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MLRC Forum "Creative Routes to Profit: Technological & Legal Tools to Control and Monetize Media Content"

Wednesday, November 11th, 3:45 - 5:45 p.m.
Grand Hyatt, 109 East 42nd Street, New York, NY

Every day, media companies are finding new ways to monetize their content: micropayments, behavioral targeting, brand extensions, and more. At the same time they consider trying to stem their losses by controlling the 'bots and bloggers, they are exploring the far reaches of copyright law, unfair competition, "hot news" and other legal theories. Join us for a discussion of the most significant technological and legal responses.

The session will be moderated by:

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will present an overview of the key technologies.

MLRC Media Law Resource Center

ANNUAL DINNER

WEDNESDAY, NOVEMBER 11, 2009

MLRC will bestow its William J. Brennan, Jr.
Defense of Freedom Award on
Václav Havel
Playwright, Former President of the Czech Republic

Acceptance of the Brennan Award by Presisdent Havel on video
and, in person, by Ambassador Martin Palouš

Panel Discussion
The Power of Creativity: The Arts and Social Change

Oskar Eustis, Artistic Director, The Public Theater
Arnold Lehman, Director, Brooklyn Museum
Peter Yarrow, Singer-songwriter, Peter, Paul and Mary

Moderated by
Ken Paulson, President and COO, Freedom Forum and Newseum

Grand Hyatt, New York City
Reception: Ballroom A and the Grand Foyer, 6:00 p.m.
Dinner: Ballrooms B, C & D, 7:15 p.m.

RSVP by Monday, October 26, 2009

A limited number of hotel rooms are now available for MLRC Dinner guests at the Grand Hyatt for $299/night.
Contact Debra Danis Seiden for more details.

For invitation and registration, click here.
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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through October 25, 2009

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MLRC London Conference 2009

International Developments in Libel, Privacy, Newsgathering and New Media IP

On October 1 and 2, over 175 lawyers gathered at Stationers' Hall for MLRC's biennial London Conference. Delegates discussed a wide range of international media law issues: from the latest developments in libel, privacy and newsgathering laws to the current debate about online news aggregators and proposals for libel and privacy law reform in the UK.

MLRC Chair Kenneth Richieri opening the 2009 London Conference.

Stationers Hall, the venue for MLRC's London Conference.

A panel of MLRC members and British author Tom Bower testified at the closing session of MLRC's London Conference. From left to right: Brian Rogers (Barrister and Solicitor, Toronto, Canada), Tom Bower, Lynn Oberlander (The New Yorker Magazine); and Peter Bartlett (Minter Ellison, Australia).

Mock Parliamentary Hearing: At the closing session of the conference three MPs up-dated delegates on the status of libel and privacy reform hearings in Parliament and heard "testimony" from delegates. From left to right: Edward Garnier QC MP, John Whittingdale OBE MP, Paul Farrelly MP.

Lord Hoffmann, recently retired as a Law Lord, delivering the keynote address.

Justice Ruth McColl, NSW Supreme Court, Australia, and Mr. Justice Tugendhat, High Court England & Wales, participated in the Future of Free Expression session, commenting on the discussion.

Photographs by Phil Heijmans

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Supreme Court Appears Poised to Strike Down Ban on Depictions of Animal Cruelty

By Jonathan Bloom

A lively, entertaining, and, for free speech advocates, encouraging hour of argument in *U.S. v. Stevens*, No. 08-769, at the U.S. Supreme Court on October 6 left the distinct impression that a majority of the Court does not think 18 U.S.C. § 48, which criminalizes the creation, sale, or possession of certain depictions of animal cruelty, is constitutional. Deputy Solicitor General Neal K. Katyal seemed to gain little traction in his effort to persuade the Court that the law only applies to so-called "crush" videos and animal fighting videos and would not be invoked against mainstream materials such as bullfighting and hunting videos. His argument that recognition of a new category of unprotected speech was justified by the "dry up the market" rationale endorsed by the Court with respect to child pornography also seemed to meet with little sympathy.

By the end of the hour, the Court appeared ready to hold the law overly broad and possibly unconstitutionally vague.

Enacted in 1999, Section 48 (or the "Act") prohibits the knowing creation, sale, or possession with a commercial purpose of a visual or auditory depiction of a living animal being "intentionally maimed, mutilated, tortured, wounded, or killed" if the conduct is illegal where the creation, sale, or possession takes place. It contains an exception for any depiction that has "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

Although Congress's original objective was to eradicate "crush" videos – fetish films in which live animals are crushed to death by women with bare feet or high heels – the plain language of the Act is not limited to "crush" videos. Consistent with that fact, the legislative history speaks of "regulating the treatment of animals," H.R. Rep. No. 106-397, at 3 (1999), and of the danger of people becoming "so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans." H.R. Rep. No. 106-397, at 4. As the Third Circuit put it, the statute "drifted [far afield] from the original emphasis in the Congressional Record on the elimination of crush videos."

