

LDRC

Libel
Defense
Resource
Center

LIBELLETTER

Reporting Developments Through October 25, 2000

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**OPENING ADDRESS FROM
LDRC LONDON CONFERENCE,
MICHAEL TUGENHAT QC.
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COME CELEBRATE LDRC'S 20TH ANNIVERSARY!

LDRC ANNUAL DINNER
MONDAY, NOVEMBER 13, 2000
7:30 P.M.

*Cocktail Reception Sponsored by
Media/Professional at 6:00*

DCS BREAKFAST
TUESDAY, NOVEMBER 14, 2000
7:00 A.M. - 9:00 A.M.

*With a panel discussion on current
Bench/Media Relations Projects*

**NAA/NAB/LDRC CONFERENCE
PLANNING MEETING**
TUESDAY, NOVEMBER 14, 2000
12:00 p.m.

**THE LDRC INSTITUTE/FIRST AMENDMENT
CENTER EDUCATION PROJECT
TEACH-IN ON FRED FRIENDLY
SEMINARS**
WEDNESDAY, NOVEMBER 15, 2000
10:00 A.M.

(Details on page 2)

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UPCOMING EVENTS

LDRC Annual Dinner

Monday, November 13, 2000

Cocktail Reception, 6:00 Dinner 7:30

Sheraton New York Hotel and Towers

811 Seventh Avenue at 52nd Street, New York City

Join fellow supporters of the Libel defense Resource Center as we celebrate 20 years of promoting First Amendment rights. An invitation is attached to this issue of the LIBELLETTER, and is available at www.ldrc.com

DCS Breakfast

Tuesday, November 14, 2000

7:00 A.M. - 9:00 A.M.

Sheraton New York Hotel and Tower

Riverside Ballroom

811 Seventh Avenue at 52nd Street, New York City

Featuring a panel discussion on current Bench/Media Relations Projects.

NAA/NAB/LDRC Conference

Planning Meeting

Tuesday, November 14, 2000

12:00 p.m.

Offices of Davis Wright Tremaine

1740 Broadway, New York City

This Committee is a group of volunteers interested in planning the 2001 conference, so please come on to the meeting if you have any interest in the participating in this project. Bring your own sandwich. No special invitation is required. Contact Peter Canfield (Dow, Lohnes & Albertson, Atlanta, GA), Dan Waggoner (Davis Wright Tremaine, Seattle, WA), or Sandy Baron (LDRC) for more information.

LDRC Institute/First Amendment Center
Education Project

Teach-In On Fred Friendly Seminars

Wednesday, November 15, 2000

10:00 A.M.

A description of this event is enclosed with this LIBELLETTER. Contact David Heller, LDRC (dheller@ldrc.com), with any questions.

Maryland Federal Court Applies White-Chaplin Line of Analysis

Dismisses Implication Case on Early Motion

Libel by implication claims always present special problems, particularly when brought by private figures.

While public figures should be held to the requirement of *Bose v. Consumers Union*, 466 U.S. 485 (1984), of proving that the defendant subjectively intended to convey the particular defamatory meaning charged by the plaintiff, *see Newton v. NBC*, 930 F.2d 662, 686 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991), private figure libel plaintiffs may have no such burden.

For this reason, the *White-Chaplin* line of cases, including *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) and *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (1990), can be especially helpful. These cases require any libel by implication plaintiff to demonstrate that the publication itself shows that the defendant endorsed the defamatory implication argued by the plaintiff. Presumably, this must be shown through some other means than publishing the ambiguous language itself.

Because this test is applied without need for plaintiff discovery, it can be applied at the motion to dismiss stage.

Recently, the U.S. District Court for Maryland applied the doctrine to a case based on an article in *Men's Fitness* magazine. The court held that the alleged implication was not "odious, infamous, nor ridiculous," and that the plaintiff had not shown that the author intended to make the implication.

The decision, *Abadian v. Lee*, No. DKC 2000-716 (D. Md. Aug. 10, 2000), stemmed from the article *35 Things You Should Never Do*, in the March 1999 issue of the magazine. A section of the article written by defendant Bobby Lee advised readers to "[n]ever sign up for a gym membership on the first visit." The section continued by citing the plaintiff, Shirin Abadian, as the source for the information that "there's always a better price," and then quoted her directly: "deal to get the price where you want it, then leave. You should receive a call within a week offering a better price than the one you originally wanted, especially towards the end of the month, when

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Libel By Implication Must Be Shown

(Continued from page 2)

clubs need to meet their monthly numbers.”

Abadian had been the general manager of a Bally’s Total Fitness location in McLean, Va. when interviewed, but had been transferred to a location in Rockville, Md. She was fired after the article appeared.

In her lawsuit, Abadian admitted that the quotation and paraphrase were accurate. But she claimed that she also had told Lee that her company did not negotiate membership fees, and that his failure to include this information made her appear either incompetent or dishonest.

Abadian also said that she had contacted Lee after the article was published, and that he admitted that he knew that Bally’s did not negotiate membership fees. He said that this information had been edited out of his copy, and promised to call Bally’s on Abadian’s behalf. Lee did not make the call, and Abadian was fired shortly thereafter.

In the court’s opinion, District Court Judge Deborah Chasanow began by deciding that the case was controlled by Virginia law, since that is where Abadian had been employed during most of her career with Bally’s, and thus potentially suffered the most injury to her professional reputation.

Chasanow proceeded to analyze the standard for libel in Virginia. She wrote that Virginia courts have required plaintiffs in libel by implication cases to make an “especially rigorous showing,” slip op. at 8, citing *Chapin, supra*.

To qualify as an actionable statement, “the language must . . . be reasonably read to impart the false innuendo.” Furthermore, to demonstrate the requisite level of intent, the language must “affirmatively suggest that the author intends or endorses the inference.” Slip op. at 9, quoting from *Chapin*.

The court rejected Abadian’s arguments on both points.

Since Abadian admitted that she had been quoted accurately, and since both parties admitted to the court that negotiating membership fees was a common practice, “[a]ny negative implication that a reader may draw from these admittedly true statements is uncertain at best,” the court wrote. Slip op. at 11.

Chasanow also concluded that the plaintiff had not shown the requisite intent. “Lee wrote nothing to suggest, let alone intend or endorse, the alleged defamatory mean-

ing.” Slip op. at 13.

Finally, Judge Chasanow summarily dismissed four other claims: false light invasion of privacy, injurious falsehood, negligence and interference with employment. Invasion of privacy is not recognized by Virginia law, she wrote, and injurious falsehood applies only to injury regarding property. Interference with employment requires intentional interference with a plaintiff’s employment or contract, and no intent was shown in this case. And, citing *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998), she concluded that “a plaintiff cannot prevail on a negligence claim after she loses a defamation claim based on the same pleadings.”

Plaintiff was represented by Gerson A. Zweifach, Williams & Connelly, Washington D.C.

Federal Court Applies Strict Defamatory Meaning and Expansive Fair Report Analysis

By David S. Wachen and Bruce D. Brown

A federal court in Kansas City dismissed a challenge to a missing child report by KSHB-TV, finding the “innocent construction rule” to be a necessary hurdle under Missouri libel law, and adopting an expansive view of the common-law fair report privilege. *Kenny v. Scripps Howard Broadcasting Company*, 98-1079-CV-W-BD (W.D.Mo. 6/28/00).

KSHB, which is owned by Scripps Howard Broadcasting Company, reported that “police are on the lookout for a missing girl who may have been abducted by a relative,” that “the child was last seen with her paternal grandmother,” and that “family members believe the girl’s father and grandmother are now with her at an unknown location.”

The broadcast included names and photographs of the sixteen-month-old child and her grandmother, Carolyn Kenney, who subsequently sued Scripps for defamation,

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Federal Court Applies Strict Defamatory Meaning

(Continued from page 3)

claiming the report implied that she had kidnapped her grandchild, was wanted by police, was a criminal and/or had taken her grandchild without a right to do so. While acknowledging that she had picked up the child and had been with the child and the child's father at a location unknown to the mother, the plaintiff argued that the report created a false impression because there had been no custody determination over the child.

In granting Scripps's motion for summary judgment, the Court held that the broadcast was not defamatory and, in any event, was protected by the fair report privilege because it represented a fair and accurate report of police records generated when the mother reported the child as missing.

Not Defamatory

On the issue of defamation, the Court determined that it needed to apply both an "innocent construction" as well as a "plain and ordinary meaning" analysis in determining whether the broadcast was capable of defamatory meaning. In so doing, the Court found the broadcast incapable of defamatory meaning under the innocent construction rule, noting "the news item does nothing more than report that police are looking for a sixteen month old girl who was last seen with plaintiff." In support of its finding, the Court pointed to the report's qualifying language (e.g., "may have been abducted" and "family members believe the girl's father and grandmother are now with her"), rejecting plaintiff's argument that such "weasel words" do not eliminate the defamatory insinuation.

Information in Police Reports Privileged

The Court further held that the common-law fair report privilege provided an independent basis for dismissing the claim as a matter of law in light of two police reports and a "pick-up order" generated after the child's disappearance. The Court found that "police reports are reports of an official action subject to the fair report privilege" — even if reporters did not review the reports directly.

While unable to deny the existence of these reports, plaintiff argued that the privilege nevertheless did not apply because it was unclear whether station personnel had, in fact, reviewed the reports or simply relied on the mother's recitation of facts contained in them. The Court, however, held that, for purposes of the privilege, it does not matter how the information is obtained as long as the news report represents a fair and accurate account of the information contained in the records, following the reasoning in *Medico v. Time, Inc.*, 643 F.2d

134, 147 (3d Cir. 1980) and *Warren v. Pulitzer Publishing Co.*, 78 S.W.2d 404 (Mo. 1934).

In dismissing the case, the Court also recognized that the purpose of the report was to help locate the missing child, not to accuse anyone of criminal acts.

The Plaintiff has filed a notice of appeal to the 8th Circuit. It is worth noting also that the plaintiff filed a related case against Wal-Mart Stores based on a missing person flyer with similar wording that was posted in a glass case in a local Wal-Mart. That case is pending in state court with an outstanding summary judgement motion having been filed and a trial date of October 30.

David S. Wachen and Bruce D. Brown are attorneys with the Washington Office of Baker & Hostetler LLP, who, along with their colleague and lead counsel, Bruce W. Sanford, and local counsel Bernard J. Rhodes of Kansas City's Lathrop & Gage, L.C., defended Scripps in Kenney v. Scripps Howard Broadcasting Co.

The Court found that "police reports are reports of an official action subject to the fair report privilege" — even if reporters did not review the reports directly.

LDRC would like to thank interns — Eli Freedberg, Benjamin N. Cardozo School of Law, Class of 2002 and Peter Wilner, Benjamin N. Cardozo School of Law, Class of 2002 — for their contributions to this month's *LDRC LibelLetter*.

Disgruntled Professors Drop Libel Claims Against Teacher Review Web Site

By Roger R. Myers and Lisa M. Sitkin

Facing the prospect of paying defendants' attorney's fees under California's anti-SLAPP statute, Code of Civ. Proc. § 425.16, two college professors dropped their widely publicized lawsuit against the operator of a web site where students post reviews of their instructors' teaching performance, and stipulated to a judgment that included an award of \$85,000 in attorneys' fees. The case, *Curzon-Brown, et al. v. San Francisco Community College District, et al.*, Case No. 307335 (S.F. Sup. Ct.), involved questions traditional to libel law, such as what constitutes protected opinion, as well as a number of newer issues relating to speech and publication on the Internet, including the scope of immunity provided under Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1), and whether a party can be held liable for simply providing a hyperlink to a web site alleged to contain defamatory statements.

Grading the Faculty

The Teacher Review web site is an online forum operated by a former student at City College of San Francisco who created the site so that City College students could make informed choices when selecting their courses and professors. Teacher Review invites students to grade their professors' performance on an A-F scale and to comment on their teaching ability and course content.

When a student posts a new review at the site, it is automatically added to a searchable database of other reviews about the same professor, and a software program calculates the professor's cumulative grade point average. The web site is governed by guidelines prohibiting the posting of offensive or irrelevant comments, and the operator reserves the right to remove reviews that violate the guidelines.

The professors' libel suit arose when they discovered that Teacher Review contained a number of negative reviews about them, including several that were quite harsh in their criticism. In addition to bringing claims against the web site operator, Ryan Lathouwers, the professors also sued City College and the Associated Students of City College because these entities provided

links to the Teacher Review web site on their own web sites.

Demurrers and Motions to Strike

The defendants filed demurrers and special motions to strike under California's anti-SLAPP statute. This statute covers actions arising, *inter alia*, out of speech in a public forum or in connection with an issue of public interest. In a case that qualifies for the statute's protection, the plaintiff must prove a probability of success on the merits at the outset of the case or have his claims stricken. The statute also provides for a mandatory award of attorneys' fees to a prevailing defendant.

In their demurrers and motions to strike, the defendants argued that the anti-SLAPP statute applied to plaintiffs' claims because the student reviews in question were posted in a public forum (a publicly accessible site on the Internet) and were made in connection with an issue of public interest (the performance of professors at a publicly funded college).

On the merits, the defendants argued that they were protected by Section 230 of the Communications Decency Act, the statute that affords ISPs with immunity from suits arising out of third-party content.¹ Only a handful of courts have yet decided cases under Section 230, but all have unanimously held that it provides interactive service providers (defined as "users" or "providers" of "interactive computer services" such as web sites and multiple-user servers) with an absolute immunity against state claims arising out of content posted by third parties.

The defendants also moved to strike on the grounds that the reviews posted at Teacher Review constitute protected opinion, and that the professors, who had been quite outspoken in the press and on campus about many high profile issues including their lawsuit, qualified as public figures but had failed to allege or demonstrate actual malice. City College and the Associated Students argued further that they could not be held liable for reviews appearing on Teacher Review because none of the reviews appeared on their web sites or were stored on their servers. The plaintiffs' theory of liability against

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Disgruntled Professors Drop Libel Claims

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these parties was that the reference links they provided to Teacher Review somehow transformed them into publishers of the content posted there. However, like a footnote in a book or article, a link simply tells a web site visitor where to go for a given type of information and therefore does not amount to a publication or republication of that information.

An Amended Complaint and Its Settlement

In response to defendants' motions, the plaintiffs filed an amended complaint, dropping all of their original claims and adding new ones. Based on the plaintiffs' dismissal of their original claims, the defendants filed a motion for attorneys' fees under the anti-SLAPP statute, which allows defendants to recover fees if a plaintiff concedes the deficiencies in his claims by dismissing them after the filing of a special motion to strike.

Aware that all of the defendants intended to renew their motions to strike, the plaintiffs quickly settled with City College and entered into an agreement whereby they dismissed both City College and the Associated Students from the suit and released them from future claims relating to the Teacher Review web site. Under this agreement, plaintiffs agreed to pay \$10,000 of City College's attorneys' fees, with payment suspended as long as they refrained from pursuing similar claims against City College and Associated Students. Associated Students, however, argued that it retained the right to seek its attorneys' fees for bringing the motion to strike plaintiffs' original claims.

Pursues Only Site

The plaintiffs proceeded against the web site operator on a new false light invasion of privacy theory, alleging that he had manipulated the plaintiff professors' grade point averages on Teacher Review by selectively deleting positive reviews of them and leaving up negative reviews he knew to be inauthentic or inappropriate. Plaintiffs asserted that this alleged conduct removed the operator of Teacher Review from the protection of Section 230.

According to plaintiffs, Subsection 230(c)(2), which provides that a covered party must act "in good faith" when removing content from a web site in order to qualify for immunity against claims by a party whose own content is removed, also applies to claims by a party who is the subject of removed content.

Defendant filed a new demurrer and special motion to strike the amended complaint, in which he rebutted the plaintiffs' patent misreading of Section 230 and also presented extensive evidence that plaintiffs' allegations were, in any event, untrue, and that they themselves had submitted fraudulent reviews to Teacher Review and induced others to do the same.

In response, plaintiffs sought wide-ranging discovery under § 425.16(g) of the anti-SLAPP statute, including the identities of students who had posted reviews to Teacher Review. Both the website operator and Associated Students filed oppositions to this request, on the ground that the students' anonymity was protected by the First Amendment. The trial court then calendared all motions for resolution at one time, accepting defendants' argument that discovery motions under § 425.16(g) need not be considered unless the court first rejects the various legal and constitutional arguments as to why the case should be dismissed.

On the eve of the October 4 hearing, plaintiffs offered to settle the case. They have agreed, *inter alia*, to dismiss all of their claims with prejudice and release the web site operator and related parties from future claims, and have further stipulated to a judgment of \$75,000 in attorneys' fees, with enforcement to be suspended in exchange, *inter alia*, for a payment of \$10,000 to the ACLU of Northern California.

¹ Section 230 was enacted in the wake of a decision finding an interactive service provider that enforced guidelines for postings at its site liable for defamation on the basis of its exercise of editorial control. Concerned that the threat of liability would either lead web site operators to shut down public forums such as chat rooms and information exchanges or prevent them from exercising any controls at all, Congress provided these parties with immunity from suits arising out of third-party content.

Mr. Myers and Ms. Sitkin, who are with Steinhart & Falconer LLP in San Francisco, California, represented the Associated Students in this matter.

Center for Psychological Rehab for Priests Held to Be Public Figure in Catholic Community

On August 16, the Fourth Circuit Court ruled in a per curiam opinion that The New Life Center, Inc., a Roman Catholic psychiatric center that rehabilitates dysfunctional behavior in Catholic priests and seminarians, qualifies as a limited purpose public figure in its libel suit against Ignatius Press, which publishes a monthly magazine, *The Catholic World Report*. *New Life Ctr., Inc. v. Fessio*, 2000 U.S. App. LEXIS 20894.

The article at issue in the suit, written in a February 1997 issue of *The Catholic World Report*, stated the New Life Center is run by theological liberals, many of whom are openly homosexual. The article insisted that counselors at these centers ridiculed and disparaged

patients who professed belief in church doctrine.

The article featured the stories of two seminary students, one of whom was only referred to by a pseudonym (a fact not

divulged in the article), who claimed that New Life Center ruined their careers by diagnosing them with homophobia, doctrinal rigidity, severe sexual dysfunction, and suggested that one might actually be a homosexual in denial. The article insinuated that patients are routinely and incorrectly diagnosed with such disorders and conditions by the homosexual counselors at the Center.

The district court found the plaintiff to be a limited purpose public figure, that it had failed to offer sufficient evidence of actual malice, and granted summary judgment for the defendant. The Fourth Circuit agreed on both issues. (The district court found it lacked jurisdiction under the Virginia long-arm statute over the individual defendants named in the complaint, who included the freelance author and editor of the article. The Fourth Circuit upheld that judgment when it found that there was no evidence of actual malice on the part of the defendants, a finding which rendered the jurisdictional issue moot.)

