re-charge, gave over the videotape to the station at its request.

The prosecutor's rationale for the subpoena, expressed in his court papers as he did not agree to talk to the Wall Street Journal, twofold. One, he contended that he has an obligation to ensure a fair trial. Two, he contended that broadcasting this type of senseless, seemingly racially based, violence would be a "reckless, insensitive, and highly dangerous undertaking." According to the Jounal article, many educators in the town agree. They are afraid that viewing the tape will further incite racial violence and exacerbate racial tensions among the students of the town.

VICTOR KOVNER AND LAURA HANDMAN WILL BE SPEAKING ABOUT THE McGRAW-HILL LITIGATION AT THE DCS ANNUAL MEETING AND BREAKFAST ON FRIDAY, NOVEMBER 10 at 7:00 A.M. -9:00. A.M.

COME AND DISCUSS THE DIFFERENT LEGAL AND STRATEGIC ISSUES THIS CASE HAS RAISED.

A SIGN-UP FORM IS ENCLOSED WITH THIS MONTH'S LIBELLETTER.

Ohio Limits Negligent Infliction of Emotional Distress

The Supreme Court of Ohio has recently held that "Ohio does not recognize a cause of action for negligent infliction of emotional distress where the distress is caused by the plaintiff's fear of a nonexistent physical peril." *Heiner v. Moretuzzo*, 73 Ohio St.3d 80, 87, 652 N.E.2d 664, 670 (Ohio Sup. Ct. 1995). In 1983, the Ohio Court had reversed the historical requirement for the tort by a contemporaneous physical injury. With the ruling in *Heiner* the court effectively limited recovery for negligent infliction of emotional distress to "instances where the plaintiff has either witnessed or experienced a dangerous accident or appreciated the actual physical peril." *Heiner*, 652 N.E.2d at 669, *citing Paugh v. Hanks*, 451 N.E.2d 759 (1983); *and Criswell v. Brentwood Hospital*, 551 N.E.2d 1315.

Although the Supreme Court of Ohio had held in *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109 (1983), that a plaintiff could state a cause of action for negligent infliction of emotional distress without proof of a contemporaneous physical injury, the recent decision makes clear that there must at least be "cognizance of a real danger" before the plaintiff can recover. *Heiner* at 669.

In contrast to the line of Ohio cases approving recovery for negligent infliction of emotional distress involving bystanders or victims of accidents, the case before the court was based on the claim that the plaintiff had negligently been misdiagnosed as HIV positive by a physician. In this instance the court stated that since the plaintiff was, in fact, not HIV positive, she "never faced an actual physical peril as a result of [the physician's] alleged negligence." *Heiner* at 671. Therefore the serious emotional injuries suffered by the plaintiff, which the court did not dispute, were "caused by the plaintiff's fear of a nonexistent physical peril," for which there is no recovery under Ohio law. *Heiner* at 670.

NAA/NAB/LDRC CONFERENCE , SEPTEMBER 20-22, 1995

The biennial NAA/NAB/LDRC Conference for media defense attorneys was held in Tyson Corners, Virginia on September 20-22, 1995. Several hundred attorneys attended an extraordinary two days and two nights of presentations, panels, and break-out/workshop groups. The content of the organized activities was designed to challenge and stimulate discussions and ideas from the sophisticated attendees; to allow the counsel there to share material with one another, as well as with the panelists and presenters.

The opening dinner on September 21 featured a panel of Bert Lance, George Stephanopoulos, Geraldine Ferraro, William Safire, Jonathan Alter, Nina Tottenberg and Tim Russert, using the device of hypotheticals to weave in and out of their own experience with libel and privacy laws and journalism. Too difficult for public officials or figures to win a libel claim was the concensus from the public figures and officials on the panel; too time-consuming, too expensive, too little possiblity of success. But how these experienced Washington press representatives manage the difficult journalistic issues, and how these experienced Washington figures manage the difficult political issues made for compelling discussion. Laura Handman and George Freeman were chairs of that panel.

Thursday night's keynote speaker was Judge Abner Mikva. Having retired as Chief Judge of the D.C. Circuit last year to take the position of Cousel to President Clinton, and having served five times in the U.S. House of Representatives prior to his appointment to the bench by President Carter in 1979, Judge Mikva provided a unique view of all three branches of government. On an evening in which McGraw-Hill was in the middle of an evidentiary hearing on the prior restraint against it, Judge Mikva took the view that virtually no documents should be permitted to be sealed in litigation in the federal court system. He stated that one of the greatest subsidies provided by government to American business was the court system, a free-of-charge dispute resolution system. But with its use should come a presumption of openness, with public access to all materials exchanged in the litigation. Judge Mikva's view was that parties

The keynote breakfast speaker on Thursday morning was Elena Kagan, associate counsel to President Clinton and currently on leave from the University of Chicago, where she is a professor of law.

