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LIBELLETTER

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Georgia Appeals Court Rules Richard Jewell a Public Figure, Strikes Down Order to Jail Reporters for Refusing to Identify Confidential Sources

By Peter Canfield

On October 10, the Georgia Court of Appeals ruled that former 1996 Olympic Games bombing suspect, Richard Jewell, is both a voluntary and involuntary public figure for purposes of his libel suit against *The Atlanta Journal-Constitution*. At the same time, the court vacated trial court orders outstanding since 1998 commanding the newspaper to reveal identities of confidential sources and a contempt order entered, but stayed, in 1999 ordering reporters jailed for refusing to comply. See *The Atlanta Journal-Constitution v. Jewell*, 2001 Ga. App. LEXIS 1153 (Oct. 10, 2001) (Johnson, Presiding Judge., with Ruffin and Ellington, JJ. concurring).

Claiming that he was wrongly suspected by the FBI, Jewell in the five years since the bombing has never sued the FBI but has doggedly pursued financial settle-

ments with the nation's news organizations, asserting on talk shows that it is morally reprehensible for the media to report and comment on such official suspicions absent formal charges while contending in court that such reporting and comment amounts to actionable defamation.

In both fora, Jewell has pursued with particular vehemence *The Journal-Constitution*, the 1996 Olympic Games host-city newspaper and the first news organization to report the FBI's suspicions to the public. And he has seized on the newspaper's refusal to comply with the trial court's confidential source orders as a basis for bypassing his burdens of falsity and fault and proceeding directly to a trial on damages.

The Georgia Court of Appeals decision derails this effort, both by affirming the trial court's ruling that Jewell is a public figure and by directing the trial court to not even consider compelling confidential source dis-

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ATTENTION MEDIA MEMBERS:

NOTICE OF ANNUAL MEETING

**NOVEMBER 7, 2001, WEDNESDAY
5:00 PM**

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covery absent a statement-by-statement determination based on the entire record, including Jewell's admissions, that Jewell can prove that a challenged statement was false and otherwise a legally viable basis for an allegation of libel.

The *Journal-Constitution* has requested such a determination from the trial court from the case's inception, first by a March 1997 motion for judgment on the pleadings, which the trial court deferred pending discovery, and since December 1998 by a post-discovery summary judgment motion, which the trial court refused to consider unless *The Journal-Constitution* revealed its confidential sources.

Although the Court of Appeals declined the newspaper's invitation to treat the trial court's failure to rule on the summary judgment motion as a denial and to review that denial on the merits, the court makes clear that its decision now plainly requires that the motion may be denied only if Jewell shows "by clear and convincing evidence that false and defamatory statements were published with actual malice."

In published reaction to the decision, L. Lin Wood, Jewell's principal public relations and libel action lawyer, has called the decision "devastating" and Jewell's "worst case scenario" and given notice of his intention to petition for review by the Georgia Supreme Court and, if necessary, the United States Supreme Court.

Media Appearances Made Jewell a Voluntary Public Figure

In arguing for his private status, Jewell portrayed himself as an private citizen who had been sucked into the vortex of public attention by overzealous members of the media and invoked the voluntary public figure analysis enunciated by the D.C. Circuit in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) and later adopted by the Eleventh Circuit in *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491,

1493 (11th Cir. 1988).

Under that test, a court must: (1) isolate the public controversy, (2) examine the plaintiff's involvement in the controversy, and (3) determine whether the alleged defamation [was] germane to the appellant's participation in the controversy. See *Silvester*, 839 F.2d at 1494.

The Court of Appeals agreed this was the correct test but concluded, like the trial court, that its application to the facts here required a determination that Jewell was a voluntary public figure.

First, the court held that the trial court was correct to reject as too narrow Jewell's contention that the public controversy was "who bombed the Olympic Park." Rather, "the public controversy following the bombing

and prior to the allegedly defamatory statements included the broader question of the safety of the general public in returning to the Olympic Park area."

Second, focussing on both the volume and content of Jewell's repeated media appearances during the three-and-a-half days between the time of the bombing and the time *The Journal-Constitution* first reported that he had become a suspect, the court rejected Jewell's contention that he did not attempt to shape the resolution of this controversy. "While Jewell asserts that his media role was limited to that of an eyewitness and that he did not attempt to shape the resolution of any controversy," the court observed, "Jewell's participation in interviews and the information he related about the controversy was not so circumscribed."

Although the court stated that it could "envision situations in which news coverage alone would be insufficient to convert Jewell from private citizen to public figure," it found that Jewell's media appearances were both extensive and voluntary, including "ten interviews and one photo shoot in the three days between the bombing and the reopening of the park, mostly to prominent members of the national press. While no magical num-

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Jewell's participation in the public discussion of the bombing exceeds what has been deemed sufficient to render other citizens public figures.

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ber of media appearances is required to render a citizen a public figure, Jewell's participation in the public discussion of the bombing exceeds what has been deemed sufficient to render other citizens public figures."

Rejecting Jewell's claim that "he only gave the interviews to accommodate the desires of his employer and that he never intended to have any influence on the matters," the court found that an analysis of the content of Jewell's media appearances, "viewed objectively," made clear that "he attempted to improve the public's perception of security at the park." Noting that Jewell had made repeated comments "regarding the adequacy of the law enforcement preparation, the appropriateness of the response to the bombing, and the safety of those returning to the park," the court observed that "Jewell should have known, and likely did know, that his comments would be broadcast and published to millions of American citizens searching for answers in the aftermath of the bombing."

Finally, the Court of Appeals rejected Jewell's contention that *The Journal-Constitution's* allegedly defamatory reporting on how and why Jewell had become a bombing suspect was not germane to his participation in the controversy over Olympic safety. The court noted that under *Waldbaum*, a statement is germane if it might help the public to decide how much credence to give to the plaintiff. Here, the court observed, Jewell had "discussed his participation in the events, his previous training, the training and reactions of other law enforcement personnel on the scene, and urged the public to show the bomber that this type of activity would not be tolerated." "Certainly," it concluded, "the information reported regarding Jewell's character was germane. ... The articles and the challenged statements within them dealt with Jewell's status as a suspect in the bombing and his law enforcement background."

Dameron Revisited

The Court of Appeals also found that even if Jewell had not voluntarily assumed public figure status, he would have become one involuntarily. In doing so, the

court relied heavily on the D.C. Circuit's ruling in *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985).

In *Dameron*, the plaintiff claimed defamation in connection with a magazine article that mentioned his role as the sole air traffic controller on duty at the time of a notorious airliner crash. Although the plaintiff had not availed himself of the media to speak on the public issues relating to the crash, he was nonetheless held to be an involuntary public figure. See 779 F.2d at 740-43. The plaintiff's sole role in the controversy over the cause of the crash was that he was the air traffic controller on duty at the time of the crash and that he had subsequently spoken at an NTSB hearing on the crash. See *Id.*

Noting Jewell's central involvement in a similar tragedy, the Court of Appeals found Jewell also was an involuntary public figure: "Even if we found that Jewell did not 'inject' himself into the controversy, 'injection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will.' Jewell, who had the misfortune to have a tragedy occur on his watch, is such a person." (quoting *Dameron*, 779 F.2d at 741).

Confidential Sources Protected Despite Absence of Reporter's Privilege

In addition to affirming the trial court on the crucial issue of Jewell's status as a public figure, the Court of Appeals vacated trial court orders relating to Jewell's request for discovery of confidential source identities. In doing so, Court of Appeals made clear that even where confidential sources are not protected by a formal privilege, they still must not be subjected to automatic discovery.

Georgia is one of the few jurisdictions that has not recognized the existence of a reporter's privilege under the First Amendment. Georgia courts considering the issue have interpreted the plurality decision in

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Branzburg v. Hays, 408 U.S. 665 (1972), as rejecting any constitutional privilege. No Georgia court has been willing to find greater protections for news sources under the state constitution. Although Georgia has enacted a qualified statutory privilege, it cannot be invoked by a party to a defamation suit.

Invoking a Rule 26(c) balancing analysis which Georgia courts regularly employ in other contexts involving “sensitive” discovery, *The Journal-Constitution* argued that a libel defendant should not be forced to disclose its confidential sources unless the libel plaintiff can demonstrate a need for the identities that outweighs the public and private harm that would be caused by disclosure.

The Journal-Constitution went on to show that Jewell’s professed need for confidential source identities focused on a handful of allegedly defamatory statements based in part on information provided by the sources. However, the evidence before the court also established that each of those statements was true.

For example, Jewell demanded the identity of sources who had stated that he had been the “focus” of the bombing investigation. However, both Jewell’s own extra-judicial admissions and FBI records established the truth of this statement. At the very least, *The Journal-Constitution* argued, Jewell could have no legitimate need to discover the identities of sources for demonstrably true information.

Nonetheless, the trial court ordered *The Journal-Constitution* reporters to disclose their sources based solely on its conclusion that Georgia recognized no formal reporter’s privilege.

Although the Court of Appeals agreed with the trial court’s conclusion that neither Georgia law nor the First Amendment recognized a reporter’s privilege for *The Journal-Constitution* reporters, the Court found that there is nevertheless “a strong public policy favoring the protection of the confidentiality of journalists’ sources consistent with that favoring the protection of other types of sensitive information during discovery.” Accordingly, it concluded that the trial court had erred in not undertaking the traditional protective order balanc-

ing analysis.

The Court of Appeals then suggested the following procedure to be employed by courts faced with requests to discover confidential sources in libel cases:

“[T]he trial court must require the plaintiff to specifically identify each and every purported statement he asserts was libelous, determine whether the plaintiff can prove the statements were untrue, taking into account all the other available evidentiary sources, including the plaintiff’s own admissions, and determine whether the statements can be proven false through the use of other evidence, thus eliminating the plaintiff’s necessity for the requested discovery. In other words, if Jewell cannot succeed on a specific allegation of libel as a matter of law, or if Jewell is able to prove his specific allegation through the use of available alternative means, then the trial court’s balancing test should favor non-disclosure of confidential sources.”

It is unfortunate that one of the two reporters who had been cited for contempt by the trial court did not live to see the citation vacated. After a sustained illness, Kathy Scruggs died in her sleep in early September.

Richard Jewell has been represented in the case by L. Lin Wood, Brandon Hornsby and Mahaley C. Paulk of L. Lin Wood, P.C.; Wayne Grant and Kim Rabren of Wayne Grant, P.C.; and G. Watson Bryant.

CNN, ABC, AP, CBS, Dow Jones, NAA, the New York Times Company, the Tribune Company and the Washington Post Company, represented by David A. Schulz and Jeffrey H. Drichta of Clifford Chance Rogers & Wells, filed an amicus brief with the Court of Appeals in July in support of the *Journal-Constitution*. The Georgia Press Association, represented by David E. Hudson of Hull, Towill, Norman, Barrett & Salley, also filed an amicus brief.

Peter Canfield, together with Sean Smith, Michael Kovaka and Tom Clyde of Dow, Lohnes & Albertson, represent The Atlanta Journal-Constitution and its editors and reporters.

Fair Use Not Gone with the Wind

By Gregg D. Thomas and Rachel E. Fugate

A trial judge abused his discretion when he found a book infringed a copyright and then halted the book's distribution, a federal appeals court has ruled. *SunTrust Bank v. Houghton Mifflin Company*, 2001 U.S. App. LEXIS 21690 (11th Cir. Oct. 10, 2001).

"The Wind Done Gone" was scheduled for publication this spring when Judge Charles A. Pannell, Jr., a United States District Judge in Atlanta, ordered the presses stopped. Judge Pannell found that the book infringed the copyright on Margaret Mitchell's classic "Gone With The Wind." Houghton Mifflin Company, publisher of the banned book, had argued that "The Wind Done Gone" by Alice Randall was protected commentary on the iconic work "Gone With The Wind." Judge Pannell, however, found that the Mitchell Trust, which owns the copyright to "Gone With the Wind," was likely to succeed on the merits of its copyright in-

fringement action and entered a preliminary injunction prohibiting publication of the book.

On May 25, three Eleventh Circuit judges heard arguments in the case and ruled from the bench that Judge Pannell's order violated the First Amendment. In a brief two-page opinion, the Eleventh Circuit ruled in favor of the First Amendment, finding that the injunction represented "an unlawful prior restraint in violation of the First Amendment."

On October 10, 2001, the court issued its full opinion. Interestingly, the court made no mention of the prior restraint issue it touched upon in its May 25 opinion. Instead, the court focused on the traditional analysis for the issuance of a preliminary injunction: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the harm an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest.

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Fair Use Not Gone with the Wind

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The court did stress that “copyright does not immunize a work from comment and criticism,” and was keenly aware that it must remain cognizant of the First Amendment protections embedded in copyright law.

Against that backdrop, the court began its analysis of the district court’s injunction by noting that, although an injunction is particularly appropriate in copyright cases involving simple copying or piracy, when the alleged infringer has a colorable fair use defense, injunctive relief may not be appropriate and is often inconsistent with the goal of copyright law to protect the free flow of ideas. Although, the book appropriated numerous characters, settings and plot twists from “Gone With The Wind,” the Mitchell Trust did not show that it was likely to succeed on the merits of its copyright infringement claim. To the contrary, the court found that Houghton Mifflin was entitled to a fair use defense.

In analyzing the fair use factors — purpose and character of the work; nature of the copyrighted work; amount and substantiality of the portion used; and effect on the market value of the original — the court emphasized that “The Wind Done Gone” was a parody of “Gone With The Wind.” As such, the book had to mimic “Gone With The Wind” to make its point.

Central to the court’s fair use finding was the purpose and character of “The Wind Done Gone” and the determination that the book was highly transformative, a fact that virtually negated its commercial purpose. Moreover, even though the nature of “Gone With The Wind” entitled it to the greatest degree of protection, this factor carried little weight because “parodies almost invariably copy publicly known, expressive works.”

Additionally, courts face difficult problems when analyzing the amount and substantiality of use in the context of parodies because all parodies must “conjure up” the original work in the minds of readers.

On the record before it, the court was unable to determine whether the amount of copyrighted material used was reasonable. Finally, the Mitchell trust did not

prove harm to “Gone With The Wind’s” market value because the book did not supplant the market for the original or any derivative works.

The court concluded its opinion by finding that the district court erred by presuming irreparable harm after it found that the Mitchell Trust was likely to succeed on the merits of its copyright infringement claim. The court noted that there is no presumption of irreparable injury when the alleged infringer has a viable fair use defense. Moreover, to the extent the Mitchell Trust will suffer monetary harm, such harm could be remedied through an award of monetary damages and was not truly “irreparable.” Thus, finding injunctive relief improper, the court stated “the public interest is always served in promoting First Amendment values and preserving the

public domain from encroachment.”

Judge Stanley Marcus wrote a concurring opinion to emphasize that the Mitchell Trust had fallen woefully short of establishing the likelihood of success

on the merits of its copyright infringement claim. He stated that he would go further than the majority in stressing the transformative nature of “The Wind Done Gone,” a factor he believed cut decisively in Houghton Mifflin’s favor. Judge Marcus opined that the Mitchell Trust “may not use copyright to shield ‘Gone With The Wind’ from unwelcome comment, a policy that would extend intellectual property protection ‘into the precincts of censorship’.”

SunTrust is represented by William B.B. Smith, Ralph Ragan Morrison & Anne Moody Johnson of Jones Day Reavis & Pogue in Atlanta.

Houghton Mifflin Co. is represented by Miles J. Alexander, Joseph M. Beck, Terre B. Swan & W. Swain Wood of Kilpatrick Stockton in Atlanta.

The court noted that there is no presumption of irreparable injury when the alleged infringer has a viable fair use defense.

Jury Awards \$3 Million to HIV-Positive Model in Defamation Case

By Victor A. Kovner and Gregory A. Welch

On September 28, 2001, a Suffolk County jury announced their final verdict in a defamation case against Merck & Co. and its advertising agency Harrison & Star, awarding a 34-year-old woman \$2 million in punitive damages. Earlier that week, the jury had awarded the plaintiff \$1,001,000 in compensatory damages. The verdicts came after a two-week trial on damages only, which New York Supreme Court Justice Mary Werner had ordered last June when she granted summary judgment to the plaintiff on liability. In that ruling, Justice Werner held that Merck and Harrison & Star had defamed plaintiff and violated her statutory right of publicity by placing her photograph next to a character sketch in a patient information brochure for Crixivan, an HIV/AIDS drug developed by Merck.

“Sharing Stories”

The lawsuit arose out of the use of plaintiff's photograph in a patient information brochure entitled “Sharing Stories.” Merck hired Harrison & Star, a healthcare advertising agency, to create materials to help launch Crixivan, a protease inhibitor, which was a break-through medication in the treatment and control of HIV. Because successful use of Crixivan required strict adherence to an extremely difficult dosing schedule, Harrison & Star prepared “Sharing Stories” to provide examples of how Crixivan was being integrated into the daily schedules of those who had begun taking the drug during its clinical trials. Harrison & Star gathered information for “Sharing Stories” by conducting numerous interviews with HIV-positive individuals who had been taking Crixivan. In order to protect the privacy of those interviewed and to effectively communicate the information to a broad spectrum of the HIV-positive population, Harrison & Star created four “patient profiles,” which were meant to represent the types of people who were likely to contract HIV.

One of the patient profiles was “Maria,” who was described as 19, with two young children – 18 months and 3 years old. She was enrolled in a clinical trial 2 years ago and has been taking Crixivan, Retrovir, and Efavir ever since. To protect her from a recurring case of herpes, she takes Zovirax once a day.

In another section of the brochure, “Maria” describes how she plans her doses of Crixivan around her childcare and work responsibilities.

“Sharing Stories” also included a note that was intended to clarify that the “patient profiles” were composite characters but that did not accurately reflect this intent: “More than 50 HIV-positive individuals taking Crixivan contributed ideas to this brochure, *even though only four of them are highlighted here*. Their names have been changed to protect their privacy. We thank them for their stories and their time.” (Emphasis added.)

After the text of “Sharing Stories” was completed, Harrison & Star hired a photographer, Skip Hine, to find appropriate HIV-positive models to illustrate the “patient profiles.” In October 1996 Hine had contacted an agency called Proof Positive, which is exclusively devoted to HIV-positive models and is a division of The Morgan Agency, a California-based talent agency. Proof Positive arranged for 40 models to attend a casting session for the “patient profiles.”

The plaintiff, who learned she was HIV-positive in 1993, had called Proof Positive to seek out modeling work and she attended the casting call in 1996. Plaintiff was selected to illustrate the character of “Maria,” and she attended a photo shoot where she posed for the picture that was used in “Sharing Stories.”

Prior Proceedings

Although plaintiff acknowledges that she agreed to appear in certain educational materials about Crixivan, she denies that she agreed to the use of her photograph in “Sharing Stories.” After plaintiff learned that her photograph appeared in “Sharing Stories,” she filed a lawsuit using the fictitious name “Jane Doe,” claiming defamation, intentional and negligent infliction of emotional distress, fraud, violation of N.Y. Gen. Business Law §§ 349 & 350 and violation of New York's right of publicity statute (N.Y. Civil Rights Law §§ 50-51). In addition to her claims against Merck and Harrison & Star, plaintiff also sued The Morgan Agency and the photographer, Skip Hine. Plaintiff's primary objection to “Sharing Stories”

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Jury Awards \$3 Million to HIV-Positive Model in Defamation Case

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was her belief that the profile of “Maria” implied that plaintiff/“Maria” was promiscuous.

After extensive discovery, including more than 25 depositions, each of the parties moved for summary judgment. On June 13, 2001, Justice Werner dismissed all claims against The Morgan Agency and Skip Hine, but granted summary judgment against Merck and Harrison & Star on the defamation and right of publicity claims, ordering the case to proceed to “an immediate trial on damages,” including the question of whether punitive damages should be allowed. As to punitive damages, Justice Werner found that actual malice had been established because the defendants knew the references to plaintiff were false, even though the record shows that defendants were not intending to make any statement about plaintiff at all. Justice Werner held that plaintiff would have to establish common law malice to warrant such an award under *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466 (1993).

Merck and Harrison & Star filed an interlocutory appeal from the summary judgment decision and sought a stay of the damages trial pending the outcome of the appeal, arguing that, because the summary judgment decision was likely to be reversed, it was in the interest of the parties and judicial economy for the damages issues to be tried once with the liability issues at a single trial. However, the Appellate Division denied the stay and a trial was scheduled to begin on September 10 before Supreme Court Justice Alan D. Oshrin.

The Trial on Damages

Given the posture of the case, Justice Oshrin informed the jury at the outset that it had already been determined that Merck and Harrison & Star had violated plaintiff’s rights and that the only question for the jury at this trial was the appropriate amount of damages. As a result of the publication, she said, she withdrew from social events because she felt acquaintances had taunted her with comments about those aspects of “Maria’s” profile that were not true about plaintiff, namely, that she was a single promiscuous teenage mother as the bro-

chure implied and had a recurring case of herpes.

With respect to emotional distress, plaintiff acknowledged that she had suffered severe distress due to earlier events in her life. She described how she learned that she was HIV-positive in 1993, after her husband told her during her eighth month of pregnancy that he was infected with HIV. Even worse, while she was in the delivery room, her husband disclosed that he had known he was HIV-positive before their marriage. Compounding plaintiff’s tragedy, her son was born HIV-positive. She testified that these events left her “an emotional basket case.” But plaintiff said that, by the time she learned of the “Sharing Stories” brochure, she had largely overcome the effects of these devastating events and that the publication of her photograph next to the description of “Maria” had a profoundly negative effect on her, causing her to become depressed and distrustful of people. As a result of the publication she withdrew from social events because she had been taunted by references to the false aspects of the patient profile, namely, that she was not a single promiscuous teenage mother as the brochure implied and that she did not have a recurring case of herpes.

Other witnesses also testified about the negative effect of “Sharing Stories” on plaintiff, including plaintiff’s therapist, Janine Budah. Ms. Budah, who had counseled plaintiff for several years, both before and after the publication of “Sharing Stories,” testified that plaintiff suffered a severe setback due to the Merck brochure.

Defendants countered this testimony by focusing on the contemporaneous notes of plaintiff’s therapy sessions, which indicated that she was getting better at the very time plaintiff claimed to suffer a setback. While Ms. Budah had testified that plaintiff’s distress over “Sharing Stories” was one of the four most memorable events in her therapy, she acknowledged that her notes did not contain a single reference to the incident. Defendants also emphasized that problems in plaintiff’s life other than “Sharing Stories” were the more likely source of plaintiff’s continuing distress and distrust of people.

