

# LDRC

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## LIBELLETTER

Reporting Developments Through October 22, 1999

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### **Fourth Circuit Reduces Damages in *Food Lion* to \$2**

By Paul M. Smith and Nathan Siegel

On October 20, 1999, the U.S. Court of Appeals for the Fourth Circuit issued its long-awaited decision in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, involving claims of fraud, trespass, and breach of the duty of loyalty based on ABC's undercover investigation into sanitary practices in a grocery chain. The decision, while not 100 percent favorable to the press, should send a clear message that generic torts should not be bent out of shape to punish controversial newsgathering conduct and that non-defamation claims cannot be used to bypass the protections of *New York Times v. Sullivan*

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## Fourth Cir. Reduces *Food Lion* Damages

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and recover compensation for the reputational impact of a news story that is not attacked as untrue.

Applying state law, the Fourth Circuit reversed the judgment to the extent it awarded compensatory and punitive damages for fraud, but the court affirmed (in the face of state law and First Amendment challenges) the district court's award of nominal damages based on the plaintiff's trespass and duty of loyalty theories. Finally, the court of appeals agreed with the district court that "broadcast damages" should not be awarded.

### *Proceedings Below*

In *Food Lion*, ABC reporters had posed as applicants for unskilled grocery store jobs, using falsified information about their employment backgrounds, and when hired brought hidden cameras into stores to film conditions and practices while they worked. The resulting story on *Prime Time Live*, based not only on the filming but also on eyewitness reports from dozens of present and former employees, was highly unfavorable to Food Lion.

But instead of claiming libel, Food Lion asserted a variety of tort claims aimed at the newsgathering practices employed by ABC. A North Carolina jury ultimately awarded \$1400 in compensatory damages for the reporters' resume fraud, nominal damages for trespass and breach of an employee's "duty of loyalty," and \$5.5 million in punitive damages on the fraud claim.

Based on the jury's verdict, the court also held the defendants liable under the North Carolina Unfair Trade Practices Act (UTPA), but then required Food Lion to elect its fraud claim and the statutory claim, and Food Lion chose the former.

The district court did not allow the jury to consider awarding Food Lion compensatory damages for injuries caused by the information in the broadcast itself, reasoning that those injuries were proximately caused not by the newsgathering conduct of ABC but

by the food-handling practices of Food Lion. After trial, the court also issued a remittitur of the punitive damages to \$315,000, which Food Lion accepted.

Both sides then appealed, with Food Lion contesting its liability on the tort claims on state law and constitutional grounds and Food Lion arguing that it should have been allowed to recover "broadcast damages."

### *Arguments in the Court of Appeals*

ABC's briefs in the Fourth Circuit focused first on arguments that, under state law, Food Lion had not proved the torts it had asserted. With respect to fraud, the argument was that "injury" is an essential element and that Food Lion's claims of injury from the falsified job applications — based on the wages paid the reporters as well as the costs of training replacements after they left — were not cognizable.

As for trespass, ABC argued that Food Lion gave consent for these two employees to enter its property, and that the consent was not negated because of the misrepresentations in the job applications or because of the investigative conduct of the reporters. ABC further argued that the "duty of loyalty" owed by these employees to Food Lion was not breached by their investigation into unsanitary practices in the workplace. Finally, ABC argued that the conduct shown here is not the type of anti-consumer or anti-competitive conduct barred by the North Carolina UTPA.

In making these state law arguments, ABC urged the Fourth Circuit to follow clear state policies of avoiding interpretations of state tort law that would create tensions with the First Amendment. It went on to argue that the district court had erred in citing the Supreme Court's ruling *Cohen v. Cowles Media* as a basis for refusing to accord any form of heightened First Amendment scrutiny to Food Lion's supposedly "generally applicable" tort claims.

First, ABC urged that *Cowles* cannot be applied to a case where tort law is being expanded in a case against the press to cover a given type of conduct for

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## Fourth Cir. Reduces *Food Lion* Damages

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the first time, because of the danger that the press is being "singled out." Second, ABC argued that *Cowles* should not be read to eliminate at least "intermediate" scrutiny in cases where application of a law regulating conduct has an substantial, albeit "incidental," impact on expression.

ABC went on to argue that, at a minimum, the punitive damages should be reduced under the First Amendment, because the jury had been asked to punish investigative journalism, not just specific tortious conduct.

Food Lion responded that its tort theories were well established under state law and that substantial evidence supported the jury's findings of liability. It relied on *Cowles* in response to the First Amendment defense to liability, denying that the press was being "singled out" in any way. Finally, Food Lion cross-appealed, seeking "broadcast damages." It argued that the district court erred in determining, as a matter of law, that the broadcast of the hidden-camera tapes, and the injury to Food Lion's business caused thereby, were not the proximate result of ABC's tortious conduct.

ABC argued, in reply, that the district court was correct because the effect of awarding broadcast damages for these newsgathering torts would be to compensate a wrongdoer for the revelation of its own misconduct. Moreover, ABC argued that, under the First Amendment as construed by the Supreme Court in such cases as *New York Times v. Sullivan* and *Hustler Magazine v. Falwell*, broadcast damages would constitute compensation for reputational injury and thus could not be awarded without a showing of falsity and actual malice.

### *Fourth Circuit on the State Law Rulings*

A panel of the Fourth Circuit, in an opinion written by Judge Michael, affirmed in part and reversed in part. In a key portion of its decision on

which the panel was split 2-1, the court reversed the fraud judgment on state law grounds, finding insufficient evidence of "injury" to Food Lion. The majority pointed out that these were high-turnover "at will" positions; indeed, the job application stated that either party could terminate the employment relationship at any time. Moreover, the reporters made no representations as to how long they would stay in the jobs. As a result, the court held, Food Lion's claim of injury based on the administrative costs of replacing two employees who worked for only a week or two "is simply inconsistent with the at-will employment doctrine" that prevails in North Carolina and South Carolina — a doctrine under which "Food Lion could not reasonably rely on the sort of misrepresentations (about background, experience, etc.) made by the reporters to conclude that they would work for any extended period."

The majority also rejected Food Lion's other injury claim — based on the wages paid — on the ground that the evidence showed the reporters were fully satisfactory new employees who provided services in return for the wages.

The effect of the reversal of the fraud judgment was to eliminate any liability for compensatory damages above \$2, as well as any liability for punitive damages.

Judge Niemeyer, in dissent on this point, argued that Food Lion was injured because the reporters impliedly misrepresented for their "potential for staying at Food Lion" and their "loyalty" to Food Lion.

A unanimous court went on hold that the UTPA claim was invalid but also upheld liability for breach of the duty of loyalty and trespass. It acknowledged that the existing case law analyzing an employee's "duty of loyalty" had based liability on actions categorically different for those present here — employees competing against their employers, misappropriating their property or business opportunities, or breaching their confidence. But the court predicted that the state courts would find

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## Fourth Cir. Reduces *Food Lion* Damages

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liability for the conduct at issue, because the reporters, when investigating while working, were attempting to serve two masters — ABC and Food Lion — whose interests were “diametrically opposed.”

The court also upheld the trespass judgment. In so doing, it rejected the argument that the reporters’ misrepresentations rendered Food Lion’s consent to enter the property void from the outset. On this point, the Fourth Circuit said it “like[d]” the “thoughtful analysis” of the Seventh Circuit’s 1995 decision in *Desnick v. American Broadcasting Cos.* — which rejected a trespass claim in a case involving reporters posing as potential patients in an eye clinic. Relying on *Desnick*, the court concluded that it would make no sense to transform a claim of resume fraud into a claim for trespass, merely because an employee must enter property to perform a job. Such a rule, the court recognized, “would not be protecting the interest underlying the tort of trespass — the ownership and peaceable possession of land.”

The court held, however, that the trespass judgment could be upheld on the theory that the reporters exceeded the scope of Food Lion’s consent by committing the tort of breach of the duty of loyalty while on Food Lion’s property. The interests underlying trespass, the court held, are served by a rule “that consent to enter is vitiated by a wrongful act that exceeds and abuses the privilege of entry.”

### First Amendment Rulings:

#### On Liability

The Fourth Circuit went to reject ABC’s arguments for heightened First Amendment scrutiny of Food Lion’s tort claims — scrutiny that would allow some form of weighing of the state interests supporting those claims and the countervailing interests served by the kind of investigative journalism exemplified by this case. The court of appeals held that *Cohen v. Cowles Media* was directly applicable to the trespass and duty of loyalty claims, because, like the promissory estoppel

claim in that case, these tort theories do not target or single out the press and they govern “the daily transactions of the citizens of North and South Carolina.”

The court added:

If, for example, an employee of a competing grocery chain hired on with Food Lion and videotaped damaging information in Food Lion’s non-public areas for later disclosure to the public, these tort laws would apply with the same force as they do against [the reporters] here. Nor do we believe that applying these laws against the media will have more than an “incidental effect” on newsgathering.

(Citing *Cowles*).

The court recognized that the Supreme Court had been less than fully consistent in withholding heightened scrutiny of “generally applicable” laws that incidentally burden expression — notably in *Barnes v. Glen Theatre, Inc.*, a nude dancing case decided almost the same day as *Cowles*. But the Fourth Circuit harmonized these cases on the ground that the burdened conduct at issue in Food Lion was not itself expressive; it was mere newsgathering.

#### On Damages

The news was better for the press when the court of appeals turned to the issue of broadcast damages. There, the court bypassed the issue of proximate cause and issued a ringing holding that the First Amendment bars any attempt to “recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim.” It affirmed that “such an end-run around First Amendment strictures is foreclosed by” *Hustler Magazine v. Falwell*.

*Hustler*, of course, involved a satirical and arguably offensive cartoon, which prompted Falwell to bring a claim of intentional infliction of emotional distress. The Supreme Court held that such a claim seeks recovery for the impact of the publication, and that the plaintiff therefore had an obligation to prove falsity and actual malice under *New York Times v. Sullivan*.

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### Fourth Cir. Reduces *Food Lion* Damages

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The Fourth Circuit rejected Food Lion's argument that *Cowles*, not *Hustler*, was controlling on the issue of broadcast damages. It noted that the Supreme Court in *Cowles* had emphasized that the plaintiff was not seeking damages for injury to reputation, whereas Food Lion, "in seeking compensation for matters such as loss of good will and lost sales, [was] claiming reputational damages from publication." The court also rejected the argument that the videotapes were obtained "illegally" — *i.e.*, tortiously — and that their subsequent use could therefore be attacked without satisfying the *Sullivan* standards.

#### *The Future*

It is to be hoped that Food Lion's experience will cause others to think twice before they rush into court and attack newsgathering in an effort to respond to a negative story they cannot attack directly. The lawsuit, after all, has kept the story alive for years, and resulted, at this point, in a recovery of \$2. Perhaps most importantly, in the wake of *Food Lion*, it is now clearer than ever that newsgathering conduct cannot be an excuse for allowing recovery of damages for reputational injury — where the information causing the injury has not been shown to be untrue and where the applicable standard of care ("actual malice" or at least negligence) has not been met.

*Paul M. Smith is a partner in the D.C. office of Jenner & Block, which represented the defendants in the Food Lion case on appeal. Nathan Siegel is a litigation counsel with ABC who was co-counsel for the defendants in the trial court and on appeal.*

### Video Suit Against CBS: *Fraud, Trespass and Defamation Claims*

As we were going to press with this issue of the *LDRC LibelLetter*, an opinion came down granting CBS's motion to dismiss in part on issues of fraud and trespass and denying it in part on the trespass and defamation claims in the federal district court for the Southern District of New York in *La Luna Enterprises v. CBS*, (98 Civ. 5852 (RLC) 10/20/99). Below is a quick summary. A longer piece on the decision will appear next month.

At issue was footage shot by CBS at the La Luna Restaurant in Miami Beach, Florida. Plaintiff, a Russian restaurant that apparently caters to the Russian community in Miami, alleges that CBS News asked and was granted permission to shoot in the restaurant for a report on Miami Beach tourism. The footage ended up, however, in a report on the threat of violence posed by the new Russian mob in the United States. Plaintiff is never mentioned by name in the report. It serves as background for voice overs, the opening one of which notes the concerns law enforcement have about the criminal side of Russian immigration.

Working through both "of and concerning" and defamatory implication issues, the court denies the motion to dismiss — recognizing, at least with respect to the latter issue that "this is a close call." Slip op. at 12.

The fraud claim is dismissed because the court recognized it as an attempt to obtain reputational harm damages, the result of the broadcast of the tape, without proving the requirements of defamation. The court engages in a worthy (and what will undoubtedly be well cited) discussion of why this attempt at an end run around the libel law is impermissible.

Similarly, the court rejects the plaintiff's effort to obtain publication/reputation damages based upon a trespass claim. Because Florida law (the law the court earlier in the opinion determined governs the case) allows a claim for nominal damages in trespass, the claim is allowed to proceed on that basis.



### A NOTE ABOUT FOOD LION

The decision, as Paul Smith and Nathan Siegel rightly note, is a mixed one for the media. On one hand, to be sure, is the court's strong support for the principle that the First Amendment simply does not allow damages to reputation or similar defamation-like awards that are based upon the response to the publication of material unless the plaintiff meets the strict requirements of libel. There are to be no "end-runs" around the requirements of the libel law.

But the court rejects the application of First Amendment principles to issues of liability. The court's decision does not rule it out in other cases; it just finds it inapplicable here.

And the media bar should put a pin into the issue of punitive damages. It should be noted that the relevant state law in this case, North and South Carolina, did not allow punitive damages for trespass. The only punitive damage award in the case was on the claim for fraud, which was dismissed when the Fourth Circuit dismissed the underlying claim. Keep an eye out for states in which the local law allows for punitive damages on such state law claims. The press, for a variety of good and sound reasons, including that the facts of the individual cases have not justified such awards, has generally not be subject to punitive damages in the recent undercover/investigative reporting litigations. It is not a matter, however, that we should ever take for granted.

LDRC will be reporting on a number of the recent newsgathering cases in our last LDRC BULLETIN for this year and, of course, for this decade. We are gathering in essays from many notable lawyers and scholars on issues that have seen dramatic legal developments in the decade of the 1990's. The topics include the litigation of newsgathering claims, looked at from three different angles; ride-alongs; opinion and implication in libel cases; the law of reporters privilege (federal and state); and commercial speech. The first half of this decade-ending LDRC BULLETIN will be published within the next few weeks. The second half — and this issue of the LDRC BULLETIN demands two halves — will be published later in November.

### NOTICE OF ANNUAL MEETING

The Annual Meeting of the *Media Membership* of the Libel Defense Resource Center, Inc. will be held at:

5:00 pm  
Wednesday, November 10, 1999  
at the  
Sheraton New York Hotel.  
811 Seventh Avenue  
at 52nd Street  
Executive Conference Center  
Conference Room C

**Please note:** The Sheraton is a new location for the meeting.

**Media Members:** Enclosed please find the agenda for this year's meeting as well as a proxy statement that must be signed and returned to LDRC if you do not plan to attend the meeting.

LDRC, Inc.'s corporate by-laws require one-third of the media membership to attend the annual meeting in person or by proxy in order to validate the meeting and the elections. Therefore, if you do not plan to attend, please return the enclosed proxy form to.

*We look forward to seeing you on November 10.*

## D.C. Circuit Allows Wiretap Dissemination Case to Proceed Offers Troubling Answer to Question Left Open in *Florida Star*

By Adam Liptak

In late September, the Court of Appeals for the District of Columbia Circuit offered a partial answer to one of the last fundamental questions of First Amendment press jurisprudence, a question left open by the Supreme Court in the Pentagon Papers case and in *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 16 Media L. Rep. 1801 (1989): may one be punished for the dissemination of accurate and newsworthy information passively received from a source who obtained it unlawfully? The answer, according to a badly fractured court, is yes, at least where the dissemination being punished is to the press as opposed to publication in the press. *Boehner v. McDermott*, No. 987156A (D.C. Cir. Sept. 24, 1999).

### *The Illegal Tape*

The litigants are two Congressmen. Representative John A. Boehner, an Ohio Republican, sued Representative Jim McDermott, a Washington Democrat, for disclosing to *The New York Times*, *The Atlanta Journal-Constitution* and *Roll Call* a tape or transcript of a conference call illegally taped by a Florida couple. Rep. McDermott has not been accused of involvement in the illegal taping or of having done more than passively receiving the information from the couple and then distributing it to the press.

The conference call involved Rep. Boehner and a number of House Republicans and included a discussion of the House Ethics Committee's investigation of the then Speaker of the House, Newt Gingrich. *The Times* published an account of the call and a partial verbatim transcript on its front page.

The Florida couple pleaded guilty to violating an aspect of the Electronic Communications Privacy Act prohibiting the interception of electronic communications. They were fined \$500 each. The Justice Department conducted an investigation that included contacting the newspapers in question, but it took no further action against the papers or their source

or sources. *The Times* described its source as "a Democratic Congressman hostile to Mr. Gingrich." Rep. McDermott has not said whether he was the source.

The federal statute makes criminal and allows civil suits for not only the *interception* of electronic communications but also the *disclosure* of the contents of such communication where one knows or has reason to know of their unlawful interception. It does not punish the *receipt* of such communications. Rep. Boehner sued, for \$10,000 and punitive damages, on the theory that Rep. McDermott had violated the prohibition against disclosure.

### *Florida Star's Open Question*

Rep. McDermott moved to dismiss the complaint on essentially the same grounds advanced by the press in *Peavey v. Harmon*, 37 F. Supp. 2d 495 (N.D. Tex. 1999) (on appeal sub nom. *Peavy v. WFAA, Inc.* to the Fifth Circuit); *Bartnicki v. Vopper*, No. 98-7156 (decision pending in Third Circuit); and *Keller v. Aymond*, 722 So. 2d 1224 (La. Ct. App. 1998) (petition for certiorari sub nom. *Central Newspapers, Inc. v. Johnson* pending in the U.S. Supreme Court). All involve claims against the media for publication of similar wiretap materials.

He argued that allowing punishment of truthful and newsworthy information in these circumstances runs afoul of the First Amendment under *Smith v. Daily Mail*, 443 U.S. 97 (1979) and *Florida Star*, which hold that the publication of truthful information about a matter of public significance may not be punished absent a need to further a state interest of the highest order. There is little doubt that this principle, if applicable here, concludes the lawsuit against Rep. McDermott.

*Florida Star* does contain an intriguing footnote, though. It says that this principle "does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or a source, government may punish not only the unlawful acquisition, but the ensuing publication as well." 16 Media L. Rep. at 1806 n. 8.

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## D.C. Circuit Allows Wiretap Case to Proceed

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The district court granted the motion to dismiss. It held that Rep. McDermott had not “unlawfully obtained” the communication because only interception and disclosure, not receipt, were prohibited by the statute. The court called this a “loophole,” opining that its availability “not only defends, but even encourages, the circumnavigation of wiretap statutes.” Having accepted the existence of the “loophole,” however reluctantly, the court had little difficulty in finding that Rep. Boehner could not overcome the strict scrutiny required by *Florida Star*.

The appeal made for some strange bedfellows. The Clinton Justice Department supported the plaintiff, a Republican Congressman, and argued that only intermediate scrutiny was required. The dissenting judge, David Sentelle, is thought by many to be an arch conservative; he supported the Democratic Congressman and, by implication, the press. Only the press acted predictably: four newspaper publishers and the Reporters Committee for Freedom of the Press, represented by Ted Boutros and Seth Stodder of Gibson, Dunn and Crutcher, weighed in on the side of the supposed source.