Professor Kagan lectured on the relationship between existing law and speech in "cyberspace," which emerged as one of the dominant themes of the meeting. She noted that the traditional assumption underlying First Amendment protections for speech — namely the belief that the correct forum for settling disputes on matters of public concern is the marketplace of ideas and not a courtroom — is perhaps nowhere more appropriate than in cyberspace, where one has the ability to speak directly to a wide audience without the capital outlays necessary to speak using more traditional media.

The Thursday lunch was given over to a discussion of UK libel law, with eloquent and humorous commentary provided by Queen's Council Geoffrey Robertson and Solicitor Mark Stephens. The panel was co-chaired by Robin Bierstedt, of Time Inc., Samuel Klein, of Dechert, Price, and Rhoads, and Robert Sack, of Gibson, Dunn, & Crutcher.

Two sessions were devoted to "Old Torts and New Technology." The morning session offered an overview of the new technology. Co-chair David Kohler, of CNN, provided a vivid and humorous demonstration of the use of hidden camera technology by playing a videotape of his conversations with conference attendees at the previous evening's cocktail party, captured without their knowledge by a colleague's "scarf cam." The featured speaker was John Walsh, of Cadwallader Wickersham & Taft, a well-known and successful plaintiff's attorney. He reviewed recent cases resulting from the use of new technology, involving claims for eavesdropping, intrusion, trespass, and intentional and negligent infliction of emotional distress. Co-chairing the session were Michael Sullivan of Ross, Dixon & Massback, and Barbara Wartelle Wall of Gannett Co.

The afternoon session focused on counseling media clients on the strategies and potential liabilities of such areas as "ride-alongs," surreptitious recording, and other newsgathering torts. Speakers included John Zucker of Capital Cities/ABC, Jonathan Buchan of Smith Helms Mulliss & Moore, Jonathan Hart of Dow, Lohnes & Albertson, and Anne Egerton of NBC. A focus of the panel was on the practical means by which clients may be able to accomplish journalistic goals with less potential for liability. A session on "docudramas," chaired by Ronald Guttman, of Christensen, White, Miller, Fink & Jacobs, and Andrea Pollack, of Home Box office, was held over lunch on Friday. Elizabeth Allen, of Metromedia, and R. James George, Jr., of George, Donaldson, & Ford were the featured speakers. The panel participants discussed among other things, the sometimes hard to predict nature of claims in the non-traditional formats. The session included scenes from a docudrama on the "Texas cheerleader" story (in which one cheerleader's mother attempted to have her daughter's rival murdered), which led to suits for right of publicity by tangential characters in the story; and the rebroadcast of the "Texas tower" show, which led to a false light suit by one of the policemen featured, who claimed that he was portrayed as cowardly and indecisive; ironic because the original broadcast had led to a suit by the other officer, who claimed among other things that he was portrayed as too brave.

A Friday morning breakfast session on "Torts in Cyberspace" addressed the increased potential for liability in the rapidly expanding frontier of "cyberspace." Panelists included Robert Hamilton, of Jones, Day, Reavis & Pogue, who successfully represented CompuServe in *Cubby, Inc. v. CompuServe Inc.*; Jacob Zamansky, of Singer Bienenstock Zamansky Ogel, who is representing the plaintiff in *Stratton Oakmont v. Prodigy Services Co.*; and Ellen Kirsh, general counsel of America On-Line. The session was co-chaired by

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LIBEL CONFERENCE

(Continued from page 19)

Gail Lione, of U.S. News & World Report; Robert Hoemeke, of Lewis, Rice & Fingersh; and Barbara Wartelle Wall, of Gannett Co. Ellen Kirsch arranged for a giant screen entry into America On-Line, demonstrating the types of bulletin boards and other communications vehicles available to subscribers.

The heightened exposure of online providers to potential liability becomes apparent if one couples the vast audience in cyberspace with the essentially impossible task of screening the literally millions of messages daily. The panelists discussed not only the distinctions and similarities between *Cubby, Inc.* and *Stratton Oakmont*, as a matter of law and of facts, but the obvious risks attendant to efforts to monitor or exercise editorial control over the content of messages left on an on-line service. In addition to practical suggestions and discussion of how to manage material on on-line services, the panelists analyzed contract clauses between on-line service providers and content providers or bulletin board leaders.

The **Trial Tales** session was chaired by Tom Kelley, of Faegre & Benson, and featured Sandy Bohrer, of Holland & Knight, Gary Bostwick, and David Freeman, of Wyche Burgess Freeman & Parham. The session offered inside looks at defense victories: one in the *Masson* retrial; one resulting from comments made by two sisters on a Sally Jesse Raphael show about their mother, who joined Scientology in her 60s. Also reviewed was one defense loss, in a suit resulting from inclusion of footage of a man being arrested for violating a curfew in his bar in a story on mass arrests of members of a notorious gang. Because of the gang's fearsome reputation the local community the plaintiff's business essentially collapsed within a brief period.