Plaintiff also testified that her outlook on life was now much improved. She is now remarried and recently gave

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Jury Awards \$3 Million to HIV-Positive Model in Defamation Case

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birth to her second child, a daughter. Both her new husband and their daughter are HIV-negative. (The news about her second child was somewhat surprising, in light of the fact that she had argued on summary judgment that “Sharing Stories” was defamatory because it implied that she had a second child after she learned she was HIV-positive.)

Although plaintiff’s evidence of reputational harm was limited, she did present testimony from an acquaintance who had read “Sharing Stories” before he knew plaintiff, and concluded that plaintiff was “trouble” and “a slut.” However, after meeting her a few times, he changed his opinion and befriended her. Plaintiff also testified that someone whom she did not know well made an ambiguous comment about herpes at a social event that made her believe that he had seen “Sharing Stories.”

Plaintiff’s Case for Punitive Damages

To establish her entitlement to punitive damages, plaintiff called a number of witnesses from Merck and Harrison & Star. The Harrison & Star witnesses testified that they had not intended to harm plaintiff, and included her photograph in “Sharing Stories” only after she had auditioned for the job and attended a photo shoot. They acknowledged that they had failed to obtain a release signed by the plaintiff, although her modeling agent testified that he signed a document that he believed covered the use of plaintiff’s photograph in “Sharing Stories.”

Two copywriters from Harrison & Star testified that they had intended to include disclaimer language in “Sharing Stories” to make it clear that the four patient profiles were composites of the more than 50 HIV-positive people who had been interviewed and not accurate biographical information about the models pictured. These copywriters produced their drafts of “Sharing Stories,” showing that each had written “composite” next to

the intended disclaimer. These witnesses acknowledged that in the final version of the note they inadvertently omitted the “composite” concept.

To establish her entitlement to punitive damages against Merck, plaintiff focused on what Merck employees did after receiving a letter from plaintiff’s counsel complaining about “Sharing Stories.” In-house counsel for Merck testified that within days of the company’s receipt of the complaint letter, he directed their fulfillment house to place a hold on “Sharing Stories” to prevent further distribution to Merck’s sales force. He also began investigating the claim and learned that plaintiff’s modeling agency believed that the use of her photograph in “Sharing Stories” was authorized. Merck’s attorney responded to plaintiff’s objection by saying that Merck believed it had

done nothing wrong but nevertheless would stop distributing “Sharing Stories,” though he did inaccurately state in his letter that all copies had been destroyed. Merck then arranged to have a revised version of “Sharing Stories” printed without

plaintiff’s photograph.

Plaintiff argued that Merck should have done much more, including directing each person on their sales force to stop distributing any copies they might still have and to retrieve copies of “Sharing Stories” they had already distributed. Plaintiff also emphasized that, despite the hold on “Sharing Stories,” apparently a small number of the brochures were inadvertently distributed on three occasions.

Motion to Dismiss Claims for Punitive Damages

At the close of plaintiff’s case and again at the end of the trial, defendants asked Justice Oshrin to dismiss the punitive damages claims, which plaintiff was seeking under both the libel and Section 51 causes of action. Justice

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To establish her entitlement to punitive damages against Merck, plaintiff focused on what Merck employees did after receiving a letter from plaintiff’s counsel complaining about “Sharing Stories.”

Jury Awards \$3 Million to HIV-Positive Model in Defamation Case

(Continued from page 11)

Oshrin agreed that the claim for punitive damages under Section 51 should be dismissed. With respect to Harrison & Star, Justice Oshrin ruled that punitive damages under Section 51 can be awarded only against a defendant who knows it is using plaintiff's image without her consent. Because Harrison & Star believed that plaintiff had consented to the use of her photograph in "Sharing Stories" and had no role in distributing the brochure after plaintiff complained about the use of her photograph, there was no basis for awarding Section 51 punitive damages against Harrison & Star.

With respect to Merck, Justice Oshrin agreed with defendants that Section 51 damages are only available to redress unauthorized uses within the State of New York, citing *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930 (Sup. Ct. N.Y. Co. 1995) and the plain language of the statute. While Merck may have distributed a limited number of "Sharing Stories" brochures after receiving plaintiff's objection, there was no evidence that any of these post-notice distributions took place in New York. Accordingly, Justice Oshrin dismissed the Section 51 punitive damages claim against Merck as well.

However, Justice Oshrin reserved decision on defendants' motion to dismiss the punitive damages on the libel claim. Defendants urged that there was no evidence of common law malice (such as hatred, ill will or spite towards plaintiff) under the standard set out in *Prozeralik*. Plaintiff conceded that defendants had no conscious ill will toward plaintiff but argued that common law malice could be established with evidence that defendants acted recklessly. Plaintiff argued that Harrison & Star acted recklessly by placing plaintiff's picture next to the character sketch of "Maria" without ensuring that she had signed a written release and that Merck acted recklessly with regard to plaintiff's rights by doing nothing more than placing a "hold" on future distribution of "Sharing Stories" after Merck received the complaint letter from plaintiff's lawyer.

The Verdicts

The case went to the jury on Friday, September 21. The jury was asked first to determine the amount of compensatory damages on plaintiff's claims and then to decide whether plaintiff was entitled to punitive damages against either Harrison & Star or Merck. The following Tuesday, the jury (by a 5-1 vote) returned with a verdict of \$1 million in compensatory damages on the libel claim and an additional \$1,000 on the Section 50-51 claim (presumably for the value of plaintiff's photograph). In response to a special interrogatory, the jury decided that punitive damages were warranted against both defendants.

After hearing brief testimony about the wealth and recent net profit of Harrison & Star and Merck, the jury retired to deliberate on the amount of punitive damages. On the afternoon of Friday, September 28, the jury reached its verdict on this issue (again by a 5-1 vote), awarding \$1.75 million in punitive damages against Merck and \$250,000 in punitive damages against Harrison & Star.

Defendants are currently preparing their post-trial motions to strike the punitive damages award and for other relief. Defendants' appeal on the adverse summary judgment decision on liability is still pending.

Victor A. Kovner, Gregory A. Welch and Constance M. Pendleton of Davis Wright Tremaine LLP, which was engaged in July 2001 after Justice Werner granted summary judgment to plaintiff, together with Sara Edelman of Davis & Gilbert LLP, represented Merck & Co. and Harrison & Star, Inc. Joseph A. Tranfo and Meredith C. Braxton of Tranfo & Tranfo represented the plaintiff.

Plaintiff conceded that defendants had no conscious ill will toward plaintiff but argued that common law malice could be established with evidence that defendants acted recklessly.

Local Public Figure in Statewide Publication

By Tom Tinkham

Defendant real estate developer active in his local community's affairs is a public figure even for purposes of a state-wide newspaper publication. *Neilsen V. Wall*, 2001 WL 969004 (Minn. App. 8/28/01)

The plaintiff, Neilsen, was a real estate developer and broker in the suburb of Roseville, Minn. The defendant, Wall, was a former Roseville Planning Commission member and former Mayor of Roseville. For over ten years, Neilsen had been active in public affairs in Roseville and particularly critical of a number of Roseville public officials. He attended public debates and wrote letters to the editor of the local newspaper; he brought several lawsuits against the City of Roseville; and publicly supported various candidates for public office in Roseville.

Wall wrote a letter to the editor of one of the suburban newspapers, critical of Neilsen and he made negative comments regarding Neilsen that were published in the *St. Paul Pioneer Press*, with

distribution throughout the State of Minnesota. Neilsen sued Wall for comments made in the letter to the editor and comments to reporters that were reprinted in the *St. Paul Pioneer Press*.

The Court of Appeals affirmed the district court's grant of summary judgment in favor of the defendant. It concluded that Neilsen was a limited-purpose public figure because he had assumed a prominent role in the public controversy in Roseville concerning real estate development policy.

Neilsen contended that even if he was a limited-purpose public figure, it was only in the geographic area of Roseville, Minn., and he was not a public figure for the scope of the distribution of the *St. Paul Pioneer Press* throughout the State of Minnesota. The court rejected the argument that the status of a limited-purpose public figure ends at the geographical boundaries of a particular political subdivision. The court commented that the plaintiff cited no Minnesota or federal authority supporting the argument that the constitutional analysis changes, depending on the geographical distribution of a publication.

The court also affirmed the conclusion that there was insufficient evidence of malice to support the claim. First, it

reiterated the general principal that the mere failure to investigate before publishing does not alone establish actual malice. It goes on to conclude that the words Wall used, such as "schemes," "grumpy old men," "puppet candidates," "cozy relationship," "self-appointed apostles," "pulling strings," "sitting on the sidelines," and "playground bullies" are properly categorized as political commentary and opinion, but are not factual statements that can support a defamation claim. Wall's statement that lawsuits brought by Neilsen were "specious lawsuits," also is simply a matter of opinion, since most people who are sued, regard those suits as lacking in merit.

George O. Ludcke and John D. Bessfer of Kelley & Berens in Minneapolis represented Nielson.

Pierre N. Regnier of Jardine, Logan & O'Brien in St. Paul, Minn., and Richard A. Lind, Sarah E. Morris of Lind, Jensen, Sullivan & Peterson in Minneapolis represented Wall.

The court commented that the plaintiff cited no Minnesota or federal authority supporting the argument that the constitutional analysis changes, depending on the geographical distribution of a publication.

Supreme Court Denies Review of Doctor's Libel Case

N.C. Court of Appeals Found the Doctor to be a Limited Purpose Public Figure

The Supreme Court denied a doctor's petition for certiorari leaving in place a North Carolina Court of Appeals decision that the doctor was a limited purpose public figure and dismissing his libel claim. See *Gaunt v. Pittaway*, 520 S.E.2d 603 (N.C. Ct. App. 1999), *aff'd on reh'g*, 534 S.E.2d 660 (N.C. Ct. App. 2000), *cert. denied*, 2001 U.S. LEXIS 9483 (U.S. Oct. 9, 2001). George Gaunt, an infertility specialist, sued Donald Pittaway, Director of Reproductive Endocrinology at Bowman Gray School of Medicine, for libel over several statements Pittaway made to *The Charlotte Observer* about Gaunt's training and expertise in the field of *in vitro* fertilization.

In the first of two relevant rulings, the North Carolina

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Supreme Court Denies Review of Doctor's Libel Case

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Court of Appeals upheld the trial court's grant of summary judgment on the defamation claim. The court determined that Pittaway's statements were opinions, on matters of public concern, that did not contain provable false connotations and were thus not actionable as libelous. In the alternative, the court found that, even if the statements were not opinions, Gaunt — as a limited purpose public figure — had failed to show actual malice.

The court did not review the grant of partial summary judgment regarding Gaunt's status because Gaunt had failed to designate such order in his notice of appeal. The court, however, granted a motion to rehear the issue.

In the second ruling, the court found that Gaunt "satisfied both the federal and state definitions of limited purpose public figures." First, according to the court, there was an "important public controversy surrounding *in vitro* fertilization at the time of *The Charlotte Observer* news article." Several major news sources published articles debating whether doctors performing *in vitro* fertilization should have special training in reproductive endocrinology. Also during this time, there were debates in the United States Congress and the North Carolina General Assembly on consumer protection issues involving *in vitro* fertilization clinics.

In addition to the facts that made this a public controversy, the court found that Gaunt had done many things to "thrust himself into the vortex of the controversy." According to the court, Gaunt had written to "several politicians," hired a personal lobbyist, and worked with public relations experts to "enhance his public image." Thus, the trial court had correctly granted the defendant's motion for partial summary judgment.

Gaunt was represented by Gary V. Mauney of The Law Offices of William F. Maready in Winston-Salem, N.C. Pittaway was represented by Michael G. Gibson of Dean & Gibson in Charlotte, N.C.

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Ninth Circuit Permits Right of Publicity to Trump First Amendment

Court Holds Publication's Use of Photo to be "More" Commercial Than Non-Commercial

By Joel McCabe Smith

Within a few weeks of each other this past summer, two different Ninth Circuit panels filed opinions regarding the reach and operation of California's right of publicity statute (Civil Code § 3344). The first was in *Hoffman v. L.A. Magazine*, 255 F.3d 1180 (9th Cir. 2001), filed July 6, 2001 and the second was in *Downing v. Abercrombie & Fitch*, 2001 WL 1045646, filed September 13, 2001. Each panel had before it a defendant publication that had used a photograph of a plaintiff public figure, without consent, and in both cases the public figure claimed that the use was "commercial" speech permitting the right of publicity statute to trump the First Amendment protection uniformly accorded "non-commercial" speech.

In the *Hoffman* case, the District Court (Hon. Dickran Tevrizian), after a four-day bench trial, had determined that the defendant's use of the plaintiff's photo was in violation of the right of publicity statute; the Ninth Circuit (Boocheever, Tashima, and Tallman) reversed. In the *Abercrombie* case, the District Court (Hon. Manuel Real) had granted the defendant's motion for summary judgment on the ground that the defendant's use of the plaintiffs' photo was *not* in violation of the statute, but, rather, was entitled to full First Amendment protection; the Ninth Circuit (Hug, Fletcher and King) reversed.

The later *Abercrombie* opinion is irreconcilable with the earlier *Hoffman* opinion and, if the *Abercrombie* opinion is permitted to stand, it will dilute the clear holding of the *Hoffman* opinion.

The Hoffman Opinion

FACTS

Hoffman involved claims asserted by the well-known actor Dustin Hoffman against *L.A. Magazine* which had published an article entitled "Grand Illusions" that was illustrated with computer-altered photos of famous actors, including Hoffman, who were made to appear as if they were wearing Spring 1997 fashions. For the article,

the Magazine took a distinctive photo of Hoffman in a red long-sleeved sequined evening dress from the 1982 movie "Tootsie," and modified it so that Hoffman's body was replaced by the body of a male model in the same pose, wearing a butter-colored silk gown.

HOLDING

In reversing the district court's multi-million dollar award to Hoffman (*see Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999)), the *Hoffman* panel was required to address the issue of "commercial speech," which it defined as speech that "does no more than propose a commercial transaction." *Hoffman*, 255 F.3d at 1184. Although the panel acknowledged that the Magazine's use of the Hoffman photo was *in part* commercial, the panel stated that "[those] facts were not enough to render the use *pure commercial speech*." *Hoffman*, 255 F.3d at 1185 (emphasis added). Instead, the panel held that the commercial aspects of the Magazine's use of the photo were "inextricably entwined" with expressive elements, such that *the whole* was subject to full First Amendment protection, citing Judge Fletcher's opinion in *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (9th Cir. 1988).

The Abercrombie Opinion

FACTS

Abercrombie is an outfitter catering to young people. The upscale retailer sells casual apparel for men and women, including shirts, khakis, jeans, and outerwear. In addition to sales in approximately 200 stores nationwide, Abercrombie also sells merchandise through its Catalog and its Quarterly. The action arose from Abercrombie's publication of a photograph of several "legendary" 1960s-era surfers in the Quarterly to illustrate an article about a well-known surf location in Southern California, and seven of the surfers sued.

Like most periodicals, the Quarterly is available to subscribers (for \$12.00 per year) and those who purchase individual issues (for \$6.00 per issue). In addition

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Ninth Circuit Permits Right of Publicity to Trump First Amendment

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to photos and information regarding Abercrombie fashions, the Quarterly contains substantial editorial content, including articles, interviews, illustrations and photographs of general interest. Issues of the Quarterly are over 250 pages in length, and approximately one-quarter of each issue is devoted to stories, news and other editorial pieces. In fact, issues of the Quarterly are considered, by some (who often pay a substantial premium for them), to be “collectibles.” See, e.g., www.ebay.com (search “abercrombie quarterly”).

The Spring Break 1999 edition of the Quarterly entitled “Spring Fever,” which contains the photo, was designed to incorporate a surfing theme, and contained extensive editorial content dealing with surf culture and related topics. In keeping with this theme, one of the editorial pieces commissioned for the Spring edition by Abercrombie was a 700-word story entitled “Your Beach Should Be This Cool,” which described the surf history of “Old Man’s Beach” in San Onofre, California.

The article was illustrated with two historical surfing photographs taken by a well-known surf photographer. The first photo was a color depiction of San Onofre beach, with surfers riding waves in the background. The second was the subject photo, an over-30-year-old black-and-white depiction of surfers posed on the beach with their boards at a surfing contest, wearing competition t-shirts provided by the promoter of the event. Using these photographs, which Abercrombie had licensed from the photographer for this purpose, the editor of the Quarterly designed the layout for the article. The color photo of San Onofre was positioned on the left page, the article was on the right page, and the photo of the surfers was positioned as a two-page spread on the following pages.

Both of the photographs were expressly linked to the article by a caption bar immediately beneath the article

that stated “Photos at left *and on the following pages* by renowned surf photographer LeRoy Grannis at San Onofre State Beach, contest in session, September 1963.” (Emphasis added.)

After the editor designed this layout for the article, it was presented to Abercrombie’s CEO for the his approval. When the CEO saw the photo for the first time, as an illustration for the article, he was inspired to have Abercrombie design a shirt *similar* to the numbered competition t-shirts worn by the surfers in the photo. The Abercrombie t-shirt, known as the “Final Heat Tee,” was thereafter included in the Quarterly and offered for sale on the two pages following the photo.

Nothing in the Spring edition indicates that the surfers, who are identified in the caption bar as having been photographed in 1963, were wearing or endorsing Abercrombie shirts or other products in 1999.

The pages in the Spring edition carrying the Final Heat Tees make no reference to the surfers and do not depict them or any part of the photo. Nothing in the Spring edition indicates that the surfers, who are identified in the caption bar as having been photographed in 1963, were wearing or endorsing Abercrombie shirts or other products in 1999. At most, one could accurately infer that the Final Heat Tees, like vintage “bomber jackets” or “poodle skirts,” reflected an effort to recreate a clothing style of yesteryear.

HOLDING

Side-stepping the legal analysis employed by the panel in *Hoffman*, the panel in *Abercrombie* evaluated the “commercial speech” issue in a manner that directly conflicts with *Hoffman* and other precedents of the Ninth Circuit and the Supreme Court.

Under *Hoffman*, and the other relevant decisions of the Ninth Circuit and the Supreme Court, if speech is not “pure commercial speech,” it must be categorized as “non-commercial” and is fully protected by the First Amendment. *Hoffman*, 255 F.3d at 1185 (emphasis added); see also *Leidholdt*, 860 F.2d at 895, decided by Judge Fletcher, who was also a member of the *Aber-*

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Ninth Circuit Permits Right of Publicity to Trump First Amendment

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Abercrombie panel. In the *Abercrombie* case, however, the panel does *not* conclude that *Abercrombie's* use of the photo in the Spring edition was “pure commercial speech.” Instead, recognizing that the photo served, at least in part, an editorial purpose, the panel summarily characterized the Quarterly’s use of the surfers photo as “much *more* commercial in nature” than the Magazine’s use of Hoffman’s photo. (Emphasis added.) However, because “more commercial” speech is not the same as “pure commercial” speech, the panel should have decided the issue favorably to *Abercrombie*. In addition, by ignoring the caption bar and mischaracterizing *Abercrombie's* use of the photo as “window-dressing” that “does not contribute *significantly* to a matter of the public interest” (emphasis added), the panel violated basic principles of First Amendment jurisprudence, which prohibit the courts from “weighing” the editorial content of expressive speech. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994).

In short, the *Abercrombie* panel’s failure to apply *Hoffman* and the other decisions of the Ninth Circuit and the Supreme Court have countenanced in an unprecedented result: state law-created publicity rights were permitted in *Abercrombie* to trump the First Amendment in the context of noncommercial speech.

Petition For Rehearing

On October 4, 2001 *Abercrombie* filed a Petition for Rehearing with the Ninth Circuit arguing that the *Abercrombie* panel’s opinion irreconcilably conflicts with the *Hoffman* panel’s recent decision, and numerous other First Amendment decisions of the Ninth Circuit and the U.S. Supreme Court. The Petition urges that, in light of that conflict, there will be an inevitable “chilling effect” on constitutionally-protected expression unless the *Abercrombie* opinion is corrected.

Joel McCabe Smith is a member of Leopold, Petrich & Smith. The Firm represents Abercrombie & Fitch in connection with this matter.

Unanimous Indiana Supreme Court: No Corporate Privacy Claim

By Dan Byron

A recent decision from the Indiana Supreme Court in *Felsher v. University of Evansville*, 2001 Ind. LEXIS 903 (Oct. 1, 2001), reaffirmed the general rule that corporations are not entitled to bring an action for invasion of privacy. The opinion reversed that part of the trial court’s grant of injunctive relief based upon the University’s corporate claim for invasion of privacy by appropriation. The Indiana Court of Appeals had unanimously affirmed the trial court, setting a dangerous precedent contrary to the general rule.

Concerned over the potential ‘chilling’ implications of the case for media interests, the Hoosier State Press Ass’n, LIN Television Corp., the Nat’l Ass’n of Broadcasters, and the Society of Professional Journalists joined in an amici curiae brief to the Indiana Supreme Court urging reversal.

The Indiana Controversy

The University of Evansville, along with several faculty members, brought an action in Vanderburgh Circuit Court to enjoin *Felsher*, a former university professor, from using the university’s name, or the names of the faculty members, in electronic mail accounts and internet website addresses developed by him. *Felsher* had been using the accounts and websites to spread unflattering commentary about the university and the individuals, as well as to ‘nominate’ the individuals for academic posts at other institutions. The trial court agreed with the plaintiffs and granted a permanent injunction to the University and its faculty and the Court of Appeals did likewise.

The Decision

Upon the filing of the amici brief by the four media groups, the Indiana Supreme Court granted transfer of the case and on October 1 published its opinion upholding the position of the amici and the defendant. The court announced that the issue of a corporate entity’s entitlement to an invasion of privacy claim is “one of

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Unanimous Indiana Supreme Court: No Corporate Privacy Claim

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first impression in Indiana.”

The Indiana Supreme Court acknowledged that an appropriation claim involves a privacy issue in the nature of a property right, but held that the Restatement (Second) of Torts, § 652I negates any inference that a corporation may maintain an appropriation claim. The court further noted that this position is consistent with an overwhelming majority of other states that have addressed the issue. While the Restatement suggests that some situations may give rise to an expansion of invasion of privacy law, in this case that expansion was not warranted, particularly because the university’s corporate interests could be adequately protected by commercial law, such as the law of unfair competition. The court struck down the injunction as it applied to the University and then modified its application to the other individual plaintiffs.