The defendant in the case, Mr. Stevens, a pit-bull lover and author of books and articles on, and producer of documentary films about, pit bulls, operated a website through which he sold, among other things, documentary videos containing footage of pit bulls participating in dog fights and attacking other animals. He was prosecuted under the almost-never-used Section 48 after law enforcement agents purchased several videos from him by mail, three of which contained footage of pit bull fights in Japan, where such fights are legal. The district court denied Mr. Stevens' motion to dismiss the indictment on the grounds that the statute is facially invalid under the First and Fifth Amendments. He was convicted after a jury trial and sentenced to 37 months in prison.

The Third Circuit, sitting *en banc*, reversed, holding that the Act bans speech protected by the First Amendment and does not survive strict scrutiny. *See* 533 F.3d 218. The court declined to create a new category of unprotected speech for depictions of animal cruelty without direction from the Supreme Court, and it found no compelling government interest in banning speech to compensate for underenforcement of state animal cruelty laws (which exist in every state). The court concluded that the "serious value" exceptions could not save an otherwise invalid speech restriction.

The Supreme Court's grant of the government's petition for certiorari galvanized the First Amendment community, which saw the case as a threat not just to mainstream materials depicting violence against animals but to core First Amendment principles, including the Court's recognition of a few, limited categories of unprotected speech and its approval of restricting speech to prevent harm in extremely narrow circumstances such as incitement, criminal solicitation, and child pornography. Contrary to the animal rights party line that this was a case not about free speech but about heinous acts against animals, it was clear to free speech groups that precisely the opposite was true. The case attracted some twenty-two amicus briefs – a dozen urging affirmance – with the Humane Society and the ASCPA among those supporting the government and the Reporters Committee for Freedom of the Press, the National Coalition Against Censorship, and the Association of American Publishers among those supporting Mr. Stevens.

The argument was dominated by hypotheticals involving

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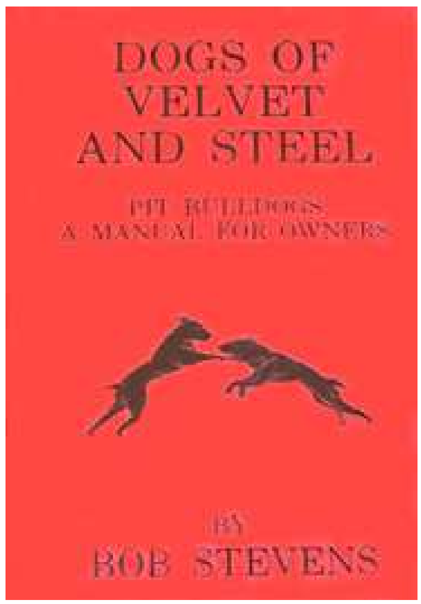
bullfighting, hunting, gladiators, human sacrifice, and ethnic cleansing, with the Justices probing the reach of the law as well as the outer bounds of the First Amendment. The first question came from Justice Sotomayor, who put her finger on the disconnect between Congress' focus on "crush" videos and its passage of a considerably broader law: She asked Mr. Katyal whether Congress had any evidence before it as to the market for anything other than "crush" videos (the answer eventually elicited by Justice Ginsburg from Mr. Stevens' counsel was no). The absence of factual findings as to a link between the market for animal-fighting videos and the staging of animal fights exposed a central flaw in the government's "dry up the market" rationale, at least as applied to material other than "crush" videos.

Mr. Katyal's trouble deepened when he cited *New York v. Ferber*, , 458 U.S. 747 (1982), for the proposition that Section 48 is constitutional because, like child pornography laws, it is not targeting "the underlying communicative impact" of the depictions but rather the market for them. Justice Scalia cut him off sharply with "Well, of course it is" and pointed out that the statute "is targeting the communication of videos that depict this conduct." Chief Justice Roberts also objected to the suggestion that the law is "not concerned with the content," citing the "serious value" exceptions and noting that "you have to look at the content to determine whether or not the speech is prohibited." How can you tell, he asked, whether Mr. Stevens' videos aren't political videos supporting the legalization of animal fighting, just as PETA and other groups on the other side seek to prohibit it?



The defendant , Mr. Stevens, a pit-bull lover and author of books and articles on, and producer of documentary films about, pit bulls, operated a website through which he sold, among other things, documentary videos containing footage of pit bulls participating in dog fights and attacking other animals.

Several justices bore in on the uncertain line between what is and what is not covered by the Act. What is the difference, Justice Sotomayor asked, between Mr. Stevens' videos and David Roma's pit-bull documentary "Off the Chain," which, she said, "had much, much more" explicit footage of animal cruelty? The line, Mr. Katyal conceded, "will sometimes be difficult to draw."

Justice Scalia, whose antipathy to the Act dominated the argument, seized on the issue of viewpoint discrimination raised in Mr. Stevens' brief. He wanted to know whether someone who wanted to promote bullfighting as "exciting" would be protected. He later observed that "most of the hunting videos I have seen people watch for entertainment" but that, under the Act, "entertainment value doesn't count." (Justice Scalia's fondness for hunting surely worked in Mr. Stevens' favor.) He was not persuaded by Mr. Katyal's insistence that there was no realistic danger of prosecution for bullfighting or hunting videos because they would be covered by the exception for educational material, questioning whether all bullfights were educational and wondering why dogfights could not also be considered educational. Justice Ginsburg asked how to differentiate between bullfighting, cockfighting, and dogfighting, to which Mr. Katyal was forced to concede that "certain depictions of dogfighting and cockfighting would be swept up, not all."