### *Judge Randolph for the Court*

Judge Randolph wrote the opinion for the court. It was premised on a surprising distinction not argued to him by any party or *amicus* and not adopted by either his concurring or dissenting colleague. What Rep. McDermott did, in providing copies of the tape to newspapers, Judge Randolph wrote, was conduct and not speech. For this reason, the *Florida Star* principle was not triggered and thus the wiretap statute, as applied, survived the default intermediate scrutiny.

This interesting reasoning allowed Judge Randolph to leave open the question of whether the press could be punished for publishing wiretap communications it knew to have been unlawfully obtained by a source. (He also helpfully left open the question of whether “someone further down the chain” than Rep. McDermott, at the

point where “the taint of illegality was sufficiently dissipated,” might have separate defenses.) He returned over and over to the theme that the press is differently situated from sources but seemed unable to say where this distinction leads, so that at best the decision leaves the question in the *Florida Star* footnote open at least as regards the press.

### *Ginsburg’s Concurrence*

Judge Ginsburg, concurring in the judgment and in the less novel portions of Judge Randolph’s opinion, had less to struggle with. He had no trouble, even assuming that Rep. McDermott’s dissemination was speech and even assuming that the *Florida Star* principle applied as a general matter, in holding that Rep. McDermott was not entitled to its benefits because his acquisition of the information had not been lawful. (Judge Randolph made this same point; oddly, Judge Ginsburg failed to concur with that portion of Judge Randolph’s opinion.)

There is no support in the wiretap statute for this proposition. Judge Ginsburg looked to general principles of criminal law to conclude that “one who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not ‘lawfully obtained’ that information in any meaningful sense.” The disclosure to McDermott by the Martins was unlawful under the Wiretap Act and McDermott knew that it was unlawful. The fact that the law did not punish receipt of the tapes, and therefore only the Martins’ side of the transaction was punishable, did not, in Judge Ginsburg’s analysis, modify the unlawful nature of the transaction.

This drove Judge Ginsburg to intermediate scrutiny, and he held that the statute passed that test. There is nothing in the words of Judge Ginsburg’s concurrence, and little in what he chose to concur with in Judge Randolph’s opinion, that can give the press any comfort. To the contrary, his analysis has more dangerous implications for the press than that of Judge Randolph.

### *Sentelle’s Dissent*

Judge Sentelle dissented. In brisk and

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**D.C. Circuit Allows Wiretap Case to Proceed**

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straightforward fashion, he held that the case fell squarely within *Florida Star* and, given this, the court was duty bound to offer an answer to the question left open by that case: "I think we must answer the question reserved in that decision, and I think we must answer it against the

burdening of publication." Judge Sentelle did touch and perhaps even rely on the point that, in this case at least, there was "a defect in the chain," in that the wiretap statute does not prohibit receipt. This "defect" is not present in

every statute prohibiting the dissemination of unlawfully conveyed information, and it would not be hard to remedy the "defect" in the wiretap statute through further legislation.

Judge Sentelle had no patience with Judge Randolph's distinctions — between newspapers and sources, between speech and conduct. The former, he wrote, would create a "publishing aristocracy nowhere suggested" in the First Amendment. The latter elevates form over substance: Rep. McDermott "could have provided the newspapers with all the tapes in Washington on a given day and incurred no liability but for the speech contained on the tapes."

The hard question, Judge Sentelle wrote, was whether Rep. McDermott had "unlawfully obtained" the wiretap materials, thereby taking him out of the *Florida Star* principle. Here Judge Sentelle reasoned backward from his rejection of Judge Randolph's distinction between the press and others. "I do not see," he wrote, "how we can draw a line today that would punish McDermott and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information from McDermott's releases and published

***"I do not see," Judge Sentelle wrote, "how we can draw a line today that would punish McDermott and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information from McDermott's releases and published it again."***

it again." Because Judge Sentelle was unwilling to impose such "an undifferentiated burden" on speech, he would have ruled for Rep. McDermott.

***The Fault Line in the Jurisprudence***

Two judges, then, confronted the reserved question in *Florida Star* squarely. Neither would have treated the press any differently from Rep. McDermott. But they did

answer the reserved question differently: Judge Ginsburg allowed punishment and Judge Sentelle would have rejected it.

Judge Randolph's muddled and tentative opinion for the court illuminates the fault line in contemporary press

jurisprudence. On one side of the line is essentially absolute protection for publication of the news. On the other side is significant, growing and even angry regulation of newsgathering. The reserved question in *Florida Star* straddles the fault line, in much the same way that the question of whether publication damages may be obtained on a newsgathering claim straddles the line. Either answer widens the divide. Judge Randolph is building where it's no longer sensible to build. His structure won't last.

In the short term, the press will be able to distinguish *Boehner v. McDermott* in the several pending cases raising the same issue in the press context. If you're a press lawyer, that's good. In the medium term, though, and for the same reasons, the *Boehner* case will arguably not present a split in the circuits if either *Peavey* or *Bartnicki* is decided in favor of the defendants. That's a pity, because the time has come for the Supreme Court to confront the lingering question of whether publication of the truth may be punished simply because it came to light through wrongdoing.

*Adam Liptak is Senior Counsel for The New York Times and is Chair of the LDRC LibelLetter Committee.*

## Peavy v. WFAA-TV: Pending Before the Fifth Circuit, Another Wiretap Case

In September, fifteen media entities and trade associations filed an amicus brief in support of A. H. Belo and its station, WFAA-TV, Inc. in Dallas, Texas, in *Peavy v. WFAA-TV, Inc.*, pending before the Fifth Circuit Court of Appeals (Nos. 99-10303, 99-10271), where at issue is the liability of the media for use of a tape of telephone conversations received from a source who unlawfully intercepted the calls.

Unlike *Boehner v. McDermott*, *Peavy* directly concerns whether plaintiffs may obtain damages under the federal Wiretap Act from the news media when the news media publishes or uses in newsgathering newsworthy information from an unlawful third-party recording of plaintiff's conversation. Also filing an amicus brief in the case, but on the side of the plaintiff, was the U.S. Department of Justice, which has now filed amicus support in three separate cases (*Peavy*, *Boehner* and *Bartnicki*, in the Fifth, D.C., and Third Circuits respectively) on the side of plaintiffs who would wish to hold accountable a party who receives and either uses or redistributes a tape of a telephone call that a third person(s) actually intercepted and taped.

As the report on the *Boehner* decision and the amicus brief in *Peavy* points out, this position by the plaintiffs and DOJ is a direct assault on the principles the Supreme Court laid out in the line of cases from *Cox* through *Florida Star*.

### *Peavy v. WFAA-TV: A Public Scandal*

Charles Harman, with the aid of a police scanner, intercepted conversations involving his neighbor Dan Peavy, a trustee of the Dallas Independent School District. In the conversations, Peavy made statements suggesting he was committing fraud upon the School District in his role as a trustee and used racial slurs to discuss other trustees. Harman provided the unlawfully-obtained recordings of the Peavy conversations to WFAA-TV, which concluded that the credible evidence of public corruption warranted investigation.

The station ultimately aired a three-part series

concerning Peavy's execution of his responsibilities as a trustee without mentioning or playing any of the tapes the station had received from Harman.

The District Court for the Northern District of Texas held, inter alia, that the First Amendment precluded imposition of liability on WFAA-TV for using in newsgathering newsworthy information obtained by the station through no unlawful behavior of its own. *Peavy v. Harman*, 37 F. Supp. 2d 495 (N.D. Tex. 1999). *Peavy* appealed.

As was the case in *Boehner*, the crux of the issue before the Fifth Circuit is whether it should apply strict or intermediate scrutiny in assessing the constitutionality of applying the Wiretap Act in these circumstances. In a line of cases culminating in *The Florida Star v. B. J. F.*, 491 U.S. 524 (1989), the Supreme Court has applied strict scrutiny to regulations which attempt to punish media publication of newsworthy information lawfully obtained by the news media, even in the presence of unlawful conduct by sources. See also *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Commonwealth of Va.*, 435 U.S. 829 (1978); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

A competing line of cases stands for the general proposition that only intermediate scrutiny need be applied to laws of general application which have incidental burdens on speech in some circumstances. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *United States v. O'Brien*, 391 U.S. 367 (1968). The author of the majority opinion in *Boehner* applied intermediate scrutiny in finding that the First Amendment did not proscribe liability there.

WFAA-TV is represented by Thomas Leatherbury, Michael Raiff, and Stacey Dore of Vinson & Elkins L.L.P. in Dallas. Cam DeVore and Jessica Goldman, of Davis Wright Tremaine LLP in Seattle, filed an amicus brief with the Fifth Circuit in support of WFAA-TV on behalf of a group of fifteen national and regional media amici.

## Levan's Libel Win Over ABC Reversed \$10 Million Award Undone

Finding insufficient evidence of actual malice, the Eleventh Circuit reversed a jury verdict against ABC News, and denials of ABC's motions for judgment as a matter of law, in *Levan v. Capital Cities/ABC, Inc. and William Willson*, No. 97-5380 (11th Cir. Sept. 29 1999). In so doing, the Court of Appeals overturned compensatory damage awards to BFC Financial Corporation of \$1.25 million and to its President, Chief Executive Officer and controlling shareholder, Alan Levan, of \$8.75 million. The district court had dismissed claims for punitive damages at the close of plaintiffs' case, finding that the plaintiffs had failed to prove the defendants acted with "the primary purpose of 'ill will, hostility, and attempt to defame' as required under Florida law." Slip op. at 23.

The Court of Appeals took account of the extensive number and wide range of sources relied upon by ABC in its report, and what it obviously concluded was the basic truth of the concerns expressed by ABC about the transactions that were the subject of the news report, and concluded that the modest evidence plaintiffs offered to support their claim of actual malice simply "pale[d] in comparison."

### *Was It a False Impression?*

Levan and BFC had alleged that ABC made a number of false statements and implications in its broadcast, the result of which was to convey the false impression that Levan had deliberately set out to defraud the investors of the limited partnerships offered by BFC. The Court identified the most damaging allegations as the false implication that Levan had refused to talk to ABC, and thereby had something to hide; and the editing of a tape provided

by Levan to ABC and of statements made at a Congressional hearing, each in such a manner as to create false impressions about what was said.

### *The Roll-Ups*

The litigation concerned an ABC News 20/20 report that seriously questioned the fairness of transactions initiated by BFC and Levan with the investors in real estate related limited partnerships organized and managed by the plaintiffs. Small and

modest investors participated in these limited partnerships, which bought and sold commercial property.

When in the mid-1980's there was a severe decline in the real estate market, and the properties in the limited

partnerships lost value, BFC and Levan offered the limited partners a complex transaction, called "rollups," the net effect of which was that the limited partners gave over to BFC all of the partnership assets and accepted in return debentures from BFC. These bonds were, the court found, fairly characterized as "junk bonds" and carried long terms before they had to be redeemed or any interest paid on them.

In reporting on the transactions, ABC's sources included Congressional staff members, limited partnership experts, and securities analysts. ABC staff attended Congressional and SEC hearings. According to the Court, "[t]hese sources almost uniformly criticized the rollups as being grossly unfair to the limited partners." Slip op. at 10.

In addition, the sources were critical of the fact that BFC, unlike the investors, did very well in the transaction. It obtained cash and properties from the partnerships, many of which it quickly sold, and was able to use those funds to shore up its "cash-starved savings and loan," BankAtlantic, which would have otherwise not been able to meet its capital

*(Continued on page 12)*

***"Given these sources,  
ABC was not required to continue its  
investigation until it found somebody  
who would stand up for Levan."***

## Levan's Libel Win Over ABC Reversed

*(Continued from page 11)*

requirements. Levan had fiduciary duties to the limited partners, but he was also in charge of BFC and BankAtlantic.

### *Initial Question: What Was the Gist?*

Not unexpected in a case that involves implications, the parties disagreed on the gist of the statement in the report. ABC argued that the gist was that the rollups were unfair. Plaintiffs argued that the gist was that Levan had knowingly misled the limited partners, a theme that came from ABC's suggestion that Levan refused to talk to them, which in turn implied that he had something to hide. The court decided for itself that the report sent a message somewhere in between those proposed by the parties: something along the lines that the deal was so bad Levan must have known it was unfair.

### *Actual Malice Unproven*

The court was simply impressed by the depth of the sources ABC had used for the piece, the fact that these objective experts condemned the transaction as unfair, and the fact (although the court doesn't quite put it this way) that the terms of the transaction on its face gave every appearance of unfairness.

That the producer had said, in his efforts to obtain the interview with Levan, that "the truth is irrelevant to me"; that the broadcast said or suggested that Levan refused to talk to ABC, when he had refused an on-camera interview but had spoken at length with the producer and had provided a videotape response to what he understood were the questions ABC intended to pose to him; that certain ABC personnel had apparently testified that they believed that Levan thought the transactions were fair; that ABC had run three corrections on the report; that ABC had failed to interview the expert plaintiffs recommended or limited partners who favored the rollups; were not sufficient to support a finding of actual malice.

The opinion is rich in statements on the application

of actual malice principles to regularly occurring factual scenarios:

"Given these sources, ABC was not required to continue its investigation until it found somebody who would stand up for Levan." Slip op. at 39.

"While these corrections [to the report] may be relevant to the issue of damages, the fact that ABC made them does not constitute clear and convincing evidence ABC acted with actual malice at the time it broadcast its report." Slip op. at 22.

"ABC's choice not to include statements by limited partners voting for the transaction was similarly irrelevant. The decision to air the interview of one person but not another is at heart an editorial decision." Slip op. at 40.

Prior to the trial of his libel action against ABC, Levan and BFC were defendants in a class action suit brought by limited partners who voted against one of the rollup transactions. A jury found for the plaintiffs' in that suit and awarded \$8 million in damages. Before the case was appealed, the defendants agreed to a settlement by which they paid the entire award in exchange for the plaintiffs' agreement to vacate the judgment. ABC attempted to intervene in that litigation to prevent the vacatur and to try to preserve the collateral estoppel effect of the judgment for the libel litigation. That motion was denied. *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508 (11th Cir. 1996). See *LDRC LibelLetter* December 1996 at 1.

Defendants were represented by Floyd Abrams and Susan Buckley of Cahill Gordon & Reindel and Alan Braverman and Henry Hoberman of ABC and Stephanie Abrutyn.

**LDRC would like to thank Fall intern —  
Jeff Storey, Cardozo Law School,  
Class of 2001 — for his contributions  
to this month's *LibelLetter*.**

## THE VOLUNTARY AND INVOLUNTARY LIMITED PURPOSE PUBLIC FIGURE

### *Jewell is Public Figure in Georgia*

#### *Involuntary Public Figure Status Rejected by 4th Circuit for Watergate Figure*

#### *Mistaken Suspect is Public in Wisconsin*

In early October, a Georgia court held that former Olympic Park bombing suspect Richard Jewell was a limited purpose public figure for the purposes of his lawsuit against the Atlanta Journal-Constitution. *Jewell v. Cox Enterprises*, No. 97 VS 0122804 (Ga. Fulton County Ct. Oct. 5, 1999).

#### *Criteria Applied*

The newspaper argued both that Jewell was a public official by virtue of his former employment as a deputy sheriff in Habersham County, Georgia, and that he was a voluntary limited purpose public figure by virtue of the role he played in the Olympic Park bombing and ensuing investigation. In its order denying partial summary judgment to Jewell, the court concluded that Jewell was not a public official, as "the alleged defamatory statements occurred well after Plaintiff had left his position in law enforcement and did not pertain to a prior, or existing, controversy regarding the discharge of his duties[.]" *Jewell*, slip op. at 7-8.

However, the court went on to find Jewell a public figure. It used criteria developed in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), which defined a limited purpose public figure as one who has, or can realistically be expected to have, a major impact on the resolution of a specific public dispute, and *Silvester v. American Broadcasting Co.*, 839 F.2d 1491 (11th Cir. 1988): "The Court must (1) isolate the public controversy, (2) examine the plaintiff's involvement in the controversy, and (3) determine whether the alleged defamation was germane to the plaintiff's participation in the controversy." *Jewell*, slip op. at 9.

#### *Parties Dispute Scope of Controversy*

In his motion Jewell argued that the only public controversy at the time of the alleged defamation

concerned "who was responsible for the bombing." The court found Jewell's definition of the relevant debate "underinclusive" and that the issue was more broadly "the safety of the general public returning to Olympic Park [which] was an obvious concern for non-participants in the controversy." *Id.* at 10.

Next, the court noted that in order to be termed a public figure, a plaintiff must intend to, or be reasonably expected to, achieve some influence over the resolution of the controversy. The opinion provides a list of Jewell's media appearances in the four days after, in his capacity as park security, he noticed the bomb and managed to clear a large number of people out of the immediate vicinity. *Id.* at 2-3. In examining the content of these interviews, the court found that Jewell spoke at length of his opinion that the park was a safe place for the public to visit. In that sense, Jewell was "using his credibility [as a trained security guard] and newfound publicity to relieve the anxiety of the public . . . in the presumed hope of influencing the resolution of this public controversy." *Id.* at 11.

Finally, the court held that the alleged defamatory statements, concerning Jewell's background and personal life, did relate to Jewell's participation in the controversy. Quoting *Waldbaum* to the effect that a public figure's education and experience could affect the public's belief in his statements, the court held, "once [Jewell] voluntarily entered a public controversy, he could expect scrutiny regarding his background and the possibility of misstatements which may attend the active interest of the media." *Id.* at 12.

The court did not rule on the issue of Jewell's possible status as an involuntary limited purpose public figure, but distinguished the case from *Wells v. Liddy*, 1999 WL 547916 (4th Cir. Md), in which the plaintiff was found not to be an involuntary public figure, having played a minor role in the relevant controversy.

(Continued on page 14)



## The Voluntary and Involuntary Public Figure

(Continued from page 13)

### *Wells v. Liddy: The Involuntary Public Figure*

That case involved a claim against G. Gordon Liddy, one of the convicted Watergate conspirators, brought by Ida Maxwell "Maxie" Wells, who was a secretary at the Democratic National Committee offices when the Watergate break-in occurred. Liddy had taken up a theory of the "real purpose" for the break-in, as proposed in the 1991 book *Silent Coup: The Removal of a President*, that the intention was to discover whether the DNC held embarrassing information tying John Dean's wife to a prostitution ring. According to the authors' theory, which Liddy described on several speaking occasions and on an Internet site, Wells held photographs of call girls (including Dean's wife) in her desk and coordinated DNC affiliates' patronage of the prostitution ring.

Wells sued Liddy in the District of Maryland for defamation. The lower court granted summary judgment, concluding that Wells was one of the rare involuntary public figures alluded to in *Gertz*, or in the alternative that Louisiana law applied (it was Wells' domicile), and therefore even a private figure would have to show actual malice on the part of a media defendant involving a matter of public concern. *Wells v. Liddy*, 1 F. Supp. 2d 532 (D. Md. 1998); see *LDRC LibelLetter*, April 1998 at 5. In a panel opinion, the Fourth Circuit reversed the district court ruling on the public figure issue, and on the choice of law issue for two instances of alleged defamation.

In declining to find Wells to be a public figure, the court, in an opinion by Judge Williams, first examined Liddy's contention that Wells was a voluntary limited-purpose public figure by virtue of her media appearances following the emergence of the prostitution-ring theory (the district court concluded that Wells, in fact, did not qualify as a voluntary public figure). The Fourth Circuit relied on *Gertz*, *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) to hold that Wells was not a voluntary limited purpose public figure because she had not voluntarily assumed a prominent role in a public controversy.