Clarification of Other Privacy Law

Significantly, the Indiana Supreme Court also clarified previous Indiana law concerning invasion of privacy claims. It stated that while there are four tenuously related branches of the invasion of privacy tort, Indiana does *not* recognize an invasion of privacy claim based on the public disclosure of private facts. This portion of the opinion solidifies the same court’s prior, fractured opinion in *Doe v. Methodist Hosp.*, 690 N.E.2d 681 (Ind. 1997), which suggested (contrary to a concurring opinion) that Indiana did not recognize a claim for invasion of privacy by public disclosure of private facts.

Dan Byron, Steven Hardin, Jennifer Perry and Brad Maurer of McHale, Cook & Welch in Indianapolis represented amici curiae in this matter. Defendant Felsher appeared pro se throughout the proceedings.

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Court Refuses to Enjoin Release of Motion Picture *Hardball*

By Debbie L. Berman and Michael A. Doornweerd

A Chicago federal judge denied plaintiffs' request for a temporary restraining order and for a preliminary injunction that would have delayed the release of *Hardball*, a major motion picture starring Keanu Reeves as a youth-league baseball coach managing a team of inner-city children. Plaintiffs are Robert Muzikowski, a securities broker active in the community, and a Little League® he founded on the west side of Chicago. Plaintiffs claim that the movie defames them and portrays them in a false light before the public. United States District Court Judge Charles P. Kocoras denied plaintiffs' motion for a TRO and preliminary injunction following oral argument on September 6, 2001. *Muzikowski, et al. v. Paramount Pictures Corp., et al.* No. 01C 6721 (N.D.Ill.).

The Film Hardball

The film *Hardball* is a major motion picture about a fictional inner-city youth baseball league. It is inspired by the book *Hardball: A Season in the Projects* which is a memoir by Daniel Coyle about his experience coaching a youth baseball team from the Cabrini-Green housing projects on the north side of Chicago. The book mentioned plaintiff Muzikowski by name and contained several anecdotes about him. Defendant Paramount Pictures acquired the movie rights to Coyle's book in 1993, and later adapted Coyle's story into a motion picture.

The film stars Keanu Reeves as the fictional character "Conor O'Neill." It is a story about O'Neill's experience coaching an inner-city youth baseball team for one season. The film does not mention or portray either plaintiff. In fact, the film's closing credits state that "while this motion picture is in part inspired by actual events, persons and organizations, this is a fictitious story and no actual persons, events or organizations have been portrayed."

The Lawsuit

Plaintiffs filed a two-count complaint on August 30, 2001, against defendants Paramount Pictures Corp., SFX Tollin/Robbins, Inc. (the film's production company), and Fireworks Pictures (the film's international distributor). Plaintiff Muzikowski's defamation *per se* claim is premised on the theory that the film is "of and concerning" him under Illinois law because, even though he is neither mentioned nor portrayed in the movie, he is mentioned by name in the book *Hardball* and in reviews of the book and because several scenes in the film involving O'Neill are similar to stories from the book about Muzikowski. Muzikowski's defamation *per quod* claim alleges as special damages that his

[T]he Court concluded that moviegoers would understand that the film was essentially fiction and would not impute all the actions of the fictional O'Neill character to plaintiff Muzikowski.

reputation was damaged by the film *Hardball*, that he suffered emotional distress, that he "will be" harmed economically as a result of the alleged damage to his reputation, and that as a result of his alleged false portrayal in the film, he is "now at a substantially greater risk of physical injury."

Muzikowski's false light claim is largely duplicative of his defamation claims.

The claims of Plaintiff Near West Little League are derivative of Muzikowski's claims in that the Near West Little League alleges only that it too will be damaged by the false portrayal of Muzikowski. In addition, the complaint generally alleges that the film's depiction of the youth-league players using foul language is false and defamatory.

Plaintiffs filed for a TRO and preliminary injunction on September 4, 2001, providing the minimal notice required under the local rules. Plaintiffs submitted as evidentiary support for their motion a verified complaint containing the allegations discussed above. Plaintiffs sought, among other relief, "to enjoin the public showing of the film *Hardball*, currently set for release on September 14, 2001." In support of their motion, plaintiffs argued that they were likely to succeed on the merits of their defamation claims, that they lacked any adequate remedy at law, and that they faced irreparable harm. In addition, plaintiffs argued that the "balance of the equities" as between plaintiffs and defen-

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Court Refuses to Enjoin Release of Motion Picture *Hardball*

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dants, as well as the public interest, supported a TRO and preliminary injunction enjoining the public showing of the film. Plaintiffs did not address the First Amendment implications of their requested relief.

In opposition, defendants argued that plaintiffs' request for an injunction prohibiting future speech was a classic "prior restraint" prohibited by the First Amendment. Citing such cases as *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), defendants argued that there was a "heavy presumption" against the constitutional validity of a prior restraint which was not overcome by garden variety defamation claims such as those alleged by plaintiffs.

Defendants also argued that plaintiffs were not entitled to injunctive relief under the traditional TRO criteria. Specifically, defendants argued that the reputational damage alleged by Muzikowski did not constitute "irreparable injury" and that plaintiffs had an adequate remedy at law in their pending action for damages. In addition, defendants argued that the balance of the equities weighed in favor of denying injunctive relief because the irreparable harm to defendants — who had spent millions making, promoting and distributing the film — far outweighed any purported injury to plaintiffs. Finally, defendants argued that the public interest would be harmed by injunctive relief that prohibited the public showing of the film.

The Decision

Following lengthy oral argument, the court denied plaintiffs' motion for a TRO and a preliminary injunction. Ruling from the bench, the court found that plaintiffs had failed to satisfy the criteria for a TRO and that plaintiffs' request for injunctive relief was not permitted by the First Amendment.

The court concluded that plaintiffs failed to establish a likelihood of success on the merits of their claims in light of the film's disclaimer that it was only "inspired" by actual events. In addition, the court concluded that moviego-

ers would understand that the film was essentially fiction and would not impute all the actions of the fictional O'Neill character to plaintiff Muzikowski.

The court also held that plaintiffs' alleged reputational damages did not constitute the kind of irreparable harm that would justify injunctive relief because plaintiffs had an adequate remedy at law. The court cited plaintiffs' pending action for money damages and concluded that, if it were judged to have merit, then "cash is at least a reasonable remedy at law." The court also concluded that the balance of the equities weighed considerably in favor of defendants in light of the commercial harm that enjoin-

ing the release of the film would cause. Finally, the court ruled that the issuance of a restraining order would not serve the public. Accordingly, the court denied plaintiffs' motion.

The court's decision to deny plaintiffs' motion for a TRO and a preliminary injunction had on it a considerable First Amendment gloss. For example, the court noted that plaintiffs' objection to the use of profanity in the film "approaches notions of censorship" and the court reiterated the well established principle that the film — good or bad — was speech protected by the First Amendment. In addition, in evaluating whether the public interest would be served by issuance of an injunction, the court stated flatly that "clearly the public would be disserved by the issuance of a restraining order," and then reiterated the First Amendment principle that the merits of the speech should be evaluated in the marketplace of ideas by citizens, rather than in courtrooms by judges.

The film *Hardball* was released as scheduled, and was the highest grossing movie during its debut weekend. The litigation is proceeding in the Northern District of Illinois, with a motion to dismiss currently pending before the court.

Debbie L. Berman, a partner, and Michael A. Doornweerd, an associate, of Chicago's Jenner & Block, LLC, represent defendants in this matter.

The court's decision to deny plaintiffs' motion for a TRO and a preliminary injunction had on it a considerable First Amendment gloss.

Web Site Operator Immune From Liability For User Comments

By Nicole A. Wong and Kurt B. Opsahl

In a decision filed September 17, 2001, the Washington State Court of Appeals held that federal law provides immunity to Web site operators for lawsuits arising from user content posted on their sites. In *Schneider v. Amazon.com, Inc.*, 2001 Wash. App. LEXIS 2086 (Sep. 17, 2001), the Court found that Section 230 of the Communications Decency Act (“CDA”) (47 U.S.C. § 230) immunized the Web retailer Amazon.com, Inc. from liability for user-created product reviews, despite Amazon.com’s editorial discretion and license over user comments.

The Washington Court first confirmed that Section 230 is not limited to traditional Internet Service Providers, finding Amazon.com encompassed by the plain language of the statute. Citing to the strong public policies in the statute’s findings and the Congressional record, the court also emphasized that Congress designed Section 230 to promote self-regulation by providing immunity. In that regard, the court found Amazon.com’s user reviews indistinguishable from an ISP’s message board. The court’s opinion further clarified that Section 230 applies to all civil liability claims arising from editorial discretion, regardless of whether they sound in tort or contract. Finally, the court addressed and rejected arguments that Amazon.com’s right to edit user comments and its license over such comments rendered it an “information content provider” outside Section 230’s immunity.

Thus, in the first appellate opinion applying Section 230 to Web sites, the court found that “all three elements for § 230 immunity are satisfied” and affirmed the dismissal of all claims.

Background

As part of its services, Amazon.com offers a platform for users to post reviews and commentary regarding goods on its Web site. The *Schneider* case arose from negative user reviews posted regarding Jerome Schneider’s books on taxation and asset protection. Mr. Schneider alleged that he contacted Amazon.com and requested that the negative postings be removed, and

Amazon.com agreed but subsequently failed to remove the reviews as quickly as allegedly promised and allegedly reposted them elsewhere on its Web site.

Mr. Schneider sued Amazon.com (and John Does I-X), initially alleging defamation and tortious interference with a business expectancy. Amazon.com moved to dismiss, and Mr. Schneider amended his complaint to delete the defamation claim and add claims for negligent misrepresentation and breach of an alleged contract to remove the negative reviews. Amazon.com again moved to dismiss on the basis of Section 230 immunity. The trial court granted Amazon.com’s motion, refused a request for reconsideration to plead the application of British or Canadian law, and the appeal ensued.

Three-Part Test for Statutory Immunity

Section 230 of the Communications Decency Act of 1996 provides in pertinent part that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Reading the statute, the court found three elements necessary for immunity: the defendant must be an interactive computer service provider; the asserted claims must treat the defendant as a publisher or speaker of information; and the information must come from another information content provider. *Schneider*, at *6.

Web Sites are Interactive Computer Services

A number of cases have recognized that traditional Internet Service Providers are interactive computer service providers under the CDA (more often than not addressing America Online). See, e.g., *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Ben Ezra, Weinstein, & Co., Inc. v. America Online, Inc.*, 206

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F.3d 980 (10th Cir.), *cert. denied*, 531 U.S. 824 (2000); see also *Truelove v. Mensa*, Case No. PJM 97-3463 (D.C. Md. February 10, 1999) (unpublished) (plaintiffs concede list mailing service is an interactive computer service) and *Barrett v. Clark*, Case No. 833021-5 (Cal Super., Alameda, June 25, 2001) (unpublished) (applying Section 230 to repeated postings on Usenet newsgroups). However, as the *Schneider* court recognized, no cases have directly addressed the application of Section 230 to Web site operators like Amazon.com. (The court by footnote noted a case involving online auctioneer eBay, in which its status as an interactive computer service provider was undisputed. *Stoner v. eBay*, 2000 WL 1705637 (Cal. Super., San Francisco, Nov. 7, 2000) (unpublished). See also *Does v. Franco Publications*, Case No. 99 V 7885 (U.S.D.C., N.D. Ill, Eastern Div. June 22, 2000) (unpublished) (complaint's characterization of ISP as Web host does not prevent immunity under the CDA) and *Gentry v. eBay*, Case No. GIC 746980 (Cal. Super., San Diego, Jan. 18, 2001) (unpublished) (in telephonic ruling, found negligence and unfair competition claims barred by Section 230, without discussion of eBay's status)).

Nevertheless, from the plain language of the statute, the court held that a Web site that "enables visitors to the site to comment about authors and their work" was "squarely within [Section 230's] definition" of interactive computer service. *Schneider*, at *9. The court found its holding supported by the legislative history and findings and policy statement in the CDA and stated that it could "discern no difference between web site operators and ISPs in the degree to which immunity will encourage editorial decisions that will reduce the volume of offensive material on the Internet." *Id.* at *12.

Treatment as Publisher or Speaker Barred in Tort or Contract

On its face, Section 230 bars any claim which treats the defendant as a publisher or speaker of third-party content. In practice, courts have generally applied Section 230 to tort claims, where the complaint accuses the defendant of improperly deciding to publish, alter or withdraw

content. See, e.g., *Zeran, supra*; *Blumenthal, supra*; *Barrett, supra* (defamation); *Does v. Franco Publications, supra* (publishing video tapes as intrusion into seclusion); and *Doe v. America Online*, 783 So. 2d 1010 (Fla. Sup. Ct. 2001) (negligence). Here, after amending the complaint, *Schneider* asserted claims sounding in contract as well as tort. *Schneider* sought "to recover the damages which flowed from Amazon's misrepresentations and breach [of] its agreement following the postings." *Schneider*, at *14. This, *Schneider* contended, was not barred by the CDA.

The court rejected *Schneider's* argument. The opinion pointed out that the purported breach - failure to remove postings — was an exercise of editorial discretion and therefore protected under Section 230. Furthermore, the court noted, the language, legislative history, and interpretations of several other courts have shown that Section 230 was designed to protect against all civil claims, and is not limited to tort claims. *Schneider*, at *15 (citing *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684 (Cal. App. 2001) (taxpayer's action for declaratory and injunctive relief); *Jane Doe One v. Oliver*, 46 Conn. Supp. 406 (Conn. Sup. Ct. 2000) (contract and tort claims)); see also *Gentry, supra* and *Stoner, supra* (statutory unfair competition).

Editing and Licensing Insufficient for Information Content Provider

The final issue addressed by the court was whether, by virtue of Amazon.com's right to edit user comments and its ownership of a license over the comments, Amazon.com was an "information content provider" unprotected by Section 230.

The court rejected both arguments. Agreeing with the analysis in *Ben Erza*, the court found that the "mere right to edit" could not create liability. *Schneider*, at *18. Likewise, the court looked to the licensing discussion in *Blumenthal*, which allowed immunity "even where the interactive service provider has a active, even aggressive role in making available content prepared by

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Web Site Operator Immune From Liability For User Comments

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others.” *Blumenthal*, 992 F. Supp. at 52. In the court’s opinion, because Amazon.com did not create or develop the negative comments, it was not an information content provider.

Evolutionary Change in Case Law

Since the seminal *Zeran* case in 1997, courts have been rounding out the contours of Section 230’s protections against civil liability for third-party content. *Schneider v. Amazon.com*, an evolutionary step in the process, now confirms the application of Section 230 immunity to Web site operators. Overall, *Schneider* neatly sums up the state of Section 230 jurisprudence, while providing a published appellate opinion upholding this strong protection for Web site operators, including retailers like Amazon.com.

Nicole A. Wong is a partner and Kurt B. Opsahl is an associate with Perkins Coie LLP in San Francisco.

Amazon.com was represented at the trial level and on appeal by Elizabeth L. McDougall of Perkins Coie LLP in Seattle, Washington. Jerome Schneider was represented by Michael David Myers of Myers & Parker, Seattle, Washington. The Washington State Court of Appeals opinion was authored by Judge Ellington, Judge Kennedy and Acting Chief Judge Becker concurring.

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New York Court Increases Private Figure’s Burden in Libel-By-Implication Case

By Adam Liptak

The problem is a familiar one. A newspaper layout, say, calls for a photograph to accompany an article that touches on a number of subjects. A photograph is chosen, often late in the process, on the theory that it illustrates one of those subjects or the article’s general theme. The juxtaposition of text and image gives rise to an entirely inadvertent but nevertheless defamatory implication. The pictured individual sues.

Some jurisdictions do not allow libel by implication claims at all in some circumstances, and others require that the face of the publication make plain that the asserted implication was the principal one or was expressly endorsed. In actual malice cases, of course, a libel-by-implication claim is impossible to prove where the implication was inadvertent, as a defendant cannot very well have published an implication with something like knowledge of falsity if she was not aware of having created the implication in the first place.

But what about private figure cases where the implication is inarguably present? On October 1, 2001, an intermediate appellate court in New York held that even private figure plaintiffs must prove that defamatory implications were subjectively intended or endorsed to prevail on a libel claim.

In 1996, *The New York Times* published, in its Sunday Westchester section, a routine article entitled “Health Issues That Concern the County Most.” It surveyed about a dozen health issues — rabies, Lyme disease, tuberculosis and the like. Its most sustained discussion was of AIDS and transmission of AIDS from mothers to infants. The photograph chosen to illustrate the article was of a patient receiving health care in Westchester County. The patient was a very small infant, and the photograph of her was accompanied by the accurate caption “Sabrina McCormack of New Rochelle at the County Medical Center.” It thus aptly illustrated the article’s general theme, and it might also be said to be an illustration of a passing reference to that medical center’s neonatal facility.

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NY Court Increases Burden

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The infant and her parents sued in state court, for libel and commercial misappropriation of name and likeness, on the theory that the passage about AIDS, which happened to surround the photograph, implied that they had AIDS. This understanding of the juxtaposition of text and image was shared by many neutral observers, and a motion to dismiss on the ground of the absence of defamatory meaning was denied. A motion to dismiss the commercial misappropriation claim as a news use was also denied, on the ground that the supposed falsity of the juxtaposition made the news use exception unavailable. Both denials were affirmed.

The trial court also denied *The Times's* later motion for summary judgment. *The Times* argued that the plaintiffs' failure to come forward with evidence that the implication was subjectively intended or endorsed doomed their claim even though they were private figures required to show only gross irresponsibility, the intermediate standard of fault that New York settled on in the wake of *Gertz*. Though the gross irresponsibility standard is quite protective of the press and may as a practical matter approach actual malice in difficulty of proof, by its terms it looks to objective criteria concerning "standards of information gathering and dissemination ordinarily followed by responsible parties" and not, as in the actual malice setting, to subjective belief. *The Times's* argument, then, requested the importation of a separate, subjective requirement into an otherwise objective standard.

Two New York federal district courts had seemingly required this, though in muddled passages. A Minnesota district court had done so more clearly, in the negligence context. And there is academic commentary to support the proposition too. But *The Times's* key basis for the requested innovation relied on *Gertz* itself. Though *Gertz's* most familiar holding is that negligence is the constitutional floor for the standard of fault states must require of private figures suing media defendants, that holding was subject to an important proviso. It applies only where "the substance of the defamatory statement makes substantial danger to reputation apparent." The inquiry would be different, the Supreme Court said, "if a

state purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." That is, *The Times* argued, the Court recognized that premising liability on unintended implications would amount to unconstitutional strict liability.

On October 1, 2001, the appeals court accepted this argument, though it devoted all of a sentence to it. It held that the defamation claim must be dismissed because "plaintiffs have failed to establish by a preponderance of the evidence that *The Times* defendants intended or endorsed such an implication and acted in a grossly irresponsible manner." Much of the balance of the decision is devoted to a boilerplate explanation of the gross irresponsibility standard, along with the suggestion that since three *Times* editors "reviewed and edited the article before publication" and a photo editor said there were "journalistic connections" between the text and image the standard could not be met.

The court also reversed the denial of summary judgment as to the commercial misappropriation claim. *Messenger v. Gruner + Jahr* had been decided by New York's highest court between the two appeals, and it has finally put to rest the question of whether assertedly false news reports lose the news use exception in New York.

The Times and two freelancers were represented by Adam Liptak of its Legal Department and John J. Gallagher of Corbin Silverman & Sanseverino. The plaintiffs were represented by James William Hubert, a solo practitioner in White Plains, N.Y.

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Mob Case Subpoena to ABC Quashed in NY

Potential as Impeachment Material Insufficient

By Bob LoBue and Todd Geremia

The New York County Supreme Court recently ruled that a party seeking unpublished, non-confidential news material may not pierce the journalist's privilege embodied in New York's Shield Law, N.Y. Civil Rights Law § 79-h(c), unless the party seeking this material "can define the specific issue, other than general credibility, as to which the sought after [material] provides truly necessary proof" of a "specific delineated defense or claim."

In *In re Subpoena to American Broadcasting Cos. (People v. Crea)*, Indictment No. 5544-00, the New York County Supreme Court (Jeffrey Atlas, J.) quashed a subpoena issued to American Broadcasting Companies, Inc. at the request of the alleged acting head of the Lucchese Crime Family, Steven Crea. Crea has been indicted along with many other alleged members of the Lucchese Family, for his alleged involvement in criminal schemes related to the construction industry.

At the upcoming trial, a turncoat informant named Sean Richard is slated to be the State's lead witness. ABC News conducted a series of interviews with Richard about his life in the mafia and connection to the individuals indicted in the pending criminal proceeding. Portions of these interviews were broadcast on the day that the indictment was announced and later as part of a segment of the news magazine "20/20 Downtown."

Crea sought all of ABC's materials concerning the Richard interviews, including journalist's notes and outtakes, to help prepare his case and demonstrate Richard's hostility to Crea and his associates. ABC moved to quash the subpoena on several grounds, including that it sought unpublished, non-confidential news qualifiedly protected against compelled disclosure by New York's Shield Law. The court found that the sought-after materials were relevant to the allegations in the indictment. Nonetheless, the court granted ABC's motion and rejected Crea's argument that the outtakes of the Richard interview were "critical or necessary" to his defense, one of the three factual showings that must be made by clear and specific proof before the Shield Law

privilege in non-confidential news materials may be pierced.

The court reasoned that Crea had not established, under the applicable standard, that his defense "virtually rises or falls" on the sought-after material because "when the legislature speaks of unpublished news being critical or necessary to the proof of a claim or defense, it does not have in mind general and ordinary impeachment material or matters which might arguably bear on the assessment of the witness."

The court's use of the "virtually rises or falls" standard is not new. See *In re Grand Jury Subpoenas Served on Nat'l Broadcasting Co.*, 683 N.Y.S.2d 708, 710 (Sup. Ct. N.Y. Cty. 1998); *In re Application to Quash Subpoena to Nat'l Broad. Co. v. Graco Children Prods., Inc.*, 79 F.3d 346, 351 (2d Cir. 1996). The decision does, however, appear to be the first from a New York State Court to squarely hold that prior

[H]olding that prior statements of a litigant's key witness, sought for the purpose of developing impeachment material, are not "critical or necessary" to a defense or claim within the meaning of the Shield Law.

statements of a litigant's key witness, sought for the purpose of developing impeachment material, are not "critical or necessary" to a defense or claim within the meaning of the Shield Law.