When Justice Alito asked whether videos or broadcasts of staged gladiatorial contests could be banned, Mr. Katyal suggested that it would fall under the exception for historical works, but Justice Scalia, who let out an exasperated "Who knows?" as Mr. Katyal was answering, asked derisively "If you dress up like an ancient Roman, the whole thing is of historical interest?"

These questions elucidating the statute's glaring lack of precision prompted Justice Breyer – no sure vote in First Amendment cases – to call the exceptions "vague" and to point out that people can't know if a litany of depictions (bullfighting, deer hunting, fox hunting, humane slaughter, etc.) would fall within one of the exceptions or subject them to prosecution. Why can't Congress write a statute, he wondered, "that does not force the courts into the work of interpreting these very vague words to prevent the statute from being held unconstitutional?"

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Justice Kennedy, whose majority opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), rejected the extension of *Ferber* to "virtual" child pornography, also pursued the issue of vagueness and signaled his discomfort with the law's breadth. "This statute without the exceptions clause would be wildly overbroad," he stated. "[Y]ou say it's not overly broad because of the . . . savings clause. . . . But it seems to me that the exceptions must be then tested as to whether or not they are vague." Justice Kennedy also objected to Mr. Katyal's contention that no chilling effect on hunting videos had been shown in the ten years the law has been in effect, pressing him to cite "an example of a case where we said a statute which might otherwise be overbroad is not overbroad because prosecutors have been restrained."

The government's argument that protecting animals from harm justified creating a new category of unprotected speech was one of the most worrisome aspects of the case. Justice Scalia returned several times during the argument to the short list of categories of unprotected speech, such as obscenity and child pornography, and expressed strong resistance to expanding the list. He said that whereas child pornography is part of a "traditional classification which there has always been permission for the government to prohibit," Section 48 "is something quite different." He also observed that "unless it's a subject like obscenity which from the beginning has not been considered protected speech, it seems to me that side of the debate [those who like animal fighting] is entitled to make its point . . . as forcefully as possible."

Toward the end of the argument, Justice Scalia appealed powerfully to free speech first principles. Averting to Justice Breyer's suggestion to Patricia A. Millett, Mr. Stevens' counsel, that the government was seeking to ban the promotion of material that appeals to people's worst instincts, Justice Scalia said "it's not up to the government to decide what are people's worst instincts" because "if the First Amendment means anything, that's what it means. . . . It's not up to the government to tell us what our worst instincts are." "[W]hat other base instincts,do people have," he asked rhetorically, "besides this one?"

Another concern shared by many of Mr. Stevens' amici was that the Court might adopt the government's suggestion that it identify unprotected speech with a balancing test whereby speech could be restricted if its social value is outweighed by the benefits of restricting it. Picking up on this argument (which the government seems to have dropped after its opening brief), Chief Justice Roberts asked Ms. Millet whether the language in *Ferber* that the "evil to be restricted so overwhelmingly outweighs the expressive interest at stake" was the proper test for unprotected speech. She responded that that was not a test but rather "a description of the types of categories that by history and tradition had been outside the First Amendment."

Whether speech can be banned based on its offensiveness or its impact on viewers also came up. Early in the argument, Justice Ginsburg asked Mr. Katyal how this case was different from *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), in which the Court summarily affirmed the Seventh Circuit's decision striking down an Indianapolis ordinance that prohibited violent images in which women were depicted as sex objects in order to discourage discriminatory attitudes toward women. Mr. Katyal, disclaiming any attempt by Congress to target expression, responded that the Act was not aimed at the communicative impact of the images, and he later stated that banning images of human sacrifice based on repulsiveness would raise "a whole different set of questions" that were not before the Court. This implicit recognition by the government that, outside of obscenity, the First Amendment does not permit restriction of speech based on offensiveness was important, but it was inconsistent with the House Report on Section 48, which, as noted, states that restricting depictions of animal cruelty would help prevent viewers from becoming desensitized to violence.

Another doctrinal issue raised by the government had to do with overbreadth, specifically whether the Third Circuit erred in striking the law down on its face under strict scrutiny (having found that it applied entirely to protected speech) rather than engaging in overbreadth analysis based on the premise that, at least as to "crush" videos, the Act applies to unprotected speech. Justice Alito explored this issue by pressing Ms. Millet as to whether a "properly drawn" statute aimed at "crush" videos would be constitutional (she acknowledged that it might be). He also asked whether overbreadth was determined by "a lot of hypothetical situations" or by real-world experience with enforcement. Ms. Millet responded that it was necessary to look at the text of the statute and to ask whether it fits with what the Constitution allows. Even if the statute caused the market for crush videos to dry up, she said, that would not address the vagueness concern.

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Chief Justice Roberts also asked about overbreadth, positing (as did the government) that if crush videos could be banned by a narrowly drafted statute, why shouldn't the Court hold that the statute is facially valid and consider as-applied challenges? Ms. Millet responded that the far greater amount of other kinds of material that was captured by the Act made it substantially overbroad and thus subject to facial invalidation.