As regarded her involvement in the Watergate scandal,

she was dragged into the controversy involuntarily: her statements to law enforcement and testimony in the Senate were "compelled by the force of law," and her four statements to the media in twenty-seven years of debate over Watergate could not establish that she had "thrust herself to the forefront of a [public] controversy" as required by *Firestone*.

### *The Fourth Circuit Refuses to Follow D.C. Circuit on Defining Involuntary Public Figures*

On the issue of Wells' asserted involuntary public figure status, the district court opinion relied on *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), which held that people thrown into a public controversy could become prominent by "sheer bad luck." Noting that "*Gertz* tells us that involuntary public figures 'must be exceedingly rare' . . . and, unfortunately, bad luck is relatively common," the *Wells* court refused to follow the D.C. Circuit in an analysis by virtue of which "all individuals defamed during discourse on a matter of public concern must prove actual malice." According to the Fourth Circuit, that standard was expressly rejected in *Gertz* and *Firestone*.

Instead, the *Wells* court articulated a different test for establishing a plaintiff as an involuntary public figure. First, the defendant must show that the "plaintiff has become a central figure in a significant public controversy," as evidenced by regular media reports focusing on the plaintiff, and that the alleged defamatory statements were made in the context of discourse related to that controversy. Second, the plaintiff must have "assumed the risk of publicity," through actions likely to lead to publicity under the circumstances. Wells did not fit that standard, the court held, as even once the prostitution-ring theory emerged, she was mentioned only as a minor figure in the events in question.

### *Crime Suspect as Public Figure*

The Wisconsin Court of Appeals, affirming a grant of summary judgment, issued an opinion earlier this year which, like *Jewell*, focused on the limited purpose public figure status of a suspect in a crime. *Erdmann v. SF*

(Continued on page 15)

## The Voluntary and Involuntary Public Figure

(Continued from page 14)

*Broadcasting of Green Bay, Inc.*, No. 98-2660 (Ct. App. Wis. June 29, 1999). The case involved a teenage boy who shot himself, then accused the plaintiff, Todd Erdman, of the crime and of stalking the boy's sister. A manhunt ensued and the plaintiff was arrested at a bowling alley. After the boy's confession cleared Erdmann of the crime, he sued a local television station that had reported on the accusation, the hunt, and the arrest. The trial court granted summary judgment on the basis that Erdmann was a limited purpose public figure and had failed to allege actual malice.

On appeal, the Court of Appeals affirmed on both counts. It based its definition of a limited purpose public figure primarily on the Wisconsin case *Wiegel v. Capital Times Co.*, 145 Wis. 2d 71, 426 N.W.2d 43 (Ct. App. 1988), which articulated a four pronged test that is basically identical to that used by the Georgia court in *Jewell*: (1) identifying a public controversy; (2) isolating the controversy at issue to determine its scope; (3) examining the plaintiff's role in the controversy to be sure it is more than tangential; and (4) determining if the alleged defamation was germane to the plaintiff's participation in the controversy. *Erdmann*, slip op. at 3, citing *Wiegel*, 145 Wis. 2d at 82-3.

First, the court found that the hunt for Erdmann and his arrest comprised a "public controversy" for purposes of the test, whose scope extended to "the investigation, apprehension, arrest and media reporting." *Id.* at 4. When the controversy was defined as such, clearly Erdmann played more than a tangential role as the entire affair centered round him. Moreover, the alleged defamatory statements were certainly germane, as they consisted of a report of the very allegations that initially began the controversy.

Unlike the *Jewell* court, the Court of Appeals did not much concern itself with the issue of the plaintiff's asserted lack of intention to place himself within the controversy. Rather, the court simply relied on *Gertz* to the effect that "it may be possible for someone to become a public figure through no purposeful action of his own," *Erdmann*, slip op. at 5, quoting *Gertz*, 418 U.S. 323, 345, failing to share the *Wells* court's understanding of

the severe limitations imposed from that dictum. The court also found relevant Erdmann's public response to the allegations, suggesting that it was evidence that the plaintiff had "access to the media." *Erdmann*, slip op. at 5.

The court then proceeded to the issue of actual malice, which it found as a matter of law was "not established when reporters rely on police information without evidence that the reporters actually entertained serious doubt about the truth of the reports they received from other sources." *Id.*

## Barbara Jewell Settles Suit Against U.S.

Barbara Jewell, mother of Richard Jewell, has settled her lawsuit against the government and Justice Department officials who she claimed violated her civil rights when they searched her apartment, which she shared with her son. The search was conducted looking for evidence in connection with the government's investigation of the Atlanta Olympic Park bombing. The search resulted in the government taking away with them a number of Mrs. Jewell's possessions — reportedly some Tupperware, family photos and Disney videotapes among them. The settlement included a \$2500 payment by the government for damage Mrs. Jewell claimed was done to her property when the government marked her possessions with indelible ink.

Mrs. Jewell's lawyer was quoted by the *Fulton County Daily Report* as stating that they decided to get out of this suit because they concluded that the real culprit in the episode was not the government, but the *Atlanta Journal-Constitution*.

The gist of Mrs. Jewell's claims, reportedly, was that the government agents lied to the magistrate in order to obtain the search warrant; that they already knew Richard Jewell could not have been the bomber. While the judge in the case had denied the government's motion to dismiss based upon a claim of qualified immunity, the judge was reported to have said that Mrs. Jewell had failed to come forward with evidence sufficient to support her allegations and had ordered her to file a more detailed complaint against the government.

## Florida Shield Law Held Not to Protect Information from Libel Plaintiff

An appellate court in Florida has issued a ruling under the Florida shield law that may have uncomfortable effects for media defendants in defamation suits. In *News-Journal Corporation v. Carson*, 24 Fla. L. Weekly D1948 (August 20, 1999), the court allowed discovery of documents that a libel plaintiff had given to reporters at the defendant *News-Journal* when they interviewed him regarding his candidacy for a county judgeship. The newspaper argued that the documents were protected by Florida's recently codified statutory qualified reporters' privilege, and were not subject to discovery.

The court held that the privilege had been waived as concerned one of the two documents, because the newspaper had submitted a copy of it to the court with an affidavit filed in the lawsuit. As for the other document, the court went on to apply the balancing test incorporated in the statute. It noted that although the plaintiff could easily produce other copies of the same materials, their import to his case lay in the defendant's possession of them, a fact which would go toward a showing of actual malice.

The opinion observes:

In many [libel] cases, upholding the privilege has the effect of making proof of actual malice impossible because establishing what the publisher knew or did not know at the time of publication depends on the kind and quality of the information and identity of the sources at hand when the publication was made. *Id.* at D1949

The court found the plaintiff's right to "his day in court" to override the interests underlying the shield law statute, interests which Judge Sharp did not articulate in the opinion. Rather, the last paragraph simply notes that application of the privilege is "far less compelling" when the media is a defendant to a libel suit, and when "the source" himself seeks production.

### Jewell Lawyer to Represent JonBenet Ramsey Parents

It was reported this month in *Newsweek* that Lin Wood, Atlanta lawyer and counsel to Richard Jewell, to AirTran in its litigation with the *Atlanta Journal-Constitution* (see page 21 *infra*), has been retained by the parents of JonBenet Ramsey to explore possible litigation against media.

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## Trial Court Dismisses Libel Suit by Milken Lawyer Against Simon & Schuster

By Robert Cusumano

After a few false starts, a New York trial court finally dismissed a libel suit brought by a prominent Manhattan lawyer, Michael Armstrong, against author James Stewart for his best-selling expose of the Wall Street scandals of the late 1980s, "Den of Thieves." Granting a motion for summary judgment, the trial court found the passage in question to be indisputably true, found Armstrong to be a limited purpose public figure, and found him unable to prove actual malice. While the court's 20-page opinion breaks no new legal ground, its careful evaluation of the evidentiary record on a motion for summary judgment sets an excellent example, if not a citable precedent.

### *Focus on One Paragraph*

The case arose out of a paragraph in the book reciting an incident involving Armstrong, who represented Lowell Milken (Michael Milken's brother) in the criminal investigations and prosecutions of Drexel Burnham Lambert. In an attempt to avoid a felony indictment against Lowell Milken, Armstrong prepared an affidavit for Craig Cogut, another Armstrong client who had worked as outside counsel for Drexel in Los Angeles. According to the book, "there was only one problem" with the affidavit: "the facts weren't true." As a result, the passage concluded, Cogut angrily rejected the affidavit and hired new lawyers.

A motion to dismiss this 1992 lawsuit, along with interlocutory appeals to New York's highest court, served only to focus discovery in the case on the veracity of the statement that "the facts weren't true." As a result, the testimony of Craig Cogut and his advisors became critical. Meanwhile, discovery also established that Lowell Milken himself was quietly financing the prosecution of the case with "non-recourse loans" to Armstrong issued out of a family corporation.

### *The Lawyer as Public Figure*

The court opened its discussion of the issues by holding Armstrong to be a limited purpose public

figure, but not a general purpose one. Although Armstrong had been a relatively prominent lawyer who had held various prosecutorial offices and had acted as counsel to New York's Knapp Commission, the court found that that fell short of the *Gertz* requirement of "pervasive involvement in the affairs of society."

However, with regard to the subject matter of the book and the passage — the Drexel/Milken investigations — the court pointed to evidence that Armstrong "endeavored to cultivate favorable press coverage" in the context of a very public prosecution. That, along with his decision to inject himself into the controversy in the first place, satisfied the standard for a "limited purpose" public figure.

These rulings would appear to be far from novel or groundbreaking. In one respect, however, the court's holding may represent a refinement of *Gertz* as it is

*Editors note: I thought it was worth pointing out that LDRC is reporting, on pages 15-18 of this LibelLetter, three cases involving lawyers as plaintiffs. In each case, we are reporting a win by the defendants, at least at the pretrial motion stage. But it is a reality that lawyers (and judges) are not infrequent libel plaintiffs.*

applied to reporting about lawyers acting as such. According to the court, neither Armstrong's prominence nor his status as a lawyer was, per se, sufficient to warrant the "actual malice" standard. What was sufficient, either individually or together, was (1) Armstrong's involvement as a lawyer advocating positions on the public controversy that was the subject of the publication and/or (2) Armstrong's voluntary interactions with the press in connection with the case.

Thus, the court rejected the idea that *Gertz*

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## Court Dismisses Libel Suit by Milken Lawyer

*(Continued from page 17)*

somehow immunizes lawyers from being limited purpose public figures merely by virtue of their status as lawyers. Instead, where the reporting specifically concerns the lawyer's activities as a lawyer in connection with a major public controversy, the "actual malice" standard is appropriate.

### *Testimony Refutes Malice*

Justice Cozier of the commercial part of New York Supreme Court in Manhattan focused on the testimony of Armstrong, Craig Cogut and his wife, and Cogut's new lawyers, who had in fact been hired at the time of the affidavit incident. Justice Cozier found that there was no dispute that the affidavit prepared by Armstrong was materially inaccurate, no dispute that Cogut angrily refused to sign it, and no dispute that he retained new lawyers as a result of the incident. The Court refused to be detoured by Armstrong's claims that an affidavit was ultimately signed (in a substantially altered form), and that the affidavit that Cogut rejected was just a "draft." The testimony established that Armstrong had "pressured" Cogut to adopt statements that he had asked to be removed from the document.

As far as malice, the court found it to be impossible for the defendants to have acted with actual malice when their sources — the Coguts and their counsel — had testified under oath both to the substantial truth of the underlying story about the affidavit, and had confirmed the fact that they had recited the story to the defendants more than once.

In many ways, this was an "easy case" for application of summary judgment. The case concerns only a few sentences. The evidence was strong, and the deposition testimony was overpowering. (Indeed, the first several pages of defendants' summary judgment brief consists of a stream of quotations from the depositions that, without editorial comment, confirm the entire story (and more) in the words of the participants under oath.)

That said, counsel for Armstrong subjected the paragraph in question to microscopic scrutiny, aggrandized its meaning into barely recognizable forms, and subjected the defendants to days of testimony about their research and sourcing of this one, otherwise obscure paragraph. The court's refusal to be drawn into strict scrutiny of word choices and shades of "meaning" — its focus on evidence establishing the basic fairness of the paragraph — is a positive development for litigators dealing with the practical realities of libel litigation. That this no-nonsense approach emerged in a case being financed by affluent and powerful backers using libel law to pursue their own agenda against powerful and, from their perspective, devastating reporting that had, in effect, ruined them, is all the more heartening.

*Robert Cusumano is with Simpson Thacher & Bartlett, New York, and represented the defendants in this matter.*

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## California Court Dismisses Libel Action, Holding That Negative Comments About an Adversary's Lawyer Constitute Opinion

By Steve Contopoulos and Brad Ellis

In a published decision that brings together a number of important principles of defamation law, the California Court of Appeal has affirmed judgment in favor of the defendants in a libel action brought by an attorney who contended that colorful negative descriptions of him and attacks on a lawsuit he filed implied that he was incompetent and unethical.

The case, *Ferlauto v. Hamsher, et. al.*, 1999 Daily Journal D.A.R. 9903 (Sept. 20, 1999), arose out of the publication of the book *Killer Instinct: How Two Young Producers Took on Hollywood and Made the Most Controversial Film of the Decade*, published by Broadway Books, a division of Random House, Inc. The author of the book, Jane Hamsher, along with Don Murphy, produced the film "Natural Born Killers," which was directed by Oliver Stone. Using earthy, vituperative language, Ms. Hamsher recounts a lawsuit brought by Rand Vossler who, for a brief period, had been slotted to direct the film.

### The "Kmart" Johnnie Cochran

The Los Angeles attorney who represented Mr. Vossler sued Ms. Hamsher and the other defendants, claiming that Ms. Hamsher's description of him as a "Kmart Johnnie Cochran" and a "creepazoid attorney," her attacks on the lawsuit he filed as "frivolous" and "spurious," and her description of the judge's reaction to a motion he filed — "laughed at their motion," "the judge thought their motion was a joke" — defamed him.

The trial court sustained the defendants' demurrer to the Second Amended Complaint without leave to amend, finding that "the alleged defamatory statements would not imply to a reasonable fact-finder provable false factual assertions."

### Context Counts

The Court of Appeal affirmed. The Court's decision applies a number of important principles, stating them in clear concise terms which should prove useful to defense counsel. For example, the Court reaffirms the First Amendment protections to even highly derogatory — albeit imaginatively stated — opinions. The Court follows California's "totality of the circumstances test" announced in

*Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 13 Media L. Rep. 1159 (Cal., Jul. 31, 1986) and highlights the importance of context in making the fact/opinion determination.

In this case, the adversarial setting and the "exaggerated, irreverent and attention-grabbing style" of the book, were key factors in the Court's determination that the statements complained of were nonactionable opinion. The Court, quoting from *Morningstar, Inc. v. Superior Court*, 23 Cal. App. 4th 676, 22 Media L. Rep. 1513 (Cal. App. 2 Dist., Mar. 18, 1994) notes that editorial context is "a powerful element in construing as opinion what might otherwise be deemed fact."

### Of and Concerning

Applying the principle that the Constitution does not permit liability unless the complained of statements are "of and concerning" the plaintiff, the Court also held that a number of other statements sued on — for example, "not an ethical one," "loser wannabe lawyer" — in addition to being "nonactionable, feisty expressions" were not about the plaintiff at all.

### No First Amendment Waiver

Finally, the Court also rejected the plaintiff's argument that some of the defendants had waived their First Amendment rights when they settled Vossler's lawsuit and agreed to keep the settlement confidential. The Court reiterated the appropriately high bar to such waiver claims, turning to *Curtis Publishing Co., v. Butts*, 388 U.S. 130, 1 Media L. Rep. 1510 (1967) for the principle that the First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" Only in "clear and compelling cases" will courts uphold a claim of waiver of those safeguards. All too often, we find ourselves having to remind courts of the fundamental importance of the First Amendment, and the language from *Curtis*, restated in *Ferlauto*, is a powerful way to make the point.

*Steve Contopoulos and Brad Ellis are with the Los Angeles office of Sidley & Austin.*

## Lawyer Loses "Extort" Libel Claim Against Newspaper

An Alabama court has upheld dismissal of libel and slander claims filed by a local lawyer after comments in a newspaper article accused the lawyer of trying to "extort" money by filing false charges. However, the Court of Civil Appeals of Alabama reinstated a libel action based on allegations in a letter to the state Attorney General from a Montgomery building owner that the lawyer conspired with an employee to file a frivolous lawsuit. *Blevins v. W.F. Barnes Corp.*, 1999 WL 685840 (Ala. Civ. App. 1999).

The attorney had filed a lawsuit against the company that owned the building where his offices were located on behalf of his paralegal, who said she had been harmed by cigarette smoke coming from a nearby lounge. Prior to filing the lawsuit, the attorney sought to settle the paralegal's claim with the building owner for \$25,000 in damages and an agreement to stop the smoking. The dispute was reported in the Montgomery Advertiser, which quoted the president of the company as saying that the lawyer tried to "extort" money because the company refused his demands. He also wrote to the state Attorney General seeking an investigation of the lawyer's conduct.

The court concluded that the building owner's comments for the newspaper article could not support a claim of slander per se because the word "extort" does not have the same meaning as the crime of "extortion." As for the libel claim against the newspaper, the court held that the average reader, taking the "extort" comment in the light of the entire article, "could easily see that Barnes believed the lawsuit was unwarranted and that the settlement offer of \$25,000 was simply a way for the attorney to recover money for his client without litigation." This was an appropriate course of conduct for an attorney and could not be said to impugn his professional reputation. That supported a grant of summary judgment for the newspaper.

The allegation in the letter to the Attorney General

that the lawyer tried to ferret out the building owner's financial condition and then conspired with his employee to mount a frivolous claim was broad enough to harm the lawyer in his profession. Therefore, the court concluded that the letter was capable of a defamatory meaning.

The court rejected the defendant building owner's contention that his allegations were privileged because they related to a judicial proceeding. It said that the privilege extended only to matters relevant or material to the smoking litigation and did not cover the defendant's comments attacking the attorney's integrity.

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## The Discovery Rule Does Not Apply to Media Defamation, Says Pennsylvania Court

By Malcom J. Gross

Pennsylvania, like numerous other jurisdictions, has a deliberately short one-year statute of limitations for defamation actions. This statute is, therefore, often completely conclusive for media defendants faced with defamation claims. Many plaintiffs, and their attorneys, assume that the traditional two-year tort statute applies to defamation actions and simply miss the statute. As a result the statute is extremely important as a media defense tool.

The discovery rule, if applied to defamation actions, is a potential plaintiffs' savior because it would permit defamation claims after the short statute has expired where a plaintiff has not "discovered" the defamation against him until a later date.

The discovery rule is a tort concept most commonly demonstrated as the hidden sponge in the stomach discovered only years after the malpractice.

In the case of first impression, the Eastern District of Pennsylvania has unequivocally rejected the discovery rule in defamation actions and has placed particular emphasis on that rejection in cases where the defamation involves a media publication.

### *Promoted and Sold*

In *Barrett v. Catacombs Press, et. al* (99-736) Federal Judge Franklin Van Antwerpen rejected an attempt to use the discovery rule by a plaintiff against a small California book publisher. Catacombs Press published a book titled *Silent Clots: Life's Biggest Killer* by James Privitera, M.D., an alternative medicine advocate from California, and his associate Alan Stang. Steven Barrett, M.D., a prominent opponent of what he describes as quackery, health frauds, misinformation and similar writing, was mentioned a number of times in an at least unflattering manner in Privitera's book.