In re American Broadcasting Companies, Inc. is, in this respect, similar to *Graco* in which the United States Court of Appeals for the Second Circuit construed the New York Shield Law to not permit compelled disclosure of prior statements by a civil litigant in outtakes because this impeachment material did not rise to the level of "critical or necessary" to the defense of the underlying suit. See *Graco*, 79 F.3d at 352 ("Ordinarily, impeachment material is not critical or necessary to the . . . defense of a claim."); cf. *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (quashing subpoena to journalist under New York Shield Law because "principal evidentiary purpose" of sought-after material was to impeach witness who had been effectively impeached with prior criminal record).

Robert P. LoBue and Todd R. Geremia, of Patterson, Belknap, Webb & Tyler LLP, represented American Broadcasting Companies, Inc. Gerald B. Lefcourt and Gary G. Becker represented Steven Crea. The prosecution took no position on the motion.

UPDATE: Judge Denies Anti-SLAPP Motion to Strike in Trade Journal Case Over Confidentiality of Source Lists

San Francisco Superior Court Judge A. James Robertson denied a special motion to strike under the California anti-SLAPP statute finding, instead, that the publisher of a major pulp and paper industry newsletter established a probability of prevailing on the merits of its unfair competition and misappropriation claims. See *Paperloop.com, Inc. v. Gow, et al.*, No. 322044 (Cal. Super. Ct. Sept. 13, 2001). Paperloop.com is suing two former reporters, a former publisher and Forestweb, a competing trade journal, alleging that the industry sources the journalists acquired while working for Paperloop.com or its predecessor Miller Freeman, Inc., were trade secrets misappropriated when the reporters went to work for Forestweb, their current employer. See *LDRC Libelletter*, August 2001 at 10.

Paperloop.com is both an on- and off-line company that publishes trade journals including *Pulp and Paper Week*. Paperloop.com was formed in January 2000 as a joint venture between Pegasus Capital Advisors, L.P. and Miller Freeman, Inc. The plaintiff's complaint alleges that since Miller Freeman served the pulp and paper industry for almost 100 years prior to the formation of Paperloop.com, it developed extensive contacts among industry executives and employees who subscribed to its publications and attended its trade shows. According to the complaint, the sources largely refuse to be identified, many only speak to Paperloop.com and only on a confidential basis, and these sources "belong to Paperloop."

Ola Jane Gow, James V. McLaren, and Diane Keaton, the individually named defendants were formerly employed by Paperloop.com and/or Miller Freeman. Forestweb, their current employer and a co-defendant, is a smaller Internet-based competitor. Paperloop.com is alleging that the reporters, McLaren and Keaton, contacted Paperloop.com's sources on behalf of Forestweb and used information gleaned from the sources in Forestweb's publications.

On August 9, the defendants filed a special motion to strike Paperloop.com's complaint under Cal. Civ. Proc. § 425.16, California's anti-SLAPP statute. Subsection (b) of § 425.16 provides that a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court

determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." While Judge Robertson held that the Anti-SLAPP provisions apply to this suit, he found the plaintiff had established a probability it would prevail on the claim.

In order to establish a probability that it will prevail on its claim, Paperloop had to show it could satisfy the California's Trade Secrets Act, Cal. Civ. Code § 3426, *et. seq.* Under the trade secrets act, trade secrets are defined as information that "(1) Derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

While the defendants argued that Paperloop could not establish that the source lists were sufficiently confidential to be protected under the provision, the court held that the evidence offered up by Paperloop, if proven at trial, would be sufficient to establish the secrecy and reasonable efforts required by the statute. The court stated that "efforts at maintaining secrecy need not be absolute, just reasonable under the circumstances." However, in ruling on this motion Judge Robertson did not consider defendant's evidence to the effect that neither Miller Freeman nor Paperloop had taken sufficient steps to protect the asserted confidentiality of the source identities. Judge Robertson instead relied only on Paperloop's assertions that it took steps to maintain secrecy, including assertions that Paperloop provided source lists "only to those employees whose job responsibilities requires access to the source list information," that employees were "advised that the source lists are confidential and belong to Paperloop," and that the employee handbook states that "compilations of such information are the property of Paperloop."

The defendants have filed an appeal from the denial of the motion.

Neil Shapiro, of McCutchen, Doyle, Brown & Enersen, LLP in San Francisco, and Phillip Maltin, of Konowiecki & Rank, LLP in Los Angeles, represented the defendants. Stephen Baldini, of Akin, Gump, Strauss, Hauer & Feld, LLP of New York, and Laurence Weiss, of Heller Ehrman White & McAuliffe, LLP in San Francisco, represented Paperloop.

Georgia Statute Struck Under *Florida Star*

By Jason S. McCarter

On October 1, the Georgia Supreme Court struck down Georgia's rape confidentiality statute as unconstitutional under the First and Fourteenth Amendments to the United States Constitution. *Dye v. Wallace*, No. S01A0625, 2001 Ga. LEXIS 759. Finding the Georgia statute indistinguishable from the Florida law struck down as violative of the First Amendment by the United States Supreme Court in *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603 (1989), the court affirmed summary judgment for a local newspaper reporter and his newspaper sued for invasion of privacy under the State's rape shield statute. The Georgia Supreme Court's opinion, concurred in by all Justices, was authored by Justice Carol W. Hunstein.

The case arose from the molestation and statutory rape of a minor child by an employee of her legal guardian's restaurant. The guardian, Angie Dye, reported the incident

to the McDuffie County Sheriff's Department, which created an incident report describing what Ms. Dye witnessed and what her child had told her. After the report was created, it was placed in an open basket at the McDuffie County Law Enforcement Center for review by the public and media, as authorized by the provisions of the Georgia Open Records Act, O.C.G.A. § 50-18-70 et seq. As part of his duties for the *The McDuffie Progress*, reporter Jim Wallace reviewed the incident report and attached warrants and prepared a news story based on the information contained in them.

The article detailed the arrest of the alleged perpetrator and the charges against him, namely child molestation, enticing a child, and statutory rape. Although the article did not name the child or her guardian, it did contain descriptive statements concerning the child's age, where the incident occurred, and the mother's ownership of the restaurant. Arguably, these details were sufficient to allow

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To be published in January 2002

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Georgia Statute Struck Under *Florida Star*

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readers of the small town newspaper to identify the victim. As such, Dye brought suit against Wallace and the newspaper's corporate owner for invasion of privacy by unlawful publication under the state's rape confidentiality statute, O.C.G.A. § 16-6-23, which makes it unlawful for any news media or any other person to print or otherwise publish "the name or identity of any female who may have been raped or upon whom an assault with intent to commit the offense of rape may have been made."

Following an earlier opinion of the Georgia Supreme Court in *State v. Brannan*, 267 Ga. 315, the trial court granted summary judgment for the reporter and the newspaper on the grounds that the news article did not literally contravene the rape confidentiality statute, as there had been no reference to the specific crimes of rape or assault with the intent to commit rape. Alternatively, the trial court found that the application of the rape confidentiality statute to impose civil liability was unconstitutional on the facts of the case.

Without addressing the first grounds, the Georgia Supreme Court affirmed the grant of summary judgment on constitutional grounds. Starting from the premise that the statutory rape and molestation of a minor child is clearly a matter of public concern under Georgia precedent, the *Dye* court also found it undisputed that the reporter lawfully obtained the information about the assault from a publicly available police report and that the published article accurately reflected the information contained in the report. Under these facts, the state supreme court found the *Florida Star* opinion directly controlling.

In *Florida Star*, the Court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Florida Star*, 491 U.S. at 541. Following this standard, the Georgia court recognized that the interests asserted by the State in justifying the statute – privacy of rape victims, the physical safety of such victims, and encouraging victims to report crimes – were indeed "highly

significant interests." But as in *Florida Star*, the court found the imposition of liability on one who truthfully reports a matter of public concern "too precipitous a means of advancing these interests" to justify such an "extreme step."

In particular, the *Dye* court found that the State could have used a more limited means of guarding against dissemination of the victim's identity, that the statute raised self-censorship concerns, that it had a broad, objectionable negligence per se standard, and that it was underinclusive. The *Dye* court simply cited *Florida Star* for support of each of these conclusions, elaborating only on the limited means issue. On that issue, the court stated in a detailed footnote that, short of a prohibition on truthful publication, the government retains ample means of protecting a rape

victim's anonymity. Most clearly, the government can curtail the release of this sensitive information by, for example, classifying it, establishing procedures to ensure its redacted release, and extending damage remedies against the gov-

ernment or its officials where they mishandle sensitive information. The court noted that the Georgia legislature had made no provision to exempt the names and identities of sex crimes from availability under the Georgia Open Records Act.

Again quoting *Florida Star*, the court said "Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts."

The Hon. Roger Dunaway, Superior Court of McDuffie County, was the trial court judge. Danny L. Durham and Richard A. Ingram of Augusta, Georgia represented Appellant Dye, while James B. Ellington of Augusta represented Appellees Wallace and McDuffie County Newspapers, Inc.

Jason McCarter is an associate with Dow, Lohnes & Albertson in Atlanta.

[The Georgia Supreme Court] found the statute indistinguishable from the Florida law struck down as violative of the First Amendment by the United States Supreme Court in Florida Star v. B.J.F.

Magazine Wins Dismissal of USOC Attempt to Exercise Veto Power over Reporting about the Olympic Games

By Roger R. Myers, Thomas Kelley and
Lisa M. Sitkin

In a case pitting a trademark-holder's rights against the First Amendment rights of the media to report on the Olympic Games, a district court judge in Colorado dismissed a lawsuit brought by the United States Olympic Committee to stop publisher American Media from using the word "Olympics" in a magazine previewing the summer 2000 Games in Sydney, Australia.

The case, *United States Olympic Committee v. American Media, Inc.*, Case No. 01-K-281(D. Colo.), arose out of the September 2000 issue of an American Media monthly publication, AMI Specials, entitled *AMI Specials Salutes Our Athletes: Olympics USA*, which contained photos and profiles of various Olympic athletes, descriptions of events and a television schedule of Olympic events. Shortly after the magazine appeared on newsstands, the USOC filed a complaint and an application for a temporary restraining order in federal court in San Francisco, alleging that American Media had violated the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 *et seq.* (the "Act"), a special trademark statute that grants the USOC exclusive rights in the commercial and promotional use of certain Olympic-related marks and terminology, including the word "Olympic," the Olympic rings and the Olympic torch.

In the lawsuit, the USOC explained that it uses the rights granted it by the Act to extract licensing fees from many of the media that cover the Olympics. By suing American Media, it sought to restrain the publisher from distributing *Olympics USA* or from publishing any further unlicensed coverage of the Olympic games and, not incidentally, to justify its existing licensing arrangements with other media. It failed on both counts.

At the outset of the case, American Media narrowly averted imposition of an injunction. At a hearing held on September 13, 2000, District Court Judge Sandra Armstrong inexplicably delved into the merits of the application before first addressing the equities, and appeared poised to issue the TRO. However, American Media convinced the Court that the issue had become

moot because the magazine was already scheduled to come off the stands in a matter of days. On this basis, the court convinced the USOC to withdraw its application as moot.

Nonetheless, American Media was concerned about comments made by Judge Armstrong during the hearing indicating that in her view the First Amendment did not preclude -- indeed was not even implicated by -- issuance of a prior restraint on a news publication. Alarming, Judge Armstrong seemed content with the now-disfavored notion that the Act is a law of "general applicability" and therefore not subject to First Amendment constraints even when applied to speech.

In the hopes of getting a fairer consideration of its position, American Media filed a motion to transfer venue on the ground that California was an inappropriate forum since the USOC is headquartered in Colorado and American Media is located in Florida. American Media also filed a motion to dismiss on the merits. Judge Armstrong transferred the case to the District of Colorado where American Media renewed its motion to dismiss.

In its motion, American Media argued that the USOC's complaint failed to state a claim as a matter of law because the title and contents of a magazine reporting on the Olympic Games constitutes non-commercial editorial speech not subject to the Act. It argued further that applying the Act to non-commercial speech, including the title of an editorial work, would violate the First Amendment. The brief also emphasized that a decision allowing the USOC to control which speakers could and could not use the term "Olympic" in their reporting on public events was an invitation to abuse which the USOC had shown itself all too ready to accept. (Among other arguments advanced in the lawsuit, the USOC claimed that the Act authorized it to prohibit the publication in news reporting of photographs of Olympic athletes dressed in their official Olympic team uniforms).

With respect to the scope of the Act, American Media relied on *San Francisco Arts & Athletics v. USOC*, 483 U.S. 522 (1987), which held that the use of Olympic terminology on commercial products such as souvenirs and t-shirts and to promote a competing athletic event violated the Act, but also found the Act constitutional because it

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Magazine Wins Dismissal of USOC Attempt to Exercise Veto Power

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does not reach most noncommercial speech, such as reporting about the Olympics. *Id.* at 536 & nn.14-15 (citing with approval the statement in *Stop the Olympic Prison v. USOC*, 489 F. Supp. 1112, 119 (S.D.N.Y. 1980), that the Act does not prohibit “the news media [from] report[ing] about the Olympic competitions ... [and] ... us[ing] the word ‘olympic’ [in that context]”).

In response to the USOC’s argument that *Olympics USA* constituted a “commercial” use of the Olympic terminology subject to the Act because the magazine itself was for sale, American Media pointed to a long line of trademark and other cases holding that only “speech which ‘does no more than propose a commercial transaction’” is properly considered “commercial,” *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 762 (1976) (citation omitted), and that the mere fact that a publication is for sale does not transform it from editorial and expressive speech to commercial speech. *E.g., id.*; *New Kids on the Block v. News America Pub.*, 745 F. Supp. 1540 (C.D. Cal. 1990), *aff’d*, 971 F.2d 302 (9th Cir. 1992).

With respect to the First Amendment, American Media argued that even if the Act were construed to reach non-commercial uses of the Olympic terminology, proscribing the use of, *inter alia*, the term “Olympic” in the contents and title of an editorial work such as *Olympics USA* would run afoul of constitutional protections. In particular, American Media relied on *Rogers v. Grimaldi*, 875 F. 2d 994 (2d Cir. 1989), and its progeny, which hold that the First Amendment precludes a finding of liability under trademark laws such as the Act based on use of a protected word or phrase in the title of an editorial work unless the title (1) has no relevance to the underlying work and (2) explicitly misleads as to the source or content of the work. *Id.* at 999. Given that the title of *Olym-*

pics USA was clearly relevant to its subject matter and that there was no explicit claim of affiliation with the USOC (in fact, the magazine contained a disclaimer that stated it was not endorsed by or affiliated with the USOC), American Media contended that the USOC could not meet this constitutional test.

In a lengthy memorandum and order, District Judge Kane dismissed the complaint, holding that the Act does not apply to non-commercial speech and that *Olympics USA* does not constitute commercial speech. Having resolved the case on statutory grounds, the court declined to reach the constitutional issue. However, in an odd move, Judge Kane allowed the USOC the opportunity to amend its complaint to allege a Lanham Act

claim. It is unclear how such a claim could proceed under the constitutional constraints set forth in American Media’s motion to dismiss, but we will never

know because USOC opted to forego amending its complaint or appealing Judge Kane’s order and dismissed the action with prejudice pursuant to a settlement agreement.

Judge Kane’s memorandum and opinion is reported and available at 156 F. Supp.2d 1200 (2001).

Mr. Myers and Ms. Sitkin, who are with Steinhart & Falconer LLP in San Francisco, California, represented American Media in this matter in the initial proceedings in California. Mr. Kelley, along with Natalie Hanlon-Leh and Christopher Beall, all of Faegre & Benson LLP, took up the reigns after the case was transferred to Colorado. Michael Kahane, Vice President and General Counsel of American Media, Inc., also assisted in the case.

Given that the title of *Olympics USA* was clearly relevant to its subject matter and that there was no explicit claim of affiliation with the USOC (in fact, the magazine contained a disclaimer that stated it was not endorsed by or affiliated with the USOC), American Media contended that the USOC could not meet this constitutional test.

UPDATES

NY Appellate Panel Applies Single Publication Rule to Internet Libel Suit

A New York appellate panel, applying the single-publication rule to Internet publications, upheld the dismissal of a defamation case brought against the state of New York by a former state employee. See *Firth v. State of New York*, 2001 N.Y. App. Div. Lexis 9382. George Firth, a former director of the Division of Law Enforcement in the Department of Environmental Conservation, brought the defamation suit after a report was posted on the state's website by the state Inspector General. New York's Court of Claims dismissed the suit after finding Firth's defamation claims were precluded by the statute of limitations. The Appellate Division, Third Department, upheld the dismissal. Firth had argued that the continuous violation doctrine should apply, resetting the statute of limitations every time the website was accessed. See *LDRC Libelletter*, April 2000 at 19.

The report, which was posted in December 1996, suggested that Firth had engineered weapon-replacement deals so that he and others in the Division of Law Enforcement could cheaply obtain the old guns and then sell them at a profit. No modification to the report was made after its initial posting. New York has a one-year statute of limitations for libel. Firth filed his suit in March 1998.

All five judges on the panel — Judges Crew, Peters, Carpinello, Rose and Lahtinen — agreed with the Court of Claims that the single-publication rule controlled. In the majority opinion, the panel said it was “unpersuaded” that the statute of limitations “started running anew each time that the report was accessed.” Instead, the statute of limitations began running the day the article was posted online.

Judge Peters and Judge Lahtinen, however, dissented from the decision to uphold the grant of summary judgment, finding that the record “raises an issue of fact as to whether a modification to the State's *website* from which this report could be accessed would constitute a republication which could prevent the dismissal of this action on timeliness grounds” (emphasis added). The dissenters concluded that the case leaves unresolved the question of whether modification of a website constitutes republication of an offending remark, akin to publication of a book in new paperback format.

Nevada Supreme Court Denies Rehearing of Wynn Libel Case

On Sept. 20, the Nevada Supreme Court denied a motion to reconsider its reversal of a \$3.17 million libel verdict for casino owner Steve Wynn. *Wynn v. Smith*, 16 P.3d 424, 29 Media L. Rep. 1361 (Nev. 2001), reh'g denied, ___ P.3d ___ (Nev. Sept. 20, 2001). The court's denial of the motion means that the suit, against publisher Barricade Books, will be remanded for a retrial.

The suit stemmed from a circular for *Running Scared: The Life and Treacherous Times of Las Vegas Casino King Steve Wynn*, an unauthorized biography of Wynn by *Las Vegas Review-Journal* columnist John L. Smith. The circular, which was sent by Barricade Books to 5,000 reviewers, said that the book “details why a confidential Scotland Yard report called Wynn a front man for the Genovese crime family.”

In 1997, a jury awarded Wynn \$1.5 million for damage to his reputation, \$500,000 for emotional distress and mental anguish, \$100,000 in presumed damages for injury to his business and professional standing. The jury also awarded \$1 million in punitive damages and ordered Barricade to pay \$73,000, the profits it made from the book, to Wynn. See *LDRC LibelLetter*, Aug. 1997, at 3.

On appeal, the Nevada Supreme Court unanimously reversed in January 2001 and remanded for a new trial, holding that a jury instruction which required a finding that “the publisher entertained *doubt*” (emphasis added) effectively lowered the standard of proof for finding actual malice. The instruction, the court said, should have required a finding of “serious doubt.” See *LDRC LibelLetter*, Feb. 2001, at 3.

Various media amici joined the case to argue that the Court should recognize that the Scotland Yard report was covered by the fair report privilege. While the Court ruled that the privilege extended to non-judicial government proceedings, it also held that the British police report was not “official” and had not been made publicly available.

Wynn's motion for rehearing of the case argued that the error in the jury instruction was harmless. But the court rejected the motion without comment.

The Supreme Court also affirmed the trial court's grant of summary judgment to book author Smith. In 1999,

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Nevada Supreme Court Denies Rehearing of Wynn Libel Case

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Wynn dropped a separate suit against Smith and Barricade Books owner Lyle Stuart. See *LDRC LibelLetter*, May 1999, at 38.

While the decision means that a retrial is possible, it was welcomed by publisher Lyle Stuart. Barricade Books filed for bankruptcy protection after the jury verdict was reached. Stuart told the *Las Vegas Review-Journal* that he did this in order to be able to continue to sell books, but by August, Stuart was anxious for the Supreme Court to ruling on the rehearing motion, so that Barricade could emerge from bankruptcy and pursue expansion plans.

Defendants Barricade Books and Lyle Stuart were represented by David Blasband of Deutsch Klagbrun & Blasband LLP in New York and JoNell Thomas in Las Vegas. Schreck Morrison in Las Vegas and Barry B. Langberg and Deborah Drooz of the Los Angeles office of Stroock, Stroock & Levan represented Steve Wynn.

Writer Remains in Jail in Houston

Vanessa Leggett, a freelance writer and book author, remains in jail for refusing to testify before a federal grand jury and turn over the research materials she has gathered while working on a book about a Houston society murder. See *LDRC Libelletter*, August 2001 at 7. Leggett, 33, told the Associated Press that she felt "even more powerless and helpless" since September 11.

Leggett was doing research on the 1997 murder of Houston resident Doris Angleton. A federal grand jury looking into the murder issued a broad subpoena to Leggett and the district court held her in contempt when she refused to comply, and on July 20 Leggett went to jail. Leggett has now been in jail twice as long as any other journalist in the history of the United States.

Leggett's attorney has petitioned the 5th Circuit Court of Appeals for a rehearing and a rehearing en banc of the oral arguments in her case. In August, a three-judge panel for the 5th Circuit refused to release her. In its unpublished decision, the panel drew a strong distinction

between the journalist's privilege in a civil case and the journalist's privilege in a criminal case, finding that in a civil case the journalist's privilege against revealing confidential sources is at its strongest.

Journalists Jailed Abroad

Since September 11, one British journalist and two French journalists have been arrested in Afghanistan. Yvonne Ridley, a reporter for the London *Sunday Express*, was arrested on September 28 after crossing into Afghanistan from Pakistan. Afghan authorities claimed her entrance into the country was illegal. Her two guides were also arrested. Originally, the Taliban said Ridley would face trial, but she was later released. One of the French journalists remain in custody.