Clearly a Public Controversy

While “not every issue of interest to the public can

be considered a public controversy,” (citing *Firestone v. Time*), the Fourth Circuit found that the issues of misconduct by priests, and the treatment afforded priests whose behavior warranted it, were clearly ones of “public controversy” as defined by Fourth Circuit precedent (citing *Foretich v. Capital Cities/ABC*, 37 F.3d 1541 (1990), among other Fourth Circuit decisions)

As to whether New Life had engaged itself in the controversy and/or otherwise met the indicia of a public figure, the court looked at whether the plaintiff had access to channels of communication to dispute the allegedly defamatory remarks, assumed a role of prominence in the controversy, sought to influence the resolution of

the specified conflict, whether the controversy existed prior to the defamatory remarks, and finally if it retained public figure status at the time of the alleged defa-

mation. The court ruled that New Life Center met all of these criteria.

New Life ran seminars, published an internationally distributed quarterly newsletter, and published books, all of which were channels of communications more substantial than those afforded a private individual. Through its publications and advertisements, it presented itself as expert on the evaluation and treatment of priests, including those with sexual disorders. It claimed its head was an internationally known researcher, lecturer and diagnostician, voluntarily assuming prominence in the controversy and endeavoring to influence it by promoting what it believed was its highly successful methods of treatment.

And while New Life may not be well known to the general public, it was well known and well respected within the hierarchy of the Catholic Church. (“Someone who has not attracted general notoriety may nonetheless be a public figure in the context of a particular controversy covered by publications of specialized interest,” quoting *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991)).

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Center for Psych. Rehab Held to Be Public Figure

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No Evidence of Malice

New Life sought to prove actual malice from a disclaimer in the article which noted that because much of the article was based upon the sources who had been sent to facilities for priests with emotional problems and were therefore subject to challenge, defendants had verified all charges published with at least one independent source. The court rejected this as in and of itself, indicating a lack of belief in the truth. And, of note, the court refused to find actual malice from the fact that the “independent sources” were often doing no more than repeating what they heard from the patient-sources.

Finding various factual errors also did not establish actual malice, the court upheld summary judgment for the defendant.

per's book also stated that Eidson had been killed after King's death to keep the story secret.

A 1998 paperback edition of the book published by Warner Books, Inc. removed Eidson's name from the text identifying him as leader of the assassination team, but did not remove him from the book's index.

The book garnered attention because the author, William Pepper, had been an advisor to King in his civil rights efforts during the 1960s. In the 1990s, Pepper became convinced of the innocence of James Earl Ray, who confessed in 1969 to killing King but later recanted. Pepper, who is an attorney, then represented Ray in his efforts to obtain a new trial. Ray died in prison in 1998.

King's son Dexter, who met with Ray in 1997 and expressed his belief in Ray's innocence, wrote a foreword to the 1998 edition of Pepper's book. Pepper also represented the King family in a 1999 wrongful death case against retired restaurant owner Loyd Jowers for his alleged involvement in the conspiracy. A Memphis jury awarded the family the \$100 in damages that it had sought in the case.

Among proven errors in Pepper's book, Eidson was actually still alive and living in Costa Rica. He was informed about the book by the Special Forces Association, a group for veterans of the United States Army Special Forces, also known as the “Green Berets.”

In 1997, Eidson filed a \$15 million libel suit against Pepper and the publishers of his book in state court in Charleston, South Carolina, the home of Special Forces Association general counsel David Collins. He testified that he was working as a firefighter in Birmingham, Ala. at the time of King's killing.

The publishers of the two editions of Pepper's book, Carroll & Graf Publishers Inc. and Warner Books, Inc., both settled with Eidson in June 1999 for undisclosed amounts. Both companies also issued statements retracting the allegations in the book.

While Pepper filed an answer with the court defending his research, he did not respond to discovery requests or appear at the trial, and was held in default. According to newspaper reports, Pepper is now practicing in London, England.

On October 4, Charleston County Master-in-Equity Roger Young ruled for Eidson, and awarded him \$1 million in actual damages and \$10 million in punitive damages.

\$11 Million for King Conspiracy Allegation

A South Carolina judge has awarded an \$11 million judgment against an author who claimed that a former Green Beret led a plot to assassinate Martin Luther King, Jr. The defendant author effectively defaulted, failing to appear at trial. *Edison v. Pepper*, No. 97-CP-10-3302 (S.C. Ct. Common Pleas, Oct. 5, 2000).

Based on LDRC's annual studies of libel trials and damage awards, the case is one of only 17 libel cases nationwide since 1980 in which damage awards have exceeded \$10 million. It is also the second of these cases in the past two years in which an award over \$10 million was entered in a case where the defendant defaulted. See *Konanykhine v. Izvestia*, No. 97-1139 (Va. Cir. Ct. Dec. 13, 1999); *LibelLetter*, Jan. 2000, at 28.

In his 1995 book *Orders to Kill: The Truth Behind the Murder of Martin Luther King*, published by Carroll & Graf Publishers Inc., William Pepper alleged King was killed by a Mafia hit man hired by the U.S. government. He also claimed that Green Beret supply sergeant Billy R. Eidson led a sniper team which served as a backup in case the “hit” was unsuccessful. Finally, Pep-

Preliminary Appeals Ruling Reverses \$2.975 Million Verdict in Kentucky

In a ruling which is not yet final, the Kentucky Court of Appeals has reversed a \$2.975 million libel verdict against WHAS-TV in Louisville over its reporting of an accident on a roller coaster at the Kentucky Kingdom amusement park. *Belo Kentucky, Inc. v. Kentucky Kingdom Amusement Park*, 2000 Ky. App. LEXIS 97 (Sept. 8, 2000). The ruling also sent the case back to the Jefferson Circuit Court for a new trial.

The appeals court found that the television station acted with "actual malice" in regard to only one of the three statements which were the basis for the defamation suit. Since the jury did not apportion damages amongst the statements, the court said, the judgment must be reversed.

The appellate court also ruled that the trial court had acted improperly when it set aside an additional \$1 million that the jury had awarded to Kentucky Kingdom as general damages.

Finally, the appeals court ruled on a number of other issues to instruct the lower court on how to handle the case on remand.

Both parties have filed petitions to the appeals court regarding its ruling, so the decision is not final under Kentucky law. The *LibelLetter* will publish a more extensive analysis of the decision and its implications when it is final.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

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Texas Court Upholds Sanctions Against Public Official Libel Plaintiff Who Sued a Law Firm for its Prepublication Review

By Robert P. Latham

A Texas appellate court has issued a strong opinion in favor of a law firm that had been sued by a public official libel plaintiff for the firm's actions in representing a television station prior to the broadcast of news stories regarding the public official. *Randolph v. Jackson Walker L.L.P.*, ___ S.W.2d ___, slip op. 14-99-00744-CV, September 14, 2000 (Tex. App. — Houston [14th Dist.]). The court reinforced an absolute privilege for statements made by an attorney in contemplation of judicial proceedings and for an attorney's actions in conducting prepublication review of a news story.

The Sanctions Against the Libel Plaintiff in the Trial Court

The suit was brought by former Houston City Controller Lloyd Kelley and one of his executive assistants, Cynthia Randolph, against KTRK Television, Inc., a Houston TV station. The station had broadcast a series of reports regarding how Kelley had discharged his duties as City Controller, and included in the report surveillance footage of Kelley and Randolph at a water amusement park called "Splashtown" during normal business hours.

Kelley's allegations against the TV station were the subject of a prior appellate court opinion in Houston in which the same court found that all of the statements in the broadcasts were true or substantially true. See *LibelLetter*, March 2000, at 8. However, Kelley filed an amended petition in which he named Jackson Walker L.L.P., the television station's lawyers, and a Jackson Walker partner, David Bleisch, as defendants based on 1) Jackson Walker's prebroadcast review of the stories regarding Kelley, and 2) a telephone call to Kelley and a letter to Kelley from Bleisch in an attempt to gain access on behalf of KTRK to the Controller's office.

Kelley complained about Bleisch's statement, made only to Kelley, that a "public entity's denial of access to a particular member of the media in the absence of a compelling governmental interest to the contrary is unlawful." Kelley alleged that this statement by Bleisch and Jackson Walker accused him of a crime and was therefore libelous. Kelley fur-

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TX Ct. Upholds Sanctions Against Public Official

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ther claimed that Bleisch's statements, made in a letter and over the telephone, were "published" by virtue of the fact that there were other people in the room with Kelley when he was talking over a speaker phone to Bleisch and that Kelley himself sent Bleisch's letter to the City Attorney's office pursuant to city policy.

Jackson Walker moved for sanctions in the trial court alleging that Kelley had brought the claims against Jackson Walker for purposes of harassment and that the claims were groundless. Jackson Walker alleged that the reason Kelley had brought the firm into the suit was to prevent Jackson Walker from representing KTRK with regard to Kelley's claims against the station. The trial court agreed and entered "death penalty sanctions," dismissing Kelley's claims and striking his pleadings as they related to Jackson Walker and Bleisch.

The Court of Appeals Upholds the Sanctions

The Texas Court of Appeals upheld the "death penalty" sanctions, finding that the trial court did not abuse its discretion in holding that Kelley's claims were groundless and were brought for purposes of harassment. In reaching this conclusion, the court of appeals issued strong pronouncements in favor of the absolute privilege for statements made by attorneys not only in judicial proceedings but also in contemplation of judicial proceedings.

The court noted that Bleisch's statement to the effect that it was impermissible under Texas law to deny one media access that is enjoyed by other media was a correct statement of law. Even if it were not, the court referenced two earlier Texas cases, *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex. App.—San Antonio 1997, no pet.) and *Russell v. Clark*, 620 S.W.2d 865, 870 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) and held:

public policy demands that attorneys be granted the utmost freedom in their efforts to represent their clients. To grant immunity short of absolute privilege to communications relating to pending or proposed litigation, and to subject an attorney to liability for defamation, might tend to lessen an attorney's efforts on behalf of his client.

ney's efforts on behalf of his client.

Thus, the court concluded that Bleisch had made the complained of statements in anticipation that KTRK might be forced to file a suit to obtain its rightful access if the City Controller's Office continued to stonewall KTRK. The court held that the attorney's communications simply "cannot constitute the basis of a civil action."

As for Kelley's claims regarding "publication" of the Bleisch letter by virtue of his passing it on to the City Attorneys' Office pursuant to city policy, the court held that the publication was accomplished by Kelley, not Jackson Walker. Consequently, even if the statement were not true, and even if it were not absolutely privileged, the court held that Kelley would still have no libel claim against Jackson Walker.

[T]here can be no claim against a lawyer who allegedly wrongfully advised another party, thus leading to the other party's alleged defamatory statements.

Finally, and of perhaps prime importance to First Amendment practitioners, the Texas court reiterated that a law firm could not be liable to a defamation plaintiff by virtue of its prepublication review of a news story. The court cited the D.C.'s circuit's opinion in *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1302 (D.C. Cir. 1988) and stated emphatically

[T]here can be no claim against a lawyer who allegedly wrongfully advised another party, thus leading to the other party's alleged defamatory statements.

The court found that a libel plaintiff has "no standing to sue the attorneys for the advice" given to their media clients.

The Texas case is useful not only for its reinforcement of these protections afforded to attorneys representing media clients, but it is also important for its procedural context. The appellate court approved of the trial court's findings that the claims brought by Kelley against Jackson Walker were groundless and designed to try to prevent Jackson Walker from being able to represent its own client in litigation. Kelley's assertions against the law firm were therefore properly subject to the ultimate sanction of striking of the pleadings. The opinion should serve as a strong deterrent for other defamation plaintiffs who may contemplate a similar maneuver.

Radio Talk Show Host Need Not Reveal Sources

Colorado Supreme Court Vacates Contempt Order

By Thomas B. Kelley and Steven D. Zansberg

In a ruling issued September 12th, Colorado's Supreme Court vacated a district court order imposing a \$5,000 fine for contempt against popular morning talk show host, and defamation defendant, Peter Boyles, for his failure to reveal his confidential sources to the plaintiff. In its ruling, Colorado's Supreme Court announced that before a newsperson could be compelled to divulge the identity of confidential sources who were relied upon in making an allegedly defamatory statement, the trial court must find that the plaintiff had demonstrated that the statements at issue were "probably false" at the time of the broadcast and that the newsperson defendant did not have a "reasonable basis to believe that [the] source's information was true at the time it was reported." *Gordon v. Boyles*, 2000 Colo. LEXIS 1038 (Colo. 2000).

The Broadcasts

In mid-April 1997, Peter Boyles, a radio talk show host with a penchant for covering high profile crimes and the response of the law enforcement thereto, reported on a stabbing incident in which Denver police officer Ron Thomas received a stab wound to his stomach. Thomas was stabbed in an altercation that allegedly involved gang members outside a Denver area nightclub. In his broadcasts, Boyles stated that Denver police officer Brian Gordon was the individual who stabbed Officer Thomas, in a dispute over a woman. Boyles stated that the Denver Police Department had covered up the incident because Gordon is the son of a high ranking police official.

Subsequent to the February 1, 1997 stabbing incident, the Denver Police Department conducted an internal investigation which remained confidential. However, according to the District Court judge who reviewed the internal affairs file *in camera*, none of the witnesses who were interviewed by the Police Department stated that Officer Gordon was at the nightclub when Thomas was stabbed or that Gordon took part in the fight.

During his broadcasts, Boyles stated that he was re-

lying upon confidential sources, whom he identified as being "borderline gang members who are struggling with some drug problems." (Boyles also told his supervisor at the radio station, Chris Gallegos, and corporate officers of Jacor Broadcasting, the station owner, who the confidential sources were.)

The Lawsuit and the District Court's Ruling

In August 1997, Officer Brian Gordon and his wife Betty filed suit against Boyles and Jacor on theories of defamation, intentional infliction of emotional distress, false light, and negligent supervision arising from Boyles' broadcast statements that Gordon was involved in the fight with Thomas and his allegation that the Denver Police Department had covered up the incident. Through written discovery requests, Gordon demanded that Boyles and Jacor divulge the identity of the confidential sources upon which Boyles claimed he had relied in publishing his statements.

Asserting Colorado's Press Shield Law, '13-90-113, C.R.S. (1999), Boyles and Jacor refused to provide the identity of the confidential sources. Boyles also initially refused to disclose the bases for the sources' reliability, or to confirm or deny that he had spoken to any Denver police officers about the incident before he aired his reports.

Gordon moved to compel Boyles' responses to his discovery requests. In August 1998, the trial court held a hearing, ordering that Boyles provide additional information responsive to Gordon's requests. Specifically, the trial court ruled that Boyles did not have to disclose the identities of his sources, but he did have to provide more detailed information about his sources and their reliability than he had done previously.

Boyles' emergency petition to the Colorado Supreme Court challenging the trial court's order was denied. At a subsequent hearing following the Supreme Court's denial of the emergency writ, the trial court ordered that Boyles actually divulge the identities of

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Radio Talk Show Host Need Not Reveal Sources

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his confidential sources. The trial court determined that the information sought by Gordon was necessary to prove his case and could not be obtained through other means; furthermore, because the allegations made by Boyles were “provable as false,” they did not enjoy constitutional protection so that requiring Boyles to disclose his sources’ identities did not infringe on an interest protected by the First Amendment.

Notably, in order to determine that Boyles’ statements were “provable as false,” the judge reviewed *in camera* the Denver Police Department’s internal affairs file but refused to make that file accessible to Boyles or his counsel to test the veracity of witness statements therein.

Reporter Offers Support on Source Credibility

Boyles then tendered supplementary discovery responses in which he described the information he obtained from three

separate sources, identified only as Source 1, Source 2, and Source 3, which provided him with a reasonable basis to believe that Officer Gordon had stabbed Officer Thomas in the dispute over a woman. Boyles claimed that he assessed the reliability of two of his three sources based upon their positions, their reliability on past occasions, and the similarity of the information they had provided him.

Boyles further claimed that discussions he had on his radio program with a Denver city councilman, a Denver police spokesperson, a local weekly newspaper editor, and a local reporter provided information that confirmed the reliability of the information he had received from his confidential sources. Accordingly, Boyles refused to divulge the names or other specific information about his confidential sources, again relying upon Colorado’s Press Shield Law.

Following Boyles’ supplemented discovery responses, Gordon moved the court to hold Boyles in contempt and impose sanctions. After a hearing on that motion, the trial court held Boyles in contempt, both for refusing to disclose his confidential sources and for failure to fully respond to other discovery requests on grounds other than the state’s shield statute. The court imposed a \$5,000 fine

on Boyles for his refusal to divulge the identity of his sources.

The Supreme Court Vacates

Colorado’s Supreme Court vacated the trial court’s order of contempt against Peter Boyles, and remanded for further proceedings consistent with its opinion. The opinion states that:

with some modifications in terminology and application, we agree with and adopt the trial court’s test for assessing a plaintiff’s interest in compelling a newsperson defendant in a defamation case to disclose confidential information.

However, the Court expressly rejected the “provable as false” test that the district court had applied and, instead, announced a test requiring a plaintiff to demonstrate that the published statement was “probably false”

at the time it was published *and* that the defendant did not have a reasonable basis to believe that the source’s information was true at the time it was reported.

The Court began its explication of the appropriate test by quoting at length from Justice Stewart’s dissenting opinion in *Branzburg v. Hayes*, describing “the importance of promoting an unfettered press as a central component of our democracy,” and, in particular, recognizing that “the ability of the press to gather information by promising to keep the identities of their sources confidential is a crucial tool for the media.” A unanimous Colorado Supreme Court reaffirmed these propositions as the “First Amendment context of the newsperson’s privilege,” which is codified in Colorado’s Press Shield Law.

The Court recognized that in the context of a defamation action in which the defendant newsperson relies upon information obtained from confidential sources, the plaintiff will most likely be able to satisfy the first two prongs of Colorado’s Press Shield Law: (1) that the information sought is directly relevant to a substantial issue in the litigation (the defendant’s state of mind necessary to establish actual malice), and (2) that the information is not obtain-

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The Court began its explication of the appropriate test by quoting at length from Justice Stewart’s dissenting opinion in Branzburg v. Hayes.

Radio Talk Show Host Need Not Reveal Sources

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able through other reasonable means.

Thus, the Court focused its attention on the third prong of Colorado's statute, which requires the proponent of a subpoena for news information to demonstrate that his or her interests in seeking the information outweighs the interests under the First Amendment of the newspaper in not responding to the subpoena and of the general public in receiving news information. It is under this third prong of the statute that the Court imposed the requirement on libel plaintiffs, to overcome the press shield privilege, to demonstrate that at the time the allegedly defamatory statements were uttered by the newspaper, that those statements were "probably false."

Although the Court suggested that it was merely substituting the term "probably false" for the trial court's terminology "provable as false," the Court expressly disavowed the latter standard as an inappropriate test for assessing whether the press shield statute is overcome because it was derived from the U.S. Supreme Court's "statement of fact" jurisprudence in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In adopting the requirement there be a *prima facie* showing of falsity before compelling source disclosure, the court relied upon the *Cervantes* line of cases which so hold.

Significantly, the Court recognized circumstances in which the showing of need for disclosure will be inadequate even when probable falsity has been demonstrated. Consistent with the language of the statute, the Court placed the burden of demonstrating the probable falsity of the published statement upon the plaintiff.