Gary Bostwick identified the different results between the trial and retrial of *Masson* as resting on a "makeover" of Janet Malcolm; a less dour and humorless jury; and the defense's ability to introduce additional damaging evidence from the taped interviews Malcolm did of Masson, the latter when Masson opened the issue by agreeing that Malcolm always chose the worst paraphrase of his words.

Although the court rejected the claim that the sisters in the Raphael case had a First Amendment right to tell their side of their mothers' story, the defendant's trial strategy of essentially "trying Scientology up and down the courtroom" was successful. Introducing excerpts from the mother's diary, the defense focused on the pervasive control exercised by the Scientologists, and its destructive impact, in breaking the most basic of bonds, that between mother and child.

In between meals and mealtime speakers, and the various panels, the attendees worked through hypotheticals and shared strategies in six breakout/workshop groups. Each group participated in a workshop on "Prepublication and Prebroadcast Review," "Pre-Trial Strategies," and "Trial Strategies." The Reporters' summaries of the proceedings of two of those groups are included with this month's *LDRC LibelLetter*. For those of you who did not attend the Conference, these summaries should offer you some of the ideas discussed at the Conference groups. For those of you who did attend, you may wish to put the summaries into your binders at the appropriate section.

Tapes of all sessions are available from ACTS, Inc., 14153 Clayton Road, Town & Country, MO 63017; (800) 642-2287.

TO ALL WHO PARTICIPATED IN THE NAA/NAB/LDRC CONFERENCE: THANK YOU!

Thank you to all of the chairpeople. Thank you to all of the panelists, workshop moderators, and reporters. And thank you to all LDRC members who came and participated in the proceedings. This Conference is a participatory one. This Conference works, and it does indeed work very well, because all of you who came and shared strategies, ideas, and often hard-won learning.

Obviously a particular thank-you to Terry Adamson and Dan Waggoner, the two chairs of the Conference. And to their committee members, many of whom put together panels, found speakers and served as moderators.

Stratton Oakmont v. Prodigy Settled

The *New York Times* reported this morning that in return for a statement from Prodigy that it is sorry if statements posted on one of its bulletin boards had injured it, Stratton Oakmont, Inc. and its president had agreed to drop their $200 million libel suit against Prodigy.

Stratton Oakmont plaintiffs also agreed that they would not oppose Prodigy's motion for Justice Ain to set aside his earlier decision, in which he held that Prodigy could be held liable as a publisher for statements made on its on-line service. *See, LDRC LibelLetter, June 1995, p. 1.* That agreement from the plaintiffs does not, however, guarantee that the judge will vacate or reverse his original decision.

According to the report, Prodigy had planned to raise truth as a defense to the action and had sought documents from the Securities and Exchange Commission regarding a prior investigation into the plaintiff's practices. The settlement effectively ended discovery and prevented the confidential S.E.C. report from entering the public record.

According to Stratton Oakmont's attorney, Jacob Zamansky, "We got what we wanted, which was an apology." He also expressed satisfaction that the suit had increased public awareness as to the dangers of defamation in cyberspace and the need for on-line services to evaluate the extent of their responsibility for defamation on-line.

Prodigy's attorney, Martin Garbus, claimed that Prodigy's statement was not an apology in the sense of accepting respsonsibility for the allegedly defamatory statement but rather an indication that it was sorry that Stratton Oakmont was hurt by the statement. The statement read:

"Prodigy is sorry if the offensive statements concerning Stratton and Mr. Porush, which were posted on Prodigy's Money Talk bulletin board by an unauthorized and unidentified individual, in any way caused injury to their reputation."

The suit arose out of statements put on Prodigy bulletin board "Money Talk" by an as-yet still anonymous individual with access to the Prodigy system. After limited expedited discovery, the plaintiffs moved for partial summary judgment on the issues of (1) whether Prodigy was a "publisher" of the allegedly libelous statements; and (2) whether the Board Leader in charge of "Money Talk" acted as Prodigy's agent for purposes of the suit. The court's ruling in May 1995 granted summary judgment in favor of the plaintiffs on both points.

The judge distinguished the Prodigy case from the leading case of *Cubby, Inc. v. CompuServe Inc.*, 776 F.Supp 135 (S.D.N.Y. 1991), by finding that Prodigy had assumed control over the content of its bulletin boards by, among other things, utilizing a software that screened for offensive language and Board Leaders, whose duties included enforcing content guidelines and operating an "emergency delete function" capable of removing objectionable user postings from the service.

The court also found, contrary to Prodigy's argument and factual presentation, that the Board Leaders operated, not as independent contractors, but under the supervision and control of the on-line service.