Overall, hostility to the Act cut across "party" lines and left observers with the strong sense that the Court would affirm – some even speculating as to a 9-0 vote. Justice Alito and Chief Justice Roberts seemed the most willing to at least entertain the government's argument that the Act is constitutional as to some applications and that the court of appeals therefore should have undertaken overbreadth analysis, but it was far from clear that their questioning indicated a leaning toward reversal or remand as opposed to simply testing Mr. Stevens' position.

Whether unanimous or not, the Court seems strongly inclined to endorse what Ms. Millet referred to as Congress's obligation to "write with a scalpel and not a buzz saw in the First Amendment area."

Jonathan Bloom, counsel to Weil, Gotshal & Manges LLP, was principal author of an amicus brief to the Supreme Court in the case on behalf of the Association of American Publisher and fourteen other organizations. All the briefs in the case are available online here .

"We Thought We Had a Deal"

Supreme Court Hears Arguments Whether Section 411(a) of the Copyright Act Is Jurisdictional

By Toby Butterfield and Al J. Daniel, Jr.

On October 7, 2009, the second day of the 2009 Term, the Supreme Court of the United States heard oral argument in *Reed Elsevier Inc. v. Pogrebin*, No. 08-103, a class action copyright infringement case in which freelance authors sued newspaper and magazine publishers for including their articles in electronic databases without authorization.

These consolidated cases had been held in abeyance in the district court pending the decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), which held that the inclusion of the authors' previously published articles in electronic databases was not protected by the privilege to publish the articles in collective works under 17 U.S.C. § 201(c), leaving the defendants to other defenses such as individual licenses, limitations, or estoppel. No decision will likely issue for several months, but this case presents a question of fundamental importance under the Copyright Act. The Supreme Court's decision will have significant effects on that other pending class action settlement, the Google Book Settlement.

The actual arguments in the Supreme Court reveal a remarkable scene of the Supreme Court justices peppering counsel for the publishers with all manner of questions, many seemingly hostile to their appeal of the Second Circuit's decision.

Summary of Proceedings

Section 411(a) of the Copyright Act, 17 U.S.C. § 411(a), provides that "no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration (with exceptions not pertinent here). The named plaintiffs in these cases had each registered at least one work with the Copyright Office prior to commencing their actions. However, many, probably the majority, of the works encompassed by the broad plaintiff class definition had and have not been registered with the Copyright Office.

The lower federal courts only have the jurisdiction and powers granted them by Congress. U.S. Const. art. III, § 1. In the district court, the defendants invoked Section 411(a) as a defense, claiming that the district court lacked jurisdiction over claims involving unregistered works. After an extended period of negotiations, the parties reached a detailed settlement agreement which encompassed a broadly defined class of plaintiffs and works, including the unregistered works, but provided lesser compensation for unregistered works. Some authors of unregistered works objected to the lesser compensation, to which the publishers responded that the claims would have been barred by Section 411(a) if they had been brought separately and thus were worth less. The district court approved the settlement, despite the objections. The Pennsylvania class action law firm representing plaintiff authors and the Authors Guild in this case also represents authors and the Guild in the so-called Google Book Case. *The Authors Guild, Inc. v. Google Inc.*, 05 Civ. 8136 (DC) (S.D.N.Y.). The plaintiff class definitions are comparably broad in both cases, purporting to encompass not only U.S. works, but also works in foreign countries which have copyright treaty relations with the United States.

Various objectors with unregistered works appealed on the ground that the settlement compensation was unfair to them and that they were not adequately represented.

The United States Court of Appeals for the Second Circuit *sua sponte* raised the issue of subject matter jurisdiction under Section 411(a) and ordered supplemental letter briefs on the issue. The Court then reversed, holding that the district court could not entertain or approve a settlement that included the unregistered works because registration of those works was a jurisdictional pre-requisite to suit on those claims under Section 411(a). *In re: Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 136 (2d Cir. 2007).

In their petition for certiorari, the defendant publishers posed two questions, paraphrased as: (1) whether the district court could approve a settlement releasing claims otherwise

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outside its jurisdiction, despite Section 411(a), and (2) whether the Second Circuit erroneously ignored a purported assurance in the Supreme Court's *Tasini* decision that parties could resolve the problem of "compromised electronic news archives" by agreements among authors and publishers.

It cannot have been a comforting sign to petitioners or to the respondents supporting the petition, that, in granting certiorari, the Supreme Court completely restated the question for review as follows: "Does 17 U.S.C. §411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?" Order, March 2, 2009. The Court's narrow restatement of the issue presumably indicated that it was only interested in the threshold issue of subject matter jurisdiction, not the fact-bound questions concerning the class-action settlement. The case was distributed for conference on ten different occasions before the Court granted certiorari.