The Court relied upon a U.S. District Court decision in *Southwell v. Southern Poverty Law Ctr.*, 949 F. Supp. 1303 (W.D. Mich. 1996), for refusing to compel disclosure of confidential sources in cases where the defendant provides sufficient evidence to support a "reasonable reliance" on the confidential source. The Court stated that even if the discovery record shows that statement to be "probably false" based upon current information,

if the newspaper defendant can demonstrate that there was a reasonable basis to believe that a source's information was true at the time it was

reported, then the court should favor protecting the source.

The Court concluded this portion of its opinion by stating:

while in some instances disclosure may be the best option, we emphasize that when deciding whether to compel a newspaper to disclose confidential information, a trial court should compel disclosure only as a last resort when necessary to promote the effective administration of justice.

Applying this newly enunciated standard to the facts before it, the Court reversed the trial court's imposition of a contempt sanction upon Peter Boyles for failing to divulge the identity of his confidential sources. The Court remanded the matter for further proceedings to allow the trial court, in the first instance, to

apply the newly minted standard to the facts of this case.

In a separate portion of the opinion, the Court also reversed the contempt sanctions that the trial court imposed against Boyles' employer, Jacor Broadcasting, because it found that Jacor executives were informed of the identity of Boyles' confidential sources within the context of attorney-client privileged communications, and were therefore protected by the attorney-client privilege from disclosing the information about Boyles' sources.

Thomas B. Kelley and Steven D. Zansberg are with Faegre & Benson in Denver, Colorado.

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Bias of Sources, Errors in Article and Alleged Inadequate Investigation Do Not Constitute Sufficient Evidence of Actual Malice or Gross Irresponsibility

The New York Times Granted Summary Judgment on Fault Grounds

By Laura R. Handman and Jeffrey H. Blum

In *Norman Yellon v. Bruce Lambert and The New York Times Company*, Suffolk County, Index No. 99-6460 (September 25, 2000), Justice Ralph Costello granted *The New York Times*' motion for summary judgment on lack of actual malice and gross irresponsibility in a defamation action arising out of an article entitled "What Happens If Process Server Doesn't Serve?," published on the front page of *The Times*'s Long Island section on April 4, 1999. The article reported on three interrelated charges, all stemming from the conduct of plaintiff Norman L. Yellon as a notary public and as the proprietor of a process serving agency:

- The New York State Division of Licensing had revoked his Notary Public license based on its finding that Yellon had notarized affidavits of service when he did not have a notary public license and had used a phony notary stamp;
- Yellon had falsely signed signatures of other process servers on affidavits of service which he then "notarized" without their presence or authorization and he was then facing criminal charges in this regard; and
- More than a half dozen independent sources with first-hand knowledge claimed that Yellon had failed to make proper service in the various legal proceedings.

The portions of the article concerning the first two points were not contested in the litigation. Indeed, during discovery, Yellon himself admitted to hundreds of instances of false signatures and false notarizations on the affidavits of service that he filed with the courts in New York State, both state and federal. Yellon, instead, contested 10 statements regarding his alleged failure to make service.

The article was based on 200 hundred hours of investigation, interviews with 45 sources and review of more than 500 pages of documents. All of the reporter's

records of the investigation (redacted for confidential sources) were produced in discovery, and the scope and substance of the investigation was not in dispute. The Court had granted *The Times*' request to limit the first phase of discovery and motion practice to the issue of fault. Discovery on the issue of falsity would have been extensive, expensive and difficult. Accordingly, at this stage, *The Times* moved for summary judgment solely on fault grounds.

Notary Public May Be A "Public Official"

In its summary judgment papers, *The Times* argued that Yellon was a "public official" required to prove actual malice because the article addressed Yellon's qualifications and fitness as a notary public and process server. The Court did not ultimately decide the issue, but acknowledged that a notary public "has been held to be a 'public official' within his actions as a notary public in that a notary public 'assumes a position of trust which demands a high degree of conscientious public service.'" Additionally, because he also "utilized this license to conduct a business in which he served legal process for the courts of New York State," the Court indicated "the public had an interest in his qualifications and performance, and it may, arguably, be said that he acted as a public official."

Allows In Confidential Source Info

One of the article's primary sources was identified as plaintiff's former office manager who provided details about Yellon's misdeeds. She had been promised confidentiality and, accordingly, *The Times* refused to reveal her identity under New York's shield law. *The Times* did produce notes of interviews with the source's name and identifying details redacted. Yellon made no effort to independently discover the source's identity and depose her. Instead, in his oppo-

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NYT Granted Summary Judgment

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sition papers, Yellon argued that, because *The Times* refused to reveal her identity, the Court could not consider her reported statements in deciding the summary judgment motion, citing the Second Department's decision in *Greenberg v. CBS*, 69 A.D.2d 693, 419 N.Y.S.2d 988 (2d Dep't 1979).

Justice Costello disagreed and suggested that *The Times'* reliance on the confidential source could be considered for summary judgment purposes. The Court noted that:

plaintiff has an obligation to demonstrate that he has first endeavored to obtain this information by other means, and been unsuccessful, instead of directly intruding upon the self-imposed confidentiality of defendants. No such effort has been asserted by plaintiff.

At least where there is a limited universe of potential sources, when a confidential source's information appears credible and plaintiff had not taken any steps to discover the source's identity, a reporter may be able to rely on such source to establish lack of actual malice or gross irresponsibility.

Not Sufficient Evidence of Actual Malice or Gross Irresponsibility

After setting forth both the actual malice and gross irresponsibility standards, the Court held that plaintiff had failed to establish a genuine issue of fact under either standard and granted summary judgment to *The Times*.

The Court was troubled by a number of *The Times'* sources. Many of those claiming not to have been served by Yellon had been sanctioned by courts and, in one instance, barred by a federal district court judge from bringing further claims — a decision which *The Times* had prior to publication. Indeed, the article's most controversial source, Dr. Carmine Vasile, had loudly and repeatedly made accusations of corruption against a number of judges in the courthouse where Yellon's defamation suit was pending — charges *The Times*

had declined to publish.

The Court found that the claims of lack of service lodged by the various unsuccessful litigants were either untrue or had not been raised in the course of their litigations. The article did, however, fully disclose the biases of the sources and referred to the sanctions against them. The Court held that defendant's failure to fully investigate sources and allegations "was, at most, negligent," but did not amount to actual malice or gross irresponsibility.

Reliance on Freelancer

The Court also examined *The Times'* reliance on a freelance reporter who first brought the story to the attention of the paper and who supplied much of the initial information. Yellon argued that the freelancer had in her possession court documents that directly refuted several of the claims made by sources claiming lack of service. The Court, however, recognized that *The Times* and its reporter did not have these documents in their possession at the time of publication and that "whatever knowledge [the freelancer] had regarding the truth of the statements cannot be attributed to [the reporter] or *The Times* since she was not an employee." Although the freelance reporter had

The decision is a muscular application of the "gross irresponsibility" standard.

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NYT Granted Summary Judgment

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been accused by Yellon of being “closely aligned with Dr. Vasile and his crusade,” the Court nevertheless held that *The Times*’ reliance on the freelancer’s investigation was “reasonable” and that its failure to “investigate the relationship between [the freelancer] and Vasile cannot constitute gross irresponsibility.”

The Court noted that *The Times* knew that the freelancer had previously written articles for a number of established publications, even assisting on a Pulitzer Prize winning series, and *The Times*’ reporter “re-interviewed the sources she interviewed.” Accordingly, *The Times* “had no reason to doubt the accuracy or completeness of the information she provided.”

Balance in Story May be Key

Perhaps the most important factor in the Court’s decision was the article’s balanced presentation of the facts and the reporter’s efforts to get both sides of the story. The Court noted that, “in the interest of fairness,” the article included a quote from Yellon regarding the “conspiracy to put [him] out of business,” as well as a quote from the Nassau D.A. regarding the lack of substantiated complaints about Yellon’s failure to serve. When *The Times* discovered an error in the article regarding one of the claims of lack of service, it was “corrected when discovered.” The Court also found significant that the *Times* reporter had tried to interview plaintiff “numerous times,” but plaintiff refused because of his pending criminal prosecution.

Based on these facts and *The Times*’ “reasonable” reliance on the freelance reporter, the Court held that “[u]nder the instant circumstances, defendants’ failure to fully investigate the sources and allegations was, at most, negligent but not a “reckless disregard” of the truth amounting to actual malice or gross irresponsibility to withstand defendants’ motion for summary judgment....”

Conclusion

The decision is a muscular application of the “gross irresponsibility” standard. Even though the Court found that some of *The Times*’ sources were biased, even though the article contained several errors, even

though, in the Court’s view, more investigation should have been done, and even though the freelancer had documents in her possession that arguably refuted the sources’ statements to *The Times*, the Court nevertheless found that plaintiff had failed to establish either actual malice or gross irresponsibility. The decision holds that the common refrain by libel plaintiffs that defendants “would have, could have, should have” done more investigation is not sufficient evidence of actual malice or gross irresponsibility.

Laura R. Handman and Jeffrey H. Blum of Davis Wright Tremaine LLP, along with Adam Liptak, Senior Counsel for The Times, represented the defendants in this action.

Best Practices Books Available From Freedom Forum

The Freedom Forum’s Free Press/Fair Press Project has issued two paperback books on “Best Practices,” one For Television Journalists and one For Print Journalists. Each is designed to be a handbook for reporters, editors, producers, and all others in the editorial process. Lawyers for journalists might find them valuable both for ideas on how to better help their journalism clients meet every-day problems and as examples of issues for newsroom seminars.

The Best Practices for television was researched and written by Av Westin, a most experienced television producer, having started his career at CBS News in 1949, and having served as executive producer of ABC Evening News, Inside Edition, among other posts.

The Best Practices for print was written by

The books can be downloaded for free from the Publications section of the Freedom Forum web site, <http://www.freedomforum.org/newsstand>, or by calling 1-800-830-3733.

No Jurisdiction Found Over German Publisher of New York City Guidebook

A Federal District Court judge in New York has refused to find jurisdiction over a German book publisher which allegedly misused a photograph of a New York plaintiff in a travel book on New York City and on its Internet site. *Stewart v. Vista Point Verlag & Ringier Publ'g GmbH.*, 2000 U.S. Dist. LEXIS 14236 (S.D.N.Y. Sept. 29, 2000).

Jennifer Stewart, the plaintiff, is a performer who has “developed a lucrative full-time career posing as the Statue of Liberty.” She alleged that she was “world renowned” as a performance artist. She sued two German publishing companies which published photographs of her without her permission. Plaintiff contends that the publications constituted copyright infringement, violated her Lanham Act rights, and violated her right of publicity under §§ 50 and 51 of New York Civil Rights Law.

Books Available Via Web

Vista Point, one of the two publisher defendants and the one whose motion to dismiss was at issue here, used a photograph of the plaintiff dressed as the Statue of Liberty on the cover and first page of its German-language travel guidebook on New York City. Plaintiff argued that the court could establish jurisdiction because: defendant maintained a web site that could be accessed in New York, defendant offered its travel guide for sale on its own web site and on Amazon.de, a German book-selling web site, defendants produced a travel guide which they intended would be brought into New York, defendants sent a photographer into New York to take pictures of Stewart to be used for a travel guide, and defendants engaged in a marketing relationship with Ford Motor Company and AAA over the Internet.

Plaintiff was able to show that its guidebooks are sold primarily in the German-speaking markets of Germany, Austria and Switzerland. Vista Point also operates an Internet web page on which it sells

its products, including the book at issue. While it had sold seven copies of its New York City guidebook over its web site, none were sold in New York.

Its books are also available, according to the decision, through the web sites of other companies, although the affidavits seemed to prove that the only copy of the New York City guidebook actually sold by any entity into New York was one sold to plaintiff.

Vista Point alleged that it did not transact any business in New York, over the Internet or in any other manner, and had sold no copies of the guidebook in or to New York.

The defendant also proved to the court's satisfaction that it had not had a relationship with the photographer/author who took the photo of plaintiff until after the photographer had taken

the picture and the guidebook was written.

The other defendant, Ringier Publishing GmbH, was alleged to have misused plaintiff's photograph in its German-language travel magazine. Vista Point asserted that it had no relationship with Ringier Publishing.

Failed Under NY Long Arm & Dues Process

The court concluded that the actual activities of Vista Point did not meet either the relatively demanding standards of the New York long-arm statute, CPLR S.301-302, nor the requirements of due process.

New York requires that in order to find jurisdiction over a non-domiciliary which has committed “a tortious act without the state causing injury to person or property within the state,” it would need to be shown that the defendant “expects or should reasonably expect the act to have consequences in

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The court ruled that simply writing about New York, or even knowledge that a certain book would be brought to New York (i.e. placing an item in a stream of commerce) was not enough of a contact to establish jurisdiction.

No Jurisdiction Found Over German Publisher

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the state and derives substantial revenue from interstate or international commerce.”

Borrowing from United States Supreme Court analysis of jurisdiction, the district court stated that New York requires a plaintiff to prove that, “defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239 (1958).

Looking to the federal due process requirements, the plaintiff must prove that the defendant had a minimum amount of contacts within New York so that the maintenance

of the suit would not be unfair and unjust under the due process clause and the Fourteenth Amendment. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 559 (1980).

The court analyzed all of defendant’s contacts with New York and determined that plaintiff’s allegations were either factually false or legally insufficient to establish jurisdiction. The court ruled that simply writing about New York, or even knowledge that a certain book would be brought to New York (i.e. placing an item in a stream of commerce) was not enough of a contact to establish jurisdiction.

The court ruled that conduct initiated by the plaintiff, her contacting the defendant’s web site and placing an order for the book from New York, cannot confer jurisdiction over the defendant. Despite the apparent fact that the defendant was willing to ship a guide to New York, plaintiff’s initiation of the contact by ordering defendant’s travel guide did not translate into a purposeful availment by the defendant of New York.

The court found that the web site did not constitute an effort to target the New York market. The same was true of the marketing relationship defendant had with Ford and AAA, by which its books were offered. The offerings were all in German and, in the court’s analysis, not directed to New

York residents or even residents of the United States.

Also of note, the court held that the distribution of defendant’s books by on-line book retailers, such as Amazon.de, did not constitute selling its products into New York. Vista Point, itself, was not responsible for the sale or shipment of any books sold by others into New York. To the extent Vista Point acted at all, it would be wherever the transaction between it and the retailer (Amazon.de, as an example) took place.

The court concluded that defendant’s contacts in New York were merely “random and sporadic” and thus did not even meet the lesser minimum requirements of due process.

Also of note, the court held that the distribution of defendant’s books by on-line book retailers, such as Amazon.de.

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Parody Use of Famous Ad Is Protected By First Amendment

By Andrew L. Deutsch

On August 29, 2000, Judge Naomi Reice Buchwald of the Southern District of New York struck a blow for 98-pound weaklings everywhere — and, not coincidentally, for the First Amendment as well. In *Charles Atlas, Inc. v. DC Comics, Inc.*, 99 Civ. 4839, 2000 U.S. Dist LEXIS 12337 (S.D.N.Y., Aug. 29, 2000), she dismissed claims that a comic parody of the classic Charles Atlas advertisement — the one where the bully on the beach kicks sand in a scrawny weakling's face, and the weakling, after bulking up with the Atlas bodybuilding course, returns to the beach and thrashes the bully — violated the federal Lanham Act. The decision shows that courts in the Second Circuit continue to give primacy to the First Amendment where issues of free speech conflict with trademark and unfair competition law.

Doom Patrol Meets Atlas

For over 70 years, Charles Atlas, Inc. has been advertising (most frequently in comic books) its bodybuilding courses using the famous “The Insult That Made a Man out of Mac” cartoon strip. For those few who have never read a comic book, Mac, the weakling, is with his girlfriend at the beach when the bully kicks sand in his face. Mac is next seen kicking a chair at home and resolving to try the Charles Atlas course. After developing improbably large muscles, Mac returns to the beach, beats up the bully, and is lionized by his girlfriend. The final panel shows Mac in a kind of halo under the title “HERO OF THE BEACH.”

In 1991, DC Comics published an issue of *Doom Patrol*, a comic in which the origins of the fictional character Flex Mentallo are illustrated. The first panels of the comic closely copy the Charles Atlas ad, and Flex even speaks the dialogue that Mac says in the Atlas ad. Ultimately, however, Flex beats up his girlfriend, not the bully (this is a comic?) Additional elements from the Atlas ad appeared in later stories about Flex Mentallo. Charles Atlas, Inc. sued, claiming violations of the unfair competition and trademark dilution provisions of the Lanham Act, and parallel claims under New York statutory and common law.

The Court initially noted that Atlas's claim was most likely barred by the statute of limitations, since more than six years had passed since Atlas, acting with diligence, could have discovered the alleged infringement. However, the Court devoted most of its opinion to the First Amendment issues raised by the parody.

Focus on Parody

The Court rejected the first argument raised by DC Comics, that the use of the Atlas ad in an expressive medium (a comic book) was not a use in commerce prohibited by section 43(a) of the Lanham Act. It cited to several Second Circuit decisions in holding that “in commerce” was broad enough to encompass use of trademark material in a comic book story.

The court focused instead on the parody defense raised by DC Comics. Using the analysis adopted in *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group, Inc.*, 886 F.2d 490, 493-4 (2d Cir. 1989), Judge Buchwald said that some infringement had to be tolerated in order to allow parodists to do their work. Thus, the question to be resolved was whether DC Comics used the Atlas allusions for an expressive purpose or to create an incorrect association between Atlas and the comic material, in order to confuse the public.

The Court first found that the Flex Mentallo comic was a legitimate parody and entitled to First Amendment protection. Judge Buchwald noted that it was “an undeniable twist on plaintiff's comic ad for the once weak character to gain strength only to himself become a brute and a bully,” and found the Flex Mentallo character to be “a farcical commentary on plaintiff's implied promises of physical and sexual prowess through use of the Atlas method.” She found that the Atlas ad was used not to advance a competing product, but as a comic book storyline, and was therefore protected by the First Amendment.

Confusion Unlikely

On the other side of the balance, the Court found that only a minimal likelihood that consumers would be confused by the parody. Reviewing the standard factors

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Parody Use of Famous Ad Is Protected

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considered in infringement cases, the Court determined that plaintiff and defendant occupied distinct and separate markets, comic book readers were sophisticated and able to tell the difference between Atlas ads and comic parodies of those ads, there was little likelihood that Atlas would enter into the comic book field, and there was little evidence of actual confusion among consumers.

It found that while there were clear similarities in the marks and characters used in Atlas and DC's works, these similarities were necessary to an effective parody. Holding that the likelihood of confusion was "clearly outweighed by the public interest in parodic expression," Judge Buchwald granted summary judgment.

Second v. Ninth Circuit Views

Several points can be gleaned from the *Charles Atlas* decision. First, the Second Circuit remains steadfast in its refusal to allow trademark rights to trump the values of the First Amendment. In recent years, courts in the Circuit have turned away Lanham Act claims based on parodies of Cliffs' Notes, *The Old Farmer's Almanac*, and the SPAM trademark.