Taliban intelligence agents arrested Michel Peyrard, a reporter for *Paris Match* on October 9. The next day, Aziz Zemouri, a reporter for *Le Figaro* magazine, was arrested. Zemouri was turned over to the Pakistani authorities and later freed. Peyrard, along with the two Pakistani journalists he was with, remain in jail and it has been reported that he is under investigation for espionage charges. The managing editor of *Paris Match* has sent Peyrard's clippings to the Taliban's embassy in Pakistan to prove that Peyrard was a journalist and not a spy. French President Jacques Chirac formally appealed to the Taliban to release Peyrard.

The Taliban ordered all foreign journalists to leave the country after the September 11 attacks on the World Trade Center and the Pentagon.

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UPDATES

High Court Passes on National Geographic CD ROM Case

Denial of Certiorari Leaves Standing the 11th Circuit Decision in Favor of Freelance Photographer

The Supreme Court denied certiorari in a case that could have helped clarify copyright law in the wake of *New York Times v. Tasini*. See *National Geographic Society v. Greenberg*, No.01-186 (U.S. Oct. 9, 2001). The denial of certiorari leaves standing an 11th Circuit opinion holding that § 201(c) of the Copyright Act of 1976 did not permit the National Geographic Society to publish “The Complete National Geographic: 108 Years of national Geographic Magazine on CD-ROM,” an electronic archive reproducing every issue of National Geographic Magazine exactly as it appeared in print. See *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001). See also *LDRC Libelletter*, April 2001 at 43.

After the Supreme Court decided *Tasini*, 2001 U.S. Lexis 4667, 150 L.Ed.2d 500 (2001), National Geographic petitioned the Court to review its case. National Geographic’s attorneys believed that *Tasini* provided support for reversal of their case since the Court found in *Tasini* that publishers need not pay a new licensing fee for image-based reproductions such as microfilm or microfiche if they appear in the exact same position as they did in the original publication. National Geographic argued that their CD-ROM should be treated in the same manner as microfilm or microfiche — an argument rejected by the 11th Circuit.

In *Tasini*, the Supreme Court put great emphasis on the fact that the databases in question allowed the user to see an article outside of its original context. When a user finds an article on microfilm or microfiche, the user “first encounters the Article in context.” By contrast, a user of the databases involved in *Tasini* would find the articles “disconnected from their original context.” This helped distinguish the databases from microfilm and microfiche for the Court.

In a footnote, Justice Ginsburg avoided answering a question that some felt would control the outcome in *Greenberg*. In footnote 10, the Court passed on the issue of whether or not the original “selection, coordination, and arrangement” preserved the publisher’s reproduction privilege under § 201(c). Section 201(c) provides that,

absent an express transfer of the copyright or any of the rights under it, the publisher of a collective work is presumed to obtain the following privileges: to reproduce an author’s or photographer’s contribution

- (1) as part of that particular collective work;
- (2) any revision of that collective work; and
- (3) any later collective work in the same series.

After *Tasini*, many, including the lawyers representing the publishers in *Tasini*, felt the Court left open to debate the status of image-based copies that not only present a freelance contribution as it originally appeared on the printed page but also require users to navigate on a page-by-page basis, much like microfilm or microfiche. The National Geographic CD-ROM contained photographic digital reproductions of every page of every issue of National Geographic Magazine.

The 11th Circuit panel tried to distinguish the reproduction of the Magazines in CD-ROM from the reproduction in microfilm/microfiche, which the National Geographic Society has published without challenge, by stating that the CD-ROM

requires the interaction of a computer program in order to accomplish the useful reproduction involved with the new medium. These computer programs are themselves the subject matter of copyright, and may constitute original works of authorship, and thus present an additional dimension in the copyright analysis.

The panel relied on this distinction despite the fact that the microfiche reader requires the interaction between the reading machine’s patentable or copyrightable elements and the images of the magazine to create a viewable image for the user.

Kenneth Starr, of Kirkland & Ellis in Washington, D.C., represented the National Geographic Society. Norman Davis, of Steel Hector & Davis in Miami, represented Greenberg.

UPDATES

Supreme Court Denies Tucker's Writ of Certiorari

C. DeLores Tucker, the anti-gangsta-rap activist, and her husband lost their final attempt to bring a defamation suit against *Newsweek* and *Time* when the United States Supreme Court refused to hear their case. See *Tucker v. Fischbein*, No. 00-1714, 2001 U.S. LEXIS 5520. Last January, the Federal Court of Appeals for the Third Circuit upheld summary judgment for *Newsweek* and *Time* based upon the Tuckers' failure to show the magazines acted with actual malice. See *LDRC Libelletter*, January 2001 at 9.

The Supreme Court also refused to hear the case of Richard Fischbein, the lawyer who was also sued by the Tuckers for defamation. See *Fischbein v. Tucker*, No. 00-1723, 2001 U.S. Lexis 5521. Last January, Fischbein was on the losing end of the Third Circuit's opinion when the panel held that a jury could find that Fischbein acted with actual malice by encouraging reporters to write stories on the sex angle. See *LDRC Libelletter*, January 2001 at 9. Still pending in the lower courts is the suit between Tucker and Fischbein.

The litigation was prompted by now-deceased rapper Tupac Shakur. In his 1996 album "All Eyez on Me," the rapper rhymed Tucker's name with an obscenity. Tucker had served as Pennsylvania's secretary of state, headed the National Political Congress of Black Women and in 1994 formed an anti-rap campaign with William Bennet, a former White House drug policy director. After the album's release, Tucker and her husband sued the rapper's estate for, among other things, loss of consortium. The couple initially were seeking \$10 million in damages.

The lawsuit resulted in massive media coverage — most of it focusing on the consortium claim and Fischbein's commentary on the lawsuit. Fischbein was quoted as saying, "[I]t is hard for me to conceive how these lyrics could destroy her sex life ... but we can only wait for the proof to be revealed in court."

Time reported that Shakur's lyrics caused Tucker "so much distress that she and her husband have not been able to have sex." *Newsweek* said the lyrics "iced their sex life."

The Tuckers conceded they were public figures,

meaning they had to show the articles were published with actual malice. Unable to do so, the claims against *Newsweek* and *Time* failed.

Counsel for *Time* was Robin Bierstedt of the *Time* Legal Department in New York. Counsel for *Newsweek* was Kevin T. Baine of Williams & Connolly in Washington D.C. Counsel for Richard Fischbein was Alan Davis of Ballard, Spahr, Andrews & Ingersoll in Philadelphia. Counsel for the Tuckers was Richard C. Angino of Angino & Rovner, Harrisburg, Pa.

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Scientology Libel Case Ends With Denial of Certiorari

The Supreme Court declined a petition for certiorari brought by the Church of Scientology in a libel suit against *Time* magazine. See *Church of Scientology Int'l v. Time Warner, Inc.*, No. 00-1683, 2001 U.S. Lexis 5505. The denial of certiorari left standing the decision by the Second Circuit Court of Appeals affirming *Time*'s summary judgment victory. See *LDRC Libelletter*, January 2001 at 2. The Church of Scientology had sued *Time* for defamation after the magazine's May 6, 1991 article labeled the church a "Cult of Greed."

Time's eight-page cover story, written by Richard Behar, accused the church of being "a ruthless global scam" that "survives by intimidating members and critics in a Mafia-like manner," among other charges. The church, which was founded by science-fiction writer L. Ron Hubbard, challenged six passages from the article, of which several concerned the wrongdoing of individual church members. The Second Circuit, however, held that the challenged statements were either not of and concerning the plaintiff, not published with actual malice, or subsidiary in meaning to the non-actionable statements.

The district court found that two passages, which did not refer to the church but to Scientology generally or individual Scientologists, did not satisfy the of and concerning requirement. At the close of discovery, the district court granted *Time*'s motion for summary judgment based on the absence of actual malice – except for one statement which said "One source of funds for the Los Angeles church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world." The district court, upon reconsideration, dismissed that statement, holding it was subsidiary in meaning to the non-actionable statements in the rest of the article.

The Second Circuit issued a wholesale affirmance of the district court.

Among other issues, the Church of Scientology wanted the Court to find that a public figure libel plaintiff need not establish actual malice when the plaintiff sought only to vindicate his reputation by an award of nominal damages.

The denial of certiorari by the Supreme Court brought to an end the ten-year litigation battle that included two and a half years of discovery – despite the fact that discovery was limited to the issue of actual malice. During discovery, *Time* produced over 20,000 pages of documents and Behar was deposed for 28 days – 16 and a half days over a 12-month period in the main action and an additional 11 and half days in a companion case.

Floyd Abrams, of Cahill, Gordon & Reindel in New York, represented *Time*. Eric Lieberman, of Rabinowitz, Boudin, Standard, Krinsky & Lieberman in New York, represented the Church of Scientology.

Amway's Petition for Certiorari Denied

Procter & Gamble's Lanham Act claim will proceed after the United States Supreme Court denied defendant-Amway's petition for certiorari. See *Amway Corp. v. The Proctor & Gamble Co., et al.*, No. 01-29, 2001 U.S. Lexis 7382. Amway was seeking review of the Fifth Circuit opinion that held a public figure, claiming to have sustained injury to its business reputation by defamatory speech made in a commercial environment and on a matter of public concern, may avoid the actual malice rule by suing under the Lanham Act. See *LDRC Libelletter*, March 2001 at 17.

P&G's principal claim in the case related to the well-chronicled "Satanism rumor" that has plagued P&G since the late 1970s. The rumor controversy has been chronicled in books, magazines, newspapers and other media, including *The Wall Street Journal*, *The New York Times*, *Newsweek*, *Time*, *USA Today*, CNN and other national networks. According to the rumor, the president of P&G revealed that he worships Satan in a national television interview, and that many of P&G's profits go to the church of Satan.

In 1995, the rumor spread again via Amway's national voice mail system. P&G asserted that the transmission of the Satanism rumor by Amway employees was actionable as defamation. P&G also alleged that

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UPDATES

Amway's Petition for Certiorari Denied

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these very same acts violated the commercial activities prong of the Lanham Act. Under §43(a) of the Lanham Act, 15 U.S.C. §1125(a), misrepresentations relating to “commercial activities” are actionable.

The district court granted the defendant's motion for judgment as a matter of law, following the Eighth Circuit opinion in *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999), which applied a public figure/actual malice analysis to a Lanham Act claim. The district court decision was overturned by a panel for the 5th Circuit Court of Appeals, which remanded the Lanham Act claim for disparagement of P&G's “commercial activities” for fact-finding to determine “whether the primary motivation” of the Amway distributors in repeating the rumor “was economic” and thus subject to Lanham Act claims. The district court decision was overturned by a panel for the 5th Circuit Court of Appeals, which determined that the Lanham Act claim for disparagement would apply if the speech was commercial speech. According to the panel, if the “primary motivation” of the Amway distributors in repeating the rumor was “economic,” then it would be considered commercial speech. The 5th Circuit remanded the Lanham Act claim for fact-finding to determine the primary motivation of the Amway distributors.

The case also became an opportunity for re-examining the level of constitutional protection for commercial speech because the panel for the 5th Circuit went on to hold that P&G, even as a public figure, did not need to prove that the speech in question was published with constitutional “actual malice” in order to succeed under the Lanham Act. The panel's opinion said the court is “prevent[ed]” and “foreclose[d]” from applying the actual malice standard by three Supreme Court decisions — *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980), *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985).

Amway filed its petition with the Supreme Court after the 5th Circuit declined to rehear the issue last April.

Amway was represented by Kenneth Starr of Kirkland & Ellis in Washington, D.C. Amway was also represented by Chip Babcock, Richard Griffin, David Moran, Laura Stapleton and Carl Butzer, partners in the Houston, Dallas and Austin offices of Jackson Walker LLP. Procter & Gamble were represented by Stanley M. Chesley of Waite, Schneider, Bayless & Chesley in Cincinnati.

Chiquita Brands Settles Bribery Charges

According to news reports, a Colombian subsidiary of Chiquita Brands International has settled with the SEC over a bribe paid to Colombian Customs officials to obtain a renewal of a storage license. This matter was one of the many points and allegations covered in the investigative reporting series several years ago in the Cincinnati Enquirer on Chiquita Brands that provoked a criminal inquiry into the newsgathering efforts of various reporters at the newspaper, several civil suits against the newspaper and others (most of which are ongoing), various changes in editorial personnel at the paper, and a substantial settlement between Gannett and Chiquita.

In the settlement to a suit brought by the SEC in federal court in Washington under the Federal Corrupt Practices Act which focused on the failure to accurately account for the payment, Chiquita agreed to pay \$100,000. It neither admitted nor denied the allegations in the settlement.

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Third Circuit Vacates Confidentiality Order

Common-law Right of Public Access Trumped the District Court's Order

Public access trumps a district court's attempt to seal the bidding process to select lead counsel in a class action lawsuit the 3rd Circuit ruled. *See In re Cendant Corp.*, No. 99-5485, 2001 WL 893393 (3d Cir. 2001). In a decision by Judge Julio Fuentes, and joined by Judges Scirica and Garth, the Third Circuit Court of Appeals held that the District Court for the District of New Jersey had "failed to articulate the necessary findings for the issuance of the confidentiality order," and thus the accompanying sanction for violating the order was vacated.

The case was brought before the Third Circuit as an appeal by Howard Sirota, a lawyer for a member of a class action lawsuit against Cendant Corporation. Sirota was appealing a \$1,000 fine levied by the district court after Sirota discussed the case with a reporter from *The New York Times*. The district court felt Sirota's comments were improper in light of an earlier confidentiality order. Relying heavily on the common-law right of access, the court of appeals held that the confidentiality order was, itself, invalid.

The Confidentiality Order

The case giving rise to the controversy was a class-action lawsuit against Cendant. In 1998, Cendant announced that it had "uncovered substantial accounting irregularities" and it would have to restate reported annual and quarterly earnings for 1997. A flood of securities litigation ensued, including the class-action lawsuit that involved Sirota's clients.

In an effort to select lead counsel, the district court imposed a confidentiality order that would close off a bidding process which required lawyers to submit proposed fee arrangements. The district court adopted the bidding system, reasoning that "the most effective way to establish reasonable attorney fees is through the marketplace ... competition." After the bids were collected, there was an *in camera* hearing to select the lead counsel.

As a lawyer for a member of the class, Sirota was among the lawyers who submitted a bid. Despite not being selected as lead counsel, Sirota was privy to the identities of the bidders and the nature of their proposals. The pro-

posals were to be sealed until the conclusion of the case.

In March 1999, the district court preliminarily approved a proposed settlement that, among other things, would pay the lead counsel approximately \$34 million. As part of the preliminary approval, the district court instructed any class member who wished to object to the settlement, or object to the lead counsel's fee application, to file written objections with the district court. On behalf of his clients, Sirota filed objections that in part argued the \$34 million fee "far exceeds the fee Lead Counsel agreed to accept [in the bidding auction]."

Ten days after filing his objection, an article on the settlement appeared in *The New York Times*. The relevant portion of the article stated that "Mr. Sirota calculates that the value of [lead counsel's proposed fee] would be \$34 million, and argues that it would thus be about 10 percent of the total settlement fund, a percentage he contends

Essentially, Sirota was sanctioned for speaking to the media.

greatly exceeds the confidential bid that [lead counsel] submitted to the court last year."

After seeing this article, the district court held a contempt hearing and, although not finding him in contempt, levied a sanction based on its belief that Sirota's conduct had breached standards of "good conscience" or "good professionalism." The district court levied the sanction pursuant to L.Civ.R. 101.1, which gives the court "broad authority to discipline attorneys." The district court, however, determined that finding Sirota in contempt was unwarranted because the information published by *The New York Times* referred to Sirota's arguments made in his written objection filed with the court – Sirota had not revealed anything of substance to the reporter. Essentially, Sirota was sanctioned for speaking to the media.

The Propriety of the Confidentiality Order

According to the Third Circuit, the "nominal issue on appeal" was whether the District Court erred in sanctioning Sirota for violating the confidentiality order by speaking to *The New York Times*. That issue, however, was

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Third Circuit Vacates Confidentiality Order

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“predicated upon the more basic question of whether the confidentiality order underlying the sanction was properly issued.” Thus, the Third Circuit felt “compelled” to first address the propriety of the confidentiality order, and found that the strong presumption of public access controlled.

The panel concluded that “in deciding to seal the bids, the district court failed to recognize that the bids were judicial records, subject to the common law presumption of public access. As a result, the district court failed to articulate the necessary findings to override the presumption of access when issuing the confidentiality order.”

Citing *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3d Cir. 1988), the court said it was well-settled that there is “common law public right of access to judicial proceedings and records.” The court further stated that the district court’s auction procedure “transformed the bids into judicial records.” The bids, according to the court, were “essentially submitted in the form of motions to be appointed lead counsel.” Finally, the court concluded that at the time of the district court’s confidentiality order, “the bids were judicial documents subject to the common law right to access.”

Having established that the common law right to access applied, the court found that all the reasons for public access applied “with even greater force here.” According to the court, public access would promote the class members’ confidence in the administration of the case; there would be a diminished possibility of injustice, incompetence, perjury or fraud being perpetrated against the class members who are “not at the forefront of the litigation;” and openness of class actions would provide class members with a better understanding of the class action and a “better perception of its fairness.” Taken together, those factors gave a “strong presumption that the bids and the in camera proceeding would be part of an open process, accessible to the public.”

The court then explained that the presumption in favor of public access could be rebutted. Again citing *Littlejohn* and quoting from *Nixon v. Warner Communications, Inc.*,

435 U.S. 589, 598 (1978), the court explained that every court “has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”

In reviewing the district court’s decision, the panel found that the district court abused its discretion in restricting access. Most importantly, the panel said the district court “did not recognize the presumption of access, nor did it engage in balancing process to determine whether the bids were the type of information normally protected or whether there was a clearly defined injury to be prevented.” The district court, according to the Third Circuit, “should have articulated the ‘compelling countervailing interests’ it found which would authorize the closure through sealing of the matters it sought to protect.” Thus, the confidentiality order was invalid.

“[T]he public’s right of access demands that the attorney must, at the very least, be able to refer a reporter to a public document.”

The Propriety of the Sanctions

Perhaps a logical extension, the panel then held that the sanctions levied against Sirota were improper. The panel, in reviewing the sanctions, found that the district court “could not identify any improper extrajudicial statement,” and thus “it could not sanction Sirota for contacting the media in violation of the confidentiality order.”

The Third Circuit held that the district court “clearly” had authority to proceed under L.Civ.R. 101.1. The panel, however, said a court must consider a number of factors before invoking its “inherent disciplinary jurisdiction.”

The panel listed factors including ensuring that there is “an adequate factual predicate for flexing” the court’s “substantial muscle under its inherent powers.” Upon reviewing the sanctions, the panel held that it was “constrained to conclude that no adequate factual predicate existed to justify the exercise of the district court’s inherent authority.” Significantly, the panel said Sirota had not divulged any information of substance.

The panel summed up its findings by holding that while it “would be improper for an attorney to divulge the substance of a case that the court has deemed confidential, the public’s right of access demands that the attorney must, at the very least, be able to refer a reporter to a public document.”

Eleventh Circuit Overturns District Court Decision to Unseal Documents

Court Concludes the District Court Used the Wrong Legal Standard in Unsealing Documents

The Eleventh Circuit Court of Appeals has reversed a district court decision to unseal documents that were produced by Bridgestone/Firestone in discovery pursuant to a stipulated protective order and later filed with the district court under seal. See *Chicago Tribune Co., et. al. v. Bridgestone/Firestone*, No. 00-15133, 2001 U.S. App. LEXIS 19222 (11th Cir. 2001). The court of appeals, in a per curiam decision, held that the district court applied the wrong legal standard in deciding to unseal the documents, which Firestone claimed contained trade secrets.

In April 1998, the parents of an 18-year-old sued Bridgestone/Firestone when their son's Ford Explorer rolled over. The parents claimed the negligent design and manufacture of the tires was the proximate cause of their son's death. During the course of discovery, the parties stipulated to a protective order that allowed both parties to designate documents as confidential and subject to protection under Fed. R. Civ. P. 26(c)(7). Some of the documents that were designated confidential were later filed with the court, under seal, in connection with discovery and summary judgment motions. When the parties reached a settlement, those court documents were kept under seal in the Court file.

"Good Case" Wins Out

Following the settlement, Firestone came under public scrutiny for the safety of its tires. Chicago Tribune Company, The Washington Post Company, CBS Broadcasting Inc., and Los Angeles Times Communications, LLC sought leave to intervene and to obtain access to the discovery documents filed with the Court under seal. Firestone, in turn, agreed to unseal some documents, but resisted the unsealing of nine documents and 10 pages of legal-brief excerpts, claiming these documents contained trade secrets. In support of its efforts to keep the documents sealed, Firestone supplied a privilege log and the affidavit of the Senior Product Engineer in its Product Analysis Department.

The district court granted the motion to intervene and directed that the sealed court documents be unsealed. Apply-

ing the standard applicable to the closure of court records, the district court held that Firestone had failed to show continued closure of the records was "necessitated by a compelling interest" and that the closure was "narrowly tailored to that compelling interest."

On appeal, Firestone argued for the application of the Fed. R. Civ. P. 26 "good cause" standard. In turn, the media companies argued there were two sources of a right to access — a common-law right of access and a First Amendment right of access — and both required the application of the standard used by the district court. The Eleventh Circuit held that, with respect to "presumptively confidential discovery materials," the constitutional and common-law right of

access claims are to be measured by the "good cause" standard of Rule 26.

First Amendment Right of Access

The court of appeals noted that, in prior decisions, it had extended the scope of the constitutional right of access beyond the traditional application to criminal proceedings. Nonetheless, without specifically addressing the fact that the sealed materials in question were filed with the district court, the Court said "[m]aterials merely gathered as a result of the civil discovery process . . . do not fall within the scope of the constitutional right of access's compelling interest standard." In a footnote, the Court indicated that its reasoning was drawn from the decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 10 Med. L. Rptr. 1075 (1984). The Court then held that "[p]ublic disclosure of discovery material is subject to the discretion of the trial court and the federal rules that circumscribe that discretion," and further that, "where discovery materials are concerned, the constitutional right of access standard is identical to that of Rule 26(c) of the Federal Rules of Civil Procedure." Thus, according to the court of appeals, where a third party seeks access to discovery materials, even after those materials are filed with the Court under seal, the constitutional right of access standard is

The Court then held that "[p]ublic disclosure of discovery material is subject to the discretion of the trial court and the federal rules that circumscribe that discretion."