After granting the petition and restating the issue for review, the Court took the unusual step of inviting Deborah Jones Merritt, Esq., a law professor at the Ohio State University Moritz College of Law, Cleveland, Ohio, to file an amicus brief in support of the court of appeals decision under review, since none of the parties supported that decision. Professor Merritt clerked for Justice Ruth Bader Ginsburg on the court of appeals and for Justice Sandra Day O'Connor. Professor Merritt filed a powerful brief in support of the Second Circuit's decision that Section 411(a) is jurisdictional, relying on the language of the statute, its legislative history, the consistent history of the requirements for commencing suit under all the Copyright Acts, beginning with the 1790 Act, recent congressional action, numerous cases treating the statute as jurisdictional, and the public policy importance of registration in the U.S. copyright regime, including the deposit requirement which has been essential to the collections of the Library of Congress. The brief also argues that the defendants should be estopped from first invoking Section 411(a) as a jurisdictional bar to the claims on the unregistered works in the district court and then purportedly "waiving" this requirement and using it as a sword in negotiating the settlement by arguing that owners of the unregistered works could not litigate their claims, thus making them worth less in the settlement. Brief of Court-Appointed Amicus Curiae in Support of the Judgment Below 57-62 ("Ct. Amicus Br."). The Solicitor General also filed an amicus brief which agreed with petitioners that Section 411(a) is not jurisdictional and argued that the approval of the settlement should not have been vacated.

No decision will likely issue for several months, but this case presents a question of fundamental importance under the Copyright Act. The Supreme Court's decision will have significant effects on that other pending class action settlement, the Google Book Settlement.

Oral Argument

The actual arguments in the Supreme Court reveal a remarkable scene of the Supreme Court justices peppering counsel for the publishers with all manner of questions, many seemingly hostile to their appeal of the Second Circuit's decision. Charles Sims argued for the publisher petitioners (and implicitly the author respondents, who supported petitioners); Ginger Anders, Assistant to the Solicitor General, argued for the United States, supporting petitioners; and Professor Deborah Jones Merritt argued as appointed amicus curiae in support of the Second Circuit's judgment below. Oral argument is largely an occasion for the justices to ask their questions, not to listen to counsel's prepared arguments. Here, Mr. Sims could only utter two sentences invoking the Court's decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) in support of reversal before Chief Justice Roberts interjected that "[t]his is a lot harder case than *Arbaugh*, though. *Arbaugh* involved the definition of an employer [in Title VII of the …] and then the scope of the statute. This one [in the Copyright Act] says no suit shall be instituted." Transcript of Oral Argument, Oct. 7, 2009 ("Tr.") 3.

Sims then explained his "second point …" that, apart from *Arbaugh*, the "statutory text, structure, purpose and history all point to classifying 411(a) as mandatory but not jurisdictional." Tr. 4. When he moved on to his "third point …" Justice Ginsburg interrupted with a question whether Sims agreed with the government position in the case.

Later, however, the Court eased somewhat, and heard argument from Ginger Anders, Assistant to the Solicitor General, who argued as amicus that § 211(a) was not jurisdictional, but that a court hearing a case subject to dismissal under that section should *sua sponte* consider the public interest

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in refusing continuing to hear a case about any unregistered materials to promote the Library of Congress' interest [in] collecting physical copies of all copyrightable materials, which it obtains via the deposits which accompany copyright registrations. The Court seemed appreciative of hearing [the] argument that the class action need not be set aside again, and that there was a "middle way" between finding that § 211(a) creates a jurisdictional obstacle and finding that the section merely imposes an administrative step in prosecuting an action.

Lastly, the Court heard Prof. Deborah Jones Merritt, the amicus it had appointed to defend the Second Circuit's conclusion – an advocate whom Chief Justice Roberts praised as having able discharged that responsibility. The Court's questioning of her, however, revealed a possible reluctance to allow the Second Circuit's jurisdictional determination to undermine several years of negotiation and litigation. Several justices also recognized the concern of publishers eager to create a complete database and to pay for it, but supposedly unable to locate some copyright owners who had not registered their works. The amicus' main argument was that Congress had required registration as a precondition to suit, based on its 200 years of experience in balancing the rights of authors against the public's ability to find that work in the Library of Congress. However, avid Google users will doubtless find this public policy balancing act to be archaic in an age when the number of internet users vastly exceeds the number of researchers browsing stacks at the Library of Congress.

The Court will likely decide the case based on its view of the specific language and Congress' intent behind Section 411 (a). Apart from Chief Justice Roberts, who remarked several times that the wording of the section appeared to him to sound jurisdictional, some justices seemed open to the view that the section created a mandatory requirement, but not a jurisdictional barrier to whether courts could hear the controversy. If the Second Circuit's decision is reversed, the settlement will either be saved, or case remanded for consideration of the public policy considerations urged by the Solicitor General.

On the other hand, if the Second Circuit's decision is affirmed, the parties will presumably attempt to reach a new settlement in this case. The proposed Google Book Settlement also addresses claims by owners of unregistered of U.S. works, so an affirmance in this case would also further complicate that already complicated settlement.

Toby Butterfield and Al Daniel, Jr. are litigation partners at Cowan, DeBaets, Abrahams & Sheppard LLP in New York.

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Fourth Circuit Holds Publisher and Author Liable Under Federal Securities Laws

First Amendment Protections Do Not Apply to Speech About Stocks

By Bruce D. Brown and Laurie A. Babinski

In the first case to impose liability under the federal securities laws on a newsletter publisher and writer who neither traded in the stock they recommended nor owed a fiduciary duty to their readers, the Fourth Circuit held on September 15 that the publication of a prediction about a NYSE-traded company violated Section 10(b) of the Exchange Act of 1934 and Rule 10b-5. *SEC v. Pirate Investor LLC,* No. 08-1037 (4th Cir. Sept. 15, 2009).