In trademark, as in copyright, the Second Circuit has moved away from the traditional restrictive view that the parodist may only take as much as is necessary to "conjure up" the original. See *Cliffs Notes, Inc.*, 886 F.2d at 495. The exception to the rule appears to be where the parody appears in an advertisement of a competitor of the plaintiff; then, even if funny, the use of the plaintiff's trademark may fall afoul of the tarnishment branch of the dilution doctrine. *Deere & Co. v. MTD Products*, 41 F.3d 39 (2d Cir. 1994) (use of "scared" version of John Deere deer symbol held dilutive).

The second point returns to the central theme of this article. Whether the weakling parodist can fight off the trademark bully may well depend on whether the beach borders the Atlantic or Pacific Ocean. The Ninth Circuit continues to take a significantly nar-

rower view of what constitutes a parody, and has imposed Lanham Act liability on parodists who are not competitors of the original trademark holder.

In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997), cert. denied, 521 U.S. 1146 (1997), the Ninth Circuit affirmed a preliminary injunction against an adult book "parody" which used Dr. Seuss's children's book drawing and prose styles to tell a version of the O.J. Simpson story. The district court had held that that the First Amendment will not protect a parodist who had "alternate means of achieving the satiric or parodic ends . . . that would not entail consumer confusion," and that "trademark infringement will be excused only where necessary to the purpose of the [satiric] use." 924 F. Supp. 1559, 1573 (S.D. Cal. 1996).

The Ninth Circuit's approach is a recipe for fewer and duller parodies. It ignores the fact that parody traditionally paints with a broad, if not crude, brush. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (finding vulgar parody of "Pretty Woman" song to be fair use of copyrighted work). Moreover, parodists rarely work with lawyers at their sides. Their primary targets are consumer products, entertainment vehicles and companies, all of which are protected by trademarks. Parodists, who are looking to amuse and criticize, are unlikely to exercise the delicate care of taking only so much of a trademark as is absolutely necessary to their satiric purpose.

Ultimately, the issue of parody use of trademarks should reach the Supreme Court. Given the favorable view of parody reflected in the *Campbell* decision, it is likely that the Court will prefer the Second Circuit's liberal approach to the Ninth Circuit's more restrictive analysis.

Andrew L. Deutsch is a partner in the New York office of Piper Marbury Rudnick & Wolfe LLP. The views expressed herein are his personal views and do not reflect the positions of any client of his firm.

First, the Second Circuit remains steadfast in its refusal to allow trademark rights to trump the values of the First Amendment.

Actor's "Privacy" Suit Over Toy Rejected

Court Rejects Vanna White Precedent

Actor William "Sonny" Landham cannot sue a toy manufacturer which sold an action figure based on a character he played in the movie "Predator," the 6th Circuit Court of Appeals has ruled.

Landham, who has appeared in a number of films including "48 HRS" and "Lockup," played the role of "Billy, the Native American Tracker" in the 1987 Arnold Schwarzenegger film "Predator." In his lawsuit, *Landham v. Lewis Galoob Toys, Inc.*, 2000 U.S. App. Lexis 23386 (6th Cir. Sept. 18, 2000), the actor argued that a toy based on the role was produced and sold without his permission, and that it violated his "right of publicity" under Kentucky law, Ky. Rev. Stat. § 391.170(1), and Section 43(a) the federal Lanham Act, 15 U.S.C. § 1125(a).

An Action Figure and No Signed Contract

Before appearing in the film, Landham signed a "Standard Cast Deal Memo" with the film's production company, the Twentieth Century Fox Film Corporation. The memo specified only the start date and salary, and provided that Landham would provide his own bodyguard. Fox later sent Landham a more detailed "Deal Player Employment Agreement," which was never signed. The second document provided that all rights to the characters in the film belonged to Fox.

In 1995, Fox licensed Galoob Toys, Inc. to produce and sell a line of its "Micro Machines" toys based on the movie. One of the sets based on the movie included a helicopter, a 4 x 4 vehicle, and three action figures including "Billy."

While based on Landham's character, the 1.5-inch-tall action figure had no distinctive facial features. And the toy's designer testified at trial that he had purposely avoided any resemblance between the toy and Landham.

The court began by recognizing that a "right of publicity exists in Kentucky," adding that "because of the general constitutional policy of maintaining uniformity in intellectual property laws, courts typically give attention to the entire available body of case law when deciding right of publicity cases" (citations omitted).

No Federal Preemption

Relying largely on 9th Circuit opinions including *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); and *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) and the U.S. Supreme Court's opinion in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the court rejected Galoob's argument that any claim under Kentucky law was preempted by federal copyright law.

The court also rejected Fox's argument that the licensing provisions of the "Deal Player Employment Agreement" should be enforced — even though Landham had not signed it — because he had continued to participate in the project after receiving the agreement.

The court then turned to Landham's right of publicity claim. "[I]n order to assert the right of publicity," the court wrote, "a plaintiff must demonstrate that there is value in associating an item of commerce with his identity." The court said that Landham's case failed to meet this standard, both because he had failed to present any evidence that the value of the merchandise was enhanced by his association with it, and because

[precedents] ... make clear that although exploitation of a fictional character may, in some circumstances, be a means of evoking the actor's identity as well, the focus of any right of publicity analysis must always be on the actor's own persona and not the character's.

Wary of White

The only case which may be read to the contrary, the court added, is the decision in *White, supra*, in which "Wheel of Fortune" star Vanna White recovered for a commercial in which a robot wearing similar attire and in a similar role as White was used to advertise VCRs. The court distinguished the *White* decision on the grounds that White used her own name professionally, and had shown that her identity

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had commercial value.

More importantly, we share ... Judge Kozinski's [a 9th Circuit judge who dissented from a denial of hearing the *White* case *en banc*] unwillingness to give every individual who appears before a television or movie camera, by occupation or happenstance, the right as a matter of law to compensation for every subtle nuance that may be taken by someone as invoking his identity without first being required to prove significant commercial value and identifiability.

The court used the same rationale to reject the Lanham Act claims. Given Landham's previous acting experience, including appearances in several adult films, the court wrote that his identity was not particularly strong among the toy-buying public, and there was little risk of buyers misunderstanding that the actor had endorsed the "Billy" toy.

UPDATES

Supreme Court Denies Cert in Journalist Porn Case

On October 2, the U.S. Supreme Court denied without comment the appeal of Larry Matthews, a journalist convicted in 1998 of possessing and distributing child pornography despite his claim that he was accessing the information to pursue a story. *Matthews v. United States*, 2000 U.S. LEXIS 6409 (U.S. Oct. 2, 2000). Matthews, a radio journalist with thirty years experience, pleaded guilty following a federal trial judge's ruling that he would not be allowed to tell a jury that the pictures he sent and received on the Internet were research for a freelance article he was going to write. See *Libel-Letter*, May 2000 at 30. Matthews could spend up to 18 months in jail.

U.S Supreme Court Denies Cert in Cheers Copyright Case

On October 2, the U.S. Supreme Court declined without comment to hear a case regarding whether licensed animatronic robots based on the copyrighted *Cheers* characters "Norm" and "Cliff" violate the right of publicity of the actors who portrayed them. *Paramount Pictures v. Wendt*, 99-1567 2000 U.S. LEXIS 4886. George Wendt and John Ratzenberger, the actors who played "Norm" and "Cliff" on the series, claim that Host International Inc. ("Host") violated their right of publicity when it created bars in international airports based on a *Cheers* theme that included two life-sized robots named "Hank" and "Bob." Host was granted a license to create the international bars resembling the *Cheers* set by Paramount Pictures Corp. ("Paramount"), owner of the copyright and trademark for *Cheers* and all of its characters. Wendt and Ratzenberger allege that the interactive robots, which move and engage in banter with customers sitting nearby, impermissibly resemble their *Cheers* characters.

Paramount and Host's petition to the Supreme Court was the latest in a lengthy court battle during which the federal trial court twice dismissed the case and the Court of Appeals twice reinstated it, most recently remanding it in 1997.

At that time, the Court of Appeals ruled that federal copyright law did not necessarily override California's right-of-publicity law. The court said that a jury should decide whether the robots resemble the characters portrayed by the actors. Rehearing and rehearing *en banc* was denied by the Ninth Circuit in December of 1999, with a strong dissent by Judge Kozinski, joined by Judges Kleinfeld and Tashima. *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284 (9th Cir. Cal. 1999).

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Reporter's Alleged Promise Does Not A Contract Make

Court Finds Any Harm to Alleged "Confidential" Source "Rooted in Her Own Lie"

By Stuart W. Gold and LaShann M. DeArcy

On September 6, 2000, Judge Colleen Kollar-Kotelly of the United States District Court for the District of Columbia dismissed a complaint filed against the Washington Post, *Newsweek* magazine and reporter Michael Isikoff for breach of contract, promissory estoppel, unjust enrichment, negligent misrepresentation, breach of fiduciary duty and intentional infliction of emotional distress. In the face of scant precedent, the Court was challenged to explore the legal relationship between reporters and sources. Ultimately, however, the motion to dismiss was won, for the most part, on the basis of long settled legal principles of state law. *Steele v. Isikoff, Newsweek Magazine, and the Washington Post Company, Inc.*, sounded Civ. Action No. 98-1471 (D.D.C. Sept. 6, 2000), a victory for the defendants and all journalists and their publications.

The Complaint

Much like the media coverage surrounding the personal affairs of President Clinton, the complaint read like a soap opera, replete with sex, lies and scandal. According to the complaint, Julie Hiatt Steele, the plaintiff, was telephoned by her longtime friend Katherine Willey in 1997. During their conversation, Willey urged Steele to speak to Michael Isikoff of *Newsweek* magazine. Without explanation, Willey directed Steele to relay to Isikoff a tale of an alleged sexual encounter between Willey and President Clinton. Specifically, Steele was asked to tell Isikoff that on the night of the alleged encounter, Willey came to her home directly from a meeting with the President. She was further asked to tell Isikoff that, at that meeting, the President had "groped" Willey. Finally, she was instructed to tell Isikoff that when Willey arrived at her home, she appeared upset and humiliated as a result of her encounter.

Steele contended that she reluctantly agreed to relay

the story to Isikoff. She alleged that she agreed to speak to Isikoff only after assurances by both Willey and, in particular, Isikoff that the conversation would be "off the record." Steele maintained that she and Isikoff understood that "off the record" meant that the conversation was made in confidence and that neither her name nor her statements would be printed by Isikoff or *Newsweek*.

After a series of phone calls, Steele learned that *Newsweek* intended to publish the Willey story. In an attempt to prevent its publication, Steele told Isikoff that

Much like the media coverage surrounding the personal affairs of President Clinton, the complaint read like a soap opera, replete with sex, lies and scandal.

Willey had not come to her home that night as she originally told him. Rather, she now claimed that in their original conversation she had lied about that detail, at

Willey's request. According to Steele, before she recanted, Isikoff represented that their conversation would again be "off the record."

Newsweek later published three articles about the Willey story. To Steele's chagrin, the original Willey story did, in fact, name Steele – identifying her as a friend of Willey who first supported Willey's contention that the President made sexual advances against her and then altered her account to Isikoff.

Almost a year after the first Willey story was published, and after her appearance before one of the special prosecutor's grand juries, Steele filed suit in federal court against Isikoff seeking damages for injury to her reputation, embarrassment, humiliation, loss of earning capacity, anguish, and severe emotional distress. Under the theory of *respondeat superior*, Steele stated that both the *Washington Post* and *Newsweek* magazine should be held liable for all injuries she sustained as a result of Isikoff's alleged conduct. Steele also made a negligent hiring and supervision claim against *Newsweek*.

Finally, Steele sought to recover punitive damages from Isikoff and *Newsweek*. In her complaint, she characterized Isikoff's conduct as malicious, premeditated

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and done “with the intent to deceive and defraud for his own personal gains in blatant disregard for [her] reputation and emotional well being . . .” Casting a wide net, Steele went on to claim that *Newsweek* knew of and maliciously and intentionally authorized Isikoff’s conduct. As such, she contended that *Newsweek* should also be held liable for punitive damages.

Motion to Dismiss

Not surprisingly, Isikoff, *Newsweek*, and the *Washington Post* mounted a full assault against the claims levied by Steele. First, the defense filed a motion with the Court to dismiss each of Steele’s eleven claims. The defense then successfully obtained a stay of all discovery while the motion was pending.

In the motion, the defense stated that Isikoff never made any promises to Steele and categorically maintained that Steele’s claims that her conversations with the reporter were “off the record” were based on “pure fantasy.” (As noted elsewhere, Steele never complained about the published story and continued to call Isikoff in the weeks following the first article’s appearance.) In addition, the defense alerted the Court that Steele’s claims were merely an attempt to “turn her own misconduct into cash, or, at its most nefarious, a disturbing attempt to disrupt [Isikoff’s] reporting effectiveness.” Indeed, at Steele’s trial on charges of obstruction of justice there was testimony that Steele had told another person that after speaking to Isikoff she changed her mind and did not want her name on the record.

The defense’s motion was based, in large part, on two arguments. First, because Steele sought damages for reputational harm, her complaint failed to meet the First Amendment requirement that she plead and prove falsity and reckless disregard for the truth. Second, under basic rules of contract, equity and tort law, Steele’s complaint should be dismissed because of her admitted intentional plan to deceive Isikoff.

The Opinion: First Amendment Defense

After first noting the difficult burden faced by a defendant on a motion to dismiss, the Court began to systematically pick apart the deficiencies in Steele’s com-

plaint. Relying on *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court articulated two overarching rules of law to be applied to the instant case.

First, under *Hustler*, if a party seeks damages for harm to reputation or state of mind, the suit can proceed only if that party meets the constitutional requirements of a defamation claim — proof of falsity and in all likelihood actual malice, or at least some other degree of fault. Second, as discussed in *Cohen*, if a party seeks damages for non-reputational harms, then the First Amendment does not bar the suit so long as the claims are brought under generally applicable laws.

With these standards in mind, the Court refused to dismiss all of Steele’s claims on First Amendment grounds at such an early stage. Instead, the Court found that Steele’s complaint carefully portrayed some of her harm as analogous to the plaintiff in *Cohen*, such as “occupational harm.”

Interestingly, the Court referred to the need to meet “the constitutional defamation requirements” without ever explicitly stating they included actual malice. Perhaps this was because the Court was not going to prejudge whether Steele was a public figure or whether *Hustler* was applicable to nonpublic figures. Of greater concern is whether the ruling means that a clever drafter need only include the words “pecuniary damage” or “loss of earning capacity” to survive a motion to dismiss.

In any event, the Court’s hesitancy on the First Amendment defense did not save Steele’s suit. To the contrary, the Court agreed with the defense, concluding that, under generally applicable state law, each of Steele’s eleven claims failed to state a claim upon which relief can be granted.

Choice of Law: Virginia or D.C.

The Court, sitting in diversity in an action between a citizen of Virginia and citizens of the District of Columbia, recognized that each of Steele’s eleven claims would turn on state law. Thus, as a threshold matter, the Court had to determine which state’s law would apply.

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According to the defense, a vast majority of the claims presented a “false conflict” between Virginia and D.C. law. That is, no one state’s policies would be advanced by applying one over the other. The Court agreed and noted that with the exception of the promissory estoppel claim, D.C. and Virginia laws were virtually interchangeable. As such, and because the District of Columbia was the forum jurisdiction, the Court declared that D.C. law would apply where the laws of Virginia and D.C. were the same.

With regard to the promissory estoppel claim, however, a conflict existed, with Virginia not recognizing claims based on a promissory estoppel theory, while DC law did recognize the theory. Here the Court turned to a modified governmental interest analysis. Accordingly, the Court sought to identify the jurisdiction with the most significant relationship to the dispute.

Overwhelmingly, the Court found Virginia’s relationship to the dispute was stronger than the District of Columbia’s. Specifically, Steele’s complaint alleged that Isikoff made his first promise of confidentiality to her in a meeting in Virginia. Next, Steele alleged that Isikoff’s second promise was made over the phone while she was in Virginia. Further, Steele allegedly related the Willey story to Isikoff while she was in Virginia. Finally, the alleged impact of the publication of Steele’s name and statements were felt by Steele in Virginia. Consequently, the Court concluded that Virginia had the strongest relationship to the dispute and that it would apply Virginia law to the promissory estoppel claim.

Breach of Contract

According to Steele, she and Isikoff entered into two separate contracts under which she promised to give him information about the Willey story in exchange for his promise to protect her identity and not disclose the content of their conversations. Steele argued that the story, as printed, constituted a breach of those contracts.

The issue of whether a reporter’s promise of confi-

dentiality creates a binding contract was a case of first impression in the District of Columbia and Virginia. As such, the Court turned to the only published opinion on the matter — *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990), *rev’d on other grounds*, 501 U.S. 663 (1991).

Following *Cohen*, the Court concluded that contrary to Steele’s assertions, Isikoff’s alleged promises did not create a contractual obligation. Rather, the only duty borne out of those promises was a moral one. Citing *Cohen*, the Court stated :

The issue of whether a reporter's promise of confidentiality creates a binding contract was a case of first impression in the District of Columbia and Virginia.

[w]e are not persuaded that in the special milieu of media news gathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract . . . The parties understand that the reporter's promise of anonymity is

given as a moral commitment, but a moral obligation alone will not support a contract.

Although the Court swiftly concluded that Steele's claim that there was a contract was unfounded, it went on to discuss the substance of her argument. In particular, the Court found that even under a traditional contract analysis, Steele failed to meet the legal standards necessary to sustain her claim. The Court explained that:

every contract [contains] an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.

Through Steele’s own accounts, the Court found that she breached this covenant by knowingly and intentionally lying to Isikoff. The Court characterized Steele’s lie as the “epitome of bad faith” and concluded that her conduct amounted to “imperfect performance” in viola-

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tion of the implied duty of good faith and fair dealing. As a result, the Court held that Steele was in breach of the very contract she sought to enforce.

Turning to Steele's second contract claim, the Court refused to characterize the two primary conversations between Isikoff and Steele as two separate agreements. Rather, the Court found that there was, at most, only a single contract — Steele's promise to divulge the Willey story and Isikoff's alleged promise to keep Steele's identity and statements confidential. Steele's subsequent conversation with Isikoff, the Court held, fell within the scope of the initial alleged contract. As a result, any of the failings of the first contract, would also be attributed to the second. Accordingly, Steele's second contract claim failed for the same reasons as the first — Steele's bad faith.

The Court also accepted defendants' alternative basis for dismissal of Steele's second contract claim — the contract failed for lack of consideration. Specifically, the Court ruled that the obligation that Steele assumed during her second conversation with Isikoff, was identical to the obligation she incurred when they first spoke. In both instances, Steele had a duty to disclose what she knew about the Willey story. The Court went on to state that, though the versions of the story may have changed with each conversation, Steele's underlying duty did not. As such, any duty that Steele incurred in a later conversation with Isikoff, merely amounted to a preexisting duty of the first "contract." Therefore, applying basic contract principles, Steele's claim under a second alleged contract failed for lack of consideration.