Privitera had promoted his book on a number of television programs and at a major book exhibition in Chicago in June of 1997. Privitera was also able to establish that he had managed to sell approximately 12 copies of his book in western Pennsylvania as early as

May 10, 1997. This date and sale was important because Pennsylvania does not begin the running of its statute of limitations until the allegedly defamatory material is available in Pennsylvania. *Bradford v. American Media Operations, Inc.*, 882 F. Supp. 1508 (E.D. Pa. 1995).

Barrett did not file his action in state court until December 18, 1998 (the action was subsequently removed by the defendants to Federal Court). Defendants were also able to establish that the book was promoted and distributed through a newsletter, distributed to Pennsylvania subscribers at the latest on November 15, 1997. As a result, Barrett's action was stale under Pennsylvania's statute of limitations.

Barrett, however, attempted to argue that the discovery rule permitted him to press his case. Barrett contended that despite the sales and promotion of the book before the running of the statute, he did not become aware of the defamation against him in the book until after the running of the statute. Therefore, he contended the discovery rule permitted him to proceed. Barrett pointed, particularly, to the minimal circulation of the book in support of his claim.

### *Distinguished Secret Speech*

Barrett was able to cite a number of Pennsylvania cases which appeared to recognize the discovery rule in defamation actions. The court, however, distinguished these cases because, although they involved defamation claims, the defamation was, in effect, secret and between two private parties. As a result, the District Court refused to rely on those cases.

Instead, the District Court flatly rejected the discovery rule except where the defendant's communication is consciously secret. The court relied on the fact that the basis for the discovery rule is that "no amount of vigilance" will permit a plaintiff to detect and discover his injury. The court strongly emphasized the importance of the public policy behind the time limits imposed by statutes of limitations and

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## Discovery Rule Does Not Apply to Media Defamation

*(Continued from page 21)*

the need to have certainty regarding Pennsylvania's statutes of limitations.

But the court goes on to find the discovery rule particularly inappropriate in the context of a media defendant. The discovery rule, the District Court then went on to hold, could never be applied to a media defendant because the very publication by mass media — involving by definition distribution and an intent to bring about mass sales — is inconsistent with the principles that underlie the discovery rule.

The net effect of the decision is a strong statement in favor of an absolute statute of limitations involving all media defendants (large and small) in Pennsylvania.

*Malcom J. Gross is a partner in Gross, McGinley, LaBarre & Eaton, LLP in Allentown, Pennsylvania and represented the defendants in this action who made this motion, The Catacombs Press, and co-authors, Doctors James R. Privitera and Alan Stang.*

*Editors Note: LDRC reported on the dismissal on the basis of a lack of in personam jurisdiction (in an April 21, 1999 decision) of the claims against another defendant in this lawsuit, an Oregon resident who allegedly defamed the plaintiff on a passive web page she maintained and in messages posted to various Internet discussion groups. See LDRC LibelLetter April 1999 at 21.*

## Terry Reed's Claims Dismissed in Missouri Federal Court

Noteworthy, perhaps, primarily because of the notoriety of the plaintiff, was the dismissal of all claims brought by Terry Reed against various media in Missouri arising out of their reporting of the American Heritage Festival organized by Reed and his wife and held in

Carthage, Missouri in July 1998. A federal district court judge, parsing through the complaint and the various motions to dismiss filed by The Carthage Press, *The Kansas City Star*, and Entercom (which operates a radio station in the Kansas City area) and one of Entercom's program hosts, touched upon numerous basic issues of libel law, but ultimately concluded in each instance, and in separate opinions, that the claims should be dismissed. *Reed v. Pierce*, 98-3343-CV-S-3 (W.D. Mo. 1999).

Reed is author of the book *Compromised: Clinton, Bush and the CIA*, about how Clinton as governor of Arkansas allowed the Reagan/Bush Administrations to use Arkansas for secret CIA training, manufacture of untraceable weapons parts for Nicaragua Contra freedom fighters, and money laundering. As a result of their coverage of his various conspiracy theories, Reed was involved in several libel suits against *Time Magazine* and other publications.

The disputes before the Missouri court centered on the coverage of the Festival and the the sale of white supremacist, Nazi, and similar hate-mongering literature with the consent of the Festival, and the appearance of speakers at the Festival who were themselves authors of supremacist, conspiracy-theory, and anti-government literature.

The court held that the various claims failed because the statements at issue were either true, opinion, not defamatory, not of-and-concerning Reed, or were not made with actual malice.

The claim against the Managing Editor of The Carthage Press was purportedly a class action libel claim on behalf of all of the individuals who attended the "festival" asserting that the article in his paper effectively accused the class of being Nazi sympathizers, white supremacists, and like characterizations. The claim was dismissed on of-and-concerning principles.

## Fair Report Privilege Fails to Garner Summary Judgment in *AirTran Airlines v. Plain Dealer*

In mid-September, a federal court in Atlanta declined to grant summary judgment to *The Cleveland Plain Dealer* in a libel case based on the newspaper's report on a FAA inspection of AirTran Airlines, formerly known as ValuJet. *AirTran Airlines v. The Cleveland Plain Dealer*, No. 1:98-cv-1750-CAM (N.D. Ga. Sept. 14, 1999). The court found questions of fact as to whether the newspaper article actually relied on the Draft Inspection Report it purported to, whether that non-public draft report was official, whether the article carried the same "gist" as the inspection report, and whether the newspaper had acted with some variety of "malice" in publishing this article.

ValuJet had been grounded after a 1996 crash in which 110 passengers and crew were killed, and the FAA had indicated that it would monitor the airline to prevent similar occurrences in the future. In late 1997, the FAA conducted an inspection of the airline using a team of inspectors from outside of the airline's Atlanta base. That outside inspection team drafted a report finding 106 violations by AirTran. When the Atlanta-based FAA team responsible for oversight of AirTran then reviewed that report as part of the process of issuing a final report, it discounted some of those findings and stated that it found no significant safety violations.

### *Report on Draft*

The lawsuit centers around a January 1998 article reporting on the outside team's draft report and the violations recounted in that report. The article, "New name, Old problems for ValuJet: FAA finds faults at AirTran," referred to "internal Federal Aviation Administration documents" reporting the violations set forth by the initial inspection team in its report. AirTran filed suit, claiming that the final report containing the findings of the Atlanta-based FAA team showed that the initial team was incorrect in some of its conclusions and that *The Plain Dealer* should have held serious subjective doubt as to the truth of the draft report.

### *Fair Report Argued*

*The Plain Dealer* moved for summary judgment before the start of discovery, which was then stayed by agreement of the parties until the motion could be ruled on. Georgia law generally holds that when the fair report privilege is at issue, the legal analysis should focus on a comparison of what was said in the documents and in the article. In this instance, *The Plain Dealer* argued that the article was a fair report of what was said in the initial team's draft report, which, contrary to usual FAA policy, was not promptly made public. The entire draft report was verbatim repeated in the final report issued in February 1998.

In Georgia, the fair report privilege is a statutory qualified privilege protecting from liability "fair and honest reports of the proceedings of legislative or judicial bodies" and fair and honest reports of court proceedings. Slip op. at 8, citing O.C.G.A. §§ 51-5-7(5) and -7(6). In order to fall under the privilege's protection, the court notes, the report cannot be the assertions of the publisher, may not include material added by the publisher, and must not distort the factual assertions as to convey affirmatively a false or defamatory meaning. *Id.* at 9.

The opinion offers a myriad of reasons for denying summary judgment on these grounds, all of them turning on the specific circumstances of the case.

### *Was it the Right Report?*

First, the court questions whether the article was based solely on the draft inspection report. It finds that certain statements in the article did not correspond to the report (*id.* at 17), and that the article itself referred to more than one document. "Without all the underlying documents, the court cannot determine whether the Article constitutes a fair and honest reporting of the contents of those documents," the opinion states. *Id.* at 11.

The opinion goes on to note, moreover, that the copy of the Report submitted to the court was uncertified, and

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## Fair Report Privilege Fails in *AirTran Airlines v. Plain Dealer*

(Continued from page 23)

the only evidence of authenticity was the unsworn statement of one of *The Plain Dealer's* attorneys. The latter would not be admissible at trial, and thus the court could not consider it at the summary judgment phase. *Id.* at 11. Further on the court acknowledges that the same draft report is included verbatim in the Final Inspection Report, seeming to authenticate the draft as an FAA document, but questions whether the document attached to counsel's statement was really the one relied upon by the reporter. *Id.* at 15.

### *Was it Official?*

The court specifically questions whether the draft report constituted an "official document" covered by the fair report privilege. *Id.* at 18. AirTran claimed that the report was "an 'unofficial,' 'non-public' document which was 'improperly leaked' to defendant prior to the issuance of the official . . . report." *Id.* The court was apparently amenable to this theory and pays much heed to language in the Final Inspection Report, which it finds to indicate that the draft was not intended to be released of its own accord, *id.* at 18-19, even though that refusal represented a change in FAA policy.

At the end of the day the court decided not to rule definitively as to whether "an improperly leaked, preliminary, unofficial, non-public draft of unidentified FAA documents is the type of official document contemplated by the fair report privilege." *Id.* at 20.

### *Malice?*

Instead, it finds issues of fact as to whether the defendant acted with "malice" among the issues sufficient to defeat the privilege under Georgia law. Left unclear is whether the court has held that common law or actual malice, or both, are the legal standard. The court does hold that as the plaintiff had alleged actual malice in its complaint, the court found summary judgment "premature at this juncture." *Id.* at 21.

### *Was it Fair?*

The last part of the opinion questions the "fairness" of

*The Plain Dealer's* article; that is, whether the piece in the newspaper had the same "gist" as the document on which it was based. Comparing the two, the court apparently finds fault with the use of the term "serious safety violations" and other descriptive words in the article, as the draft report merely described 106 safety violations that had come up in preliminary investigations. Parsing the language of the article, the court determines, "Taking all of this together, the Article could have conveyed to the public that the FAA had concluded that plaintiff operated an unsafe airline." *Id.* at 25. As that was not necessarily the "gist" of the draft report, a material issue of fact remained as to whether the article was, indeed, a "fair" report.

The court also suggests that circumstances extrinsic to the article itself might have some bearing on the issue of fairness. It acknowledges that due to the history of the airlines, the results of the FAA inspection constituted a matter of public importance; "By the same token, however, because of the unfortunate crash, ideally, the responsible press would have been especially cautious as to not inflame the already predisposed public." *Id.* at 27.

### *Anti-SLAPP Denied*

*The Plain Dealer* also moved to dismiss the suit based on Georgia's anti-SLAPP statute, which aims to protect from abusive litigation "statements made in good faith as part of an act in furtherance of the right of free speech . . . in connection with an issue of public interest or concern." O.C.G.A. § 51-5-7(4). The court denied that motion as well, holding that it could not determine as a matter of law that the statements contained in the article were made in good faith. *AirTran* at 30. The court then ordered that discovery in the case should begin.

This case offers another face-off between Lin Wood and Peter Canfield (Dow, Lohnes & Albertson) who are opponents in the *Jewell* case. Both cases involve the early reporting of on-going government investigations. As noted on page 15, *Newsweek* has reported that Lin Wood has taken on representation of JonBenet Ramsey's parents in their potential lawsuits against the tabloid media for its coverage of their daughter's murder.

## Consumers Union Denied Summary Judgment in SUV Defamation Case *Isuzu is Public Figure in SUV Controversy*

Last month, a federal court in California denied summary judgment to Consumers Union of United States, Inc., the publisher of *Consumer Reports*, in a defamation and product disparagement action brought by sport-utility vehicle manufacturer Isuzu Motors. *Isuzu Motors Limited v. Consumers Union of United States, Inc.*, No. CV 97-5695 RAP (RNBx) (C.D. Cal. Sept. 20, 1999). This case is currently scheduled for trial in November. Isuzu sued Consumer Union for reporting the results of safety tests CU performed on the Isuzu Trooper, and for a related press release and letter asserting the presence of design flaws deliberately ignored by the manufacturer.

This litigation arose shortly after Suzuki Motor Corporation brought similar claims against Consumers Union, when *Consumer Reports* republished an excerpt from its negative 1988 review of the Suzuki Samurai

SUV. That litigation is also still pending, as a federal judge in the Central District of California deliberates CU's motion for summary judgment.

Isuzu's product disparagement claims related to the publication of the test results and analysis in *Consumer Reports* and other publications. The defamation claims concerned a press release and a letter to another magazine, in which Consumers Union's vice president R. David Pittle commented on the results. The court applied the same legal analysis to all claims.

### *Isuzu is a Public Figure*

The courts, Judge Paez states in the opinion, do not have a uniform approach to determining whether a corporation is a public figure. California courts and the Ninth Circuit tend to apply the same standard to

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## A POLL OF STATION NEWS DIRECTORS SHOWS GROWTH IN NEWS STAFF AND PROGRAMMING

A poll commissioned by *Broadcasting & Cable* magazine has obtained some interesting answers from broadcast station news directors about the state of local news. The magazine surveyed 150 news directors by telephone, most of whom were with stations affiliated with one of the networks: ABC, CBS, NBC and Fox. The poll seems to be an annual event, and was reported in *Broadcasting & Cable*, September 27, 1999 starting at page 38.

Sixty-one percent of the news directors reported that their station airs 3 to 5 hours of news programming each day. Thirteen percent reported 6 or more hours. Twenty-five percent said that their station currently had plans to expand the number of local news hours within the next six months.

Sixty-one percent said that their 1999 news budgets were up from the prior year. Only 8% suffered a decrease in their news budgets. That correlates somewhat with the fact that 45% of the news directors reported that their news departments had grown in the last year, while only 13% said that their departments had decreased. Thirty-nine percent said that their news staff would increase next year, while only 4% thought their staffs would be decreased.

With all of the concern being expressed about lack of diversity in the management of media companies and in the casts of entertainment programming, it is noteworthy that 85% of the news directors felt that their newsroom staffs adequately reflected the cultural and racial diversity of their markets.

Only 31% agreed that media violence was in any way responsible for the Columbine shootings (or presumably any other violent acts), and 95% reported that they had not reduced the amount of crime or violence in their newscasts.

For those who care, the news directors this year voted NBC as the strongest news organization (ABC, 19%; CBS 11%, NBC, 47%, CNN 23%; and Fox, 1%) and NBC Nightly News as the best newscast.

## Consumers Union Denied Summary Judgment

*(Continued from page 25)*

corporate defendants as they do to individual persons, in contrast to the Fifth Circuit which applies a three-factor test. Deriving its criteria from several approaches, this court found that Isuzu was at the least a limited purpose public figure: the debate regarding the Trooper's safety was a public controversy; Isuzu had "vigorously" entered that debate; the corporation regularly received media scrutiny (one of the Fifth Circuit factors); and as a large corporation it had the resources to gain access to the media. *Id.*, slip op. at 8-10. While agreeing that publicity attendant to litigation would not automatically render the plaintiff a public figure, the court noted that Isuzu was engaged in the controversy concerning rollover standards before it sued Consumers Union.

This holding led to an examination of whether the plaintiff had enough evidence of actual malice to present a question of fact. Plaintiff's actual malice argument was premised on Consumers Union's knowledge that its test results often depended on driver influence. In finding a question of fact to preclude summary judgment, the court noted that the test results revealed significant disparities for the three test drivers, that the National Highway Traffic Safety Administration had criticized the tests as unreliable, and that the report disregarded arguably relevant mortality statistics for the Isuzu Trooper. *Id.* at 12-13.

Pittle's statements, to which the defamation claims attached, suggested that Isuzu had declined CU's invitations to review the findings before publication, and that "perhaps" otherwise the company would have remedied the alleged design defects. *Id.* at 16 and 18. CU termed these statements inactionable opinion, but the court disagreed, finding factual allegations implicit in each of them.

With regard to a passage in the press release which began (quoting Pittle), "If Isuzu's leaders had

accepted any of our five invitations to come to our test facility and review our findings in-depth . . .," the court inferred a factual representation that "Isuzu refused to visit the CU facility" (Isuzu acknowledged that it never visited Consumers Union but asserted that it had accepted several invitations, although subject to unidentified conditions CU would not meet). Furthermore, the suggestion that "Perhaps then they would have directed more effort to protecting their customers than at shielding their public image" was held a factual assertion that "Isuzu took inadequate steps to protect its customers." (The word "perhaps" did not refer to the allegation, but rather "to what Isuzu's reaction might have been had they gone to visit the CU site," according to the court.) *Id.* at 17.

Pittle's letter to *Peterson's Wheel & Off-Road Magazine* referred to "the Trooper's tendency to tip up" as "the result of a design defect" and to Isuzu "scrambling to protect its public image." The court found that within the context of the debate between Consumers Union and Isuzu, which had reached heated tones before the letter's publication, these references were "clearly factual assertions" about the Trooper's safety and Isuzu's responsiveness to warnings. *Id.* at 18-19. As Isuzu questioned all of these assertions based on the alleged unreliability of Consumer Union's testing procedures, the court refused to grant summary judgment to the publisher.

Summary judgment was also denied for a claim based on a California statute against fraud, deceit, and other anticompetitive conduct in the business realm, to which the same actual malice standard applied. *Id.* at 19-20.

**Editor's note:** *This is one of two cases we report on this month — the other being *Levan v. ABC* at page 10 — in which there was a claim that the reference to the plaintiff's response for an interview or meeting with the defendant was a basis for the libel claim. This is clearly a hot spot issue and one that should be flagged for media counsel and clients. How these matters are characterized counts.*

## Police, Cable Station Denied Summary Judgment in Libel Suit Over "Most Wanted" Broadcast

Stating that summary judgment is not warranted "[u]nless the evidence is 'so overwhelming that any other conclusion would be unreasonable,'" the Supreme Court of Montana reversed a lower court's grant of summary judgment to a cable television station that broadcast the plaintiff's photograph in connection with a community crime prevention program. *Hale v. City of Billings, Montana Police Department*, No. 98-476 (Sup. Ct. Mont. Sept. 14, 1999). Applying this restrictive summary judgment standard, the court reversed the trial court's findings on substantial truth, opinion, official duty privilege, and negligence and remanded the suit against the cable station and the Billings Police Department for further proceedings.

### *Yellowstone's Most Wanted*

The sequence of events leading up to the lawsuit began with the belated arrest for domestic abuse of plaintiff Mark Hale. While a criminal complaint was filed against Hale on April 2, 1995, the Billings police, reluctant to embarrass Hale at his place of business, did not arrest him until nearly ten months later. During that time Hale continued his daily habits unaware of the complaint lodged against him.

A few weeks preceding the arrest, the Billings Police Department provided Billings Telecommunications, Inc. (TCI) with Hale's photograph, physical description, and the charges against him. These were aired on TCI's program "Yellowstone County's Most Wanted" along with those of other at-large crime suspects. During the program, a voice-over narrative described the individuals pictured as "fugitives," and warned viewers that they might be "armed and dangerous," but also stated that they were innocent until proven guilty in a court of law. After arresting Hale, the police failed to advise TCI to remove his profile from the program until six days later; by that time, TCI had already done so. Hale sued both the police department

and TCI for defamation.