The decision has far-reaching implications for all publishers reporting on publicly-traded companies who can now be pursued under federal securities law without any of the protections of the First Amendment. A petition for rehearing is pending.

Background

In 2003, the Securities and Exchange Commission filed a civil complaint against newsletter writer Frank Porter Stansberry, publisher Pirate Investor, LLC, and its parent company Agora, Inc., under Section 10(b) and Rule 10b-5 after they published an e-mail solicitation and report regarding an upcoming agreement between the United States and Russia that had the potential to drive up shares of USEC, Inc., a provider of uranium enrichment services.

While doing research for his monthly newsletter in spring of 2002, Stansberry came across USEC, a publicly-traded company that serves as the executive agent of the U.S. government under a disarmament pact between the United States and Russia. Under the agreement known as "Megatons to Megawatts," Russia sells uranium to the United States as fuel for nuclear power plants. The agreement requires the countries to renegotiate the price of uranium periodically, and new prices are subject to the approval of both governments. In 2001, the pricing agreement had expired and the countries began to negotiate new terms. The companies reached an agreement in February 2002, but the governments had not approved the agreement as of May 2002.

Stansberry did basic research into USEC and then contacted its head of investor relations, Steven Wingfield, for an interview. Over the course of an hour, the two discussed USEC, its prospects for the future, and its key role as the sole importer of Russian nuclear fuel. They also discussed the company's recent pricing agreement with its Russian supplier, OAO Techsnabexport, which awaited the approval of both governments. Speculation in the financial press was that the agreement could be approved at an summit between Presidents Bush and Putin set to take place in Moscow from May 23 to 25. USEC itself had asked the State Department to add the pricing agreement to the summit agenda, and said publicly that it "hoped" the deal would be approved in the "near term."

At the end of the conversation, Stansberry told Wingfield that he probably wouldn't write about USEC because it didn't resemble the type of growth-oriented technology enterprises he usually covered in his newsletter. Stansberry testified at trial that Wingfield became "agitated" upon hearing that and told him: "Watch the stock on May 22nd." After reflecting on the conversation for several days and seeing signs in the press that Wingfield was correct, Stansberry realized that he had information of potential value to his readers. Because of the one-time nature of the information, Stansberry decided not to write what he knew in his newsletter but instead offer it in a report that he would sell for $1,000.

In subsequent days, Stansberry drafted an e-mail which stated that a senior official of a publicly-traded company had told him "exactly when" a deal would be finalized and announced to the public. The deal, Stansberry wrote, had the potential to double an investment in the company. Although Stansberry wrote with the exuberant and hyperbolic tone characteristic of the financial newsletter industry, he also cautioned his readers that due to the stock market's unpredictability he couldn't guarantee that the "stock w[ould] pop." The e-mail went out to 800,000 of the company's subscribers. Stansberry sold 1,217 copies of the report, which identified USEC as the public company.

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On May 13, President Bush announced a new arms reduction treaty between the U.S. and Russia. USEC's share price spiked on the news, which came several hours before Stansberry sent the e-mail solicitation to his subscribers. The price continued to increase through May 22, a date that was also the ex-dividend date for the stock. The USEC-Tenex pricing agreement was not approved on May 22; approval was announced three weeks later on June 19. Stansberry received 215 requests for refunds and honored them all.

District Court Trial

In the complaint filed in the U.S. District Court for the District of Maryland, the SEC pled, in accordance with Section 10(b) and Rule 10b-5, that the defendants had made materially false statements of fact in connection with the purchase or sale of a security. It sought an accounting, disgorgement of profits, civil penalties, and injunctive relief. The defendants' motion to dismiss was denied, and the court refused their request to file a motion for summary judgment.

The decision has far-reaching implications for all publishers reporting on publicly-traded companies who can now be pursued under federal securities law without any of the protections of the First Amendment.

On March 21, 2005, Senior District Judge Marvin J. Garbis presided over a five-day bench trial in Baltimore. The SEC offered testimony from Wingfield as well as investors who bought USEC shares based on Stansberry's recommendation. The defendants put forward testimony from Stansberry and his colleagues as well as expert testimony from the former deputy chief economist for the SEC and a professor of journalism from Northwestern University's Medill School of Journalism who specialized in the newsletter industry.

In addition to arguing that they did not fall within the purview of Section 10(b) and Rule 10b-5 and that the SEC had not met its burden of proof under the statute, the defendants also argued that traditional First Amendment protections applied because the SEC sought to impose liability based on publication of constitutionally-protected speech. Such protections would have required, among other things, that the SEC prove by clear and convincing evidence that the defendants acted with actual malice.

District Court Decision

Nearly 28 months after trial, Judge Garbis issued a decision finding Pirate and Stansberry liable for violations of Section 10(b). At the outset of the decision, the court dismissed defendants' claim that they could not be held liable under Section 10(b) unless there was clear and convincing proof of actual malice. The defendants' e-mail and report, the court said, constituted commercial speech that deserved a lesser degree of protection because it served no other purpose than to "propos[e] a commercial transaction." The court thus held that the SEC only needed to prove by a preponderance of the evidence each element of the civil offense.