Eleventh Circuit Overturns District Court Decision to Unseal Documents

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“identical” to Fed. R. Civ. P. 26(c), which requires only a showing of good cause by the party seeking protection.

Common-Law Right of Access

The Court began by stating that the common law right of access applies to both criminal and civil proceedings, establishes a “presumption that criminal and civil actions should be conducted publicly,” and “is instrumental in securing the integrity of the [judicial] process.” However, the court of appeals again emphasized the limitations of the right of access. The court said that the right to inspect and copy public documents “is not absolute,” and a “judge’s exercise of discretion in deciding whether to release judicial records should be informed by a ‘sensitive appreciation of the circumstances that led to ... [the] production [of the particular document in question],’” citing *Nixon v. Warner Comm., Inc.*, 435 U.S. 539, 3 Med. L. Rptr. 2074 (1978).

When applying the common-law right of access, the court said federal courts “traditionally distinguish between those items which may properly be considered public or judicial records and those that may not; the media and public presumptively have access to the former, but not to the latter.” The Court held that, only in “certain narrow circumstances” will the common law right of access demand “heightened scrutiny of a court’s decision to conceal records from the public and the media.” Specifically, when “the trial court conceals the record of an entire case, making no distinction between those documents that are sensitive or privileged and those that are not, it must be shown that ‘the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.’” In all other cases, the Court held, the common law right of access simply requires the Court to “balance the competing interests of the parties.” That balancing test, said the Court, may be resolved by application of the Rule 26 good cause standard.

Although the case was ultimately remanded to the district court, the court of appeals gave some strong guidance to the district court on the inquiry into the common law right of access. The court said that “material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is sub-

ject to the common-law right, and we so hold. This means that the Firestone documents filed in connection with motions to compel discovery are not subject to the common-law right of access.” And, in the next paragraph, the court said “where a party has sought the protection of Rule 26, the fact that sealed material is subsequently submitted in connection with a substantive motion does not mean that the confidentiality imposed by Rule 26 is automatically forgone. Before disclosure is appropriate, a court must first conduct the common-law right of access balancing test.”

Federal Rule of Civil Procedure 26(c)

Having found that the constitutional right of access and the common-law right of access did not impose a higher burden on the party seeking to keep records sealed than that imposed under Fed. R. Civ. P. 26, the court turned its analysis to that Rule. Rule 26 imposes a showing of “good cause” on the party seeking closure.

According to the court of appeals, the federal courts have “superimposed a balancing of interests approach for Rule 26’s good cause requirement,” which requires a court to “balance the party’s interest in obtaining access against the other party’s interest in keeping the information confidential.” Since the district court had not done this sort of balancing, the court of appeals remanded the case to the district court.

The court of appeals instructed the district court to revisit the trade secret issue “in the context of the good cause determination.” Although the district court had determined that the affidavit submitted by Firestone to support its trade secrets contention was conclusory, the court of appeals noted that that determination was made “in conjunction with the application of what we now determine was an erroneous legal standard” — i.e., the compelling interest standard. The court of appeals instructed the district court that if it should determine that Firestone’s documents did contain trade secrets, the district court “must balance Firestone’s interest in keeping the information confidential against the Press’s contention that disclosure serves the public’s legitimate interest in health and safety.”

The Concurrence

Circuit Judge Susan Harrell Black filed a special concurrence to express her “concern about third parties — who

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Federal Court Allows Access to Records in *Wen Ho Lee* Case Because Sealing Was Not Necessary to Protect National Security

By Roger Myers, Lisa Sitkin and
Monica Hayde

Perhaps foreshadowing access battles to come, a federal court in New Mexico has unsealed a host of records filed in the failed prosecution of Dr. Wen Ho Lee after the government conceded there was no basis for sealing in the first

Eleventh Circuit Overturns District Court Decision to Unseal Documents

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have no cause of action before the court — using the discovery process as a means to unearth documents to which they otherwise would have no right to inspect and copy.” According to Judge Black, the “purpose of discovery is to resolve legal disputes between parties, not to provide newsworthy material.”

Her concurrence focused primarily on the use of “umbrella protective orders,” which she said the media is permitted to challenge only as “being too broad, based on a variety of factors.” Judge Black wrote that, because the court of appeals specifically found that Firestone had argued only that the documents should remain under seal because they are trade secrets, she concurred in the holding that, absent a showing that the challenged documents are in fact trade secrets, maintenance of the seal would be improper. According to Judge Black, however, in the future a party “may argue that, although the individual documents fail to qualify as privileged material, they nonetheless should be sealed because the umbrella order is necessary to facilitate the free flow of information and thus satisfies the good cause requirement.”

Chicago Tribune Company and Los Angeles Times Communications LLC were represented by Robert Rothman and Roger Chalmers of Arnall Golden Gregory LLP in Atlanta. CBS Broadcasting Inc. and The Washington Post Company were represented by Kevin T. Baine and Mary-Rose Papan-drea of Williams & Connolly LLP in Washington, D.C. Bridgestone/Firestone was represented by Lisa Godbey Wood of Gilbert, Harrell, Gilbert, Sumerford, Martin & Gregg of Brunswick, Ga., and Dorothy Yates Kirkley and Judith O’Kelley of Kirkley & Payne in Atlanta.

place. Many of the documents were sealed for more than 18 months on the pretense that sealing was necessitated by national security interests. Only after a civil rights organization moved to unseal the records, and the court set a hearing, did the government — two court days before the hearing — concede it had overreached in sealing all the documents. Left unresolved, pending potential further proceedings, was whether the court would review the government’s redactions or would defer to the government’s censors, an issue the court declined to address unless and until a challenge is brought to the redactions.

A former researcher at Los Alamos National Laboratory, Dr. Lee was charged in December 1999 with 59 counts of unlawfully gathering national defense information. Based on government testimony that Dr. Lee presented a grave danger to national security, he was held in solitary confinement for nine months. Finally, after he agreed to plead guilty to one minor count of mishandling computer data, he was freed with an apology from the judge who presided over the government’s case against him.

At the pre-trial stage, the defense sought discovery on whether Dr. Lee had been targeted for suspicion of espionage because he is of Chinese descent. The government opposed this discovery, but the district court ordered it to produce documents relating to the selective prosecution defense for *in camera* review. Two days before the deadline for production, the government dropped 58 of the 59 counts against Dr. Lee. However, a host of court records remained under seal pursuant to an order that allowed the executive branch and court security personnel to review, redact and seal documents filed in the case.

Chinese for Affirmative Action, a San Francisco-based civil rights organization, monitored the case and has been investigating whether the national laboratories improperly target Asian-American scientists for suspicion of espionage. The collapse of the government’s case against Dr. Lee left many questions unanswered, including whether Dr. Lee was the victim of selective prosecution. Hoping that the sealed documents might shed light on these questions, and seeing no effort by the government to declassify the sealed records, CAA filed its motion to unseal in June of this year. Last month, the same judge who apologized to Dr. Lee a year

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Federal Court Allows Access to Records in *Wen Ho Lee* Case

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earlier granted CAA's motion in large measure and, in so doing, implicitly recognized that the government's national security concerns never warranted wholesale sealing in the first place.

In its motion, CAA conceded national security was a legitimate interest warranting sealing, but argued the district court had improperly deferred to the government's assertions of what needed to be sealed. The court had accepted the parties' stipulated protective order, which mirrored the Security Procedures established by then-Chief Justice Warren Burger under the Classified Information Procedures Act, 18 U.S.C. §§ 1-16, by delegating to the court security officer, "after consultation with the attorney for the government" and without judicial oversight, the responsibility to determine which records should be sealed or redacted. CAA argued that this delegation violated separation of powers doctrine and the First Amendment and common law rights of access.

In response to CAA's motion, the government agreed that the sealed records should be reviewed for national security concerns and released subject to the government's redactions. In other words, the government conceded precisely what CAA argued in its motion — that wholesale sealing of the records had never been necessitated by any compelling interest, national security or otherwise.

Where the government and CAA disagreed was with respect to who should make the final decisions regarding sealing or redactions. Having conceded that government attorneys and the court security officer had overreached, the government nonetheless argued that they — not the court — should decide what to redact. CAA disagreed, pointing to cases such as *Procter & Gamble Co. v. Banker's Trust Co.*, 78 F.3d 219 (6th Cir. 1996) and *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), which hold that courts cannot delegate sealing decisions to the parties, and to *In re Washington Post*, 807 F.2d 383 (4th Cir. 1986), one of the few cases addressing closure or sealing orders under CIPA. For media attorneys litigating this issue in the future, *In re Washington Post* provides an excellent road map, as it holds that the First Amendment's procedural and substantive tests apply even where national security interests or classified information are at issue, and that courts cannot abdicate their responsibility to review the govern-

ment's assertions regarding national security.

Unfortunately, Judge Parker declined to reach this issue after the government, on Friday, Sept. 28, informed the court it would agree to unseal the bulk of the records. At the Oct. 2 hearing, Judge Parker ordered the unsealing of 20 of the 22 records at issue, but when CAA attempted to object to the redactions and sealing of the two remaining records, the judge said he would not address that issue until CAA had reviewed the records and filed a new motion.

CAA has not yet decided whether to challenge the continued sealing or the government's redactions, but is concerned both by the court's apparent willingness to defer to the government and its written order, issued two days after the hearing. That order appeared to accept the government's contentions and found, as to one of the two records still under seal, no right of access (a point the court had not allowed CAA to address at the hearing). The order also justified sealing of the two records — one at the government's request, the other at the request of defense counsel — on the ground they were "not relevant to the issue of selective prosecution."

Despite these concerns and Judge Parker's unwillingness to decide the ultimate issue, his order did result in unsealing the majority of the information under seal. The contents of those records have "shed light" on the case, according to news articles, including the prosecution's subpoena to UCLA — where Dr. Lee's daughter was a student — for information on every student of Chinese or Taiwanese descent. It also serves as a timely reminder, as the government again seeks to withhold information in the name of "national security," how tempting it is for the government to take an overbroad view of what needs to be withheld — or to use that justification to withhold information for other purposes — and how essential it is for the media, the public and the courts to be vigilant in holding the government to its burden of demonstrating that withholding is in fact necessary to protect national security.

Mr. Myers, Ms. Sitkin and Ms. Hayde are with Steinhart & Falconer LLP in San Francisco, which represented Chinese for Affirmative Action in this matter. Their co-counsel were Robert Kim of the American Civil Liberties Union of Northern California, Zenobia Lai of the Asian Law Caucus and Hope Eckert in New Mexico.

Ninth Circuit Upholds Its Unpublished Opinions Rule

Panel Rejects Constitutional Arguments Made by 8th Circuit

Deferring to judicial efficiency, a 9th Circuit panel upheld the circuit's rule against citing unpublished opinions. See *Hart v. Massanari*, No. 99-56572, 2001 U.S. App. LEXIS 20863 (9th Cir. Sept. 24, 2001). The opinion expressly rejected *Anastasoff v. United States*, the now-vacated 8th Circuit opinion that struck down a similar circuit rule as unconstitutional. See *LDRC Libelletter*, September 2000 at 47.

The controversy centers on circuit rules that allow courts of appeals to issue unpublished dispositions that do not carry binding precedential value. Despite the differences in the circuit rules, the 9th Circuit panel found the rules to be essentially the same. Deeming these rules "an effort to deal with precedent in the context of a modern legal system," the unanimous panel determined that 9th Cir. R. 36-3 did not violate the United States Constitution by allowing courts of appeals to issue unpublished dispositions that are "not binding precedent," and forbidding lawyers to cite to those unpublished dispositions. In contrast, the *Anastasoff* court concluded that 8th Cir. R. 28A (i) was unconstitutional, insofar as it would allow courts of appeals to "avoid the precedential effect" of prior decisions and purport to "expand the judicial power beyond the bounds of Article III."

Background: The Anastasoff Case

The *Anastasoff* decision was vacated as moot after the parties agreed to a settlement. 235 F.3d 1054 (8th Cir. 2000) (en banc), *vacating as moot*, 223 F.3d 898. Nevertheless, the decision was a landmark decision. The *Anastasoff* ruling, written by Judge Richard Arnold, consists almost entirely of an extended historical analysis of the roots and limitations of judicial power. The constitutional argument is based on Article III, § 1, cl. 1 of the Constitution, which states that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Citing *Marbury v. Madison*, 5 U.S. 137 (1803), Judge Arnold wrote that "inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law." Putting great emphasis on the consistent

application of law, Arnold wrote that a court's "declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties."

Judge Arnold continued his argument by stating that the principles that form the doctrine of precedent were "well established and well regarded at the time this nation was founded," and the Framers of the Constitution "considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution." It followed, then, that a circuit rule that would — in Judge Arnold's opinion — expand the powers of the judiciary beyond those powers conferred under Article III must be found unconstitutional.

The opinion, according to Judge Arnold, was "not about whether opinion ought to be published, but whether they ought to have precedential effect, whether published or not." At the same time, however, the opinion was not meant to create "some rigid doctrine of eternal adherence to precedents," but a system of judicial accountability.

9th Circuit: Hart v. Massanari

Simply put, the *Hart* court felt *Anastasoff* "overstates the case." The 9th Circuit panel concluded that rules that allow courts of appeals to issue non-binding opinions are "hardly the same as turning our back on all precedents, or on the concept of precedent altogether." Rather, according to panel, these rules are "an effort to deal with precedent in the context of a modern legal system, which has evolved considerably since the early days of common law, and even since the time the Constitution was adopted."

Taking aim at the 8th Circuit's constitutional analysis, the 9th Circuit panel was concerned with the fact that the 8th Circuit relied solely on Article III, § 1, cl. 1. More specifically, the 9th Circuit panel was troubled by the fact that the 8th Circuit relied on a clause that has never been used to delimit powers. In footnote 5, the court added that the little authority on point "supports the view that

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the text of the judicial power clause is descriptive,” not prescriptive. The panel even described *Anastasoff* as possibly “the first case in the history of the Republic to hold that the phrase ‘judicial Power’ encompasses a specific command that limits the power of the federal courts.” The 9th Circuit panel concluded that the judicial power clause has “never before been thought to encompass a constitutional limitation on how the courts conduct their business.”

The 9th Circuit panel then examined the history of the concept of precedent. From the outset, the panel made it clear that to adopt *Anastasoff*'s position, the panel would have to be “satisfied that the Framers had a very rigid conception of precedent, namely that all judicial decisions necessarily served as binding authority on later courts.” In turn, the panel looked to the modern conception of precedent and found that the “overwhelming consensus in the legal community has been that having appellate courts issue nonprecedential decisions is not inconsistent with the exercise of the judicial power.” Consequently, the panel felt that to accept *Anastasoff*, it would have to “conclude that the generation of the Framers had a much stronger view of precedent than we do.” Instead, the panel determined that the concept of precedent is “far stricter” today than it was at the time of the Framing. The 9th Circuit panel conceded that the principle of precedent was “well established” in the common law courts by the time Article III of the Constitution was written, but it was not applied in the “strict sense” in which it is applied today.

Looking to the history of the English courts, the 9th Circuit panel found that the present-day concept of precedent is very different from the common law concept of precedent. Among the historical evidence, two reasons stand out to explain the differing views of precedent. First, as the 9th Circuit panel stated, common law judges did not “make law,” but rather they “found” the law. At that time, according to the panel, an opinion was evidence of what the law was, not an independent source of law. Thus, if an opinion was deemed incorrect, the common law judges held that single case to be incorrectly decided.

Secondly, the 9th Circuit panel attributed the “absence at common law of a distinct hierarchy of courts” as an-

other reason for the differing views of precedent. The panel concluded that the “modern concept of binding precedent — where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy — came about only gradually over the nineteenth and early twentieth centuries,” after lawyers began to accept the premise that judges made, not found, law, and a clearly defined hierarchy was established.

Where the 8th Circuit was concerned with judicial accountability, the 9th Circuit focused on judicial policy. Turning from history to policy, the 9th Circuit panel also found that a system of “strict binding precedent” would suffer from the “defect that it gives undue weight to the first case to raise a particular issue.” The modern “organization and structure of the federal courts” came about as a result of “certain policy judgments about the effective administration of justice” — such as rules allowing for nonprecedential decisions. The 9th Circuit panel feared that all flexibility would be lost within the federal court system if *Anastasoff* was accepted. The panel felt that if *Anastasoff* was correct, then the 2nd Circuit would have “no authority to disagree” with an 8th Circuit case that is “directly on point,” and the first circuit to rule on a legal issue would then “bind not only itself and the courts within its own circuit, but all inferior federal courts.”

Finally, the 9th Circuit panel felt that *Anastasoff* would result in a flood of work for the federal courts, as federal courts of appeals generally “lack discretionary review authority,” and would have to issue lengthy opinions for every case, carefully laying out the facts and the law.

Almost defensively, the 9th Circuit panel added that issuance of a nonprecedential decision “does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented.” On the contrary, issuance of a nonprecedential opinion simply means that the opinion is “not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases,” according to the panel.

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Department of Justice Misses Senate Deadline to Explain AP Phone Subpoena

Media Write Ashcroft on Issue

When the Justice Department disclosed in late August that it had secretly compelled Verizon last May to turn over the home telephone records of Associated Press reporter John Solomon, U.S. Sen. Charles Grassley gave the Justice Department until Sept. 24 to explain the subpoena. In the wake of Sept. 11, that deadline was missed.

Since Sept. 11, the Justice Department has been seeking expanded police powers to combat terrorism. Grassley spokeswoman Jill Kozeny told *Editor & Publisher* that Grassley has informed the Justice Department that there will be less resistance to expanded police powers if the Justice Department can either show they followed procedures in the subpoena or they admit it was a mistake.

By compelling Verizon to turn over the home telephone records, the Justice Department had apparently violated its own long-standing guidelines governing such subpoenas by failing to provide advance notice to the reporter and by compelling disclosure prior to exhausting all other alternative sources of information. After disclosing the subpoena, the Justice Department publicly insisted that there had been no change in its policy.

The Attorney General's Guidelines state that their purpose is to "provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function."

Media Expresses Concern

Much like Sen. Grassley, on Sept. 5, the AP requested a "full and public accounting of the facts and circumstances surrounding the decision to issue this subpoena." The AP also asked for the destruction of Solomon's phone records held by the Justice Department.

On Oct. 15, Floyd Abrams, of Cahill Gordon & Reindel in New York, backed up the Associated Press's requests with a letter to Attorney General John Ashcroft sent on behalf of ABC, CBS, CNN, NBC, the Los Angeles Times, The New York Times, The Wall Street Journal and Time, Inc.

Abrams wrote that he media entities "thought seriously of deferring the sending" of the letter or "even not sending it at all," lest they be "misunderstood as minimizing in any way the concern we all share about fashioning an appropriate response to the attack and on protecting our citizens from any future attacks of any sort." The letter was sent after the entities concluded that in the days ahead it will be "all the more important for the press to report fully as well as fairly about events that occur in our newly tumultuous world."

That said, Abrams's letter emphasized that journalists "simply cannot perform their role of informing the public, as protected by the First Amendment," if the Justice Department ignores its own guidelines and issues a subpoena for a journalist's home telephone records without exhausting all other reasonable investigative steps or providing "reasonable and timely" advance notice. Abrams noted that telephone records "may reveal the identity of confidential sources as well as reportorial methods, not to mention communications of an entirely private nature."

Finally, Abrams added that in the future, it is of "critical import that the Department adhere to its guidelines before serving any subpoenas on the press or otherwise seeking to obtain information about its activities."

9th Cir. Upholds Its Unpublished Opinions Rule

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The Underlying Case

The 9th Circuit panel was given an opportunity to consider this issue when an attorney cited an unpublished opinion. This decision was part of a show-cause hearing. The panel dismissed the order to show cause why the attorney should not be disciplined for violating the circuit rule.

The panel's decision does not fully address the portion of the rule that prohibits attorneys from citing unpublished opinions.

UPDATE: Government Agrees Not to Pursue Bookstore Subpoenas

Three bookstores Had Been Subpoenaed in Connection with Torricelli Investigation

According to the American Booksellers Foundation for Free Expression (ABFFE), the federal government has agreed not to pursue the production of customer records requested in subpoenas issued to three bookstores. The subpoenas, seeking all records relating to purchases by U.S. Sen. Robert G. Torricelli and seven other people since Jan. 1, 1995, were part of an investigation of the senator from New Jersey. The decision by the federal government came after the Justice Department was notified of the bookstores' intentions to file a motion to quash the subpoenas on First Amendment grounds.

The tactic of issuing search warrants and subpoenas for bookstore records has become more common after Independent Counsel Kenneth Starr subpoenaed several Washington, D.C. bookstores in 1998 seeking information on Monica Lewinsky's book purchases. In April 2000, police in Denver served a search warrant on the Tattered Cover bookstore seeking customer purchase information in connection with a drug investigation. The scope of that search warrant was subsequently narrowed on First Amendment grounds. See *LDRC Libelletter*, November 2000 at 25. In Kansas City later that year, the Drug Enforcement Agency subpoenaed a Borders bookstore. A U.S. District Court in Kansas quashed the subpoena. See *LDRC Libelletter*, December 2000 at 29.

The test under *In re Grand Jury Subpoena to Kramer-books & Afterwards, Inc.*, 26 Media L. Rep. 1599 (D.D.C. 1998) requires a court to weigh the government's interest in the requested information, the nexus between that information and the government's investigation, the availability of the information from other sources, and the extent of the government's exposure of other constitutionally protected matters.

The three bookstores — Books & Books in Coral Gables, Fla., Olsson's Books and Records in Washington, D.C., and Arundel Books in Los Angeles — all claimed the subpoena would have required the bookstores to turn over personal information about their customers, including the titles of the books the customers had purchased. As with the Monica Lewinsky case, there was a fear that this would have a chilling effect on the First Amendment rights of all bookstore customers.

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Open and Shut: The Doors of Access to the New York Courts

By Douglas Jacobs, Jonathan Sherman
and Jennifer Ramo

On September 5, 2001, Courtroom Television Network took the long simmering battle for cameras in New York state trial courts to the next — and, if it succeeds, final — level. It sued the State.