### *Summary Judgment Standard is High*

The trial court granted summary judgment, concluding as a matter of law that the broadcast information was truthful, or if not truthful, then constitutionally protected opinion. The Supreme Court found questions of fact remaining with regard to each of these grounds. It applied a high standard for summary judgment, based on Article II, Section 7 of the Montana Constitution:

In all suits and prosecutions for libel and slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.

While noting that "there is no absolute prohibition against granting summary judgment in libel cases," *id.*, slip op. at 3, quoting *Williams v. Pasma*, 202 Mont. 66, 72, 656 P.2d 212, 215 (1982) the court relied on the Restatement (Second) of Torts, Sections 614 and 617 to preclude summary judgment in defamation cases except "if the evidence is so overwhelming that any other conclusion would be unreasonable." *Id.*, quoting Restatement (Second) of Torts §617 cmt. a.

### *An Issue on Truth*

The court proceeded to apply this standard to each of the defendants' grounds for summary judgment. First, the Billings Police claimed that the information they provided to TCI was "essentially truthful." The Supreme Court, however, noted that while Hale's name appeared on a list labeled "most wanted" which the police gave to TCI, and the police knew the format of TCI's program, the plaintiff had actually been chosen at random from a number of outstanding arrest

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## Police, Cable Station Denied Summary Judgment

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warrants, and the police were aware of his whereabouts. Therefore, the court held, a reasonable jury could find that the characterization of Hale offered on the program, as followed from information provided by the Billings Police, was not essentially truthful. *Id.* at 4.

### *Reversal on Opinion*

As for the lower court's finding that the broadcast presented only constitutionally protected opinion, in its reversal the Supreme Court relied upon *Roots v. Montana Human Rights Network*, 275 Mont. 408, 913 P.2d 638 (1996), a Montana case derived from the U.S. Supreme Court's holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 100 S. Ct. 2695, 11 L. Ed. 2d 1 (1990), and again on the Restatement (Second) of Torts, Section 566. The court articulated the following rule: "if an opinion is not based on disclosed facts, and as a result creates the reasonable inference that the opinion is based on undisclosed defamatory facts, such an opinion is not afforded constitutional protection." *Hale* at 5.

Although the voice-over in "Yellowstone County's Most Wanted" referred globally to the individuals pictured as "fugitives" and warned they might be "armed and dangerous," the court inferred from the juxtaposition of these remarks to Hale's photograph the following statement: "In our opinion, we think Mark Hale is a most wanted fugitive, who may be armed and dangerous." According to the court, this implicit statement implied the existence of undisclosed defamatory facts that were provably false, as the plain meaning of the words did not apply to Hale. *Id.* at 5-6.

### *Official Duty Privilege/Negligence Rejected*

The defendants also argued that the statements, even if defamatory, were statutorily privileged from suit as either a proper discharge of an official duty or as concerning a judicial proceeding. The Montana Supreme Court also refused to find these theories dispositive as a matter of law.

First, it held that the statutory privilege for statements made "in the proper discharge of an official duty" is only absolute where the official duty is mandated by law. As for other statements made as a part of one's professional duties, "it is a matter for the jury to determine whether the discharge of the official duty—here, all statements provided to TCI by Billings Police—was 'proper' to the extent Billings Police did not abuse the privilege." *Id.* at 8. The court, however, articulated no legal standard of propriety.

The court cited *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995) for the proposition that statements that police make about the facts of a case are not considered part of a judicial proceeding for the purposes of the statutory fair report privilege. *Hale* at 8-9. The fair report privilege as codified in Montana covers statements made in "a fair and true report without malice of a judicial, legislative, or other public official proceeding." M.C.A. § 27-1-804. TCI had argued that its statements should be privileged as a fair report of a judicial proceeding.

Finally, the court addressed the issue of negligence, again reversing the lower court, which had found no duty on the part of the Billings Police Department to notify TCI of Hale's arrest. The Supreme Court found that such a duty did exist based on a Montana statute obliging "[every person] . . . to abstain from injuring the person or property of another or infringing upon any of his rights." *Id.* at 9, quoting § 28-1-201 M.C.A.

The court further noted that the police department was aware of its duty of care attaching to the provision of information to TCI, as evidenced in correspondence from the department to TCI acknowledging the need to manage the dissemination of information according to specific guidelines. These included notifying TCI immediately of arrests, and limiting the suspects featured on the program to those wanted for serious criminal offenses. As these guidelines were not adhered to, the court found issues of fact as to negligence. *Id.* at 9.



## Utah Court Grants Summary Judgment for Newspaper in Libel Suit Brought by Former City Council Member

### *Public Interest Privilege Applied*

By Roger Myers, Rachel Boehm and Jeffrey Hunt

Finding that a state statutory public interest privilege "was written for exactly the type of challenge made by the plaintiff in this case," a state district court in Utah has granted summary judgment to a Provo newspaper in a libel suit filed by a former city council member. Although the Court's decision provides media law practitioners with guidance on several defenses to libel claims — truth, the fair report privilege, lack of defamatory meaning — the decision is especially notable because it contains the first substantive discussion of Utah's "public interest privilege" in almost 20 years. *Brown v. Wanlass*, No. 980404712, (4th Judicial Dist. Court, August 11, 1999).

#### *Was it a Misdemeanor or Infraction? Does It Matter?*

The libel suit arose out of a September 30, 1998 article in *The Daily Herald*, a Provo, Utah newspaper published by Pulitzer Community Newspapers, Inc. The article, entitled, "American Fork withholding info from former city councilman," reported plaintiff's quest for access to city documents relating to a criminal case against the former council member. The criminal case stemmed from a June 24, 1997 incident outside of American Fork city hall in which police officers alleged that the plaintiff — then an American Fork city council member — had assaulted a police officer. The former council member was later charged with disorderly conduct, an infraction.

Plaintiff filed a lawsuit against Pulitzer, *The Daily Herald*, its editor, and the reporter who wrote the article, contending that the article was false and defamatory because (1) it described the disorderly conduct charge as a misdemeanor rather than an infraction; (2) plaintiff claimed that by reporting that the plaintiff had allegedly assaulted a police officer, the article — which omitted that plaintiff was charged with

disorderly conduct rather than assault — reported or implied plaintiff had been *charged* with assaulting or had assaulted a police officer; and (3) plaintiff argued that the article implied that the Attorney General's Office "recommended or would recommend an additional misdemeanor charge" against plaintiff.

Defendants moved for summary judgment on the grounds that the statements complained of by plaintiff (1) were true or substantially true as a matter of law; (2) were privileged under Utah's statutory "fair report" and "public interest" privileges; (3) did not convey the defamatory meaning plaintiff alleged; and (4) were not actionable under the incremental harm doctrine. On August 11, 1999, the court issued its findings of fact and conclusions of law in support of its order granting the media defendants' motion.

#### *Court Finds for the Paper*

The court found the article was true or substantially true as a matter of law, finding no actionable distinction between a misdemeanor and an infraction. The court noted that such an error in legal terminology was not enough to support a defamation claim, "particularly where the term 'misdemeanor' is commonly understood to describe relatively minor, non-felony offenses, an infraction is such an offense, and the Article accurately reported the underlying allegation" upon which the charge against the council member was based.

As an alternative basis for granting summary judgment, the court also found that the article was protected by Utah's statutory "public interest" privilege (referred to in some cases as the "public benefit" privilege), which applies if "the publication . . . of the matter complained of was for the public benefit." Utah Code Ann. § 45-2-3(5). To overcome the privilege, a plaintiff must prove common law malice — *i.e.*, that the article was published with ill will, was excessively published, or that the defendant did not reasonably

*(Continued on page 30)*

## Utah Court Grants Summary Judgment

*(Continued from page 29)*

believe his or her statements were true. Although one would expect such a privilege to be applicable in many situations, generating a substantial body of law discussing the scope and application of the privilege, it has been the subject of only occasional and brief discussion in published case law. The last substantive discussion of the Utah privilege in a published decision occurred in 1981, when the Utah Supreme Court noted that “[t]he ‘public interest’ privilege is applicable, at least, when the public health and safety are involved and when there is a legitimate issue with respect to the functioning of governmental bodies, officials, or public institutions, or with respect to matters involving the expenditure of public funds.” *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 978 (Utah 1981).

Despite the relative dearth of prior case law on the public interest privilege, the court agreed with the media defendants’ contention that an article concerning criminal charges against a council member stemming from an alleged assault of a police officer fell within the scope of the privilege, noting, “if the public interest privilege . . . does not apply to the Article at issue in this case, it could not apply to any news article. It appears to the Court as though the statute were written for exactly the type of challenge made by the plaintiff in this case.”

The court also concluded that summary judgment was warranted on two other grounds: not only was the article a fair and true report of judicial or public official proceedings and thus privileged under Utah’s “fair report” privilege, but the court agreed with the media defendants that the article did not convey the defamatory meanings that plaintiff had alleged.

In granting the media defendants’ summary judgment motion, the court also denied plaintiff’s request to conduct further discovery under Rule 56(f) of the Utah Rules of Civil Procedure, concluding that the former council member had not met his burden to demonstrate how such discovery would aid in his opposition to the pending summary judgment motion.

The former city council member declined to appeal

from the trial court’s dismissal of his libel claim against the Pulitzer defendants.

*Mr. Myers and Ms. Boehm are with Steinhart & Falconer LLP in San Francisco, California, and Jeffrey Hunt is with Parr Waddoups Brown Gee & Loveless in Salt Lake City, Utah. Mr. Myers, Ms. Boehm and Mr. Hunt represented Pulitzer Community Newspapers, Inc., The Daily Herald, editor Michael Patrick and reporter Marta Murvosh in this matter.*

### NEW LDRC FELLOW

We want to welcome Elizabeth Read as LDRC’s newest Fellow. LDRC Fellows are lawyers in the beginning of their careers who spend a year working at LDRC learning about libel, privacy and the other issues on which LDRC puts its focus. This year, the LDRC Fellow is Elizabeth Read, who graduated from Harvard Law School last spring. Some of you met Elizabeth at the NAA/NAB/LDRC LIBEL CONFERENCE and others of you will be speaking with her in the near term in connection with LDRC’s efforts, in conjunction with the LDRC Prepublication/Prebroadcast Committee, to develop a bank of materials useful in preparing newsroom seminars. Elizabeth is a most welcome addition to the LDRC lawyers.

At the same time, we want to thank Jacqueline Williams, who was the LDRC Fellow for the last year. Jacky did a terrific job while at LDRC, and has spread her good works through efforts as a member of the New York City Bar Committee on Uniform State Laws, writing and speaking in support of the Uniform Correction and Clarification Act. We wish Jacky the very best.

## Hawaiian Newspapers Enjoined from Terminating Joint Operating Agreement

### *State Claims Antitrust Violations Papers Must Continue to Publish*

On October 15, the United States District Court for the District of Hawaii issued an order enjoining the termination of a six-year-old joint operating agreement (JOA) between the Honolulu Advertiser and the Honolulu Star-Bulletin, the two largest daily newspapers published in Hawaii. *State of Hawaii v. Gannett Pacific Corporation*, No. 99-687 ACK-BMK (D. Haw. Oct. 15, 1999). The preliminary injunction was issued, counter to the defendants' First Amendment objections, to prevent the newspapers from proceeding in the termination of the JOA and the simultaneous shutting down of the Star-Bulletin, pending the resolution of the state's antitrust claims against the newspapers.

#### *The Honolulu JOA*

The Newspaper Preservation Act exempts from antitrust liability JOA's between two newspapers, in order to slow the proliferation of one-newspaper communities. Since the 1960's, the Advertiser and the Star-Bulletin had operated under a succession of such agreements. The JOA at issue commenced on January 30, 1993 for a term of twenty years.

At the inception, the Star-Bulletin was the stronger paper and was owned by Gannett Pacific Corporation ("GPC"). According to the court — and these facts are seemingly of significance as they are repeated in the opinion:

sometime prior to January 30, 1993, GPC's parent (or subsidiary) stripped the Star-Bulletin of its operating equipment and assets by transferring them to the Advertiser. GPC's parent (or subsidiary) then sold its interest in the Star-Bulletin to Liberty [Newspaper LP] and purchased the Advertiser.

Now the Advertiser holds the assets and operating equipment used by both newspapers. While sharing commercial, circulation, and advertising departments, the two publications are editorially independent from

one another.

GPC and Liberty decided to terminate the JOA as of October 30, 1999; GPC was to pay Liberty \$26.5 million up front in lieu of the yearly return guaranteed to Liberty under the JOA. Simultaneously, Liberty announced that it would cease publication of the Star-Bulletin.

#### *State Complains*

The state of Hawaii filed a complaint in federal court, alleging that the termination and shut down would constitute three violations of the Sherman Act: restraint of trade, conspiracy to monopolize, and attempted monopolization. It moved for a preliminary injunction to prevent the two companies from proceeding with their plan pending the outcome of the litigation.

As the standard for granting a preliminary injunction, the court considered "(1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief." *Id.*, citing *Miller v. California Pacific Medical Ctr.*, 19 F.3d 449 (9th Cir. 1994). Examining each of the State's Sherman Act claims in turn, the court found that it was likely to succeed on the merits of each.

#### *Editorial Competition at Issue*

As for the restraint of trade claim brought under Section 1 of the Sherman Act, the court found that the State was likely to establish the existence of an agreement, conspiracy, or combination between GPC and Liberty, an unreasonable restraint of competition caused by the termination of the JOA, and an effect on

*(Continued on page 32)*

## Hawaiian Newspapers Enjoined from Terminating Joint Operating Agreement

(Continued from page 31)

interstate commerce. (The opinion cites *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996) in enumerating these factors).

According to the court, the termination agreement constituted the first element, and publication of the newspapers regularly involved the companies in interstate commerce. And because the termination of the JOA would inevitably result in the demise of the Star-Bulletin, leaving the area with only one daily newspaper (the Advertiser), "competition in this unique island community would be eliminated."

Here the court rejected the defendants' argument that as the newspapers currently did not compete economically, the termination of their JOA could not represent an antitrust violation. Rather, it emphasized the importance of *editorial* competition, emphasizing that "if implemented, the Termination Agreement would deprive newspaper readers of free and open competition in the sale of daily newspapers and their differing editorial and reportorial voices . . . and would deprive creators of news, editorial, and entertainment content of free and open competition for their output."

### *A Conspiracy to Monopolize*

The court went on to find that the State was likely to succeed in establishing a conspiracy to monopolize and an attempt to monopolize under Section 2 of the Sherman Act. As for conspiracy, the court relied on *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) for the requisite elements and held that: (1) the termination agreement constituted a "combination or conspiracy;" (2) the defendants' actions in preparation for the Star-Bulletin's closure established the "overt acts" required for a violation; and (3) the State could probably show that GPC intended to "buy out" Liberty to achieve the closure of the Star-Bulletin, and therefore that the agreement shows an "intent to monopolize."

The court also concluded that the intended buy-out was enough to constitute anticompetitive conduct toward establishing the elements for an "attempt to monopolize" articulated in *Movie 1 & 2 v. United Artists Communication, Inc.*, 909 F.2d 1245 (9th Cir. 1990). In addition, the preparatory actions already begun showed the requisite "specific intent;" the impending closure of the Star-Bulletin presented a "dangerous probability" that GPC would achieve monopoly power; and the presence of only one newspaper in the "unique island community" of Oahu would represent an antitrust injury due to the loss of editorial competition.

### *The Defenses Rejected*

The defendants presented two primary defenses. First, they argued that the Newspaper Preservation Act immunized them from antitrust liability, and the Act allows for amendments to already exempt joint operating agreements. Finding that the purpose of the statute is "to preserve independent editorial and reportorial voices," the court held that because the termination agreement would have results counter to that purpose, the court had the power to enjoin it.

Second, the defendants claimed that the preliminary injunction requiring the continued publication of the Star Bulletin would violate their First Amendment right to refrain from speaking or publishing. The court relied on *Associated Press v. United States*, 326 U.S. 1 (1945) for its holding that the First Amendment does not immunize the press from antitrust laws:

Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

Furthermore, the court found that the First Amendment did not preclude injunctive relief, rejecting the defendants' arguments relying upon *Wooley v. Maynard*, 430 U.S. 705 (1977) and *Miami*

(Continued on page 33)

## Hawaiian Newspapers Enjoined from Terminating Joint Operating Agreement

(Continued from page 32)

*Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Those cases stand for the proposition that the government cannot compel speech any more than it can prevent it. Again citing *Associated Press*, the court distinguished this case from *Wooley* and *Tornillo* because the injunction would not compel the publication of any particular viewpoint:

Conversely, here the Court would merely enjoin Defendants to continue doing that which they are already doing under the terms of the JOA, namely publishing a newspaper with whatever editorial and reportorial content they deem appropriate. In reaching this conclusion, the Court notes that the Supreme Court addressed a similar claim in *Associated Press*: "It is argued that the decree interferes with freedom to 'print as and how one's reason or one's interest dictates.' The decree does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published. It only provides that after their 'reason' has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication." [326 U.S. at 20 n. 18]

The court also rejected the defendants' argument that the injunction interfered with their First Amendment freedom not to associate, as they had voluntarily entered into the JOA initially. The opinion notes, "An outcome to the contrary would mean that every time the Court enjoined termination of a contract, this right would be implicated."

### *Irreparable Harm*

As for the remaining factors to be considered in granting injunctive relief, the court held that allowing the defendants to continue to prepare for the closure

of the Star-Bulletin could create irreparable injury to the State. Finding that these actions, which included sending notices to subscribers and advertisers and the removal of street vending racks, had already impaired public access to the Star-Bulletin, the court held that "no monetary amount will be able to compensate for the loss of the Star-Bulletin's editorial and reportorial voice, the elimination of a significant forum for the airing of ideas and thoughts, the elimination of an important source of democratic expression, and the removal of a significant facet by which news is disseminated in the community."

In analyzing the balance of hardships presented to the parties, the court found that the loss of competition and variety in news reporting would harm the State's interests a great deal, while GPC and Liberty had presented no evidence that their combination was not profitable overall, despite the Star-Bulletin's operating losses. Therefore according to the court the balance tilted sharply in favor of the State. For the reasons articulated elsewhere in the opinion, the court further concluded that the public interest demanded the continuation of both publications.

The preliminary injunction precludes GPC and Liberty from taking any steps towards implementation of their termination agreement, and enjoins them to continue to "produce high quality newspapers for their readers, improve acceptance for their advertisers, [and] subserve public interest by maintaining the separate identities, individuality and editorial and news freedom and integrity of the Star-Bulletin and the Advertiser."

### Any developments you think other LDRC members should know about?

*Call us, or send us an email or a note.*

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## Wisconsin Court Denies Prior Restraint

By James A. Friedman and Robert J. Dreps

In a case remarkably similar to *Procter & Gamble Co. v. Bankers' Trust Co.*, 78 F.3d 219 (6th Cir. 1996), the Milwaukee County Circuit Court late last month refused to impose a prior restraint on the publication of *The Business Journal of Milwaukee*, a weekly business newspaper. *Zande v. American City Business Journals, Inc.*, Case No. 99-CV-7716 (Milwaukee Co. Cir. Ct. Sept. 23, 1999). In *Zande*, Universal Foods Corporation ("UFC") and a former employee that UFC itself had sued tried to block the publication of a news article containing information from court records nominally subject to a protective order in a separate defamation case between them.