Promissory Estoppel and Unjust Enrichment

In addition to the breach of contract claims, Steele urged the Court to grant her equitable relief under the doctrines of promissory estoppel and unjust enrichment. According to Steele, she detrimentally relied on Isikoff's alleged promise of confidentiality. Moreover, Steele argued that both *Newsweek* and Michael Isikoff unfairly profited from the publication of the Willey story. The Court, however, was unpersuaded by her arguments.

Because Virginia law applied to the promissory es-

toppel claim, the Court was able to summarily dismiss the claim because promissory estoppel is not a recognized theory in Virginia. The Court also noted that even if promissory estoppel was recognized in Virginia, Steele's complaint would still have to be dismissed since promissory estoppel is an equitable doctrine, and Steele did not come to the Court with clean hands.

Next, the Court addressed Steele's argument for relief based on the theory of unjust enrichment. Again the Court resorted to the rudimentary principle of unclean hands to dispose of the claim: "In an action in equity, 'he who asks relief must have acted in good faith . . .'" Here again, Steele's own conduct served as the primary basis for dismissing her claim. Pointing to Steele's intentional lie to Isikoff, the Court again found that Steele's conduct constituted bad faith. As such, Steele was not entitled to relief as a matter of law.

Fraud, Negligent Misrepresentation and Intentional Infliction of Emotional Distress

Steele's complaint also alleged that Isikoff was liable in tort for fraud, negligent misrepresentation and intentional infliction of emotional distress. Relying on basic tort law, the Court found Steele's allegations were insufficient to support her claims. To recover in tort, a plaintiff must show that the defendant's conduct was the proximate cause of his/her injury. In the instant case, the Court found that apart from Steele's "conclusory assertions" that her harm resulted from Isikoff's conduct, none of the facts supported this conclusion. Instead, the Court held that Steele's harm was "rooted in her own lie," not the actions of Isikoff.

With regard to the claim of intentional infliction of emotional distress, the Court found that Steele failed to satisfy even the first element of the claim. That is, a showing that Isikoff's conduct was "extreme and outrageous." In other words, Isikoff's conduct must be plead to have gone beyond all bounds of decency in a civilized society. The Court found that though Isikoff's alleged failure to keep his promise of confidentiality may be contrary to journalistic standards, it did not rise to the

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level of “extreme and outrageous” as required by law. Accordingly, the Court dismissed the claim.

Breach of Fiduciary Duty

Finally, Steele alleged that Isikoff’s failure to keep his promise constituted a breach of his fiduciary duty to her. The Court likened this claim to Steele’s contract claim in that it raised general questions about the nature of the relationship between a reporter and source. Here too, the Court agreed with the defense, concluding that no Court has ever recognized the existence of fiduciary relationship between a reporter and his source. Notwithstanding the absence of precedent, the Court went on to address Steele’s argument.

Relying on *Church of the Scientology Int’l v. Eli Lilly & Co.*, 848 F. Supp. 1018 (D.D.C. 1994), Steele asserted that the existence of a fiduciary relationship is a fact-intensive question involving an inquiry into the nature of the relationship, the promises made, and the legitimate expectations of the parties. Steele did not, however, offer more than a bare allegation that her relationship with Isikoff was a fiduciary one. Thus, the Court found that even under the standard urged by Steele, her complaint was fatally flawed. Specifically, the Court held that although it must construe Steele’s complaint favorably, the facts as plead — a few short calls and one face-to-face meeting — reveal that Steele’s relationship with Isikoff was too fleeting to give rise to a fiduciary duty. Accordingly, the Court dismissed the claim.

As a final matter, the Court noted that there can be no derivative liability without primary liability. Thus with the dismissal of Steele’s underlying claims, her derivative claims against *Newsweek* and the *Washington Post* dissolved and were dismissed accordingly.

This case indicates that a motion to dismiss the complaint, depending on the nature of the complaint and surrounding circumstances, is still a viable and worthwhile option for defendants.

Stuart W. Gold is a partner in Cravath, Swaine & Moore, New York, and represented the defendants in this matter.

Newspaper’s Applications For Access to Civil Court File Upheld; Had Been Sealed Pursuant to Parties’ Settlement Agreement

By Roger Myers and Rachel Boehm

A California Court of Appeal has affirmed a superior court order unsealing a civil court file that had been sealed in its entirety three years earlier pursuant to a settlement between the parties, rejecting the argument that a media organization cannot move to unseal previously sealed court files unless it shows new law or new facts undermines the sealing order, as required for a motion for reconsideration. *Broughton v. Mediacopy*, No. A. 088571 (Cal. Ct. App. July 11, 2000).

In March 1997, a California jury awarded \$200,000 in damages to the plaintiff in *Broughton*, which involved allegations of racial harassment, wrongful discharge and infliction of emotional distress against Mediacopy, a company located in the San Francisco Bay Area. After trial, the entire court file was sealed pursuant to a settlement agreement resolving the case.

Trial Court Opens Files

In August 1999, shortly after discovering that the file was sealed, the *San Francisco Examiner* moved to intervene and unseal the file on the ground that the sealing order violated the public’s constitutional right of access to court records, a right recently confirmed by the California Supreme Court in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999). Mediacopy made no attempt in the lower court to offer any justification for why the file should be sealed, other than to contend that private parties should be entitled to make sealing the file an enforceable condition of settlement. Instead, it argued that the *Examiner*’s application should be denied because the newspaper had failed to file a motion for reconsideration under California Code of Civil Procedure Section 1008. Mediacopy argued that under § 1008, the newspaper was required to show new facts, circumstances, or law which would justify unsealing the court file.

The superior court treated the *Examiner*’s motion

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Applications For Access to Civil Court File Upheld

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as one brought under § 1008 and unsealed all but a few of the documents in the file. Unfortunately, the court also granted Mediacy's request for a stay of the order unsealing the records pending appeal.

On appeal, Mediacy argued that the lower court's treatment of the *Examiner's* motion as one made under § 1008 was improper, and that the media should not be allowed to gain access to previously sealed court documents without making a motion for reconsideration under that section and establishing "new or different facts, circumstances or law" as required by § 1008.

Mediacy also argued that *NBC Subsidiary* should not be retroactively applied, and that *NBC Subsidiary* should be limited to cases involving public figures — as in that case, which involved a lawsuit between Clint Eastwood and his ex-wife, another prominent entertainment figure — and to cases where the media is petitioning for access to a trial currently in progress. Had Mediacy prevailed on this argument, it could have precluded the media from unsealing improperly sealed civil court files and records after a case is over, even where the sealing order was entered without notice to the media.

Appellate Court Agrees

Fortunately, the Court of Appeal rebuffed Mediacy at every turn. In an unpublished opinion filed July 11, 2000, the appellate court affirmed the lower court's order unsealing the court file, dismissed as "frivolous" Mediacy's assertion that the public's right of access to documents filed in connection with a civil case depends on the "highly publicized" nature of the trial, and observed that, "[w]e know of no authority, and appellant cites none, that would limit the public's right of access to court records only to trials which are in progress." The court also rejected the assertion that the media must bring motions for reconsideration to unseal files even where the media's right of access was not initially considered, noting:

we do not think that Section 1008 provides the exclusive means to modify or vacate a sealing order

in a civil proceeding ...

In any event, the court found that the *Examiner* had substantially satisfied the requirements of that section, even if it applied, and that Mediacy had "failed to assert any overriding interest to justify the broad sealing order at issue."

Despite characterizing Mediacy's arguments as "contrived" and "lacking any arguable basis," the Court of Appeal denied the *Examiner's* motion for at-

Mediacy argued that under Section 1008, the newspaper was required to show new facts, circumstances, or law which would justify unsealing the court file.

torneys fees as sanctions for a frivolous appeal. The newspaper had argued that sanctions should be awarded to deter the filing of frivolous appeals in access cases that, as in this case, appeared solely or primarily designed to delay the media's exercise of its constitutional right of access.

Perhaps buoyed by the Court of Appeal's reluctance to award sanctions, Mediacy filed a petition for review in the California Supreme Court. That petition was denied on October 18, 2000.

Mr. Myers and Ms. Boehm, who are with Steinhart & Falconer LLP in San Francisco, California, represented The Hearst Corporation, d.b.a. San Francisco Examiner, in this matter.

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A Loud Debate Over Keeping Quiet

In the wake of the recent Firestone debacle, the judiciary's routine rubber-stamping of confidentiality agreements between parties to civil litigation has become a hot topic. Critics have also questioned the effect on public safety of private secrecy agreements that the courts never see.

Although the emphasis on this issue might be new, the topic itself is not. Recall Business Week's battle over "confidential" documents it received in the litigation between Procter & Gamble and Bankers Trust concluding in March of 1996, during which the Sixth Circuit registered its strong disapproval of district courts approving confidentiality agreements in the absence of any evidence or analysis. Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996), see July 1997 LibelLetter at 25. This instant approval by district courts, the appellate court noted, shifts the gate-keeping power from the court to private parties, and flies in the face of Federal Rules of Civil Procedure that allow sealing of discovery materials only "for good cause shown."

These issues are reflected in the following article, reprinted from the September 18, 2000 issue of Business Week.

Commentary By Mike France

The Hidden Culprit: The U.S. Legal System

Who's to blame for the tire debacle? So far, most of the finger-pointing has been directed at the obvious suspects: Bridgestone/Firestone, Ford, and the National Highway Traffic Safety Administration (NHTSA).

At this early stage, they certainly appear to deserve it. But there's another less visible institution that also shares some responsibility for this public-safety disaster: the American legal system. Long before the NHTSA announced in May that it was investigating Firestone tires, there were more than 60 personal-injury lawsuits stemming from blow-out-related injuries, according to the Attorneys Information Exchange Group (AIEG), an association of plaintiffs' lawyers who share documents with one another. The earliest of these cases, AIEG says, dated back to 1991.

Whatever Firestone, Ford, or the NHTSA did or did not do, these cases should have alerted the public, the media, and regulators to the dangers of ATX and Wilderness tires. Instead, these suits went almost unnoticed. One big reason: Firestone and Ford both managed to win protective orders that prevented much of the information generated by the cases from becoming public. And plaintiffs and their lawyers signed confidentiality agreements blocking them from discussing some details of the suits, such as settlement amounts.

Behind Closed Doors

Did this acquiescence to secrecy delay public awareness of the tire defect? "Absolutely, by a matter of years," says former NHTSA chief Joan Claybrook, who is now the president of Public Citizen, a Washington public interest group.

And the danger extends far beyond Firestone. Many large American companies now routinely request and are granted protective orders when they are sued and confidentiality agreements when they settle. That means much of the country's most important product-liability litigation is conducted behind closed doors.

Who's to blame? Just about everybody involved in the legal system. Aggressive corporate defense attorneys routinely seek broad protective orders, whether cases involve sensitive commercial secrets or not. Plaintiffs' lawyers sign such agreements to win quicker victories, despite how much they love describing themselves as public safety advocates.

But the group that bears the most responsibility is the judiciary. Judges don't have to agree to such conditions. While attorneys are mandated to act in the best interests of their clients, judges must answer to the public. "The law recognizes that allowing each of the parties to defend their own private interest does not necessarily protect the public interest, and that's why it assigns judges the responsibility of defending the public," says Arthur Bryant, executive director of Trial Lawyers for Public Justice, a Washington group that frequently

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tries to open up secret settlements.

Righting wrongs

Judges frequently argue that they are under pressure to approve these types of secret deals to avoid further overcrowding of dockets. That's a legitimate argument, but settling private disputes is not the only purpose of the civil justice system. It is also supposed to right wrongs that escape the detection by the nation's regulatory bureaucracy.

The Firestone litigation is a perfect example of what's wrong with the process. Surely some judges should have recognized that a serious public safety issue might be involved, and that secrecy would only delay any efforts to correct it.

What can be done? Texas and Florida have both recently instituted stricter rules establishing the presumption that all litigation documents will be public. While the new laws still give judges discretion to approve protective orders and secret settlements in rare cases, it forces judges to go on record about why any case should be kept secret. Other states should follow

suit before there's another disaster.

France covers legal affairs from New York.

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UPDATE

Michigan's Supreme Court Affirms that Investigative Subpoena Law Cannot Compel Media to Disclose Unpublished Documents

In a unanimous decision, the Michigan Supreme Court decided that Michigan's investigative subpoena law could not compel the press to disclose unpublished pictures. *People v. Pastor* [In re March 1999 Riots], 2000 Mich. LEXIS 1493. Charles Barbieri, who represented the *Lansing State Journal* in the case, stated the "law is rather clear, that news persons are immune from investigative subpoenas except in some very isolated circumstances that were not present here."

The case revolved around an investigation of a 1999 riot at Michigan State University following the Michigan State men's basketball team's loss in the Final Four. Eleven media organizations recorded pictures of the riot, and several of the organizations released published pictures of the riots over to the police upon request. But, none of the organizations complied with a police request to hand over unpublished pictures of the riot, and the authorities sought to compel the release of the photographs by obtaining an investigative subpoena.

The county prosecutor argued that the pictures should be submitted because they were recordings of a public event that provided evidence of criminal activities. However, the media outlets argued that forcing the disclosure of the materials would make the media agents of the police.

The court ruled that the media can only be subpoenaed if they have already published information or are the subject of a criminal investigation.

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The Cameras in the Courtroom Debate: New Life, But Controversial As Ever

By Kathleen Kirby and Evan Henschel

When Napster attorneys and record industry players faced off a few weeks ago before the Ninth Circuit, C-SPAN's cameras were in the courtroom broadcasting every riff. What better court proceeding to air on television than the case involving the technology that Napster claims will bring music to the people. Though Napster may have an uphill battle, C-SPAN got its cameras into the courtroom with relative ease. The network just filled out a one-page application carried on the Ninth Circuit's website.

This experience, of course, stands in stark contrast to the typical result when the media desires to get cameras into federal proceedings.

Rules on Coverage Limits and Exceptions

Federal courts currently are closed to cameras, with the exception of the Second and Ninth circuits, which have adopted judicial orders allowing televised coverage of appellate proceedings only. While a few federal district court judges have determined that they have discretion to allow camera coverage of civil proceedings, such access remains the exception rather than the rule.

Federal Rule of Criminal Procedure 53 prohibits photographs or radio broadcasts of Federal criminal cases. In 1972, the Federal Judicial Conference, the rulemaking body of the federal Judicial branch of the U.S. government, banned photographs and television cameras from all federal courts.

In 1990, the Judicial Conference began a three-year pilot program allowing electronic media in civil courtrooms in six district courts and two appeals courts. Despite the resulting study by the Federal Judicial Center which gave the program a favorable evaluation, the Judicial Conference voted by a slim margin in 1996 to permit each of the federal courts of appeals to "decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments." Only the Second and Ninth and Second Circuits acted to permit such coverage.

In March 1996, Judge Robert J. Ward of the Southern District of New York allowed camera coverage of a civil proceeding in his court, reasoning that the rules of the Second Circuit and the Southern District did not prevent such coverage (*Marisol v. Giuliani*, 929 F. Supp. 660 (S.D.N.Y. 1996)), and that the Judicial Conference did not possess enforceable power over district courts.

In response, the Judicial Conference "strongly urge[d] each [circuit] judicial council to adopt an order reflecting the Conference's decision not to permit the taking of photographs and radio and television

After lying virtually dormant since the O.J. trial, the cameras in the [federal] courtroom debate is showing renewed vigor.

coverage of proceedings in U.S. district courts," and to abrogate all permissive local rules for the federal trial courts. The Judicial Council of the Second Circuit declined to do so and at least four judges in the Eastern and

Southern Districts of New York have admitted cameras to their courtrooms.

The Fourth Circuit acted similarly, but most other circuits amended their rules in accordance with the Judicial Conference's wishes. Thus, camera coverage of federal district court proceedings remains the exception, rather than the rule.

State courts have their own history of televised coverage. During the 1970s, many state courts started to permit camera coverage, generally with favorable results. Following the Supreme Court's 1981 decision in *Chandler v. Florida*, 449 U.S. 560, holding that electronic media coverage of state court cases does not inherently violate the due process rights of witnesses or defendants, more and more states began to open their courtrooms to cameras. (Today, 48 out of 50 states allow cameras into their courts in some fashion).

Enter the O.J. Trial

The television camera was blamed for most of the lurid sensationalism of the O.J. Simpson criminal proceedings. The impact on court coverage has been

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The Cameras in the Courtroom Debate

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palpable — since the O.J. criminal trial, cameras have been barred not only from the O.J. civil trial, but also from any number of high profile state trials, and the momentum in favor of cameras in federal courts following the successful three-year experiment was stopped dead in its tracks.

After lying virtually dormant since the O.J. trial, however, the cameras in the courtroom debate is showing renewed vigor. Legislation has been introduced in both the House and Senate to allow cameras into federal district, appellate and Supreme Court proceedings, and the successful television coverage of the high profile state trial of Amadou Diallo has given some leverage to cameras proponents, H.R. 1752, S.721, S.3086 (106th Cong. 2000).

Language proposing camera coverage of federal proceedings included in H.R. 1752 this session had its origins in the “Sunshine in the Courtroom Act,” a bill first introduced in 1987 by Rep. Steve Chabot (R-Ohio) and then-New York Congressman Chuck Schumer (D). The legislation would allow television coverage of federal court proceedings, both trial and appellate, including those in the Supreme Court. Under the proposal, federal judges would be given the discretion to allow cameras in their courtrooms during a three-year experiment. Earlier this year, the bill passed the House and was sent to the Senate, but was amended to require the consent of all parties before camera coverage will be permitted. This provision may serve as a virtual ban; thus, the legislation has not been embraced by cameras proponents.

In the Senate, Senators Charles Grassley (R-Iowa) and Chuck Schumer (D-NY) this session introduced S.721, also entitled the “Sunshine in the Courtroom Act.” This bill, too, would grant appellate court judges the discretion to permit televised coverage of proceedings in their courtrooms. The bill gives this same discretion to district court judges and allows witnesses (except for parties to the case to be televised) to have their identities concealed through technological obscuring of their faces and voices, and enjoys a large measure of bipartisan support.

Hearings on S.721

On September 6, the Subcommittee on Administra-

tive Oversight and the Courts of the Senate Judiciary Committee held hearings on S. 721. A panel of judges who testified before the subcommittee split 2-1 in favor of cameras in court. Judge Nancy Gertner of the U.S. District Court for Massachusetts (a court that does not currently allow television cameras) and Judge Hiller Zobel for the Superior Court of the State of Massachusetts (who has presided over televised trials) both testified in favor of camera in the courtroom legislation. Each stated that cameras would have little or no impact on the proceeding or the conduct of witnesses or attorneys. Any negligible effect, they said, would be fleeting due to the novelty of the cameras and would not outweigh the benefits.

Indeed, Judge Gertner emphasized that in the 21st century, the First Amendment mandate for a public trial necessarily means a *televised* trial. Judge Zobel reminded the subcommittee that the judge has the discretion and power to control the demeanor of any person present in the courtroom, and should not be reluctant to do so. Judge Zobel went on to draw a distinction between the presence of cameras in the court, a benign feature, and the use of trial coverage by the media, a sometimes embarrassing phenomenon which cannot be eliminated merely by keeping cameras out. Again, both judges stated that any potential negative is soundly countered by the benefit to the American public of observing the actual administration of justice.