For more than four years, cameras have been barred from New York's trial courts. Section 52 of the State Civil Rights Law bars "the televising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory processes is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state." Because the statute prohibits the televised coverage of any proceeding in which compelled testimony "may" be taken, and because all trials involve the potential for such testimony, Section 52 constitutes a *per se* ban on cameras in New York's trial courts. Violation of the statute is a misdemeanor, and so carries with it the possibility of imprisonment.

Between 1987 and 1997, the New York Legislature lifted this ban and permitted a series of "experiments" in which trial court proceedings were televised. Those experiments were declared — in reports reviewing them, commissioned by the Legislature — to have been unqualified successes. But, for reasons more to do with politics than principle, the Legislature decided against doing away with Section 52 permanently. On July 1, 1997, New York trials could no longer be televised.

In its lawsuit against the State (filed in the Supreme Court of New York County, and also naming as defendants the Governor, the Attorney General, and the District Attorney of New York County), Court TV asserts that Section 52 is unconstitutional under Article 1, Section 8 of the New York State Constitution and the First Amendment of the United States Constitution. The central point of the lawsuit is as simple as it is commonsensical: at the dawn of the 21st century, where New York citizens obtain most of their information about govern-

ment on television, it is simply absurd — and unconstitutional — to permit ourselves to be governed by a statute that was enacted a decade before the Nixon-Kennedy debates — a statute that bars the televising of every trial, in every instance.

Background of the Statute

Section 52 was enacted in 1952. The central reason for it was the widely held perception that cameras — bulky, requiring klieg lights and snaking cables — disturbed the dignity of trials, and hindered the truth-seeking process both by their existence and because participants were thought to feel self-conscious about being seen on television. In fact, until 1935, cameras and newsreel photographic equipment were widely permitted in trial court proceedings. For example, cameras, newsreel photography and radio microphones were permitted at the 1924 prosecution of Leopold and Loeb, who were represented by Clarence Darrow, and the 1925 trial of John T. Scopes, in which Darrow and William Jennings Bryan served as opposing counsel.

In the mid 1930s, however, attitudes toward this sort of coverage changed dramatically in the wake of the trial of Bruno Hauptmann. Hauptmann, you may recall, was accused, convicted, and subsequently executed for the kidnapping and slaying of the 18-month-old son of Charles Lindbergh. The Hauptmann trial generated immense public interest, and extensive photographic and radio coverage, both in-court and out-of-court. Observers blamed cameras for that public interest — one famously dubbed the press coverage surrounding it, both in and out of court, a "Roman Holiday." Those critical views led to a national backlash against the use of photographic equipment in, and the radio broadcasting and photographic publishing of, court proceedings. As part of that backlash, in 1937, the House of Delegates of the American Bar Association adopted Canon 35, which admonished judges to prohibit the taking of photographs in courtrooms and the broadcasting of court proceedings. Ac-

[U]ntil 1935, cameras and newsreel photographic equipment were widely permitted in trial court proceedings.

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cording to Canon 35, such activities “degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.”

As television came into use in the postwar era, the House of Delegates, in 1952, amended Canon 35 to proscribe televised court proceedings. That same year, New York enacted Section 52. In approving Section 52, New York’s Governor commented that “[b]atteries of cameras, microphones and glaring lights carry with them attendant excitement, distractions and the potential for improper exploitation and intolerable subversion of the rights of the witness. Official proceedings must not be converted into indecorous spectacles.”

A decade later, 49 states barred television trial coverage by statute, court rule, and/or the adoption of Canon 35. The anti-camera attitude was reflected in the Supreme Court’s famous (though narrowly decided) ruling, *Estes v. Texas*, 381 U.S. 532 (1965). Though not addressing Section 52, the Court reversed a defendant’s conviction because, among other things, the televising of the pre-trial hearing and parts of the trial had been found to contribute to the deprivation of his fair trial rights.

But the Court, even then, left the door open for a change in the law. Justice Harlan, in a dispositive concurring opinion, stated that “the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives, the constitutional judgment called for now could, of course, be subject to re-examination.” The plurality opinion of the Court echoed that view.

Change Happens; New York Joins

It was not long until attitudes began to change. Recognizing the increasing role that television had begun to play in the daily information diet of Americans, states began to authorize various experiments to televise trials.

Those trials did not bear out the fears that underlay the enactment of statutes such as Section 52. Indeed, in 1981 — only sixteen years after *Estes* — the Supreme Court decided *Chandler v. Florida*, 449 U.S. 560 (1981). There, while not specifically overruling *Estes*, the Supreme Court affirmed the conviction of two individuals whose trial had been televised in Florida over their objections. The Court ruled that *Estes* had not announced a *per se* ban on the televising of criminal trials, essentially confining *Estes* to its facts.

What was particularly important about *Chandler* was its recognition that the recent experimentation with televised trial coverage in a number of jurisdictions was working — well. The Court noted the “change in television technology since 1962 when *Estes* was tried,” *id.* at

All of the reports determined, through exhaustive research and study, that no harm been done by either the presence of cameras or the broadcasting of trials.

576; that procedural protections had been built into the Florida rule at issue, as well as those of other states, *id.* at 576-77; and that “no one has been able to present empirical data sufficient to establish

that the mere presence of the broadcast media inherently has an adverse effect on the [judicial] process,” *id.* at 578-79. The Court also noted that “the data thus far assembled are cause for some optimism about the ability of states to minimize the problems that potentially inhere in electronic coverage of trials.” *Id.* at 576.

By 1987, the New York State Legislature, echoing movements in other states, crafted a temporary experiment to permit cameras in New York trial courts for the period of 18 months while studying the effects. Section 218 of the Judiciary Law temporarily removed the ban contained in Section 52 and opened trial courts to cameras, while appointing the Chief Administrative Judge to keep a close eye and report on the proceedings, the participants, and the outcome. A year later, the Judge issued a report concluding not only that cameras did not harm the judicial process, but that Section 218 should be made permanent. The legislature re-enacted Section 218 three times over the next decade (with a break of one

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year) and continued commissioning reports to review the experiments.

All of the reports — the last two the result of legislatively appointed commissions, the second of which took into account the O.J. Simpson criminal trial — determined, through exhaustive research and study, that no harm been done by either the presence of cameras or the broadcasting of trials, and that the public had benefited considerably from the coverage of trials on television. The commissions found that the presence of cameras had no impact on the reversal rate of televised trials — indeed, they found that not a single trial had been reversed or judgment vacated because of the presence of cameras — nor any interference with the fair administration of justice.

In 1997, despite the pro-camera conclusions reached by all four New York reports and both New York commissions, the state legislature let Section 218 expire, reviving the ban created by Section 52. Section 52 is now the law of New York. Despite extensive lobbying efforts and open support from several prominent members of New York's judiciary, Court TV and other press entities were unable to resurrect Section 218 or obtain any other similar legislation from the legislature permitting cameras in trial courts.

The Overwhelming Pro-television Movement in Other Jurisdictions

In 1965, when *Estes* was decided, 49 states had provisions such as Section 52. Today, the situation is all but reversed. Cameras are permitted in courts, in one form or another, in all 50 states. Forty states permit trials to be televised; 37 of them permit criminal trials to be televised. Indeed, the experience of New York's experiments has been played out in numerous other jurisdictions.

In the past two and a half decades, 29 jurisdictions have formally studied and evaluated the effects of the

televising of such proceedings; some have conducted more than one such evaluation. As in New York, the studies have examined the impact of televised trials on the dignity of the proceedings, the administration of justice, and the effect of the cameras on trial participants, including witnesses, jurors, attorneys, judges and other interested parties. The evidence assembled by all of these studies leads to the same conclusion as the four conducted in New York: televised trials do not disrupt proceedings or impair the administration of justice, and they provide substantial benefits to the public.

Take, for example, the Florida system, whose constitutionality was upheld by the Supreme Court in *Chandler*. In 1977, the Florida Supreme Court initiated a pilot program allowing “the electronic media [to] televise

Cameras are permitted in courts, in one form or another, in all 50 states. Forty states permit trials to be televised; 37 of them permit criminal trials to be televised.

and photograph” civil and criminal judicial proceedings in all courts of the State of Florida, subject to specific restrictions on types of equipment, light and noise levels, camera placement and audio pickup, and subject to the “reasonable orders and direction of the presiding trial judge in any such proceeding.” See *In re Petition of Post-Newsweek Stations*, 347 So. 2d 402, 403 (1977). In conjunction with the Florida Experiment, “all media participants in the program, all parties hereto, and all participants and judges” were requested to furnish to the Florida Supreme Court a “report of their experience under the program.”

When the Florida experiment ended on June 30, 1978, the Florida Supreme Court received and reviewed briefs, reports, letters, resolutions, comments and exhibits. The Court conducted its own independent, separate surveys of witnesses, jurors, court personnel (excluding judges), and attorneys. Responses were sought from individuals who had participated in or were associated with trials in which audio-visual coverage had been permitted, and all responses were to remain anonymous. Prior to their distribution, the questionnaires were re-

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viewed by the Supreme Court, the Judicial Planning Unit of the Office of the State Courts Administrator and interested academicians. Finally, the Florida Conference of Circuit Judges conducted a separate survey of trial court judges who had participated in televised proceeding. *In re Petition of Post-Newsweek Stations*, 370 So. 2d 764, 767-68 (1979).

After reviewing this material, the Florida Supreme Court concluded that the Florida Code of Judicial Conduct “should be amended to permit access to the courtrooms of this state by electronic media subject to standards adopted by this Court and subject also to the authority of the presiding judge at all times to control the conduct of the proceedings before him to ensure a fair trial to the litigants.”¹

A second example is the report of the Federal Judicial Center, which followed a two-year pilot program in six federal district courts — including one in New York — evaluating the ef-

fect of cameras in civil proceedings. The Federal Judicial Center reported in November 1993 that “[o]verall, attitudes of judges toward coverage...were initially neutral and became more favorable after experience with electronic media coverage under the pilot program.” Moreover, “[j]udges and attorneys who had experience with electronic media coverage under the program generally reported observing little or no effect of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.”

In 1994, based on all the data gathered during the two-year pilot program, the subcommittee on cameras and courts of the Judicial Conference recommended that the Judicial Conference “authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms, subject to Conference guidelines.” The recommendation was based on the determination that the in-court presence of the electronic media “did not disrupt court proceedings,

affect participants in the proceedings, or interfere with the administration of justice.”

It is of course well known — and, to advocates of press rights, notorious — that the Conference declined to adopt the recommendation. In 1996, however, federal courts in New York State ruled that the Judicial Conference did not have statutory authority to decide whether cameras could be permitted in federal trial courts. *See e.g., Marisol A. v. Giuliani*, 929 F. Supp. 660 (S.D.N.Y. 1996); *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996). On the authority of then Rule 7 of the Southern and Eastern Districts of New York, cameras were permitted in civil proceedings, including trials. (Criminal proceedings are covered by Rule 53 of the Federal Rules of Criminal Procedure, a rule authorized by Congress, which bars televised criminal tri-

als.) As of now, however, Rule 1.8 of the Southern and Eastern Districts of New York permits judges to decide for themselves in each case whether to permit civil trials to be televised, and leg-

islation is currently pending in both houses of Congress to permit each federal court to decide for itself whether to permit particular trials to be televised. *See* H.R. 2519 (int. July 17, 2001); S. 986 (int. June 5, 2001).

The Genesis of Court TV v. New York

And yet, despite all of the studies in favor of cameras, and all of the momentum toward opening up courtrooms to television — contrary to popular imagination, more, not fewer, jurisdictions permit televised trials now than in the pre-O.J. era — New York absolutely bans all televised trials. It has done so since 1997. The day has long since “arrived” when that sort of ban is to be “subject to reconsideration,” as Justice Harlan implicitly prophesied in *Estes*. It past time to challenge legislative inaction. And that is precisely what Court TV has done in its recently filed lawsuit.

The action claims that Court TV has a presumptive

[D]espite all of the studies in favor of cameras, and all of the momentum toward opening up courtrooms to television, New York absolutely bans all televised trials.

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right to televise trials, and the public a presumptive right to see them on television. In 1952, audio-visual technology was crude, and when placed in courtrooms, cameras and other recording devices could intrude upon the dignity and conduct of the proceedings. In 1952, participants might claim to feel self-conscious, intimidated or distracted by the presence of the obtrusive technology. Today, however, as numerous studies — including the four commissioned by the Legislature of New York State — have found, those attitudes, and the risks to the proceedings that they once posed, rarely, if ever, exist; and when risks do exist, trial judges can and have taken appropriate remedial precautions.

Moreover, the constitutional rights of freedom of speech and of the press to access to governmental proceedings are broad indeed, far more so than they were when Section 52 was enacted. The federal and state constitutions guarantee public and press access to trials, except in the most extraordinary of circumstances. As the Supreme Court said in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) — well after *Estes* — the right of access to trials rests on the necessity in a democracy that the public, and the press as its surrogate, know as much as is possible about how the judicial process functions, both in particular cases, and, as a whole:

[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole And in the broadest terms, public access to criminal trials permits the public to participate in and serves as a check upon the judicial process — an essential component in our structure of self-government.

The press's role in all of this, as the Court has said, crucial: it acts as a "surrogate" for the people who cannot attend, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980), and its presence and its ability to transmit what occurs in the courtroom are essential to vindicating

the overall goal — in the information age — of keeping the courtroom "public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Given those constitutional principles, embedded First Amendment jurisprudence for two decades, what possible basis can there be for distinguishing in every single case between the tools of Court TV — television cameras — and the tools of the rest of the press — pens, pencils, banks of reporters, sketch artists with pads as large as furniture?

The rule is, if anything, stronger under the New York State Constitution. *Immuno AB v. Moore-Jankowski*, 77 N.Y. 2d 235 (1991). It grants the right to "freely speak, write, and publish" and bars any state action that serves to "restrain or abridge the liberty of speech or of the press." *O'Neill v. Oakgrove Construction Inc.*, 71 N.Y.2d 521, 529 & n.3, 523 N.E.2d 277, 280 & n.3, 528 N.Y.S.2d 1, 4 & n.3 (1988). This "expansive language" and "the consistent tradition in this State of providing the broadest possible protection to the 'sensitive role of gathering and disseminating news of public events'" have led the New York Court of Appeals to rule that Article I, Section 8 "is often broader than the minimum required by the First Amendment", calling for "particular vigilance by the courts of this State in safeguarding the free press against undue interference." *Id.*

To be sure, the presumptive right to televise must be weighed against the sanctity and fragility of the judicial process, and the right of the participants to a fair and unaltered proceeding. But the assertion of generalized fears to bar the press from trials has long since been deemed unconstitutional. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) (The "First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant" of a fair trial.). The result should be no different in the context of television.

Court TV's lawsuit is not the first time it or other members of the press have sought to establish a constitutional right to televise trials. In 2000, after more than two years without a single trial televised in New York, four New York City police officers were accused of murdering New York City resident and West African immigrant

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Amadou Diallo. The presiding judge of the case (which was transferred to Albany County to avoid the effect of pre-trial publicity), Joseph Teresi, realizing not only the societal importance of the case but the need for public assurance of integrity in the judicial process, granted Court TV permission to intervene in the criminal case and allowed the filing of an application to broadcast the trial. In granting the application to televise the proceedings, Justice Teresi — as he had to do in order to permit the case to be televised — declared Section 52 unconstitutional, thus removing the bar to his ability to use his discretion to allow a camera in his courtroom.

Justice Teresi vehemently underscored his views on Section 52 by portraying the continued existence of that statute, and the death of Section 218, as “the failure of the Legislature to maximize the press and the public’s legitimate constitutional access to the courts.” (701 N.Y.S. 2d at 893, 895). Thus was the door opened for the return of cameras to New York courts, with judges throughout the state thereafter independently reaching their own conclusions about Section 52, some declaring it unconstitutional and others upholding it.

Why, then, has Court TV sued? And why has it sued the State? Following Justice Teresi’s decision, Judge William Bristol of Rochester County Court struck down Section 52 and granted a request to televise one of the early death penalty cases in New York. However, in *Santiago v. Bristol*, 273 A.D.2d 813, 814, 709 N.Y.S.2d 724, 726 (4th Dep’t 2000), the Appellate Division reversed. It ruled that (a) no court had ever held that a constitutional right to broadcast trials existed — the Court ignored, or deemed illegitimate, Justice Teresi’s decision — and (b) because that was so, those seeking to televise had no standing to intervene to ask permission to do so.

This procedural ruling, which the New York Court of Appeals declined to consider, removed the central method used by the New York press, albeit on a case-by-case basis, to obtain consideration of their requests for access. (It was, in fact, an implicit rejection of the manner in which the press always obtains access to proceedings, not merely televised access.) Further, the *Santiago* court held that the only method to challenge Section 52’s constitutionality

was via a declaratory judgment action against the state, a procedure set up by the legislature itself. Court TV, in effect, was invited to bring its lawsuit. However, if it wanted to recapture the principle of open trials vindicated by Justice Teresi’s decision in the Diallo case, it had no choice.

The Case Proceeds

The State will respond to Court TV’s Complaint in late October, and a decision likely will not be rendered until next year. But the outcome ought not be in doubt. In the face of at least three dozen studies by judges, blue ribbon commissions, and policy makers across the country, the entire spectrum of asserted concerns about cameras in the courtroom has been put to rest: harm to the process, fear of political interference on judicial proceedings, physical interference of cameras, lawyer grandstanding or judicial posturing, the distraction of jurors, and harm to the participants. While it may be that historically some or all of these claimed “horribles” have been valid at some place and at some time, none of them is applicable today; all can be addressed by rules and protections designed to minimize the already minimal risks.

So, in New York, we are back to seeking what is constitutionally appropriate — and required. And that is what the Court TV lawsuit seeks to ascertain.

Douglas Jacobs is General Counsel and Jennifer Ramo is Director of Legal and Business Affairs at Court TV. Jonathan Sherman is with Boies, Schiller & Flexner LLP in Washington, D.C., which represents Court TV in this matter.

¹ Numerous other studies by and of other jurisdictions’ experience with courtroom cameras have reached results similar to those of Florida, including California (1981 and again in 1996 after the trial of OJ Simpson). Among them are: Alaska (1988), Arizona (1983), Arkansas (1982), Connecticut (1983), Delaware (1981), Hawaii (1982, 1985), Illinois (1988), Iowa (1984), Kansas (1984, 1985), Louisiana (1979), Maine (1993), Maryland (1980), Massachusetts (1982), Michigan (1977, 1989), Minnesota (1982), Montana (1977), Nevada (1981), New Jersey (1985, 1991), North Carolina (1985), Ohio (1978, 1980, 1990), Oklahoma (1978), Rhode Island (1981, 1983), Vermont (1984), Washington (1975, 1978), Wisconsin (1979).

Federal Secrecy Provisions: It's a War Out There

The Aftermath of the Terrorist Attacks

From the beginning, we all had a feeling that nothing would be the same after the terrorist attacks on Sept. 11. For those of us in New York, the knowledge of the void downtown continues to disturb us, even as life beyond the Financial District returns to "normal." Our city, and our nation, have changed.

Of course, the media have been a part of this change. First, the adrenaline rush of a fast-breaking story. Then, the build-up towards our military reaction. And now, journalist themselves under attack, not on any battlefield, but in the newsroom.

But not all of today's threats to journalists come from the mail room. The current situation has created a number of First Amendment dilemmas for the media, the resolution of which will effect us not only in the aftermath of the terrorist attacks, but for years afterwards. In recent weeks, journalists have had to weight what to report, and how to report it, in light of threats to their nation, and themselves.

Below are some of the effects which have emerged in the law regarding the media in the aftermath of the Sept. 11 tragedies:

Letter to Administration Urges Free Press Principles

On Oct. 17, a coalition of 11 journalism organizations and free-speech advocates issued a public letter to senior Bush Administration officials and Congressional leaders listing principles which the government should follow regarding media access to military and other operations and events in the aftermath of the terrorist attacks.

"In light of the terrorist attacks on September 11, the role of the press in informing the nation about public safety concerns and the military, diplomatic, law enforcement, and intelligence actions of the government will be tested in novel and profound ways," the letter states.

As advocates for journalists and press freedoms, we write to provide the Administration and Congress with steps that we believe are essential for the government to take to ensure that it honors its obligations to the public under the First Amendment.

The letter suggests 16 short- and long-term actions that federal officials should take to affirm the First Amendment principles of an informed citizenry.

The immediate actions requested in the letter include reaffirmation of the guidelines that the Pentagon established after the Gulf War for coverage of combat operations, including:

- commitments to provide journalists with access to all major military units and to special forces where feasible;
- allowing news organizations to use their own communications systems to file reports; and
- to use press pools only when specific circumstances dictate, such as when military action is conducted in remote areas.

If the government conducts security checks of news content, it should only be for the limited purpose of ensuring that troop movements and operations are properly protected, the letter states, adding that reviews of news content should not include across-the-board rules that certain information may never be published.

Over the longer term, the letter calls for expedited responses to journalists' Freedom of Information Act requests on terrorism-related issues; quick release of identities, charges, and court proceedings against persons arrested and detained in the United States as suspected terrorists and material witnesses pertaining to the Sept. 11 attacks; prompt dissemination of all injured or deceased persons harmed in terrorism against the United States, including military personnel; a lifting of remaining limitations on flights by helicopters or other aircraft owned or leased by news media; and approval for media organizations and members of the public to observe or photograph evidence of terrorism that are on public property.

The letter was signed by the California First Amendment Coalition; the First Amendment Project; the Freedom of Information Center at the Missouri School of Journalism; Investigative Reporters and Editors; Jane E. Kirtley, Silha Professor of Media Ethics and Law and Director of the Silha Center for the Study of Media Ethics and Law at the School of Journalism and Mass Communication of the University of Minnesota; the National Coalition Against Censorship; the National Newspaper Association; the National Press Club; the Reporters Committee for Freedom of the Press; the Soci-

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ety of Professional Journalists; and the Student Press Law Center.

The letter came several days after representatives of 24 journalism organizations issued a statement after meeting during the Associated Press Managing Editors convention. In that statement, the representatives expressed their "concern over the increasing restrictions by the United States government that limit news gathering and inhibit the free flow of information in the wake of the September 11 attack."