UFC had sued Zande for allegedly posting defamatory statements on an Internet message board. A *Business Journal* reporter covering the case went to the courthouse to review the case file. In Wisconsin, court files are presumptively public and expressly subject to the state's open records law. See e.g., *In re Estate of Zimmer*, 151 Wis. 2d 122, 130, 442 N.W.2d 578 (Ct. App. 1989); *C.L. v. Edson*, 140 Wis. 2d 168, 181, 409 N.W.2d 417 (Ct. App. 1987). A brief in the file the reporter received from the clerk, which was neither sealed nor otherwise labeled as subject to a protective order, indicated that the U.S. Department of Justice had contacted UFC as part of an investigation into price-fixing in the yeast industry.

*The Business Journal* reporter decided to write two stories, one on the defamation action and one on the price-fixing investigation, and sought comments from counsel for both Zande and UFC. Both attorneys claimed that the brief had been filed, and should have been kept, under seal. They threatened to seek injunctive and other relief if *The Business Journal* published an article based on the "confidential" document.

On September 23, 1999, when *The Business Journal* refused to back down, Zande and UFC jointly filed a

lawsuit, along with motions for an order to show cause, a preliminary injunction, and an ex parte temporary restraining order, seeking to block *The Business Journal* from publishing. The case was initially assigned to the same judge hearing the underlying defamation action, but he recused himself because his staff had given the reporter the public file. The plaintiffs suffered their first set-back when the new judge assigned to the case, Thomas P. Donegan, refused to hear their motions ex parte.

With 90-minute notice to *The Business Journal*, the judge held an emergency hearing on the motions for preliminary relief. *The Business Journal's* attorneys immediately filed a letter brief, submitting the basic cases on prior restraints. At the hearing, counsel for UFC argued that if the court allowed the article to be published simply because court employees had failed to "properly" keep the brief under seal, litigants would lose faith in the court system and, he speculated, UFC's stock price might fall.

In response, *The Business Journal's* counsel reminded the court that the reporter did nothing wrong and, in any event, the source of the information was not relevant to the issue of prior restraint. The plaintiffs' arguments on prior restraint, *The Business Journal's* attorneys emphasized, did not even approach the showing required to overcome the First Amendment's daunting presumption against prior restraint.

Before the judge issued his ruling, the plaintiffs' counsel acknowledged that they had not reviewed the basic prior restraint cases. The judge had. In short order, he denied the plaintiffs' motions. The plaintiffs have moved to dismiss the case as moot. *The Business Journal* is considering seeking sanctions against the plaintiffs and their counsel.

*James A. Friedman and Robert J. Dreps were counsel for The Business Journal in this matter.*

## Judge Orders District Attorney to Suspend Investigation into *Globe's* JonBenet Newsgathering

The United States District Court for the District of Colorado issued a temporary restraining order prohibiting a district attorney from continuing a grand jury investigation into whether alleged newsgathering attempts by the *Globe* tabloid and one of its editors violated Colorado's commercial bribery and extortion statutes. A violation of either statute is a felony.

The Jefferson County, Colorado District Attorney was investigating whether *Globe* and its editor, Craig Lewis, attempted to purchase a copy of the JonBenet Ramsey ransom note from a handwriting expert that was retained by the Ramsey defense lawyers. Interestingly, the copy of the ransom note had been given to the Ramsey defense lawyers by the Boulder County District Attorney's office pursuant to its investigation of the murder of JonBenet Ramsey.

According to the Jefferson County District Attorney, the *Globe* editor, along with a Colorado attorney, approached the handwriting expert and offered a sum of cash in exchange for a copy of the ransom note. The attorney was subsequently indicted for violation of the Colorado commercial bribery statute. Neither the *Globe* nor its editor has been indicted, but the editor did receive a target letter from the district attorney's office.

The District Attorney was also investigating whether *Globe* and its editor attempted to extort information from a former Boulder police officer by threatening to publish truthful information about the officer's family unless the officer agreed to be interviewed by *Globe*.

### *The Statutes*

A grand jury investigation was launched by the District Attorney, with the objective of indicting *Globe* and its editor for violating the Colorado commercial bribery statute, Colo. Rev. Stat. § 18-5-401, and the Colorado extortion statute, Colo. Rev. Stat. § 18-3-207.

The Colorado commercial bribery statute makes it a felony to confer or offer or agree to confer "any

benefit" on any person who is under a duty of fidelity in consideration for the offeree's knowing violation of that duty.

The Colorado extortion statute makes it a felony to make a substantial threat to another person to damage the property or reputation of the threatened person or another person, with intent to induce the threatened person to perform an act or refrain from performing a lawful act.

Subsection (1)(b) of the extortion statute makes it a felony to so threaten a person if the threat will cause the result described above by "an unlawful act" or by "[i]nvolving action by a third party . . . whose interests are not substantially related to the interests pursued by the person making the threat."

A conviction under either of these statutes carries penalties of fines up to \$100,000 and up to three years imprisonment.

### *Arguments for TRO*

In support of its petition for a temporary restraining order, *Globe* argued that its editor was acting as a newsperson, and that any criminal charges that the District Attorney planned to file against the editor or the newspaper would be premised upon the exercise of rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States and Article II, Section 10 of the Colorado Constitution.

*Globe* asserted that because the commercial bribery statute, as applied to newsgatherers, forbids the offering of any benefit in exchange for information by anyone who owes a duty not to disclose that information, it chills routine newsgathering activities that are protected by the constitutional provisions. *Globe* further argued that the Colorado commercial bribery statute is unconstitutionally overbroad if it can be applied to criminalize conduct that is a commonly practiced newsgathering technique.

For instance, journalists frequently offer to pay for a news source's lunch or travel expenses. Under this

*(Continued on page 36)*

## D.A. Ordered to Suspend Investigation into *Globe's* Newsgathering

*(Continued from page 35)*

law, such conduct could constitute commercial bribery and subject the journalist to potential jail time.

*Globe* informed the court that even the promise of confidentiality to a source could be construed as a "benefit" under the statute. Thus, the statute could have the effect of making it a violation of a criminal law to promise a source that his or her identity would be kept confidential in exchange for providing information to a journalist.

The thrust of *Globe's* argument was that when a statute is capable of being applied in a way that infringes upon commonly practiced reporting techniques, it simply cannot withstand the type of judicial scrutiny that the First Amendment requires.

*Globe* also argued that the extortion statute is unconstitutionally vague and overbroad when applied to the facts at issue. Because the allegation made by the District Attorney was, at best, an allegation that the *Globe* editor made a threat to publish truthful information about the family of a police officer, *Globe* asserted that such a threat could not be construed as a "threat to do an unlawful act." *Globe* additionally argued that the extortion statute was fatally overbroad.

Judge Walker Miller granted the request for a temporary restraining order and set the matter for hearing on a permanent injunction on October 18, 1999. If the permanent injunction is granted, the District Attorney will be prohibited from proceeding with an indictment against *Globe* or its editor under either the Colorado commercial bribery statute or the Colorado extortion statute.

Arguments on the permanent injunction were heard on October 18th. The judge indicated that he will not rule until October 28th. He extended the TRO an additional ten days.

*Globe* is represented by Thomas B. Kelley and Steven D. Zansberg of Faegre & Benson, in Denver, CO, and by Michael B. Kahane and Barbara Tarlow of its law department.

## LDRC 50-STATE SURVEY 2000: EMPLOYMENT LIBEL AND PRIVACY LAW

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## Fifth Circuit Holds Passive Website and Email Link Insufficient to Establish Minimum Contacts

### *Relies on Zippo Mfg. v. Zippo Dot Com*

A three-judge panel of the Fifth Circuit has affirmed the dismissal, for lack of personal jurisdiction, of a copyright infringement claim brought in the Southern District of Texas against a Vermont corporation that advertises on the Internet. *Mink v. AAAA Development LLC*, 98-20770 (5th Cir. Sept. 17, 1999). Plaintiff David Mink brought suit against AAAA Development and David Middlebrook, a Vermont resident, claiming that they had conspired to copy Mink's software system for financial gain.

The district court dismissed both defendants. Asserting that AAAA's Internet website could establish the minimum contacts necessary for personal jurisdiction, Mink appealed the ruling. (Texas' long-arm statute extends to the limits imposed by constitutional due process requirements.)

The Court of Appeals, in an opinion by Judge Parker, quickly disposed of the claim against Middlebrook, who conducted no business whatsoever in Texas. It also determined that specific personal jurisdiction could not be established for AAAA Development, as Mink did not establish any contacts between AAAA and Texas related to his claim. The remaining question was whether AAAA's website, on which it advertised its products and provided an order form to be printed out and returned via the mail, constituted "continuous and systematic" contacts with Texas and thus met the requirements of general personal jurisdiction according to *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

In ultimately affirming the dismissal of AAAA Development, the court relied on *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). That case placed Internet use on a continuum between three levels of contact with out-of-state consumers: conducting regular business over the

Internet involving the repeated transmission of computer files; allowing users to exchange information with a host computer through a website; and simply posting passive advertising information on a website. The first category would be sufficient to establish personal jurisdiction, while the second was questionable and the last would certainly not be sufficient.

In applying the *Zippo* analysis, the court found AAAA's website closest to the last category. It noted that the website provided contact information such as the mail-in order form, a telephone number, and an e-mail address that would permit consumers to interact with the company. However, the court held this insufficient to establish personal jurisdiction, apparently because interaction would not occur directly over the website itself:

Absent a defendant doing business over the Internet or sufficient interactivity with residents of the forum state, we cannot conclude that personal jurisdiction is appropriate.

In a footnote, the court acknowledged its ignorance as to whether the e-mail address posted on the website was a direct e-mail link. As this possibility was beyond the scope of the record, the court could not consider it. However, the opinion does note that "the mere existence of an e-mail link, without more, would not change this Court's conclusion that there is no personal jurisdiction."

Although, as mentioned in the opinion, this was a question of first impression for the Fifth Circuit, other jurisdictions have used the passive/interactive distinction in deciding personal jurisdiction issues that turn on Internet use. Similar analyses have been applied in cases involving trademark infringement, libel, and other torts. See *LDRC LibelLetter*, January 1998 at 18; and April 1999 at 21.

## Longer Rights for California's Dead Celebrities *But Libel of the Dead Remains Dead*

California Gov. Gray Davis has signed a modified version of a bill designed to curb the commercial exploitation of dead celebrities. While it extended to 70 years from 50 the period during which rights are protected, it rejected initial efforts to eliminate the law's explicit exceptions for political, newsworthy, artistic, and other works protected by the First Amendment. Final action came only after a debate that pitted a galaxy of Hollywood stars against the entertainment industry.

SB 209 initially was introduced by Sen. John Burton to remove what he said were loopholes in a 1984 law that gave heirs the right to seek damages from people who used the names, voices, signatures, or likenesses of dead celebrities to advertise or sell products without the permission of the heirs.

Opponents protested that in removing exceptions to the heirs' property rights, the bill's sponsors would grant heirs the right to block almost *any* use, putting on the works' creators the burden of proving they were protected by the First Amendment. Proponents agreed to a series of amendments. For example, the final version of the bill declares that:

[f]or purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article or merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

Sponsors abandoned a provision that would have given the heirs of a dead celebrity the right to sue newspapers, magazines, and film studios for falsely depicting the celebrity. They also backed off a proposed prohibition of the use of digital technology to alter the names or images of deceased celebrities.

Entertainment companies argued that the latter provision could have been used to bar manipulation like the juxtaposition of actors and historical characters in the movie *Forrest Gump*.

The Assembly voted, 75-1, on September 1 to pass the bill. The Senate voted, 36-0, on September 7 to accept the Assembly amendments.

The bill was prompted by the experience of Fred Astaire's widow Robyn, who was outraged at the use of her late husband's likeness to advertise condoms and dance instruction videos. The United States Court of Appeals for the Ninth Circuit in *Astaire v. Best Film & Video*, 116 F.3d 1297 (9th Cir. 1997) refused to hold liable the distributors of the video that included clips from two of Astaire's movies. It rejected Mrs. Astaire's contention that the law was intended to create a very narrow exception for serious artistic and literary works. In interpreting the statute's confusing language, the court conceded that the Astaire clips would make the videos more sellable but said that was not the kind of exploitation the Legislature meant to prohibit.

Astaire was backed in her efforts to tighten the law's provisions by the Screen Actors Guild and a cast of stars that included Charlton Heston, Muhammed Ali, Tom Cruise and Nicole Kidman, Jack Nicholson, Julia Roberts, Barbra Streisand and Brooke Shields. Opponents included major movie studios, newspaper publishers, recording studios and the American Civil Liberties Union. The Legislature decreed that the measure should be cited as the "Astaire Celebrity Image Protection Act."

**Information about the "dead celebrities" bill  
can be found by going to the web site of the  
California state Senate —[www.sen.ca.gov](http://www.sen.ca.gov) —  
and clicking on "legislation."**



*Look at Who is Suing . . .*  
**Linda Tripp Sues for Invasion of Privacy**

Linda Tripp has filed suit against the Office of the President, the Department of Defense ("DOD") and two DOD officials (public affairs chief Kenneth Bacon; and Clifford Bernath, who had authority over FOIA matters) for violating her federal and common law privacy rights.

The gravamen of Tripp's complaint is that the defendants wrongfully accessed and thereafter disseminated to the media information from her confidential personnel and security background files. Specifically, the complaint alleges that the DOD defendants revealed details from her files to the *New Yorker* magazine. In March 1998, the *New Yorker* published an article by Jane Mayer entitled "Portrait of a Whistleblower" that revealed the embarrassing fact that Tripp was arrested in 1969.

According to the complaint, in preparing this article Mayer contacted Kenneth Bacon to find out what Tripp had reported to the DOD regarding her history of arrests or convictions indicating that she would compare this information to her own information on the subject. The DOD officials, according to the complaint, quickly accessed Tripp's records and disclosed information from them — presumably what Tripp had (or had not) reported in these forms regarding arrest records or convictions — both to Mayer and to a fact-checker at the magazine allegedly in violation of the Privacy Act of 1974, 5 U.S.C. §552(a) (which protects individuals against improper disclosure of information held by government agencies) and District of Columbia common law protections for privacy.

The complaint also alleges that this disclosure, together with unspecified harassment by the DOD officials and unnamed John and Jane Doe defendants, violated Tripp's civil rights under the Civil Rights Act of 1871 and 42 U.S.C. §1985(2).

**Ventura Sues Gannett/Enquirer**  
*Source for Ill-Fated Chiquita Story*  
**Claims He Was Burned**

A source for a controversial newspaper investigation of Chiquita Brands International has sued the *Cincinnati Enquirer* and the parent Gannett Company for the broken promises of its reporters to keep his identity secret.

The complaint filed by lawyers for George G. Ventura in the U.S. District Court in Cincinnati demands unspecified compensatory and punitive damages for breach of contract, tortious breach of contract, promissory estoppel, promissory fraud, and negligence.

According to the complaint, Ventura's agreement to provide information and documents for what the *Enquirer* anticipated would be a significant expose "was predicated strictly upon the numerous, explicit and unconditional representations of these reporters, who, acting for and on behalf of the *Enquirer* and Gannett, promised Mr. Ventura that his identity as a source of these documents and information would forever remain anonymous and confidential." Instead, the complaint alleges, the reporters tape recorded their conversations with Ventura and, with the acquiescence of the *Enquirer* and Gannett, disclosed his identity to his former employer, various law enforcement officials and agencies, third parties and the general public.

Indeed, the complaint alleges that defendants at the time of publication of the articles in the *Enquirer* destroyed tapes made in connection with the series' preparation *except* recordings of their conversations with Ventura.

The case is the latest of several civil and criminal actions arising out of the *Enquirer's* 1998 investigation of Chiquita's business practices. The articles used information from the illegally obtained voicemail messages of Chiquita executives. The *Enquirer* apologized for the articles, paid the company a settlement of more than \$10 million and

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## Ventura Sues Gannett/Enquirer Source

(Continued from page 39)

fired reporter Michael Gallagher, one of two investigative journalists cited in Ventura's court complaint.

Gallagher pleaded guilty to two felony charges of obtaining unauthorized access to Chiquita's voicemail system. Ventura pleaded no contest to misdemeanor charges of attempted unauthorized access to computer systems. The complaint says that Ventura also faces a civil lawsuit and was forced to leave his law firm as the result of the controversy surrounding the articles.

Ventura's complaint quotes Cameron McWhirter, the other reporter cited in the complaint, as saying, "now [that] I know who you are, but I'm not going to — you know, I would never — we would never reveal it. I'd go to jail and never reveal it." Throughout his relationship with the reporters, Ventura reiterated his desire to remain anonymous, and the reporters reaffirmed their assurances to him, the complaint says. Both past practice at the newspaper and specific approval by their supervisors authorized Gallagher and McWhirter the reporters to make the "contract" of confidentiality, the suit argues.

Ventura's complaint also accuses the newspaper of negligence because "defendants knew, or in exercise of their due diligence, had reason to know that Mr. Gallagher was not an honest, principled or ethical journalist." It says that Gallagher previously had been accused by a law enforcement official and a participant in the federal witness protection program of fabricating quotations and news.

The defendants have not responded as yet, but have previously denied revealing any confidential sources.

We encourage you to copy and distribute the *LDRC LibelLetter* to other members of your organization. If you would like LDRC to mail an additional subscription to you or a branch office of your organization, please contact us. The fee for an additional yearly subscription is \$50.

## U P D A T E

### *U.S. Supreme Court Denies Cert. for Negligent Hiring Claims in "Mancow" Suit*

The United States Supreme Court has declined to review, without comment, the Illinois Supreme Court's dismissal of negligent hiring claims against a former employer of disc jockey Matthew "Mancow" Muller. Muller, his radio sidekick Irma Blanco, Chicago radio station WRCX, and its owner Evergreen Media Corp. are defendants in a defamation suit brought in Illinois state court by former Chicago Bears football player Keith Van Horne. Van Horne, who was at the time of the alleged defamation also a WRCX personality, alleges that Muller defamed him with on-air accusations of threatening Muller's life.

Van Horne supplemented the defamation claim with one of negligent and reckless hiring, supervision, and retention against WRCX, for hiring and retaining Muller despite awareness of his past on-air antics. These allegedly include dropping cinder blocks from an overpass, obstructing access to the San Francisco Bay Bridge, and making offensive remarks about nursing home residents. Finding that no Illinois court had ever recognized causes of action for negligent hiring, supervision, and retention in the absence of an underlying physical injury to the plaintiff, the trial court dismissed those claims. See *LDRC LibelLetter*, February 1998, at 9. On appeal, however, the Illinois Appellate Court, First District reinstated them, finding that a physical injury was not a prerequisite. See *id.*

Late last year, in the case *Van Horne v. Muller*, No. 85063 (Ill. Dec. 3, 1998), the Illinois Supreme Court reversed in a holding reflective of First Amendment concerns. See *LDRC LibelLetter*, December 1998, at 9. Though the basis of the court's opinion was the lack of a nexus between Muller's former antics and the alleged defamation at issue (Van Horne failed to allege that Muller made defamatory statements in the past), it noted that the Constitution required the court to employ a narrow interpretation of the nexus requirement. The

(Continued on page 41)

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## U P D A T E

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### *Supreme Court Denies Cert in "Mancow" Suit*

*(Continued from page 40)*

court further observed in that opinion that imposing a broad duty on broadcasters to prescreen employees might have a chilling effect on their decisions to hire controversial speakers. *See id.*

Thus, the defamation suit against Muller and Blanco will proceed to trial absent the employment claims, easing the anxiety of broadcasters on this issue, at least for the time being.