Judge Edward Becker, a federal appellate judge from Philadelphia, voiced the sole opposition to S.721, testifying that the U.S. Judicial Conference vigorously opposes the bill. Judge Becker stated that the threat to a fair trial eclipses any right of the public to see courtroom proceedings, that cameras would intimidate parties, witnesses and jurors, and that litigants might feel duress to settle litigation rather than face the cameras. Judge Becker also cited concerns with security of judges and the privacy of witnesses.

The panel testifying before the subcommittee also included a television news director, Dave Busiek, who testified that after 20 years of electronic coverage of trial court proceedings in his home state of Iowa, not a single judicial action had been overturned due to the presence of radio or television, and offered that televising proceed-

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The Cameras in the Courtroom Debate

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ings in cases where the verdict seems amiss can help reassure viewer-citizens that the processes of a fair trial were observed.

An academic from Utah, Professor Lynn Wardle, concluded that cameras in court would be healthy for both judges and the public. Finally, Ron Goldfarb, author and trial lawyer, testified that the First Amendment requires televised coverage of trial proceedings unless the party seeking a closed court can establish that irreparable damage to the right to a fair trial will result.

N.Y.'s Diallo Coverage As Factor

Figuring prominently in the hearing was discussion of the televised coverage of the New York State trial of four police officers accused of killing Amadou Diallo. New York at one point served as a leading example of state experimentation with cameras in court. Though Section 52 of the New York Civil Rights Law bans televising of all trials in New York, the state legislature had passed several short-term experimental waivers of the ban. In 1997, however, lawmakers declined to renew the experiment, as had been the practice, in the wake of (although not altogether the result of) the O.J. trial.

In a watershed ruling earlier this year, Judge Joseph Teresi, presiding over the Diallo trial, ruled that Section 52 was an unconstitutional violation of the First Amendment, and permitted the trial to be televised, (*People v. Boss*, Index No. 122-00 (S. Ct. Albany Co. Jan. 25, 2000)), a critical move in light of the change of its venue from the Bronx, where the shooting took place, to Albany.

While Judge Teresi's ruling holds little precedential value from a strictly legal standpoint, the Diallo trial coverage is being cited by cameras proponents, including state and federal lawmakers in New York and elsewhere, as an example of how television can provide the public with a unique window on an important and controversial trial without compromising the integrity of the proceedings. By all accounts, there was no sign of the courtroom grandstanding that opponents of cameras in courts often cite. Any attempts by the prosecution and defense to speak to the public at large occurred outside the courtroom, as they

would have with or without a camera inside the courtroom. Most importantly, the public was allowed to witness first-hand the proceedings in this highly-charged trial and arrive at their own conclusions. Indeed, the decision to allow camera coverage of this trial probably averted more violent protests from those unhappy with the acquittal of the four police officers charged with killing Mr. Diallo, because, as a *New York Times* editorial pointed out, it "allowed the public to understand the legal complexities of the officers' claims of self-defense."

Opening the Supreme Court

During the hearing, Senator Arlen Specter (R-Pa.) stated his intention to introduce his own cameras in the courtroom bill, this one aimed solely at the Supreme Court. On September 21, he and Joe Biden (D-Del.) did so. S. 3086 would require televised coverage of all public sessions of the Supreme Court, unless a majority of the Justices found that such coverage would violate due process rights of one of the parties.

Certainly, some members of Congress have become hostile toward the court for what they see as rulings that go beyond the Constitution to writing public policy, and many have speculated that Senator Specter's legislation was engendered from his anger at the Supreme Court, which he has termed a "super-legislature." Specter said his bill "seeks to impose greater accountability upon a body which decides so many matters of the greatest importance in our country, often by a single vote." The nine Supreme Court Justices, of course, have expressed varying degrees of disapproval of cameras their courtroom, the most widely-quoted of which is Justice David Souter's ultimatum, "over my dead body."

Action on any of these bills is unlikely given the more pressing concerns of national elections. Moreover, the bills face a formidable roadblock in the form of opposition from Judiciary Committee Chairman Orrin Hatch (R-Utah). However, bipartisan support is increasing, and cameras in the courtroom legislation has been proposed three consecutive Congressional sessions.

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Bipartisan support is increasing, and cameras in the courtroom legislation has been proposed three consecutive Congressional sessions.

The Cameras in the Courtroom Debate

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It seems reasonable to expect similar legislation in 2001, regardless of whether Congress sees a shift in its political make-up.

Does Congress Have the Authority?

Even if cameras in the court legislation is passed in some form, it is not clear if Congress can tell the courts to televise proceedings, or whether such a mandate would violate the Constitution's separation of powers. While judicial rules, promulgated by judges to govern their courtrooms, pose no separation of powers argument (even though such rules are promulgated under enabling statutes passed by Congress), Congressional legislation that dictates courtroom conduct may be seen as outside Congress's authority.

When Congress passed a law requiring closed-circuit coverage for victims of the federal Oklahoma City bombing trial, for example, Timothy McVeigh's defense attorney argued that "Congress can no more tell the judge what to do in his courtroom than the judge can tell Congress what to do in the well of the House." But Senator Specter has argued that Congress has the authority to set the beginning of the Court's term and the number of Justices needed for a quorum, for example, and certainly has the authority to mandate that judicial proceedings be televised.

Still, the good news is that the cameras in the courtroom debate has resurfaced, and has caught the attention of Congress. As Judge Teresi stated, "the quest for justice in any case must be accomplished under the eyes of the public" and, as he recognized, the electronic media has become an increasingly important surrogate for the public in recent decades. Many judges themselves have said that is only a matter of time before the tide turns and, through television, we realize the intent of our Founding Fathers, who advocated holding trials "before as many people as chuse to attend."

Kathleen Kirby is of counsel, and Evan Henschel is an associate, with Wiley, Rein & Fielding in Washington, D.C.

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Federal Court in Texas Invalidates Library Censorship of Two Children's Books

By Daniel Mach

Censorship opponents were handed a timely victory on the eve of Banned Books Week, as a federal court invalidated a Texas city's attempt to restrict access to two acclaimed children's books in its public library. On September 20, 2000, Chief Judge Jerry Buchmeyer of the Northern District of Texas held unconstitutional a Wichita Falls, Texas law enacted to remove the two books — *Daddy's Roommate*, by Michael Willhoite, and *Heather Has Two Mommies*, by Lesléa Newman — from the youth section to the adult areas of the municipal library. *Sund v. City of Wichita Falls*, No. Civ. A.7:99-CV-155-R, 2000 WL 1456332 (N.D. Tex. Sept. 20, 2000).

In striking down the library regulation, the court resoundingly affirmed the principle that First Amendment strictures apply not only to complete speech bans, but also to more subtle content- and viewpoint-based burdens on protected expression.

Books Relocated When Ban Failed

The controversy over the two books arose in May 1998, when, after learning of the books' existence in the children's section of the Wichita Falls Public Library, several individuals and special interest groups sought to ban the books from the library because of the purportedly "gay message" they conveyed. When attempts at outright removal failed in the City Council, opponents of the books ultimately secured passage of City Resolution 16-99, informally named the "Altman Resolution" after its City Council sponsor.

The Resolution required the relocation of any children's books to the library's adult sections if, in the opinion of any three hundred petitioners, the books were "most appropriately read with parental approval and/or supervision." Pursuant to the Altman Resolution, which the district court concluded was, "without

question, passed with the primary purpose of limiting access to the two Books," city officials relocated *Heather Has Two Mommies* and *Daddy's Roommate* to the adult areas of the library in July 1999.

Heckler's Veto

In a suit filed by nineteen Wichita Falls residents, including parents, children, and local teachers, the defendants immediately agreed to a temporary restraining order requiring them to return the books to the children's section of the library. Following a full trial on the merits, the district court ultimately held that the Altman Resolution, both on its face and as applied to removal of the two books, violated the plaintiffs' rights under the First Amendment and the free speech guarantees of the Texas Constitution.

"By conferring upon any 300 patrons the power to remove from the children's section any books they find objectionable," the court reasoned, "the Altman Resolution unconstitutionally confers a 'heckler's veto' on the complaining patrons, effectively permitting them to veto lawful, fully-protected expression simply because of their adverse reaction to it." The court found the resolution's "appropriateness" standard to be fundamentally at odds with core First Amendment values, explaining:

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Texas Court Invalidates Library Censorship

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Not only does this language allow any special interest group to suppress library materials on the basis of their content, it actually facilitates an infinite number of content — and viewpoint — based speech restrictions.

Removing Books is Significant Burden

In its decision, the district court rejected the defendants' argument that the book removals implicated no First Amendment rights because the two children's books remained available in the library, albeit only in the designated adult sections. "Even where a regulation does not silence speech altogether," the court noted, "the Supreme Court has given 'the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.'"

Although the books were not banned entirely from the library, the court explained, their forced removal from the children's section placed a "significant burden" on library patrons' access to the two titles, making it more difficult for children and their parents to find the books. The court drew an analogy to *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 527 (1996), in which the Supreme Court invalidated a requirement that "patently offensive" cable programming be segregated, blocked, and made unavailable to viewers unless they specifically requested access well in advance. "Just as the cable regulation in *Denver Area* impermissibly burdened the rights of television viewers who wished to 'channel surf,'" the court reasoned, "the Altman Resolution unconstitutionally burdens the First Amendment rights of browsing Library patrons."

The *Sund* decision was appropriately timed, released several days before the start of national Banned Books Week. Perhaps not coincidentally, *Daddy's Roommate* and *Heather Has Two Mommies* placed second and ninth, respectively, on the American Library Association's recent list of the 100 Most Frequently Challenged Books of the 1990s.

Daniel Mach is with Jenner & Block in Washington, D.C.

RTNDA Releases New Ethics Code

Must Reading for Anyone Representing Broadcast Journalists

Television news directors face increasingly complex ethical dilemmas, due to technological advances such as the Internet, increasing pressure from sales staff, and novel newsgathering techniques. Hoping to provide guidance, the Radio-Television News Directors Association (RTNDA) has updated its ethics code, releasing the final version on September 14 at the annual RTNDA convention in Minneapolis.

The code has been expanded in length over the previous, briefer code, and now addresses dilemmas faced by electronic journalists surrounding the Internet and new technology, commercial influences on the news, coverage of crisis events, and stories about vulnerable groups such as children. The authors, intending it as a practical yet flexible guide for journalists faced with moral dilemmas, established three levels within the code: basic principles, guiding practices, and case studies and guidelines. The first two levels have been finalized and released, while the third level will be fluid and adaptable, encompassing upcoming RTNDA ethics committees and workshops that will incorporate the code in practical contexts.

The RTNDA Ethics Task Force, which has worked throughout the year reviewing drafts and making revisions, developed the code with input from RTNDA members, ethics experts, and others. The RTNDA ethics code emphasizes six "guiding principles": public trust, truth, fairness, integrity, independence, and accountability.

While LDRC recommends that anyone who represents broadcast journalists should read the entirety of the RTNDA guidelines, among the specific admonitions under the guiding principles are: electronic journalists should exercise particular caution and increase privacy when covering stories involving children, give a diverse sampling of opinions and perspectives in a given context, and avoid using technological devices that "skew facts, distort reality, or sensationalize events."

The code states that journalists should use surreptitious newsgathering techniques, including hidden cameras or microphones, "only if there is no other way to obtain stories of significant public importance and only if the technique is explained to the audience." It also states that journalists should "[u]se the private transmissions of others only with permission."

The new RTNDA Code of Ethics may be viewed at <http://www.rtna.org/ethics/coe.html>.

Tasini Sparks Wave of Litigation Against Media Companies by Freelance Writers

The wide-reaching effects of *Tasini* are starting to be felt as lawsuits similar in nature to the *Tasini* litigation are emerging. Recently filed lawsuits include *Posner et al. v. Gale Group, Inc. et al.*; *Authors Guild, Inc. et al. v. Dialog Corp. et al.*; and *Laney v. Dow Jones & Co. et al.*

The cases stem from the September 1999 ruling in *Tasini v. New York Times et al.* 206 F.3d 161 (2d Cir). In *Tasini*, the Second Circuit reversed a federal district court decision ruling that Section 201(c) of the Copyright Act does not allow newspaper and magazine publishers to put writings by freelancers on electronic databases (such as NEXIS) and CD ROMs that include the entire issue of the publication, in absence of the express written consent from the writer. The court found that the electronic databases and CD ROMs were not within the revision exception for "collective works" under the default rules of the Copyright Act. See *LibelLetter*, October 1999, at 47.

In April of 2000, the 2nd Circuit Court of Appeals denied the New York Times' request for reconsideration of the ruling. See *LibelLetter*, April 2000, at 18. On August 4, 2000, the *New York Times* filed a petition for certiorari with the U.S. Supreme Court (No. 00-201).

Posner et al. v. Gale Group, Inc. et al. and Its Predecessors

In *Posner et al. v. Gale Group, Inc. et al.* (Civ. No.00-7376, filed Aug. 14, 2000) a group of freelance writers including the estate of Jessica Mitford (author of "The American Way of Death") filed suit in a San Francisco federal court, claiming back royalties from three major online publishers. The companies being sued are Bell & Howell Information & Learning Co., Northern Light Technology Corp., and Thomson Corp. (along with two of its subsidiaries, Gale Group Inc. and Thomson Business Information).

The authors, who claim that they are entitled to a share of the fee charged to customers by online publishers for downloading Internet articles, accuse the companies of displaying, copying, selling, and/or distributing copyrighted works without the permission of the copyright owner. The lawsuit, filed on August 14 and seeking class action status, could affect as many as 10,000

writers whose works are contained in the databases.

The San Francisco suit followed on the heels of the UnCover class action settlement in California. UnCover, an online database service, reached an agreement with five freelance writers and class representatives whose work it had already distributed to pay class members up to \$7.25 million in back payments, as well as future royalties. *Ryan v. Carl Corp.*, No. C-97-3873-DLJ, (D.C.N.D. Cal.).

The settlement requires the company to search for and compensate what may be thousands of writers whose works have been sold by UnCover in the past. UnCover sold the copyrighted articles over the Internet, acquiring royalty agreements with magazine and journal publishers but not with the individual writers. The settlement resolved a lawsuit by freelancers that began in 1997.

Similar litigation was preempted in August when Contentville.com, Steven Brill's website selling large amounts of content in different formats, agreed to compensate writers for work that visitors purchase from the website. Contentville, which had been selling authors' work without their prior approval, forged the agreement with the National Writers Union (NWU). NWU will create a system to identify authors who will be compensated when their work is resold online.

Authors Guild, Inc. et al. v. Dialog Corp. et al.

On August 15, the Authors Guild and several individual authors filed suit in U.S. District Court in the Southern District of New York against five corporations that run online database services: Dialog, Reed Elsevier (publisher of the LEXIS/NEXIS database), Dow Jones Reuters Interactive, Bell & Howell, and the Thomson Corporation (publisher of the Westlaw database). *Authors Guild v. Dialog Corp.*, No. 00-Civ-6049 (SDNY, Aug. 15, 2000). The suit, seeking an injunction and monetary damages, alleges that the companies systematically included in their online databases the authors' work for newspapers and magazines without gaining the permission of the authors or compensat-

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Tasini Sparks Wave of Litigation

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ing them. The freelance articles were included within the hundreds of magazines and newspapers the online databases offer for a usage or subscription fee. Such action, plaintiffs allege, resulted in widespread copyright infringement affecting thousands of freelance writers. The suit seeks class action status on behalf of over 15,000 freelance writers.

Laney v. Dow Jones & Co., Inc. et al.

On August 21, freelance writer Ruth Laney filed suit in the U.S. District Court in Delaware against Dow Jones & Co., Inc., and Reed Elsevier Inc., alleging the companies committed copyright infringement by reproducing her articles in electronic databases without her permission. *Laney v. Dow Jones & Co., Inc., et al.*, Civ. No. 00-769, Aug. 21, 2000. Laney's suit demands an injunction and monetary damages against Dow Jones, which operates online interactive databases containing millions of articles from thousands of sources, and against Reed Elsevier, owner of the NEXIS interactive database containing two and a half billion documents. The suit, which requests a jury trial, also asks for class action status for authors of articles dating from 1978 who have had work published by the defendants in the previous three years.

Industry Response: "Work For Hire" Contracts

The American Society of Journalists and Authors, Inc. (ASJA) reports in the October 2000 issue of its *ASJA Newsletter* that publishers of periodicals are increasingly requiring freelancers sign "work made for hire" contract terms as a mandatory condition of writing assignments. By arranging these conditions, ASJA says, a publisher will own the entire copyright of the work produced "for hire."

In addition, ASJA notes the popularity of "all rights" demands from publishers, as well as "first right to publish." Although seemingly less harsh, ASJA asserts that "first right to publish" has essentially the same result as "all rights," since it includes a broad right to use the work for a limitless time period (for example, the right to use the work "in all media, whether existing now or invented in the future"). Although the writer technically still owns the

work, the publishers may use the work again at any time in the future.

Illustrating the contention on this approach, *Boston Globe* freelancers, photographers, and illustrators sued The Globe Newspaper Co. in Massachusetts Superior Court on June 12, alleging that the *Globe* engaged in unfair and deceptive trade practices. *Marx et al. v. The Globe Newspaper Co.*, Civ. No. 00-2579F (June 12, 2000). The suit claims the *Globe* tried to coerce writers, photographers, and illustrators into signing inequitable contracts requiring them to relinquish rights in all types of media to past, present, and future freelance works. The plaintiffs assert that the *Globe* told them they would not be hired again unless they agreed to the contract, allowing the *Globe* to reprint in media including the Internet, without additional payment, works that had been previously bought by the newspaper. The lawsuit seeks class action status, and could affect one thousand freelancers. The plaintiffs' request for injunctive relief, asking that the court nullify the contracts of those who felt "coerced" into signing for fear of being fired by the *Globe*, was denied by Suffolk Superior Court Judge Carol Ball on June 26.

Current Appeal in National Geographic

An appeal in a case similar to *Tasini* was heard by a three-judge panel in the Eleventh Circuit Court of Appeals on October 3. *Greenberg v. National Geographic Society*, No. 00-10510-C. *National Geographic* was sued in district court by freelance photographer Greenberg when it reported entire back-issues of the periodical on its CD-ROM. Greenberg claimed that *National Geographic* violated his copyrights on photographs that initially had been included in the magazine and were subsequently included on the CD-ROM. The district court ruled that there was no infringement and granted summary judgment to *National Geographic*. 1999 U.S. Dist. LEXIS 13874 (S.D. Fla. June 8, 1999). The photographer's current appeal attempts to build upon the *Tasini* ruling in asking the Eleventh Circuit to adopt *Tasini's* holding.

As these suits develop, *Tasini* itself awaits a ruling by the U.S. Supreme Court on the *New York Times'* petition for certiorari.