The statement asks organization members to carefully monitor government actions, and contest them when warranted. "We recognize that these are perilous times when unusual measures must be considered," the statement concludes. "However, we believe that these restrictions pose dangers to American democracy and prevent American citizens from obtaining the information they need."

The 24 organizations that signed the statement range from large, nationwide journalism groups to smaller groups of special-interest or ethnic reporters.

Rumsfeld Affirms 1992 Principles for Military Access

After several weeks of negotiation between media representatives and military officials, on Oct. 18 Defense Secretary Donald Rumsfeld said that the principles for war coverage negotiated by the Pentagon and the media in 1992 would be used to guide coverage of the war against terrorism.

The nine principles, which were created to resolve problems that emerged during the Persian Gulf War, begin with the proposition that "open and independent reporting will be the principal means of coverage of US military operations." They add that press pools should be used only in limited circumstances, that the press will have access to all major military units except Special Operations units when necessary, and that the military will provide transportation and communications to reporters whenever possible. See "1992 Statement of Principles: News Coverage of Combat," *infra*.

One point that the principles do not address is military censorship, because military and media representatives were unable to reach agreement on a single statement. Instead, each side attached its own statement on the issue.

While Rumsfeld agreed to follow the principles, he told

media representatives that "this is a very different kind of war," and that some of the axioms may need to be adjusted to fit the current situation.

According to published reports, when the Pentagon began planning military reaction to the terrorist attacks, officials initially planned to not allow reporters to join troops on military missions. Then, on Oct. 1 the Pentagon announced guidelines for pool reporting, including review of material "for ... very narrow aspects."

But the military press pool was not activated, and reporters encountered a patchwork of policies. Individual reporters were permitted on some ships from which bombing runs were launched, although they were not permitted to file their reports for several hours. And the Pentagon allowed interviews of selected military personnel, as long as last names were not used. But no reporters were permitted to join troops deployed in nations surrounding Afghanistan. Some reporters were able to obtain visas and report from Pakistan, and a few intrepid reporters attached themselves to units of the anti-Taliban Northern Alliance, or reported from areas under their control.

On Oct 17 and 18, four reporters were permitted to fly on a C-17 cargo plane from the Ramstein airbase in Germany as it undertook a two-day mission to drop food packages over areas of Afghanistan controlled by the Taliban.

Voluntary Limits on Terrorist Videotapes Sought

After television networks aired a videotaped statement by Osama bin Laden, Bush Administration officials asked the media to consider limiting coverage of statements from terrorist groups. They justified this request by stating that the statements could contain hidden messages to other terrorists. In response, the American television networks stated that they would not air the statements unedited; the response of the print media was more varied.

The British broadcast media were not as responsive to similar requests. After meeting with the Prime Minister's director of communications, the BBC, ITN and Sky News issued a joint statement that, "As responsible broadcasters we are mindful of national and international security issues

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and the impact reports can have in different communities and cultures. But we will retain the right to exercise our own independent, impartial editorial judgment.”

The British networks did agree, however, to not disclose Prime Minister Tony Blair's foreign travel plans in advance.

FOIA Standard Changed

The terrorist attacks also led Attorney General John Ashcroft to alter the standard for release of government information under the Freedom of Information Act, 5 U.S.C. § 552.

In an Oct. 12 memorandum to the heads of all federal departments and agencies, Ashcroft wrote that the Justice Department would defend agency FOIA denials as long as the agency could show a “sound legal basis” for the denial.

This is a lower standard for keeping government information from the public, reverting to the standard which applied from 1981 to 1993. Since 1993, the standard — set by then-Attorney General Janet Reno — has been whether release of the information could lead to “foreseeable harm.”

Reno criticized the “sound legal basis” standard in her memo applying the “foreseeable harm” standard. “[I]t shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption,” she wrote. “Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be. “ FOIA Update, Summer/Fall 1993, at 3. Reno reiterated this position in a 1997 memo. See FOIA Update, Spring 1997, at 1.

Ashcroft wrote in his memo:

Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless

they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

2001 FOIA Post No. 19 (Oct. 15, 2001), available at www.usdoj.gov/oip/foiapost/2001foiapost19.htm.

The memo was among the items to be discussed at a government-wide meeting of FOIA officers scheduled for Oct. 18. Another topic to be discussed at the meeting was the use of “exemption 2,” 5 U.S.C. § 552(b)(2), to refuse FOIA requests for “critical infrastructure information.”

A Department of Justice notice announcing the meeting stated that “Agencies should be sure to avail themselves of the full measure of Exemption 2's protection for their critical infrastructure information as they continue to gather more of it, and assess its heightened sensitivity, in the wake of the September 11 terrorist attacks.” 2001 FOIA Post No. 19 (Oct. 15, 2001).

Military Corners Satellite Photo Market

The military has purchased exclusive rights to commercial satellite images of Afghanistan from the IKONOS satellite, preventing sale of such images to the public and the press. This left a Russian satellite as the only potential commercial source of such pictures, although its photographs are less detailed and the Russians had not yet decided whether to make them available.

The exclusive contract was criticized in a letter to Rumsfeld by Reporters Without Borders, a Paris-based media advocacy group. The letter called the exclusive contract “a way of disguised censorship aimed at preventing the media from doing their monitoring job.”

The Pentagon did not invoke its power of “shutter control,” which was included in the 1994 Presidential Directive allowing commercial satellite photography. This allows the government to restrict commercial satellite from photographing certain areas “during periods when national security or international obligations and/or foreign policies may be compromised.” Presidential Decision Directive 23, Licensing and Operation of Private Remote Sensing Systems (March 10, 1994), para. 7. See also Fact Sheet Regarding the Memorandum of Understanding Concerning the Licens-

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ing of Private Remote Sensing Satellite Systems Dated February 2, 2000, reprinted at 15 CFR Part 960 App. II (2001).

FAA Rules Limit News

The government's first reaction to the terrorist attacks was to the ground all aircraft nationwide. But while commercial and most private aircraft are now flying again, at press time the Federal Aviation Administration continued to prohibit news planes and helicopters from operating in the 30 largest American cities. See FDC 1/1225, para. 2 (Oct. 14, 2001) (unpublished), available at [www.faa.gov/ntap/Special%20Interest%20Notams.htm#!FDC 1/1225](http://www.faa.gov/ntap/Special%20Interest%20Notams.htm#!FDC%201/1225).

In testimony to Congress on the issue on Oct. 17, Radio-Television News Directors Association President Barbara Cochran said that "broadcast news executives understand the need for caution and concern in the weeks that have followed the terrible events of September 11. We also understand the tremendous pressures on the Department of Transportation and the Federal Aviation Administration to return the nation's air travel system to a normal state. But this five-week restriction on news aircraft in major cities takes away one of the most important newsgathering tools stations use to serve the public."

The only explanation of the ban that a FAA spokesman would make to the Associated Press was that "the current restrictions on certain types of flying have been imposed for national security reasons." According to the RTNDA, in a meeting with media representatives FAA officials said that they did not have the power to rescind the ban, which they said was controlled by agencies such as the National Security Council.

According to RTNDA, about 250 television and radio stations nationwide use aircraft for newsgathering.

Courts Closed With Secret Detentions and Evidence

Federal authorities have acknowledged that they have detained more than 800 people in the ongoing investigation of the Sept. 11 terrorist attacks, but have not released any other information on these actions or held open court hearings regarding these detentions.

Such secrecy, while apparently unprecedented on such a wide scale, is permitted under the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862) ("FISA").

The Act imposes lower due process standards on federal government activities to "protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities," 50 U.S.C. § 401(a)(3), than the standards that normally apply to criminal investigations and prosecutions. For example, the Supreme Court has imposed a seven-part test for validity of an eavesdropping warrant in a criminal investigation. See *Berger v. New York*, 388 U.S. 41, 56 (1967). But under FISA, the only requirement is that there be probable cause that the target of the surveillance is a foreign power or terrorist or is an agent of a foreign power or terrorist; no showing of actual criminal, espionage or subversive intent or activity is necessary. If the target is an American citizen or a permanent resident the court must also find probable cause that the target may be engaged in an illegal activity. See 50 U.S.C. § 1802

Orders for surveillance under FISA are issued by the Foreign Intelligence Surveillance Court, upon application of the Attorney General. The proceedings of this court are closed to the public and the media, and its rulings are secret. 50 U.S.C. § 1803(c). The only public disclosure requirement is an annual report to the Administrative Office of the United States Court and to Congress disclosing the number of surveillance orders issued. 50 U.S.C. § 1807. Since 1979, the court has issued more than 12,000 such orders; none has ever been denied.

FISA also allows surveillance for up to year without a court order, although it must be certified by the Attorney General and the Senate and House intelligence committees informed. See 50 U.S.C. § 1802.

FISA has been upheld by several circuit courts. See, e.g., *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987); and *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), cert.

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denied, 486 U.S. 1010 (1988). Courts have also ruled that the Justice Department may refuse to disclose FISA orders regarding a particular individual. *See Marrera v. United States Department of Justice*, 622 F. Supp. 51 (D. D.C. 1985) (Freedom of Information Act does not require disclosure); and *United States v. Squillacote*, 221 F.3d 542, 554 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1601, 149 L. Ed. 2d 468 (U.S. April 16, 2001).

The statute presents a number of issues for the media. First, the proceedings and decisions of the Foreign Intelligence Surveillance Court are secret, and its orders are binding on all other courts except the federal Courts of Appeal and the U.S. Supreme Court. 50 U.S.C. § 1806 (h). Second, the FISA procedure has been expanded to more than eavesdropping, and to cases other than those involving spying and espionage.

Under an Executive Order issued by the Clinton administration in 1995, the FISA standards were extended to cover physical searches, and FISA evidence was allowed to be used in non-espionage criminal prosecutions. Exec. Order No. 12,949, 60 Fed. Reg. 8,169 (1995). Such evidence may be used only if espionage investigation was the primary purpose of the FISA order; if the criminal investigation becomes the primary purpose of the investigation, normal criminal evidentiary standards apply. *See* 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B)

When information obtained under FISA is used in such criminal cases, both the surveillance order and the resulting evidence are permanently sealed and classified "top secret." This means that any proceedings involving the FISA evidence may be closed, and that portions of the case file regarding FISA-authorized evidence would be inaccessible. The evidence may even be withheld from the defendant and defense counsel. 50 U.S.C. § 1806(f).

In addition to criminal proceedings, a statute enacted after the first World Trade Center bombing — the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No.104-132, 110 Stat. 3009 (1996) — allows the use of FISA evidence and closed court proceedings in deportation proceedings of non-citizens. *See* 8 U.S.C. §§ 1532(d), 1534 (e)(1)(A).

In addition to using FISA provisions to close court proceedings and files, federal authorities are detaining

people as possible defendants and witnesses. Defendants in criminal cases may be detained pending trial if a judge determines that the defendant is unlikely to appear for trial, or that release of the defendant would endanger the community. 18 U.S.C. § 3142(e). "Material witnesses" in a criminal case may be held "for a reasonable period of time" if it shown that it may be impractical to secure the person's appearance at trial by issuing a subpoena. 18 U.S.C. § 3144.

Bills passed by Congress in the wake of the Sept. 11 attacks would further expand the types of cases in which FISA evidence could be used, and in which court proceedings could be closed. Provisions in the bills passed by the Senate and House would allow use of secret FISA evidence as long as espionage investigation was a "significant" purpose of the investigation, instead of being the "primary purpose," as required under current law. *See* Uniting and Strengthening America Act, S. 1510, 107th Cong., § 218 (amending 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B)) (passed by Senate); *see also* H.R. 2975, 107th Cong., § 218 (passed by House).

While the Senate version of the bill would have made permanent changes, the House version originally provided that the surveillance provisions would expire Dec. 31, 2004, or two years later if the President informs Congress that it is in the national interest. H.R. 2975, 107th Cong., § 224 (passed by House). On Oct. 17, the two houses reportedly agreed to set Dec. 31, 2005 as the expiration date for these provisions.

Truce in War Over Leaks

After a bit of teeth-gnashing at both ends on Pennsylvania Avenue, Congress and the Bush Administration reached an understanding Oct. 10 on classified briefings.

Under the agreement, which came after Congressional leaders met with the President and assured him that they had chastened their members, Administration officials will continue to brief members of the armed services, foreign relations and intelligence committees of each house, in addition to the leaders. Other members of the House and Senate will receive classified information on a "need-to-

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know basis," White House spokesman Ari Fleischer told reporters.

President Bush had lashed out at members of Congress five days earlier, after the *Washington Post* asked administration officials to comment on information the newspaper had received which had been disclosed to members of Congress at a confidential briefing. (The *Post* agreed to withhold some of the information at the request of White House officials.) Four weeks earlier, Sen. Orrin Hatch revealed other information from a confidential briefing.

In a Oct. 5 memo to members of his cabinet, Bush said that the Administration would brief only eight members of the House and Senate – the House and Senate majority and minority leaders, and the chairs and vice chairs of each house's intelligence committees. He explained the rationale behind the memo on Oct. 9, stating that "I felt it was important to send a clear signal to Congress that classified information must be held dear, that there's a responsibility that if you receive a briefing of classified information, you have a responsibility. ... So I took it upon myself to notify the leadership of the Congress that I intend to protect our troops."

"There's no doubt about it that the importance of keeping classified information classified has been stressed," Fleischer said after the agreement was reached, "and the President hopes that it will be closely, exactly adhered to."

The blowup was just the latest on the issue of leaks of classified information. Previously, the Senate Intelligence Committee cancelled a Sept. 5 hearing on legislation which would have made federal government employees and former government employees who disclosed or attempted to disclose "properly classified" information subject to a fine and/or imprisonment for up to three years. Last year, President Clinton vetoed a budget bill containing such a provision. See *LDRC LibelLetter*, Nov. 2000, at 26.

Instead of the criminal provision, the Senate's proposed intelligence spending bill for fiscal year 2002 requires the Attorney General to "carry out a comprehensive review of current protections against the authorized disclosure of classified information," which must be submitted to Congress by May 1, 2002. S. 1428, 107th Cong. § 307 (2001).

The provision requires that the report be completed in consultation with various federal officials, including the secretaries of Defense, State, and Energy, and the CIA di-

rector. It also mandates that the study consider "whether the administrative regulations and practices of the intelligence community are adequate ... to protect against the unauthorized disclosure of classified information" and "whether recent developments in technology, and anticipated developments in technology, necessitate particular modifications of current protections against the unauthorized disclosure of classified information."

This Senate bill, which at press time was pending in the Armed Service committee, was drafted prior to the terrorist attacks of Sept. 11. The version of the bill passed by a voice vote in the House on Oct. 5, H.R. 2883, does not contain any such provision.

PATRIOT Provision Was Problem

Another problematic provision arose in the House anti-terrorism bill drafted in response to the Sept. 11 attacks, the PATRIOT Act of 2001 (the acronym stands for Provide Appropriate Tools Required to Intercept and Obstruct Terrorism). H.R. 2975, 107th Cong. (2001) (as introduced).

The original House bill included violations of section 601 of the Intelligence Identities Protection Act of 1982 (codified as amended at 50 U.S.C. § 421), within the definition of "Federal terrorism offense."

Section 601 prohibits anyone with access to classified information regarding covert agents, or anyone involved in a "pattern of activities" to identify and expose covert agents from revealing agents' identities. But the House bill did not include another provision of the Intelligence Identities Protection Act, which contains language which basically limits the offense to the individual who first discloses the identity of a covert agent; someone who receives the information, and then repeats it, can not be prosecuted. See 50 U.S.C. § 422(b).

By not mentioning this section, journalists who reported information from others which identified a covert agent could be prosecuted for a "Federal terrorism offense" under the new bill, with the possibility of a life sentence.

The problem was resolved when the House amended

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its bill, almost completely replacing it with language from the Senate version, S. 1510. The new bill, H.R. 2975, does not contain the problematic language.

Web Site Restrictions

In the wake of the attacks, government agencies and private organizations were also reported to be reviewing their web sites and removing information which could be useful to terrorists.

The web site of the Nuclear Regulatory Commission was shut down on Oct. 10. When it returned, visitors were told that, "in support of our mission to protect public health and safety, the NRC is performing a review of all material on our site. In the interim, only select content will be available. We appreciate your patience and understanding during these difficult times."

A NRC spokesman told the Associated Press that among the data removed from the site was a database containing the geographic coordinates of U.S. nuclear reactors.

Other information removed from government web sites included reports of enforcement actions by the Federal Aviation Administration, specifications for energy facilities on the Federal Energy Regulatory Commission web site, reports on the risk of chemical accidents and how to prevent them which had been posted by the Environmental Protection Agency, and a Centers for Disease Control report on security at chemical plants. The U.S. Office of Pipeline Safety limited pipeline data to government and industry officials, and the National Imagery and Mapping Agency's web site stopped selling high-resolution maps and maps of military installations.

Bush Administration officials told the AP that the agencies' actions were voluntary, and were not initiated by the White House.

Among the private groups which removed information were the Federation of American Scientists, which removed information on American intelligence facilities, and the U.S. Public Interest Research Group, which removed a report based on the data removed by the EPA.

While USPIRG removed the information to avoid provoking a debate on public disclosure, spokesman Jeremiah Baumann criticized the EPA decision, stating that the data

removed by that agency "would not be very useful to terrorists."

Canada, Too, Pushes Secrecy Provisions

In Canada, Parliament is expected to quickly pass a bill in reaction to the terrorist attacks introduced by Justice Minister Anne McLellan, with the support of Prime Minister Jean Chretien. Anti-Terrorism Act, C-36, 37th Parl. (Can. 2001). In addition to a variety of criminal provisions meant to prevent terrorism, the bill has several sections regarding access to government information and proceedings.

The bill would require that participants and officials inform the federal and state justice officials of any court or administrative proceeding in which "information that the participant believes is sensitive information or potentially injurious information" is expected to be disclosed, and allow the Attorney General to seek a court order prohibiting disclosure. § 43. The bill would also allow judges to close courtrooms to the public when "necessary to prevent injury to international relations or national defence or security." § 34.

The bill would also amend the Access to Information Act, R.S.C., ch. A-1, to the Attorney General to "at any time personally issue a certificate that prohibits the disclosure of information for the purpose of protecting international relations or national defence or security." § 87. Unlike other decisions to keep government information secret, these decisions would not be subject to review by the Information Commissioner or by the courts.

Finally, the bill would amend Canada's law allowing for the seizure of hate propaganda, R.S.C § 320, to allow judges to order the removal of such material from the Internet and order the computer system's owner to identify who posted the material. The poster would be able to contest the removal in court. §10.

Pentagon would have two chances to address potential operational security violations, but the news organization would make the final decision about whether to publish the disputed information. Under Principle Four, violations of the ground rules could result in expulsion of the journalist involved from the combat zone.

1992 Statement of Principles: News Coverage of Combat

After several conflicts between the media and military officials over news coverage of the Persian Gulf War, 15 Washington bureau chiefs sent a letter to then-Defense Secretary Dick Cheney suggesting guidelines for coverage of future conflicts. After ten months of discussions, on March 11, 1992, the representatives of major American news media and the Pentagon adopted nine principals on the issue.

1. Open and independent reporting will be the principal means of coverage of US military operations.
2. Pools are not to serve as the standard of covering US military operations. But pools may sometimes provide the only feasible means of early access to military operations. Pools should be as large as possible and disbanded at the earliest opportunity—within 24 to 36 hours when possible. The arrival of early-access pools will not cancel the principle of independent coverage for journalists already in the area.
3. Even under conditions of open coverage, pools may be appropriate for specific events, such as those at extremely remote locations or where space is limited.
4. Journalists in a combat zone will be credentialed by the US military and will be required to abide by a clear set of military security ground rules that protect US forces and their operations. Violations of the ground rules can result in suspensions of the credentials and expulsion from the combat zone of the journalist involved. News organizations will make their best efforts to assign experienced journalists to combat operations and to make them familiar with US military operations.
5. Journalists will be provided access to all major military units. Special Operations restrictions may limit access in some cases.
6. Military public affairs officers should act as liaisons but should not interfere with the reporting process.
7. Under conditions of open coverage, field commanders will permit journalists to ride on military vehicles and aircraft whenever feasible. The military will be responsible for the transportation of pools.
8. Consistent with its capabilities, the military will supply PAOs with facilities to enable timely, secure, compatible transmission of pool material and will make these facilities available whenever possible for filing independent coverage. In cases when government facilities are unavailable journalists will, as always, file by any other means available. The military will not ban communications systems operated by news organizations, but electromagnetic security in battlefield situations may require limited restrictions on the use of such systems.
9. These principles will apply as well to the operations of the standing DoD national Media Pool System.

The Pentagon and news organizations could not agree on a principle covering military censorship. The media proposed a principal stating that “News material—words and pictures—will not be subject to prior military security review,” while the military proposed “Military operational security may require review of news material

for conformance to reporting ground rules.” After failing to reach agreement, each side attached a statement on the issue.

News Media Statement

The news organizations are convinced that journalists covering US forces in combat must be mindful at all times of operational security and the safety of American lives. News organizations strongly believe that journalists will abide by clear operational security ground rules. Prior security review is unwarranted and unnecessary. We believe that the record in Operation Desert Storm, Vietnam and other wars supports the conclusion that journalists in the battlefield can be trusted to act responsibly. We will challenge prior security review in the event that the Pentagon attempts to impose it in some future military operation.

Department of Defense Statement

The military believes that it must retain the option to review news material to avoid the inadvertent inclusion in news reports of information that could endanger troops safety of the success of a mission.

Any review system would be imposed only when operational security is a consideration — for example, the very early stages of a contingency operation or sensitive periods in combat. If security review were imposed, it would be used for one very limited purpose: to prevent disclosure of information which, if published, would jeopardize troops safety or the success of a military operation. Such a review system would not be used to seek alterations in any other aspect of content or to delay timely transmission of news material.

Security review would be performed by the military in the field, giving the commander's representative the opportunity to address potential ground rule violations. The reporter would either change the story to meet ground rule concerns and file it, or file it and flag it for the editor whatever passages were in dispute. The editor would then call the Pentagon to give the military one last chance to talk about ground rule violations.

The Defense Department believes that the advantage of this system is that the news organizations would retain control of the material throughout the review and filing process. The Pentagon would have two chances to address potential operational security violations, but the news organization would make the final decision about whether to publish the disputed information. Under Principle Four, violations of the ground rules could result in expulsion of the journalist involved from the combat zone.