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### *Berger v. Hanlon: Where Is It Now?*

This ride-along case, which involved coverage by CNN of the execution of a search warrant on the Bergers' Montana ranch by Fish & Wildlife agents, went up to the Supreme Court on petitions by the government defendants at the same time as *Wilson v. Layne*, the ride-along case coming out of the Fourth Circuit. *Wilson* was the subject of an opinion by the Court handed down on May 24, 1999. 1999 WL 320817 (S.Ct. 1999) *See, LDRC LibelLetter* June 1999 at 1. On the same day, the Supreme Court issued a per curiam opinion vacating the Ninth Circuit's judgment in *Berger v. Hanlon*, which concerned the liability of the government agents for alleged Fourth Amendment violations in connection with the ride-along, and remanding *Berger* for further proceedings in line with its decision in *Wilson v. Layne*.

A week later, the Supreme Court denied the petition for certiorari filed by CNN in *Berger v. Hamann* challenging the Ninth Circuit's position that CNN could be held to be a joint actor with the government agents and thus jointly liable for any Fourth Amendment violations.

### *Berger On Remand*

On August 27th, the Ninth Circuit took up the remand from the Supreme Court. *Berger v. Hanlon* No. 9635251v2 (9th Cir. aug. 27, 1999). The Ninth Circuit

stated that the "[t]he [Supreme] Court agreed with our holding that the federal officers violated the Fourth Amendment when, without the Bergers' consent, the officers permitted the media to accompany them during the execution of a search warrant." The Ninth Circuit, however, following *Wilson v. Layne*, affirmed the dismissal of the claims against the government agents based upon their entitlement to qualified immunity.

The Ninth Circuit then went on to say that in its original decision "we held that the media defendants were not entitled to summary judgment on the Bergers' *Bivens* claim because the media participated as 'joint actors' with the federal officers. . . . The Supreme Court affirmed our holding that a violation of the Fourth Amendment occurred in this case."

Because the media are not entitled to qualified immunity, summary judgment for the defendants on the *Bivens* claims, previously granted by the district court in the case, was reversed, as was the district court's grant of summary judgment to the media defendants on the state law claims of trespass and intentional infliction of emotional distress. Summary judgment for the media defendants on the Federal Wiretap Act claim and state law claim for conversion was affirmed.

### *A Motion for Rehearing*

On September 9, 1999, CNN, Turner Broadcasting and the CNN employee-defendants (the media defendants in the case), asked the Ninth Circuit to rehear *en banc* the remand order issued by the panel based upon their contention that the panel had "substantially misapprehended" the decision of the Supreme Court. The media defendants argued that the Supreme Court did not rule that the Fourth Amendment was violated in this case. According to the media defendants' Petition, the Supreme Court stated only that the Bergers had adequately alleged a Fourth Amendment violation under the Court's ruling in *Wilson v. Layne*, and repeated the holding of *Wilson*

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## U P D A T E

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### *Berger v. Hanlon*

*(Continued from page 41)*

to the effect that the "police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home." The Court, media defendants argued, did not decide the merits of the Bergers' claims which involve some issues that are quite different from those in *Wilson v. Layne*.

The media defendants also contended that the panel overstated its own decision of two years ago in stating that it had, in its original opinion, held that the CNN journalists were joint actors with the government agents. To the contrary, the panel in the original decision two years ago only held that the defendants were not entitled to summary judgment on the issue based upon the record before the court at that time.

CNN argued that a failure by the Ninth Circuit to correct these overstatements by the panel in its August 1999 opinion on remand would foreclose CNN from "establishing through discovery and at trial that Plaintiffs cannot *prove* their allegations." Media Defendants' Petition for Panel Rehearing and for Rehearing *En Banc* at page 1.

#### *CNN's Petition Rejected*

On October 12, 1999, the Ninth Circuit panel issued the following order: "The opinion filed November 11, 1997 is withdrawn. This case is reinstated effective August 27, 1999, and the opinion filed that date stands." *Berger v. Hanlon*, No. 96-35251 and *Berger v. Hamann*, No. 96-35266 (9th Cir. 10/12/99)

The original panel opinion has been vacated by the Supreme Court and withdrawn by the panel. The extremely brief, and CNN would argue, erroneous, decision issued on August 27 stands. Back to the district court on this muddy record.

### Denials of Anti-SLAPP Motions Now Appealable in California

In a significant legislative development in California, Governor Gray Davis signed into law a bill that allows defendants to take an immediate appeal of trial court denials of motions to strike under the state's anti-SLAPP law. Assembly Bill 1675 amending Cal. Code Civ. Pro. §425.16 (adding new subsections (j) and (k)) and §904.1(a) (adding new subsection (13)). Previously such denials were non-appealable interlocutory orders.

Signed into law October 10, 1999, and effective immediately, the bill further strengthens California's anti-SLAPP law which is already the broadest statute of its kind in the country. California's anti-SLAPP law provides for a special motion to strike in actions "arising from any act of that person in furtherance of the person's right of petition or free speech." Cal. Code Civ. Pro. §425.16(b)(1). The statute defines this broadly to include: 1) statements or writings made before or in connection with official proceedings; 2) statements or writings made in public forums on matters of public interest; and 3) any other conduct in furtherance of the right to petition or the right of free speech in connection with a public issue or an issue of public interest. §425.16(e). If a case falls under the statute, the plaintiff must prove a probability of success on the merits at the outset with admissible evidence or the case will be dismissed.

The statute was previously amended in late 1997 to, *inter alia*, clarify the Legislature's intent that the statute be construed broadly, §425.16(a); and, as noted above, to explicitly protect conduct other than written or oral statements, §425.16(e)(4). *See also Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 1109, 81 Cal. Rptr. 2d 471 (1999) (recognizing that the legislature intended the statute to be broadly construed); *See LDRC LibelLetter* February 1999 at 9.

California's anti-SLAPP law provides a powerful method of disposing of libel cases. *See, e.g., Nicosia*

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## Denials of Anti-SLAPP Motions Now Appealable

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v. *DeRooy*, No. C98-3029 MMC (N.D. Cal. 1999); see *LDRC LibelLetter* August 1999 at 9; *Sanders v. The Hearst Corporation, dba San Francisco Examiner*, (N.D. Cal. 2/99); see *LDRC LibelLetter* March 1999 at 13; *Kaelin v. Globe Communications Corp.*, No. B116789 (Cal. App. 2d Dist. Nov. 10, 1998); see *LDRC LibelLetter* December 1998 at 25; *Sipple v. Foundation for National Progress*, 71 Cal. App. 226, 83 Cal. Rptr. 2d 677 (1999); *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58 (1997); *Lafayette Morehouse v. Chronicle Publishing Co.*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 and 39 Cal. App. 4th 1379, 46 Cal. Rptr. 2d 542 (1995).

The California bill was supported by a diverse coalition of legal and media organizations, including the California Newspaper Publishers Association, California Broadcasters Association and the California Anti-SLAPP Project, headed by DCS member Mark Goldowitz.

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## Department of Justice Releases Trial Statistics Study

According to a recently released Department of Justice study of civil trial cases and verdicts in state courts in 1996, media defendants have good reason to fear jury trials. Compared to LDRC's statistics, the DOJ study shows that media defendants are far less successful in libel trials than are other libel/slander defendants. In the 109 slander/libel trials reported in the DOJ's study of 1996 trial results, plaintiffs won 36.0% of the jury trials and received a median award of \$25,000. Compared to a 1992 DOJ study, plaintiff success fell in 1996 from a 41.6% success rate at jury trial reported in 1992. The size of damage awards remained consistent in both studies, however, as the median award in slander and libel cases held steady at \$25,000. *Bureau of Justice Statistics Bulletin*

September 1999.

Perhaps evidencing the perception anti-media bias in the jury room, the DOJ findings stand in marked contrast to LDRC's reports on trials and damages which include only the results from media trials. According to LDRC's statistics, plaintiffs enjoyed a 77.8% success rate in state jury trials in 1992. And in 1996, while plaintiffs were not as successful as in 1992, the 72.7% success rate was well above the 36.0% success rate reported in the DOJ study. Similarly, the median damage awards in media cases according to LDRC statistics were much higher than the \$25,000 median award reported by the DOJ for all libel and slander jury trials. In 1992, the median state jury award in media trials was \$370,000. While in 1996, the median dropped to \$162,500.

Generally, the DOJ study supports the conventional wisdom that plaintiffs have a better chance of hitting a damage jackpot with a jury trial. On the other hand, however, the study finds that plaintiffs have the best odds of simply winning at trial in cases tried to a judge.

Comparing the 1996 and 1992 reports, the *National Law Journal* noted that "[d]espite the continuing stream of eye-popping awards for injured plaintiffs, things have gotten somewhat tougher for people seeking to remedy alleged wrongs in court, at least before a jury." In 1992, plaintiffs won 51.7% of the trials reported in the study; in 1996 the plaintiff success rate had dropped to 48.7%. Additionally, for tort cases overall, the median damage award fell from \$51,000 in 1992 to \$30,000 in 1996.

The DOJ study covered civil trial cases and verdicts from America's 75 largest counties for the year 1996. The study tracked 15,638 tort, contract and real property cases disposed of by jury or bench trial in state court during that year, reporting among other things plaintiffs' success rate and damage awards by category of claim, including libel/slander. The report is a follow-up to a study that the DOJ's Bureau of Justice Statistics conducted four years ago of civil jury trials in state courts in 1992.



## Third Circuit Affirms Summary Judgment in Civil Rights Action Brought Against Author Joseph Wambaugh

By Mark R. Hornak and Gregory A. Miller

The United States Court of Appeals for the Third Circuit recently affirmed summary judgment granted in the Middle District of Pennsylvania in a Section 1983 civil rights action brought by Jay C. Smith against noted police and crime author Joseph Wambaugh. *Smith v. Wambaugh*, 29 F. Supp. 2d 222 (M.D. Pa. 1998), *aff'd* 189 F.3d 464 (3rd Cir. 1999).

Smith, who in 1986, was tried, convicted and sentenced to death for the murders of Upper Merion High School teacher Susan Reinert and her two children, alleged that Wambaugh, while researching his best-selling book, *Echoes In The Darkness*, had "conspired" with Commonwealth of Pennsylvania Officials to engage in "prosecutorial misconduct" denying him a fair trial. Judge James F. McClure in the Middle District, and subsequently the Third Circuit, rejected Smith's claims and granted summary judgment in Wambaugh's favor.

### *Background of the Case*

In June 1979, the body of Susan Reinert, a teacher at the Upper Merion, Pennsylvania High School was discovered in a motel parking lot near Harrisburg, Pennsylvania. Reinert's body revealed evidence of being chained and beaten and the cause of death was determined to be asphyxiation from an overdose of morphine. Reinert had been a teacher in the English Department at the Upper Merion High School where Jay Smith was the Principal. A massive state and federal investigation was launched into the Reinert murder and the disappearance of her children, whose bodies were never found.

The case received a great deal of publicity due to the lurid details which came to light involving a number of teachers at the Upper Merion High School. Fellow teacher William Bradfield was arrested for the Reinert murder. He had been named as a beneficiary

in Reinert's will and on several life insurance policies. He was tried, convicted of the murders and sentenced to life in prison where he died in early 1998.

In 1986, Smith, who had been the principal at Upper Merion High School where Reinert and Bradfield taught, was arrested and ultimately tried, convicted and sentenced to three death sentences. At the time of his arrest, Smith had been serving a sentence for theft by deception. Prosecutors claimed that Smith had conspired with Bradfield in the Reinert murders. In 1989, the Pennsylvania Supreme Court overturned Smith's convictions based on the improper admission of hearsay testimony.

While awaiting retrial, Smith's attorney, William Costopoulos of Harrisburg, Pennsylvania, came into possession of materials found in the basement of the home of Pennsylvania State Police Officer Jack Holtz, the lead investigator in the case. Claiming that the materials constituted improperly suppressed evidence, Smith sought dismissal of all charges prior to retrial on the basis of prosecutorial misconduct. After further proceedings, the Pennsylvania Supreme Court found that prosecutorial misconduct had occurred and, based on the double jeopardy clause of the Pennsylvania Constitution, discharged Smith in 1992.

### *Smith's Claims*

In 1994, Smith filed a multi-count federal complaint against Wambaugh in federal court in Williamsport, Pennsylvania alleging state law claims of conspiracy and abuse of process and an unlawful conspiracy to deprive Smith of his Fourth, Sixth and Fourteenth Amendment rights under the Federal Constitution. Utilizing separate counsel, Smith had instituted a separate Section 1983 civil rights claim against various Commonwealth of Pennsylvania officials, including State Police Officer Jack Holtz.

The basis of Smith's claim against Wambaugh related to Wambaugh's contacts with Holtz and others

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### Third Cir. Affirms Summary Judgment in Civil Rights Action

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involved in the investigation of the Reinert murders. During the early stages of the investigation, Reinert's ex-husband had sent newspaper clippings to Wambaugh, a well-known author specializing in true crime books and fictional stories involving police and crime scenarios, illuminated by Wambaugh's prior experiences as a Sergeant on the Los Angeles Police Department.

Wambaugh was interested in the story and had contacted former lead investigator Joe Van Nort about the possibility of a book. He offered Van Nort payment for a personal

depiction waiver in order to release Wambaugh from liability for the manner in which Van Nort was to be portrayed in the book. Before any payment was made, Van Nort died.

Holtz, who took over the lead of the investigation, entered into a similar agreement with Wambaugh and ultimately received the payment for a personal depiction waiver, and providing to Wambaugh the "narrative thread" for the story which eventually became the best-selling book, and CBS mini-series, *Echoes In The Darkness*. Smith alleged that that agreement and related payment made Wambaugh a "state actor" for Section 1983 purposes, subjecting him to civil rights liability.

#### *The Issues*

In July 1998, Smith's case against Holtz and other Commonwealth officials went to trial in federal court in Williamsport. After a two week trial before Judge McClure, the jury returned a verdict in favor of all defendants. Subsequently, in December 1998, Judge McClure ruled on Wambaugh's motion for summary

judgment, which argued that because Wambaugh was not a state actor, there was no basis for Section 1983 liability on the facts Smith had alleged.

In granting summary judgment, Judge McClure noted that Smith's lawsuit could only proceed against Wambaugh if there was sufficient "joint action" or a "conspiracy" by Wambaugh with state actors for the purpose of depriving Smith of civil rights.

#### *The State Action Test*

The court held that a private party would be liable

under Section 1983 only when the party either actually participates with state officials in a constitutionally-prohibited activity or the private party conspires with state officials for purposes of violating the Constitution.

***As the court noted, unlike the media defendants in Berger, Wambaugh had not participated in any joint unconstitutional activity with state officials and did not participate at all in the specific conduct which allegedly was a Constitutional violation.***

The court began by considering the Ninth Circuit's opinion in *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997). Although not having the benefit of the Supreme Court's subsequent *Berger* opinion, Judge McClure nonetheless concluded that *Berger* and its factual scenario had no application to Smith's allegations.

First, unlike the situation in *Berger*, there was no evidence whatsoever that Wambaugh actually participated in the activities found to have constituted prosecutorial misconduct by the state courts. As the court noted, unlike the media defendants in *Berger*, Wambaugh had not participated in any joint unconstitutional activity with state officials and did not participate at all in the specific conduct which allegedly was a Constitutional violation. The court held that under *Berger* and *Dennis v. Sparks*, 449 U.S. 24 (1980), the alleged "joint activity" must constitute an agreement to violate Constitutional rights and not simply some "joint action" in a generic sense.

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### Third Cir. Affirms Summary Judgment in Civil Rights Action

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In applying that standard, the court noted that the record revealed (after full discovery) no evidence that Wambaugh had agreed with any state actor to deprive Smith of civil rights, nor any evidence that Wambaugh even knew that such an event might take place.

The court also rejected Smith's argument that Wambaugh's offer and subsequent payment to the lead state police investigator constituted evidence from which Wambaugh could be held to have known that the police and prosecutors would do anything, including violations of law, to get a conviction. The court noted that not only was such an assertion contrary to the record evidence regarding Wambaugh's discussions with the state officials, but reduced Smith's arguments to a generalized assertion that because Wambaugh offered money to the investigators for a story, the story would therefore best end with a conviction and Wambaugh should be held responsible. The court specifically rejected this position, given that there was no evidence that Wambaugh led Holtz to believe that a conviction would be needed before *Echoes* would be written, and there was no evidence that Wambaugh wanted a Constitutional violation to occur in order to obtain a conviction.

In closing, the court noted that:

Taking Smith's argument to its logical conclusion, if a police officer or prosecutor violates a suspect's or defendant's Constitutional rights in a case in which a reward has been offered, the offeror of the reward is liable as a state actor for conduct which was neither sought nor anticipated. Obviously, we reject this reasoning.

On July 30, 1999, the Third Circuit, in a Memorandum Opinion, affirmed Judge McClure's summary judgment and held that, in order to subject

Wambaugh to Section 1983 civil rights liability, Smith was obliged to prove that Wambaugh acted under color of state law by entering into a conspiracy with or acting in joint concert with state officials whom Smith had claimed suppressed evidence unlawfully. According to the Third Circuit:

However, even if it is assumed for the moment that there was a conspiracy by state officials to suppress evidence, Smith has produced not one shred of evidence to prove Wambaugh's complicity in that conspiracy.

#### *Implications for the Future*

With the Supreme Court's decisions in *Berger* and *Wilson* holding that, under the Fourth Amendment, there can be liability for "media ride-alongs" in the execution of search warrants, all activity in which the media are involved with police officials will be subject to close scrutiny. However, in *Berger* and *Wilson*, the alleged unconstitutional conduct was the actual participation in the search, the very subject of the "agreement" which was the basis of the civil rights claim.

Judge McClure's summary judgment opinion makes plain, however, that when alleging that a private party has become a "state actor" as a result of a joint agreement or "conspiracy," there must be sufficient factual proof to demonstrate that the purpose of the conspiracy or the agreement was in itself a Constitutional violation. Failing that, private parties, including media members, should not be held liable as state actors.

*Mark R. Hornak and Gregory A. Miller of Buchanan Ingersoll Professional Corporation (Pittsburgh Office), and John Havas of Harrisburg, Pennsylvania, represented Joseph Wambaugh in this matter.*

*Tasini v. New York Times*  
**The Copyrights of Freelancers**  
**A Threat to Archival Media**

By Bruce P. Keller and Peter Johnson

*Disclaimer from the Authors: The authors represented the publishers in the case described below and freely admit a bias in their view of the merits.*

"What's black and white and red all over?" goes the old joke. A newspaper, of course. Now, according to the Second Circuit in *Tasini v. New York Times, et al.*, Nos. 97-9181, 9650, 1999 WL 753966 (2d Cir., Sept. 24, 1999), a newspaper is not a newspaper *unless* it's printed on paper (predominantly in black and white), no matter how "read all over" it can be.

*Tasini* involved the following scenario, familiar to publishers across the nation. A freelance writer, or op-ed contributor, or local stringer, sends in articles, opinion pieces or a report on the local college football game. If the work is accepted for publication, the paper sends the writer a check. No other writing changes hands. What further rights do the writer and the newspaper have in the submission?

Until last month the law seemed settled. Under Section 201(c) of the Copyright Act, the writer retains the copyright to the work and can sell it again and again to anyone who will buy it. The newspaper (a "collective work" in copyright terms, 17 U.S.C. § 101) has the right to publish and republish the story "as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." 17 U.S.C. 201(c). The pertinent section of the House Report to the Copyright Act indicates that a "revision" may be something as remote as a 1990 revision of "a 1980 edition of an encyclopedia," and "later collective work in the same series" means a

publisher "reprint[ing] a contribution from one issue in a later issue of its magazine." The law, however, does not permit the publisher "to revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work." H.R. Rep. No. 94-1476, at 122-23 (1976).