Court Orders FCC to Repeal Speech Restrictive Rules

By Jerianne Timmerman

On October 11, 2000, the D.C. Circuit Court of Appeals ordered the Federal Communications Commission to immediately repeal the personal attack and the political editorializing rules. This order caps a twenty-year effort by the National Association of Broadcasters (NAB) and the Radio-Television News Directors Association (RTNDA) to obtain repeal of these rules that impermissibly restricted the speech of broadcasters. *RTNDA and NAB v. FCC et al.*, No. 98-1305, 2000 U.S. App. LEXIS 25269 (D.C. Cir., Oct. 11, 2000).

The personal attack rule required that “[w]hen, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an

identified person or group, the licensee shall” provide the person or group attacked a tape or transcript, and a reasonable opportunity to respond. 47 C.F.R. § 73.1920.

The political editorial rule mandated that “[w]here a licensee, in an editorial, [e]ndorses or, [o]pposes a legally qualified candidate or candidates, the licensee shall” provide the other qualified candidates for the same office with notice and an opportunity to respond. 47 C.F.R. § 73.1930. Both rules were remnants of the fairness doctrine, which the FCC decided in 1987 to no longer enforce because it was inconsistent with the public interest and the First Amendment.

Challenge Began in 1980

NAB first petitioned the FCC to repeal the personal attack and political editorializing rules in 1980. This petition argued that the rules inhibited broadcasters’ presentation of controversial issues, prevented the public from receiving diverse viewpoints on important substantive issues, and discouraged licensees from editorializing. Although the Commission proposed repealing or modifying these rules in 1983, such action was never taken. NAB and RTNDA consequently petitioned the FCC for an expedited rulemaking with regard to the rules in 1987 and again in 1990.

Following petitions for writs of mandamus by RTNDA and NAB and remands by the D.C. Circuit to the Commission, the FCC refused in both 1997 and 1998, by 2-2 votes, to repeal or modify the personal attack and political editorializing rules. In reviewing the second deadlocked vote in 1999, the D.C. Circuit acknowledged that the rules “interfere with the editorial judgment of professional journalists and entangle the government in day-to-day operations of the media,” and “chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment.” *RTNDA and NAB v. FCC*, 184 F.3d 872, 881, 887 (D.C. Cir. 1999) (*remand decision*).

Consequently, the Commission needed to “explain why the public interest would benefit from rules that raise these policy and constitutional doubts.” *Id.* at 882. The Court concluded, however, that the Commission had failed to provide any “affirmative justification of the two rules as being in the public interest, or explanation of why the rules should survive in light of FCC precedent rejecting the fairness doctrine.” *Id.* at 875. The Court then remanded the matter to the Commission for further explanation, and ordered that “[g]iven its prior delay in this proceeding, the FCC need act expeditiously” on remand. *Id.* at 889.

Court Orders Speedy Action, FCC Stalls

Despite the D.C. Circuit’s admonition in 1999 for the FCC to “act expeditiously,” the Commission failed to act at all. On July 5, 2000, NAB and RTNDA consequently asked the Court to either (1) recall its mandate and invalidate the challenged rules, or (2) issue a writ of mandamus, or an order under 47 U.S.C. § 402(h), requiring the Commission to complete its reconsideration of the rules within three months, or else the rules would automatically become invalid. After considering this motion, and the FCC’s response, the D.C. Circuit ordered that, if the FCC did not act by September 29, 2000, NAB and RTNDA “may supplement their re-

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In sum, it was, according to the Court, “folly to suppose” that the FCC’s Order “cures anything,” or affords any relief to NAB and RTNDA.

Court Orders FCC to Repeal Speech Restrictive Rules

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quests and seek whatever action they deem appropriate from the court.”

On September 18, FCC Chairman William E. Kennard issued a statement explaining that, despite his earlier “cautionary recusal” in this proceeding due to his past employment at NAB in the 1980’s, he would now participate so as to end the Commission’s deadlock. Despite the Chairman’s decision to participate, the FCC still failed to act by the September 29 deadline. Given the FCC’s inaction, NAB and RTNDA on October 2 filed an emergency motion requesting the D.C. Circuit to either vacate the challenged rules, or order the FCC to repeal the rules immediately.

FCC Suspends Rules For 60 Days

On October 4, the Commission responded to NAB’s and RTNDA’s emergency motion. The FCC informed the Court that it had, by a 3-2 vote, issued an *Order and Request to Update Record (Order)*, which temporarily suspended the rules for a 60-day period effective immediately. In this *Order*, the Commission also requested that (1) broadcasters present evidence 60 days after the suspension ends justifying their contention that the challenged rules chill speech, and (2) broadcasters and groups advocating retention of the rules provide additional information on the broader question of the effects of the FCC’s 1987 repeal of the fairness doctrine. In view of this *Order*, the Commission contended that NAB’s and RTNDA’s request for mandamus was moot, and their “extraordinary request” for the Court to recall its mandate “unwarranted.”

NAB and RTNDA replied the next day, strongly arguing that the Commission had ignored the Court’s earlier directive for it to justify the rules, and improperly attempted to shift the burden to NAB and RTNDA to prove that the rules were unjustified. NAB and RTNDA also emphasized that their petition for the Court to vacate the rules was not in any way moot, because, after 60 days, the rules would return in full force for the indefinite future.

D.C. Circuit: FCC Unresponsive

On October 11, the D.C. Circuit granted NAB’s and RTNDA’s petition. *RTNDA and NAB v. FCC*, No. 98-1305 (D.C. Cir., Oct. 11, 2000). In taking this action, the Court emphasized that “[n]either the timing nor the substance” of the FCC’s *Order* responded to the Court’s *Remand Decision*. Relying on the statements of the two dissenting Commissioners (Michael Powell and Harold Furchtgott-Roth), the Court “conclude[d] that its remand order for expeditious action was ignored.” Similarly, with regard to the substance of the FCC’s *Order*, the

Court concluded that the Commission still had “not provided adequate justification for the rules,” and the *Order* “provides no assurance that it will do so.”

Suspending the “rules for 60 days simply has the effect of further postponing a final decision,” and “[i]ncredibly,” the *Order* “reinstates the rules before the Commission will have received any of the updated information that the Commission states it requires in order to evaluate the rules.” Moreover, the *Order* “provides no assurance whatsoever that the Commission will proceed expeditiously once it receives the requested information.”

In sum, it was, according to the Court, “folly to suppose” that the FCC’s *Order* “cures anything,” or affords any relief to NAB and RTNDA, whose “petition to vacate the rules has been pending since 1980.” Noting that “less stalwart petitioners might have abandoned their effort to obtain relief long ago,” the Court concluded, “[i]f these circumstances do not constitute agency action unreasonably delayed . . . it is difficult to imagine circumstances that would.” Under “these extraordinary circumstances,” the Court stated that its “decision is pre-ordained and the mandamus will issue.”

The Court acknowledged (as had NAB and RTNDA in their filings) that the Commission “may institute a new rule-making proceeding to determine whether, consistent with constitutional constraints,” the personal at-

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[T]he Court concluded, “[i]f these circumstances do not constitute agency action unreasonably delayed . . . it is difficult to imagine circumstances that would.”

Court Orders FCC to Repeal Speech Restrictive Rules

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tack and political editorializing rules are in the “public interest.” Nonetheless, the Court concluded that “extraordinary action” was warranted in this case, “particularly in view of the fact” that the reasons previously “proffered in support of the rules” had all been found “wanting” in the *Remand Decision*. Accordingly, the Court recalled its mandate and issued a writ of mandamus directing the Commission immediately to repeal the personal attack and political editorializing rules.

Election May Revive Rules

At this writing, it remains unclear how the Commission will respond to the Court’s decision. As a practical matter, the results of the November election will likely affect the Commission’s long-term course of action in these speech-related matters. Broadcasters of course believe that the personal attack and political editorializing rules should remain decently buried, along with the rest of the fairness doctrine, which, as the Commission previously determined, is inconsistent with the public interest and the First Amendment.

However, in a statement released on October 11, Chairman Kennard stated that the personal attack and political editorializing rules were “only a small part” of the larger question of how “broadcasters, as public trustees, enhanc[ed] the democratic process.” According to the Chairman, the Commission would “use this opportunity to test broadcasters’ claims that the rules chill speech and to determine how best to ensure that the public receives balanced coverage of controversial issues.” The Commission moreover “intend[s] to move forward promptly to study the public interest obligations of broadcasters in the digital age, including whether these rules should be reinstated.”

Given this stated intention, it unfortunately appears possible that the personal attack and political editorializing rules may arise, Dracula-like, from the grave, despite the stake through the heart delivered by the D.C. Circuit. If so, then broadcasters remain willing and able to continue the fight against these or similar speech-restrictive rules that are contrary to the First Amendment and fail to serve the public interest.

Jerianne Timmerman is associate General Counsel of the National Association of Broadcasters.

Budget Bill Offers Mixed Bag

Bill Criminalizes Disclosure of Classified Data, But Promotes De-Classification

A provision making it a felony for federal government employees to disclose “classified” information, House Rpt. 106-969, Conference Report on H. R. 4392, Intelligence Authorization Act for Fiscal Year 2001 (H.R. 4392), sec. 304 (2000), has passed both houses of Congress and, as of this writing, was awaiting the President’s expected signature.

The bill also includes the Public Interest Declassification Act of 2000, initiated by Sen. Daniel Moynihan (D-N.Y.), which establishes a nine-member board to promote declassification and public disclosure of government documents which “are of archival value, including records and materials of extraordinary public interest.” House Rpt. 106-969, sec. 701, *et. seq.*

Making Disclosure Criminal

The criminal provision, which originated in the Senate version of the bill, is included in legislation appropriating funds for government intelligence activities during Fiscal Year 2001. It prohibits all federal government employees and former government employees from disclosing or attempting to disclose “classified information” to a third party, under penalty of a fine and/or imprisonment for up to three years. The provision defines “classified information” as “information or material properly classified and clearly marked or represented, or that the person [disclosing the information] knows or has reason to believe has been properly classified ... for reasons of national security.”

Prior to enactment of the bill, release of classified information was a felony only if the government could prove that national security was harmed.

The measure passed despite vigorous efforts by First Amendment advocates including Molly Leahy of the Newspaper Association of America, and editorials in *The New York Times*, *Washington Times*, *Miami Herald* and other papers. The opponents ar-

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Budget Bill Offers Mixed Bag

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gued that there are already sufficient protections that guard against the release of specific classified information, that the provision would force news entities to act as the government's enforcement agents, and that would encourage the over-classification of information and draconian interpretation of existing classification regulations.

During Senate passage of the legislation, Sen. Richard Shelby (R-Ala.) assured his colleagues that "[a]rguments that section 304 will stifle the freedom of the press simply don't pass muster. This provision has nothing to do with restraining publication. It simply criminalizes knowing and willful disclosure of properly classified information by those charged with protecting it." 146 Cong. Rec. S10333 (daily ed. Oct. 12, 2000).

In previous discussion on the Senate floor, Shelby assured Sen. Joseph Biden (D-Del.) that "in passing section [304], no member of the Select Committee on Intelligence intended that it be used as an excuse for investigating the press." 146 Cong. Rec. S9684 (daily ed. Oct. 3, 2000).

Declassification Board Created

The declassification provision grew out of Sen. Moynihan's long-time interest in over-classification of government information. In 1997, he led a Commission on Protecting and Reducing Government Secrecy which concluded that:

The best way to ensure that secrecy is respected, and that the most important secrets *remain* secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall.

Sen. Doc. No. 105-2 (1997), at xxi.

The provision allows the board to require government agencies with the authority to classify information to submit annual plans for declassification of data, and reports on the agency's

progress in instituting these plans. The legislation also provides that the board shall "make recommendations to the President regarding proposed initiatives to identify, collect, and review for declassification classified records and materials of extraordinary public interest" House Rpt. 106-969, sec. 704(c)(1).



BULLETIN

Don't miss the recent edition of the LDRC 2000 BULLETIN — **FAIR USE IN THE MEDIA: A DELICATE BALANCE** — a collection of articles taking a practical look at the Fair Use Doctrine in copyright law, investigating what can be used, what cannot, and why.

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LDRC London Conference 2000: Developments in English Libel & Privacy Law

On September 25th and 26th over 100 American and English media lawyers, as well as media attorneys from Canada, Ireland, Scotland and Malaysia, convened in London to discuss the meaning and impact of recent significant developments in English libel and privacy law. The setting for the conference was Church House, a conference center located in a leafy quadrangle next to Westminster Abbey.

The recent developments on the conference agenda included the new qualified privilege approved by the House of Lords in *Reynolds v. Times Newspapers Ltd.* [1999] 3 WLR 1010, the development of common law and statutory rights of privacy in the UK, forum shopping in the wake of the House of Lord's decision in *Berezovsky v. Forbes* [1999] EMLR278, liability of Internet service providers, and the impact of new procedural reforms on libel cases. The conference also featured two panel sessions; one offering a practical guide to handling English libel claims; and a Trial Tales panel.

The format for the individual sessions was similar to that of the biennial NAA/NAB/LDRC Libel Conference: a participatory event allowing attendees to exchange ideas on current issues and trends in a series of moderated discussions at a large roundtable setting.

The conference led off with an address by Michael Tugendhat QC. In an eloquent and thoughtful speech, he commented on the House of Lords decision in *Reynolds v. Times* in a framework of *New York Times v. Sullivan* 376 U.S. 254 (1964) and the growing language of protection of "rights" in UK law. The complete text of his remarks is published separately in this issue.

There followed a series of off-the-record substantive law sessions co-moderated by an English and an American lawyer, lending English law expertise and comparative law insights. Without compromising the ground rules of the conference, the highlights are set out below.

September 25th Sessions

Andrew Caldecott QC, 1 Brick Court Chambers, and Bob Vanderet, O'Melveny & Myers, led the Libel Defenses session which focused on the qualified privi-

lege defense approved by the House of Lords in *Reynolds v. Times*. Together with the attendees they explored both the basis of the decision, the qualified privilege factors (and how subsequent decisions thus far and in the future will treat the various factors) and the practical consequences in the newsroom and in libel litigation, including the allocation of decision making between judge and jury.

Steve Contopoulos, Sidley & Austin, and Andrew Nicol QC, Doughty Street Chambers, led the Privacy Law session. The session explored the law of privacy in the UK under the doctrine of breach of confidence and discussed how privacy rights will be further developed under the newly incorporated European Convention on Human Rights. In addition, the session examined European Union regulations on data protection, including the impact on the media and harmonization with US law.

Siobhain Butterworth, *The Guardian*, and Dick Winfield, Clifford Chance Rogers & Wells, led a panel discussion on the fundamentals of responding to libel claims with panelists Harriette Dorsen, Random House; Jon Fine, NBC; Rosalind McInnes, BBC Scotland; David Sherborne, Raymond Buildings; and Justin Wolford, Express Newspapers.

Irish media lawyer Michael Kealey of McCann Fitzgerald in Dublin, gave a lunchtime presentation on Ireland's harsh defamation laws and process, which results in greater potential for publisher liability than under English law. It was noted that one English in-house lawyer had found that while his employer's publications had a very modest circulation in Ireland (approximately 5% of total circulation), its libel litigation costs in Ireland were approximately 40% of total.

September 26th Sessions

Chad Milton, Marsh USA and Mark Stephens, Finers Stephens Innocent, led the Internet session which focused on media liability in the wake of *Godfrey v. Demon*, No. 1998-G-No.30 (Q.B. March 26, 1999) including media policies on vetting on-line content and possible legislative and regulatory responses. Also discussed

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LDRC London Conference 2000: Developments in English Libel & Privacy Law

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was the new law in England giving greater authority to the government or obtain de-encryption keys, including from journalists, and the impact of Data Protection encryption requirements on data transfers and e-mail communications.

Jan Constantine, News America; and David Hooper, Biddle, led the Jurisdiction session. The session focused on the House of Lord's decision in *Berezovsky v. Forbes*, including an update on the case, the decision's impact on forum shopping and assessing whether foreign publications are susceptible to suit in London. It was noted that there was not, as yet, a case in England in which jurisdiction was sought based on a passive website alone.

Alastair Brett, *The Times* newspaper; and Julie Ford, Haynes & Boone, led the Trial Practices Session. The session examined the practical aspects of recent developments, including contingency style "conditional fee agreements," arbitration and mediation, and new preaction protocols for defamation cases pursuant to the Woolf Reforms.

Tom Kelley led the Trial Tales sessions with distinguished panelists Richard Rampton, QC, 1 Brick Court; Gavin Millar, QC, Doughty Street Chambers; and Gary Bostwick, Davis Wright Tremaine. This past year Rampton and Millar both tried high-profile libel cases in London. Rampton successfully defended American professor Deborah Lipstadt and Penguin books in *Irving v. Lipstadt*. 1996-I-No.1113 (Q.B. April 11, 2000), in which discredited historian David Irving sued Lipstadt over her characterization of Irving as a Holocaust denier. Gavin Millar was on the losing end in an unusual media v. media trial, *ITN v. Living Marxism* (Q.B. March 14, 2000). ITN and two of its reporters successfully sued *Living Marxism* magazine for libel over a cover story accusing ITN of faking coverage of Bosnian prison camps. Gary Bostwick has tried numerous libel cases for both plaintiffs and defendants, including defending author Janet Malcolm in *Masson v. New Yorker*, 501 U.S. 496 (1991).

Starting off with the barristers' recent trials, the panel explored how they pitch libel cases to juries, the

dynamics of what animates libel cases on both sides of the Atlantic (including some of the similarities in approaching libel trials and libel plaintiffs), and the future viability of the "cabrank rule," an ethical rule which by its terms bars barristers from refusing cases offered from either side of an issue.

Fred Friendly Panel

The final event of the conference was a Fred Friendly-style seminar moderated by Lee Levine of Levine Sullivan & Koch. Journalists and lawyers explored the tension between the public's right to know and an individual's right to privacy. These issues were explored through a hypothetical that involved a government official and revelations regarding his personal life and fitness for office. Among the questions examined were, is it gossip or news, how will the story get covered and whether proposed privacy laws would be more harm than help. On the panel were: Dawn Alford, investigative reporter for *The Mirror* newspaper; Robin Bierstedt, Vice President and Deputy General Counsel at Time Inc.; Martin Cruddace, head of the Editorial Legal Department of Mirror Group Newspapers; Martin Frizell, executive producer for GMTV; Lord Justice John Laws of the Court of Appeal; Alan Rusbridger, editor-in-chief of *The Guardian* newspaper; and Keith Schilling of Schilling & Lom and Partners who specializes in representing libel plaintiffs.

Conference Sponsors

The LDRC London Conference was made possible with the generous sponsorship of The Hearst Corporation and the National Magazine Company Limited, Granada Television, The Guardian, Media/Professional Insurance, Trinity Mirror plc, and the law firms of Biddle, Clifford Chance, Coudert Brothers, Finers Stephens Innocent, and Haynes & Boone.

Michael Tugenhat QC is a barrister practicing at 5 Raymond Buildings in London. He has argued numerous press cases since he was called to the Bar in 1969, including Ex p Guardian Newspapers Ltd., a recent and important reporter's privilege matter, and Shevill v. Presse Alliance, one of the first international publication cases, argued before the House of Lords and the European Court of Justice on jurisdiction and damages. One of his most recent publications was "Data Protection and the Media" in the Yearbook of Copyright and Media Law 2000 published by the Oxford University Press. He is a Master of the Bench of the Inner Temple, a Deputy High Court Judge, an international arbitrator, and a Judge of the Courts of Appeal of Jersey and Guernsey. He is also a remarkably astute observer of the law on several continents.