The court then embarked on its analysis of Section 10(b), which requires a plaintiff to prove that a defendant made materially-false statements of fact with scienter "in connection with" the purchase or sale of a security. Ignoring the defendants' argument that the statements at issue constituted predictions, the court found that Pirate and Stansberry had made a misrepresentation of fact when they published that Stansberry had "a particular inside source for the precise date on which the stock price would rise."

To reach its conclusion that the statement was false, the Court credited the testimony of Wingfield, the USEC executive with an instinct for self-preservation who testified that he did not remember telling Stansberry to "watch the stock on May 22nd," and discredited the testimony of Stansberry, who testified that Wingfield had become angry and spelled out the connection between the summit and the pricing agreement.

The court further found that the SEC had proved that the false statement was material. It held that the "lie" that "Jay McDaniel," the pen name Stansberry used to write the e-mail and report, "had been told by USEC executive that government approval of the pricing agreement would be announced on May 22, 2002" – was both "self-evident" and "supported by specific evidence." It cited the run-up in the stock price beginning on May 14 as evidence of materiality, but ignored contemporaneous evidence presented by the defendants that the bump was due to President Bush's announcement and

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other information available to the public. The court also ignored the expert testimony of former SEC chief economist Dr. Robert Comment, who testified that the defendants' statement that the announcement would be made on May 22 was immaterial, and that the defendants' statement that USEC itself saw a tie between the summit and approval of the agreement may have been material but was also true.

The court's determination that the statements were materially false also formed the basis for its conclusion that Stansberry had acted with the requisite scienter. Since the court had found that Stansberry's account of what happened at the end of his call was false, it also found that Stansberry must have known it was false because he was a party to the call. The court then imputed Stansberry's state of mind to Pirate, but not to Agora.

Finally, in what became a central issue on appeal, the court found that Stansberry's statements were made "in connection with" the purchase or sale of a security. In making this determination, the court adopted a broad reading of the "in connection with" test as set forth by the Supreme Court, which requires that the fraud be "consummated" by and "require" the purchase or sale of securities. In contravention of this explicit precedent, the court found that it was "enough" that the defendants' actions "affected the price of the stock or induced others to purchase the stock."

The court ordered Pirate and Stansberry to disgorge more than $1.3 million in profits and pay civil penalties of $240,000, and granted permanent injunctive relief that prohibited them from violating Section 10(b) and Rule 10b-5. Pirate and Stansberry filed a motion to stay the injunction pending appeal, which the court denied. The motion was later granted in the Fourth Circuit by Judge Roger Gregory with the concurrence of Judges Paul Niemeyer and Dennis Shedd.

Pirate and Stansberry presented an issue of first impression: whether a publisher and author who did not trade in the stock or have any fiduciary duties to their readers could be held liable under federal securities laws.

Arguments on Appeal

On appeal, Pirate and Stansberry presented an issue of first impression: whether a publisher and author who did not trade in the stock or have any fiduciary duties to their readers could be held liable under federal securities laws. Such a broad reading of the "'in connection with" requirement, they argued, could open up all publishers – including the mainstream media – to liability for statements about publicly-traded companies without the protections of the First Amendment.

The appellants argued that their conduct was not "in connection with" the purchase and sale of a security under Section 10(b) because the so-called fraud did not "coincide" with or "require" the purchase or sale of a security. If there was any fraud, they argued, it was "in connection with" the offer and sale of a report, not securities. The appellants also argued that they did not fall into either of the only two classes of defendants that the Supreme Court has found to meet Section 10(b)'s "in connection with" requirement – those who improperly trade in securities and those who breach fiduciary duties. Finally, the appellants cautioned that because the Constitution fully protects reporting and commentary about the stock market and public companies, the Court has placed careful limitation on potentially overbroad securities laws like Section 10(b) when speech is involved.

On constitutional grounds, the appellants argued that the e-mail and report constituted speech that was fully protected by the First Amendment and that, as a result, the Court must afford them the actual malice protections of *New York Times v. Sullivan* as well as the independent appellate review of the entire record mandated by *Bose v. Consumers Union of U.S.*

Further, they argued out that the SEC relied on a statement of protected opinion and conjecture to establish material falsity – Stansberry's prediction that USEC's stock would double in price. Finally, they argued that the permanent injunction constituted an impermissible prior restraint on future speech.

In its briefing, the SEC focused on the broad applicability of Section 10(b) and its "in connection with" requirement. It argued that the e-mail and report were "in connection with" the purchase or sale of securities because it was "virtually certain" that investors who purchased the report would buy USEC stock, a test found nowhere in Supreme Court precedent. The SEC also countered the argument that Section 10

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(b) was limited as both a statutory and practical matter to defendants who breached fiduciary duties and defendants who traded even though it had previously only applied in those contexts, citing the plain language of the statute which states that the statute applies to "any person." On First Amendment grounds, the SEC made the argument that the appellants had committed fraud, and that fraudulent speech was not constitutionally protected. As a result, the SEC said, the traditional *New York Times* standards did not apply and the permanent injunction was appropriate.