*Tasini* posed the question of what happens when the "collective work" in its entirety — including the freelance contribution — is stored on discs in an electronic database such as NEXIS or on CD-ROM

products like New York Times OnDisc, where other issues and/or publications may be stored. Does a "revision" of the collective work survive in the database?

According to the District Court, the answer was "yes," because the complete editorial selection and content of the original newspaper was transferred whole to the database, except for those revisions necessitated by the transfer of the work from one medium to another. Such revisions include the deletion of photos, advertising, other graphical materials and paid death notices in agate type when the work is converted to ASCII text.

Preserving the original aspects of this copyrightable selection makes it irrelevant that other aspects of the electronic format may differ from the print format. Instead, it found that the NEXIS and the CD-ROM formats "carry recognizable versions of the publisher defendants' newspapers and magazines. For the purposes of section 201(c), then, defendants have succeeded at creating 'any revision[s]' of those collective works." *Tasini v. New York Times Co.*, 972 F. Supp. 804, 823-25 (S.D.N.Y. 1997).

***Put simply, the central analytical problem with the Second Circuit's decision is that it ignores all of the language and legislative history of the Copyright Act***

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*Tasini v. New York Times**(Continued from page 47)**The Second Circuit Decision*

The Second Circuit panel opinion reversed the judgment of the District Court and held that Section 201(c) does not permit publishers of newspapers and magazines to make complete issues of their publications available on NEXIS and other electronic databases without the express written permission of each freelance writer who contributed an article to those issues. It did so for three reasons, each of which conflicts with basic copyright law and precedents.

- **First**, it held a collective work no longer qualifies either as a copy of the original work, or "any revision" thereof, unless it preserves both the same "selection and arrangement" as the print edition. The Copyright Act, however, its legislative history and the Supreme Court in *Feist Publications v. Rural Telephone Serv. Co.*, 499 U.S. 340, 350 (1991), all are to the contrary: neither page layouts nor any particular arrangement need be preserved.

- **Second**, using a contributory infringement analysis, it focused exclusively on how hypothetical third party researchers might retrieve, from the entirety of the collective work residing on the discs, only an individual article. The claims brought by the plaintiffs, however, did not implicate the acts of any such hypothetical user. Instead, the only infringement claims in the case resulted from the act of reproducing entire issues in the NEXIS or CD-ROM formats. Both the Supreme Court, however, and the Second Circuit itself, in *Matthew Bender & Co. v. West Publ'g*, 158 F.3d 693 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 2039 (1999), already had correctly noted that, in direct infringement cases, such other third party conduct is irrelevant.

- **Third**, it held that a "new anthology" is created by assembling a number of collective works in a digital database. The mechanical act of reproducing a work in multiple media, however, does not create a new copyrightable work. For example, the Beatles' first album remains the same work whether reproduced on

vinyl, cassette tape or a CD, even when, as is often the case, the musical selections on each format are arranged in a different sequence. It also remains the same work even when, as with multiple CDs stored in a CD player, a user customizes access to the individual musical selections stored on those discs to listen to them in a rearranged sequence.

By the court's logic, however, the user is creating an infringing "new anthology" of individual tunes, in which the copyright status of the Beatles' album is lost. If the court's "new anthology" characterization of the literary equivalent — discs stored in electronic libraries — is correct, it means that each issue of a periodical must be reproduced on a separate disc, or database, or spool of film.

None of these results can be reconciled with the plain language of the Copyright Act, which allows any copyrighted work — including a collective work such as a newspaper or magazine — to be reproduced in copies "by any method now known or later invented," and perceivable by any process "now known or later developed." 17 U.S.C. §§ 106(1), 101. The physical or structural characteristics of a digital storage medium, in which copyrightable collective works are accumulated on a mechanical, chronological basis, cannot change the copyright status of each underlying collective work any more than the binding together and storing of a year's worth of paper law reviews on a library shelf.

Put simply, the central analytical problem with the Second Circuit's decision is that it ignores all of the language and legislative history of the Copyright Act that, taken together, demonstrate an unmistakable intent by Congress that new technological retrieval systems should not change the underlying nature of the copies from which works are reproduced.

Further, the express legislative history of the Act makes clear that the drafters of Section 201(c) rejected as impractical the proposal that the rights to republish collective works, including "any revision" of those works (whether content revisions, format revisions, or both) must be acquired by contract. The legislative history shows that the "any revision" language of

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*Tasini v. New York Times**(Continued from page 48)*

Section 201(c) was adopted to avoid having to "contract around" a more restrictive approach that would have limited a publisher's statutory privilege to republish a freelance contribution *only* to the "particular collective work."

The opinion creates a fundamental practical problem as well. Although in recent years many publishers have insisted on acquiring "electronic rights" by contract, not all have done so. Moreover, acquiring such rights on a going-forward basis, while eliminating risk in the future, does not reduce the risk with respect to publications that were archived electronically before such contracts became prevalent. For those earlier works, publishers must either track down the writers and acquire the rights, or — the far more likely solution — simply delete freelance contributions that were not expressly contracted for, leaving irreparable gaps in the electronic historical record.

*"Arrangement"?*

According to the Second Circuit, the "aspects of a collective work that make it 'an original work of authorship' are the selection, coordination *and* arrangement of the preexisting materials." 1999 WL 753996, at \*7. (emphasis added) (citation omitted). It states that, because a newspaper's "initial page layout is lost, such as placement above or below the fold," *id.* at \*1, the newspaper in digitized form has lost "most of its arrangement" and therefore its copyrightable identity, making it a new work. *Id.* at \*7.

A necessary corollary to this holding would require that each periodical's print sequence and arrangement be retained in digital form, forcing users of digital databases to search each stored periodical sequentially. This, of course, would defeat the purpose and great utility of electronic media.

It also is contrary to the law. To insist on retaining layout arrangements is inconsistent with what Congress (and everyone else) knew about electronic databases when the Act was passed in 1976: arrangements inevitably would be lost when a collective work is

transferred from print on paper to other formats, such as ASCII text on a disc:

[T]he actual *copying of entire works* (or substantial portions of them) *for "input" or storage in a computer would constitute a 'reproduction' . . . whatever form the "copies" take:* punch-cards, punched or magnetic tape, electronic storage units, etc.

*Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill*, 89th Cong. ("Copyright Law Revision Part 6") 18 (1965) (emphasis added).

In a database, in fact, it is "senseless to seek . . . a specific, fixed arrangement of data. There is simply a collection of information stored in an electronic memory — information that can be arranged and retrieved in variations limited only by the capabilities of the computer and the sophistication of the retrieval program." Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 Colum. L. Rev. 516, 531 (1981). As Prof. Jane Ginsburg observes, computer databases "may lack any 'arrangement,' for they are designed to permit the user to impose her own search criteria on the mass of information." Jane Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 Colum. L. Rev. 338, 345 (1992).

Consistent with the nature of digital databases and the entire media-neutral approach of the Act, collective works were therefore defined disjunctively, as consisting of materials "that are selected, coordinated, *or* arranged" to make "an original work of authorship." 17 U.S.C. § 101 (emphasis added). The Second Circuit, however, replaced the word "or" with "and," which imposes on publishers of collective works an obligation to retain an "arrangement" that is not required by the Act. *See also Feist Publications v. Rural Telephone Serv. Co.*, 499 U.S. 340, 350 (1991) (compilation (of which collective works are a species, 17 U.S.C. § 101) "is eligible for copyright if it features an original selection *or* arrangement") (emphasis added).

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Within days of the decision, commentators noted the significance of this error. See, e.g., 58 *BNA's Pat., Trademark & Copy. J.* 614 (Sept. 30, 1999) (Noting the "confusion" caused by the reference to selection "and" arrangement, rather than "the statutory selection . . . "or" arrangement").

Although arrangement is not required, at least one of the storage media in dispute — UMI's General Periodicals on Disc ("GPO") — actually does retain the original arrangement, because "with the aid of a machine," 17 U.S.C. § 101, it reproduces photographic images of the entirety of each page of the *New York Times* book review and magazine. The Second Circuit concluded that even such CD-ROMs fall outside the scope of Section 201(c) because issues of other periodicals also are stored on the same discs and articles from them can be retrieved individually. It therefore deemed such CD-ROMs "substantially similar to NEXIS" and held that a user's ability to retrieve different articles from different collective works make these storage media "at best a new anthology." 1999 WL 753966, at \*8. That conclusion, however, also represents a fundamental mistake in copyright law analysis.

#### *Contributory Infringement: Confusion With End-Users*

The infringement analysis used by the Second Circuit focuses exclusively on the ability of end users to download articles "individually or in combination with other pieces originally published in different editions of the periodical or in different periodicals." *Id.* at \*2. It characterizes NEXIS as "a database comprising thousands or millions of individually *retrievable articles* taken from hundreds or thousands of periodicals [from which] *articles* may be *retrieved* according to criteria unrelated to the particular edition in which the articles first appeared." *Id.* at \*7 (emphasis added). The court ignored, however, that NEXIS and the CD-ROMs also were designed to, and do, permit easy retrieval of the entirety of any given issue of a periodical.

This reflects two related errors.

First, the freelancers repeatedly claimed their claims of copyright infringement have nothing to do with end users' ability to retrieve their articles, but rest entirely on how their articles are stored in the databases themselves. At oral argument on the summary judgment motion, they insisted: "We have not claimed that . . . defendants are guilty of contributory or vicarious liability with respect to direct infringement committed by end users."

Not only did they present no evidence of any infringing retrieval, the undisputed record below clearly shows that the publishers' collective works are stored in the NEXIS library and CD-ROMs on an entire issue-by-issue basis, not by "cherry-picking" individual articles. Thus, as a factual matter, nothing in the record supports any claim of infringement based on retrieval, making the court's ruling on this basis very close to an advisory opinion.

Second, potential third-party article retrievals should not be allowed to determine whether there has been direct infringement. The Supreme Court has made it clear: "Third party conduct would be wholly irrelevant in an action for direct infringement." *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 446 (1984). Because the infringement claims in this case are based entirely on the acts of reproducing copies of the particular collective works on CD-ROMs and in the NEXIS library, under fundamental copyright law, it was the content of those allegedly directly infringing copies that should have been examined.

Moreover, any claim of *contributory* infringement, in contrast to the direct infringement claims actually brought and litigated, would require an analysis of whether the databases have "substantial non-infringing uses," *id.* at 442, and whether researchers who download articles have a cognizable fair use defense. *Id.* at 448. The decision did not allude to these claims and defenses in finding end users' conduct determinative of direct infringement.

Most importantly, in using a contributory

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infringement analysis it created a conflict with the same court's panel opinion in *Matthew Bender & Co. v. West Publ'g*, 158 F.3d 693 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 2039 (1999).

The *Matthew Bender* panel rejected similar infringement claims, based on the argument that users could rearrange data on a CD-ROM product to create an

infringing configuration. That

panel recognized that

"CD-ROM technology is

different from paper.

... because the file-

retrieval system

allows users to

retrieve cases in a variety of ways" that are unrelated to the original arrangement on the CD-ROM copy. 158 F.3d at 705. It refused, however, to take the erroneous next step of concluding that direct copyright infringement arises from a hypothetical user's ability to create an infringing work using "electronic scissors". See *id.* at 706. In both the UMI CD-ROM products and in NEXIS, it is the manipulation of the retrieval system — not any revised copy — that allows articles to be downloaded individually and recombined with other articles. There is, therefore, no directly infringing copy.

***"New Anthology"***

The third significant error in the decision is the assumption that the separate copyright status of individual collective works evaporates when they are stored digitally and that the entire NEXIS library or a UMI CD-ROM constitute copyrightable anthologies. To the contrary, as the District Court correctly concluded, "NEXIS and UMI's CD-ROMs carry recognizable versions of the publisher defendants' newspapers and magazines" and "store those versions within something akin to an electronic research library." 972 F. Supp. at 825 n.16 (emphasis added).

The same conclusion was reached by the Second

Circuit in *CCC Info. Serv. v. MacLean Hunter Market Reports*, 44 F.3d 61, 68 n.8 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995), where it properly noted that immersion of a work in a larger database does not cause the original work to lose its independent copyright status.

Both the CCC decision and the District Court's characterization are consistent with Congress's understanding, in 1976, of how databases would function. Congress was well aware that individual articles would be accessible from complete books and

periodicals that are

stored in exactly the

way the NEXIS and

CD-ROM products

store individual

collective works. See,

*e.g.*, *Copyright Law*

*Revision: Hearings on*

*H.R. 2223 Before the*

*Subcomm. on Courts, Civil Liberties, and Admin. of Justice*, 97th Cong. 338 (1975) (testimony of Paul G. Zurkowski, President, Information Industry Association) (under the Act, encyclopedias and periodicals would be input, and through computer equivalents of the *Reader's Guide*, located to access individual contributions). There is no suggestion that Congress intended such libraries automatically to constitute new works in and of themselves.

To the contrary, under the Act, as well as the Supreme Court's *Feist* decision and Copyright Office practice, the NEXIS and UMI CD-ROMs do not comprise "new anthologies," because the wholesale translation of entire books and periodicals into the digital medium is so "mechanical or routine as to require no creativity whatsoever." See *Feist*, 499 U.S. at 362. For that reason, the Copyright Office refuses to register automated databases "where the collection and arrangement" consists solely of "transferring data from hard copy to computer storage." Circular 65, Copyright Registration for Automated Databases 1 (U.S. Copyright Office 1999).

The Second Circuit approach, however, results in new anthologies being created — and infringements occurring — with alarming frequency when two or more

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***The Second Circuit approach, however, results in new anthologies being created — and infringements occurring — with alarming frequency when two or more independent works are stored together in a single medium.***

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independent works are stored together in a single medium. This reasoning has the potential to transform the hard drive of every PC and laptop computer that contains multiple files into an infringing "new anthology." Congress intended no such result.

*Consequences*

The Second Circuit suddenly exposes the countless publishers and libraries that have been preserving decomposing paper collections on microfilm, CD-ROM and in electronic libraries such as NEXIS to infringement liability with respect to innumerable individual articles. According to lead plaintiff-appellant Jonathan Tasini, "Every single data provider is now at risk . . . We could go into court tomorrow if we wanted and ask to shut down every database." Felicity Barringer, "Freelancers Win Appeal in Copyright Suit," *The New York Times*, Sept. 28, 1999, at C1. Tasini already has threatened "a tidal wave of lawsuits."

Even microfilm, a format appellant Tasini characterizes as infringing, is at risk. Although the decision does not mention microfilm or microfiche, its sweeping logic necessarily converts several months' worth of newspapers stored on a single microfilm spool into "at best, a new anthology of innumerable editions," 1999 WL 753966, at \*7, and, at worst, a new anthology of individual articles, prohibited under the decision's rationale.

One obvious and economical way to respond to these threats is the deletion of all freelance contributions from any archival records of collective works. This, in turn, will have a devastating impact on research and study in the United States. The public no longer will have electronic access to the complete contents of newspapers, magazines, other periodicals and anthologies. Instead, they will have to revert to the research methods of a prior generation: the *Reader's Guide to Periodicals* and bound paper copies — to the extent such copies even exist.

*Bruce P. Keller and Peter Johnson are with Debevoise and Plimpton, New York and represented the defendants in this matter.*

## Majority of Americans and New Yorkers Come Down Against Giuliani in Brooklyn Museum Dispute *Government Interference is Rejected*

We New Yorkers are parochial, but it is probably fair to assume that the extraordinary First Amendment crisis provoked in this city by Mayor Rudolph Giuliani's dispute with the Brooklyn Museum of Art has received attention nationwide. It is with cautious optimism that we report the results of two separate telephone surveys conducted at the end of September.

These polls indicate that a majority of people, both nationwide and in New York City, do not approve of Giuliani's attempts to force the Brooklyn Museum of Art to remove a painting from its exhibition of contemporary British art entitled "Sensation." Giuliani threatened to withdraw city funding to the museum if it refused to take down the work "The Holy Virgin Mary" by Chris Ofili, which the mayor labeled as offensive to Catholics. Claiming that Giuliani's actions constituted a First Amendment violation, the museum did not surrender, and the City withheld its regular payment to the Museum.

*The New York View*

The New York Daily News and New York 1, a local cable all-news channel, conducted a telephone survey of 508 New York City residents. Sixty percent of respondents opposed the mayor on the issue, while thirty percent supported him and ten percent were unsure. In virtually every demographic category, including white, black, Latino, Catholic, Protestant, and Jewish, the majority came out against cutting off funding to the museum, which depends on the city for approximately one third of its budget.

The only groups from which the mayor garnered a majority of support were white Catholics, and people over 65, and Staten Island residents. Those with college degrees supported the museum by a margin of three to one.

As to whether the mayor should generally have the power to deny budgeted funding to a cultural institution

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## Majority of Americans and New Yorkers Come Down Against Giuliani

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because he found a project offensive, only eleven percent responded affirmatively. Fifty-eight percent felt that not even the City Council (which in this case has supported the Brooklyn Museum) should have that right.

### *A National Perspective*

The majority of New Yorkers apparently reflect the sentiments of other Americans on government's responsibilities to museums that rely on public funding. In a scientific-sample survey of 502 people across the nation, the Center for Survey Research and Analysis (CSRA) at the University of Connecticut and the First Amendment Center found that sixty percent agree that the display of potentially offensive art should not justify the cutting of funds to the Brooklyn Museum.

Approximately three quarters of those surveyed agreed with the statement that "it is dangerous to allow government to ban this exhibit in the Brooklyn Museum of Art, because allowing the ban makes it easier for government to ban other exhibits in the future." An equal percentage eschewed the notion that government should have the power to withdraw funding from public libraries housing potentially offensive books. Sixty-four percent support public funding for the arts in general.

The Brooklyn Museum controversy has made news outside of the New York City area, with 25% of Americans having heard "a lot" or "some" about it the week "Sensation" opened, according to the CSRA survey. In New York it has touched off a debate about the relationship between public arts funding and the First Amendment, a relationship whose contours, the polls suggest, are not universally agreed upon. However, it does seem that a large number of people find the expressive freedom of cultural institutions important enough to question Mayor Giuliani's tactics in this case. And responses to the CSRA survey showed that Americans find particularly important their own freedom to view controversial art: 85 percent agreed with the statement that "people have the right to attend museums that have art that may be offensive to others."

## *City Files to Evict Museum*

The Museum filed suit in the U.S. District Court for the Eastern District of New York, claiming that the withdrawal of funds would violate the Museum's First Amendment right to free speech. Shortly thereafter, the City filed an eviction action in New York state court, claiming that the questionable exhibit constituted a breach of the Museum's lease to its city-owned building, which obliges the Museum to educate school children and the general public.

In the federal case, the City disputes the court's exercise of jurisdiction, arguing that by the factors articulated in *Younger v. Harris*, 401 U.S. 37 (1971), the court should abstain from hearing the case. The dispositive factors, the city asserts, are the existence of an ongoing state proceeding, a claim raising important state issues, and an adequate opportunity for the federal plaintiffs to raise constitutional claims in the state proceeding.

The Museum, which is represented by Floyd Abrams, counters that under *Younger*, any showing of bad faith or motives of harassment on the part of the City in bringing its suit should make abstention inappropriate. District Judge Nina Gershon is considering the parties' arguments.

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