He opened the LDRC London Conference 2000 with the address reprinted below. It was so on-point to the issues to be addressed in the Conference, and it so deftly brought U.S. and U.K. law and their developments into juxtaposition, that we thought it well worth all of our while to reprint his comments.

Do the British Celebrate the 4th of July?

The Evolution of Constitutional and Civil Liberties

An Address by Michael Tugenhat

LDRC London Conference, September 25, 2000

Three weeks ago I returned from a wonderful holiday/vacation in New York with two of my sons. There was one question that young Americans we met asked of my 13 year old son. Do the British celebrate the 4th July? My son was not sure of the answer. I am going to try to give an answer.

I first visited the U.S.A. in 1963. I travelled all around the South and saw the conditions which gave rise to *New York Times Co. v. Sullivan* (1964) 376 U.S. 254. *Sullivan* was an extraordinary case. Never before had the U.S. courts had to consider a case where a public official recovered damages for defamation relating to his official conduct in such a sum as might put a major national newspaper into bankruptcy. No such case has ever occurred in the U.K. to this day, although there are other common law jurisdictions in the world where I understand similar abuse of the law of libel has occurred.

In 1968 I returned to the U.S.A. as postgraduate student at Yale Law School. I attended lectures and seminars with inspiring teachers: Dworkin, Reich and McDougall. I learnt the kind of legal reasoning that produced *Sullivan*. I learnt the language of rights. In 1970 I qualified as a barrister in England. English law did not then use the language of rights. It was hard to find out what the English law equivalent was of basic terms like "due process," even though the phrase is derived from Magna Carta. This reflected the self-confidence of the English legal establishment.

But it did not mean that rights were not recognised.

Freedom of expression was recognised: no prior restraint injunctions were granted. Elected officials rarely sued. Damages for libel were generally modest.

People in England did not see the need for a civil rights movement of the kind that had developed in the U.S.A. This was an error. Such a movement was already forming in Northern Ireland.

Broome v. Cassell: A Constitutional Case

The first important case I was in was *Broome v Cassell* [1972] AC 1027. Cassell had published a book about one of the great naval disasters of the second world war. All but 11 out of over 35 merchant vessels were sunk on their way to the Soviet Union and about 153 merchant seamen killed by enemy action and a vast quantity of war material lost. The officer in charge of the convoy was Captain Broome. The book accused him of being responsible for the deaths which the Nazis had caused. The book was written by the same David Irving who this summer lost a libel action against Deborah Lipstadt. She had called him a Holocaust denier, and the court found that charge to be true. In Capt. Broome's case, damages were awarded to him in the sum of £40,000 (£15,000 compensatory, £25,000 exemplary). That was then the equivalent of, I believe, about \$100,000. That is one fifth of the \$500,000 awarded by the jury in the first of the multiple actions brought by *Sullivan*. But the award in *Broome* was the largest award made in England for more than 20 years, and more than 10 times the amount of most awards over that period.

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The high award was considered by the House of Lords. The argument in the House of Lords was in late 1971 and the award was upheld. My role in the proceedings was to work on the American case law on behalf of the plaintiff, and, of course, *Sullivan* was cited. That is the first citation of *Sullivan* in the House of Lords that I have found in the English Law Reports. There have been many since.

In *Broome* the House of Lords did not adopt the *Sullivan* rule on public figures. Since the merits of the case were as different as possible from the merits of *Sullivan*, that may not be surprising. But Lord Kilbrandon did warn of the dangers of hampering with what, he said, “must be regarded, at least since the European Convention was ratified, as a constitutional right to free speech.” The use of the words “constitutional” seems to be a clear echo of *Sullivan* and a reference to the First Amendment and the importance of the rights it protects.

In fact, the word “constitutional right” had been used by an English judge in this context 200 years earlier. Willes J. held that the jury have “a constitutional right, if they think fit, to examine the innocence or criminality of the paper, ...” see *Rex v. Shipley* (1784) 4 Doug. K.B. 73, 171. Eight years later, in 1792, the legislature adopted the view of Willes J. It gave every defendant on a libel charge in England the right to have his guilt or innocence determined by a jury. See the Act of 32 Geo. III, c. 60. Trial by jury has proved a very effective protection to freedom of speech, but it is not sufficient, as the Alabama jury in *Sullivan* proved.

But the case of *Broome v. Cassell* marks a watershed. Although *Sullivan* was not adopted, it was the first reference in the English courts to the European Convention on Human Rights in connection with freedom of speech. And it was the first reference for generations to freedom of speech as a constitutional right.

Privacy v. Freedom of Expression

Meanwhile, the conservative English courts began to meet another challenge from the more innovative American judges in the field of free speech. This was in the field of privacy law. English law claims not to recognise a general right to protect privacy, although it does recognise a number specific situations where privacy is protected. Usually the word privacy is not used.

English lawyers were well aware that in the U.S.

the courts had developed the law to protect privacy. They had read the famous article by Warren and Brandeis in the Harvard Law Review of 1890 Vol 4 p 193. But they declined to follow it. Privacy laws are a limitation on freedom of expression.

Those clamouring most loudly for privacy laws in England were public figures. There have been a number of official inquiries and reports starting at least as long ago as 1972. Politicians exposed in the press for practising the opposite of what they preached have complained of the invasion of their private lives. The public were overwhelmingly opposed to any legislation to prevent them from knowing about the private lives of public figures. So Parliament did not dare to enact so unpopular a measure. The judges too have so far declined to develop the common law. This was partly the result of legal conservatism, but the conservatism was really just being used as a cover for liberalism. The true reason, I think, has been a distrust of politicians and a commitment not to interfere with the rights of others, including, in particular, freedom of expression.

This conservative approach by the judges was the basis of a landmark decision in 1979, *Malone v. Metropolitan Police Commissioner* [1979] Ch 344. Mr. Malone was a suspect under police surveillance, and the case concerned the interception of his telephone calls. All the American privacy cases were cited together with the Fourth Amendment, but to no avail. The judge held there

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was no relevant law of privacy in England. In England everything is permitted which is not prohibited by the law, and it was not for the judges to invent new restrictions on liberty.

But the case was taken to Strasbourg under the European Convention, and English law was held to be inconsistent with Article 8 of the Convention.

Arts. 8 and 10 of the Convention are in your reading list; they require protection of private life and freedom of expression. Freedom of thought, conscience and religion and freedom of assembly are protected by Arts. 9 and 11. The rights protected by ECHR Arts. 9, 10 and 11 are all to be found in the First Amendment. Article 8 corresponds to the Fourth

Amendment. This is not a coincidence. The ECHR was drafted mainly by English lawyers. These articles of ECHR and the First and Fourth Amendments

are alike inspired by the same legal tradition: the common law and Blackstone.

One of my treasured souvenirs from my days at Yale is an annotated edition of the American Constitution published by the US Government in 1952. It was just a little out of date when it was given to me by a New York lawyer friend. The commentary on the First Amendment is in terms which do not disclose any drastic distinction from the common law of England as it was in 1960 or 1970.

Freedom's Evolve

But the history of American constitutional law provides a lesson. The US Constitution is the oldest constitutional document in the world, written in the eighteenth century. The words have not changed, but the interpretation of them has. What was first seen as sedition soon came to be seen as legitimate public debate. The rights of whites have been recognised as also the rights of blacks. Everywhere in the world the rights of man have become the rights of men and women. In the U.K. a similar development occurred — the rights of Protestants have all too

belatedly been recognised as also the rights of Catholics. Such ancient failures to recognise the universality of human rights have cost both our countries very dear.

Freedom of speech has undergone similar development in Britain, exemplified in the recent decision of the House of Lords in *Reynolds v. Times Newspapers Ltd* [1999] 3 WLR 1010. Mr. Caldecott, who is here today, represented the plaintiff who is a public figure in Ireland. Mr. Caldecott will be much better able than I am to comment on that case. But I must say a word or two. The newspaper defendant lost and the common law was declared unchanged. Again the House of Lords declined to follow *Sullivan*.

But the case is nevertheless seen as a landmark. Why?

Freedom of expression is now repeatedly recognised as the starting point in any matter affecting the newspapers. Any derogation from freedom of expression must be convincingly established and be no more than is necessary in a democratic society.

Impact of Reynolds

Reynolds v. Times Newspapers was not a change in the law, but

it was certainly a change in the lawyers. It marks another endorsement, at the highest level, of a development that has been in train for some years. Freedom of expression is now repeatedly recognised as the starting point in any matter affecting the newspapers. Any derogation from freedom of expression must be convincingly established and be no more than is necessary in a democratic society. The values of a democratic society are paramount. In the past English judges have often expressed scepticism about the value of the press in our society, and mistrust of the standards of journalists. No longer.

In *Reynolds* Lord Nicholls referred to the chilling effect, but then explained why it could now be discounted. He went so far as to say, "The common law does not seek to set a higher standard than that of responsible journalism." He said, "freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country."

Lord Steyn picked up the words in *Broome v. Cassell*

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that freedom of expression is a constitutional right. He said, "By categorising this basic and fundamental right as a constitutional right its higher normative force is emphasised." And he went on:

The new landscape is of great importance inasmuch as it provides the taxonomy against which the question before this House must be considered. The starting point is now the right of freedom of expression, a right based on a constitutional or higher order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words freedom of expression is the rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need.

Why Not Follow Sullivan?

So why did the House of Lords in *Reynolds v. Times Newspapers* not follow *Sullivan*? The answer this time is not that they thought *Sullivan* goes to far. On the contrary, it was because they thought that in some respects *Sullivan* does not go far enough. It is not just public figures who should be protected, said the House of Lords. The privilege to publish libels without malice extends to any matter of serious public interest or concern. In Lord Nicholls' words, "it would be unsound in principle to distinguish political discussion from discussion of other matters of public concern."

There was another reason given by Lord Steyn for not following *Sullivan*. He understood that the plaintiff in the United States is entitled to discovery of the sources of the story and editorial decision-making. By contrast, English law regards the protection of journalist's sources as an essential protection of freedom of expression. It would not be fair to require a plaintiff to prove malice and at the same time refuse him sight of the evidence.

So much for defamation. A similar move towards the

values of the First and Fourth Amendments has occurred in the field of privacy. Since *Malone* the British legislature has increasingly intervened in the field of privacy to give effect to ECHR Art. 8: the Data Protection Act 1998 is on your reading list. It has been made necessary by EU legislation as well as by the ECHR.

A Change in Legal Culture

American commentators have been very critical of the EU Directive on which the Data Protection Act is based. They say it is excessive and unworkable. They are not alone. English broadcasters and newspaper publishers have also expressed concern at the scope of the privacy

protection given by the new Act. It has the potential seriously to interfere with the media. I cannot say whether the arguments of the critics will prevail or not. But what I can say is that if anyone wants to challenge whether the Euro-

pean Data Protection legislation is compatible with freedom of speech, they can now do so. Under the Human Rights Act 1998, in force from 2nd October 2000, the arguments of the critics can be tested in the U.K. courts.

What has happened is a profound change of culture amongst British judges and legislators. There are numerous citations which could be made to illustrate this.

In *R v. Home Secretary, Ex p. Simms* [1999] 3 WLR 328 at p337, Lord Steyn was considering a prisoner's right to communicate with journalists to publicise his claim that he had been wrongly convicted. He said:

Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself

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So why did the House of Lords in Reynolds v Times Newspapers not follow Sullivan? The answer this time is not that they thought Sullivan goes to far. On the contrary, it was because they thought that in some respects Sullivan does not go far enough.

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accepted in the competition of the market.” *Abrams v. United States* (1919) 250 U.S. 616, 630, *per* Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see *Stone, Seidman, Sunstein and Tushnet, Constitutional Law*, 3rd ed. (1996), pp. 1078-1086. It is this last interest which is engaged in the present case.

Lord Steyn is one three judges of the House of Lords who come from South Africa, where they know the value of civil rights. English lawyers now learn not only from the United States, but also from common law jurisdictions with more recent constitutional experience: Australia, Canada, India, New Zealand and South Africa are the best known. Germany and France are influencing us too. But the climate of change is strong and has made our judges look again at our own cases from the eighteenth century and before.

The Impact on Reporter's Privilege

On 21 July this year, judgment was given in a case in which I had the privilege of representing *The Guardian* and *The Observer* newspapers. These two newspaper's names appear, together with *The Times* newspapers, on many of the leading British, and European, cases on freedom of expression.

In this year's case the police were demanding from the two newspapers access to documents allegedly supplied to them by a Mr. Shayler. Mr. Shayler is a former secret service man who alleges that the British secret services were involved in a plot to murder Colonel Gadhafi. The police want to prosecute him for this disclosure, which they say may amount to offences under

the Official Secrets Acts.

The case was as much concerned with ECHR Art. 8 (or Fourth Amendment) as with ECHR Art. 10 (or First Amendment), but the two principles are closely related. It also concerned privilege from self incrimination, ECHR Art. 6 (or, of course, the Fifth Amendment), because the police alleged that the journalist and the editor were themselves suspected of an offence under the Official Secrets Act. The subject matter of the newspapers' publications was a major topic of public debate and has been for many months.

In the past, applications by the police for access to

On the eve of the coming into force of the Human Rights Act, Judge LJ was concerned to stress that the ECHR owes its form to the common law tradition which is common to Britain and America.

journalists' material have generally succeeded. Judges generally thought that the prevention and detection of crime was more important than public debate. But the tide has been turning. In this case, as in two other important cases in the last two years, the judges have re-

jected the police applications. They have done so in two of them explicitly on the basis of freedom of expression.

On the eve of the coming into force of the Human Rights Act, Judge LJ was concerned to stress that the ECHR owes its form to the common law tradition which is common to Britain and America. He said:

we surely appreciate that the principles to be found in Articles 6 and 10 of the ECHR [i.e. freedom from self-incrimination and freedom of expression] are bred in the bone of the common law and indeed, in some instances at any rate, the folk understanding of the community as a whole ... the decisions of the European Court of Justice simply [repeat] in different language longstanding and well understood principles of the common law...

The judge went on to cite the case of *Entick v. Carrington* [1765] 19 State Trial 1029, in which it was held that the Secretary of State did not have any power at common law or under the prerogative to order the arrest of any citizen or the seizure of any of his property for the

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purpose of discovering whether he was guilty of publishing a seditious libel. This is one of the cases at the origin of the Fourth Amendment. The judge cited the words of Lord Camden CJ in *Entick v. Carrington*:

Papers are the owner's goods and chattels ... and so far from enduring a seizure ... they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

This is one of a number of cases from the 18th century which have entered into the folk understanding. The folk expression is "an Englishman's home is his castle."

New technology has given rise to new challenges in this field. Some of the most interesting cases are now in the fields of electronic communications, where governments and individuals are raising new challenges to freedom of expression. The LDRC 1999 Cyberspace project is one of the foremost contributions to the research on this topic. It is a very valuable resource for English lawyers, and one which I have cause to be grateful for myself. I have used it more than once.

But there is a part of it which illustrates a matter for serious concern. In their article on enforcement of foreign judgments, Wimmer and Berman include this passage referring to the case of *Matusevich v. Telnikoff*, 877F.Supp.1 (D.D.C. 1995) where the plaintiff brought an action to preclude enforcement of a British libel judgment.

The U.S. District Court for the District of Columbia granted his motion for summary judgment,

holding that recognition of the British judgment would violate both Maryland's Uniform Foreign-Money Judgments Act (which tracks almost exactly, the U.S. act) and the First and Fourteenth Amendments to the U.S. Constitution. In so holding, the court compared the differing libel standards of the English and U.S. jurisdictions. The court then determined that the speech found libelous under English law would have been protected by the First Amendment in a U.S. action. Emphasizing the drastic distinction between the

I would be concerned if in future British libel judgments were refused enforcement on the ground that there remains today a "drastic distinction" between protection of freedom of speech in Britain and in the USA.

two standards, the court determined that it would not enforce the judgment.

"Drastic distinction" is the phrase which strikes me. Is this a result which depended on the circumstance of the case, and on the understanding of English law that the

Court held at the time it gave that judgment? Or is it understood as a statement by the Court of the relationship between English and American law generally, both for today and for tomorrow, as well as for the date of the U.S. judgment? I do not know. But I do hope it is not the last word on the subject from U.S. courts.

I know that the LDRC is, as its name makes clear, a defence centre. What I have said so far should, I hope, be of comfort to Americans who find themselves as defendants in libel suits in Britain.

But what I am about to say now is the corollary. I am conscious that is not of comfort to defendants resisting the enforcement in the U.S. of British libel judgments. I would be concerned if in future British libel judgments were refused enforcement on the ground that there remains today a "drastic distinction" between protection of freedom of speech in Britain and in the U.S.A. For the reasons I have given, I believe that such differences as remain between our two laws are not drastic, and that each is striving towards the same goal and is doing so out of respect for the same principles.

If U.S. and English law on freedom of speech, and

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the other First Amendment rights have diverged so much that an English libel judgment is not enforceable in the U.S., that is a matter of profound concern. In Britain today, as in the U.S.A., government is for the benefit of the people. Democratic values are fundamental. If we who believe in these values cannot agree what fundamental human rights are, then the enemies of those values will be comforted. These rights are not rights of Americans, or rights of Europeans. They are universal human rights.

There is another publication of the LDRC which has struck me. It is the report in February 2000 on trials and damages against media defendants. The average figures are in millions of dollars. On releasing the survey, your executive director Sandra Baron said this:

we cannot ignore the extraordinary size of some of the reported awards, and the average of awards against media defendants. Such numbers will put at risk investigative reporting, controversial and unpopular speech. Attention simply must be paid to the standards used to determine damage awards — or, all too often, the absence of standards for making such awards.

Those words are an aspiration in the U.S. In England I am proud to say that they are the law. In England today awards are effectively capped at about \$200,000. An award in millions of dollars would be unlawful. Attention has been paid to the standards used to determine awards. In Strasbourg it has been determined that an award over a million pounds was incompatible with freedom of expression and violated ECHR Art. 10. In 1994 our own Court of Appeal authoritatively determined that libel awards should not exceed the equivalent of about \$200,000, and it has the power to strike an award down if the jury exceeds that figure.

I return to *Sullivan* and the citation by Mr. Justice Brennan of the words of Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 US 357, 375-376 where he said:

Those who won our independence believed ... that public discussion is a political duty; and

that this should be a fundamental principle of America government.

The implied criticism of the British is a fair one. It is fair as a matter of history, but it would not be fair today. British judges in the past have not always upheld our rights. It is for that reason that those who went from England to America went out of love of freedom. But not all Englishmen who loved freedom went to America. Some stayed and fought for freedom here. One of the principles they fought for was the belief that public discussion should be a fundamental principle of British government. There is now no doubt that that fight has been decisively won on this side of the Atlantic, as it was won in America.

I return to the question: do the British celebrate 4th July? The answer is: Yes we certainly do.

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