The appeal was argued in front of Chief Judge Karen Williams and Judges Diana Gribbon Motz and Neimeyer on December 2, 2008.

Fourth Circuit Decision

On September 15, Judges Niemeyer and Motz issued a *per curiam* opinion affirming the district court's findings. (Chief Judge Williams resigned from the bench in July 2009.) They based their holding on the three questions: 1) whether the conduct in this case constituted a violation of Section 10 (b); 2) whether, if the conduct fell within the purview of Section 10(b), the First Amendment entitled the appellants to the heightened protections it affords the media in other contexts; and 3) whether the permanent injunction entered by the district court was an improper prior restraint on speech.

In a extensive discussion of the "in connection with" requirement, the Court held that "the application of [Section] 10(b) is not barred by the fact that there was no securities trading relationship" between the appellants and those who received the e-mail or purchased the report. The Court found that the Supreme Court had embraced an "expansive reading" of Section 10(b)'s "in connection with" requirement, but then ignored Supreme Court precedent to hold that the appellants' activities were "in connection with" securities transactions because their fraud was "maximized," another test found nowhere in Supreme Court precedent, by purchasers of the report who invested in USEC.

The Court then dismissed the appellants' First Amendment argument, holding that "punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment." On similar grounds, the Court concluded that the appellants' challenge of the injunction also failed. The injunction was not, the Court said, an unlawful prior restraint because "it only enjoins Appellants from engaging in securities fraud, which we have held is unprotected speech."

Finally, the Court acknowledged but never resolved the concerns raised by both the appellants and a group of publishers and non-profit journalism organizations who filed an amicus brief about the potential application of securities laws to publishers who do nothing more than make statements about or comment on publicly-traded companies. Such an interpretation of Section 10(b), they had argued, would provide an "end-run" around First Amendment protections for any anyone who wanted to sue over statements made about a public company without the hassle of higher evidentiary and legal standards.

Petition for Rehearing En Banc

The appellants on October 30 filed a petition for rehearing or rehearing *en banc*, addressing the numerous factual errors in the Court's decision caused by a selective reading of the record, all of which led to erroneous legal conclusions on the statutory and constitutional issues. The petition noted that the statutory question of first impression, paired with a holding that had serious constitutional implications, required the contemplation of the full court.

In particular, the petition highlighted the panel's decision to expand Section 10(b) liability to include anyone who writes or comments on the markets whether or not they trade or have any fiduciary duties. The petition also addressed inconsistency between the panel's decision and a decision in another case issued just over a week later that applied *Bose* independent review to all "tort claims arising from speech" – not just defamation.

Such a review, the appellants noted, would have revealed the indisputable, contemporaneous evidence that Stansberry believed passionately – and still does – that he correctly interpreted the signals the USEC official sent him at the end of their discussion.

The petition is pending.

Bruce W. Sanford, Lee T. Ellis, Jr., Bruce D. Brown, and Laurie A. Babinski of Baker & Hostetler LLP represented Agora, Inc., Pirate Investor, LLC, and Frank Porter Stansberry at trial and on appeal. Karen Martinez and Thomas Melton represented the SEC at trial. Mark Pennington and Michael Conley represented the SEC on appeal.

Mississippi Jury Rules in Favor of TV Station in Libel by Implication Case

Television Station Argued Report Was True, Not Negligent

By Luther Munford

After Hurricane Katrina hit the Mississippi Gulf Coast, WLOX-TVin Biloxi began a series that it dubbed "Action Report." The series addressed numerous hurricane recovery issues, including owner-contractor construction disputes. One of those reports sparked a defamation suit which a jury recently resolved in favor of WLOX. *Hudson v. WLOX-TV*, No. A-2402-06-212 (Miss. Cir. Ct. jury verdict Sept. 30, 2009).

The report in question described a classic construction controversy. A homeowner alleged that building contractor H&H Construction Co. had done "shoddy work" and had walked off the job after demanding more money. The principals in the contracting company, Arthur "Gerald" Hudson and his son Gerald "Heath" Hudson, refused to be interviewed on camera, but told the reporter that the company left the job because it was not paid as agreed.

The station's initial story, broadcast on June 21, 2006, related the homeowner's story, and the contractor's response. The station also reported that the contractor had told the reporter he was licensed, but that the station was unable to find the contractor listed on a state website of licensed contractors.

WLOX then ran a follow-up story on June 26, which included on-camera statements by Heath Hudson's wife. H&H then sent a letter to the station complaining about the story, but did not demand a retraction.

The Hudsons sued for defamation and tortious interference with business relations. Plaintiffs were represented by two of the state's leading trial lawyers, including a former Mississippi Supreme Court justice, who argued that the story, while literally accurate, nevertheless had a negative and defamatory "tone" by implying that plaintiffs' company was not and had never been licensed, and that it performed substandard work.

The contractor was, in fact, licensed, but was listed on the state website under the individual name of "Hudson, Gerald" rather than the company name. Also, the reporter was unaware that the contractor had sued the homeowner and filed a lien on the property because the owner had stopped paying amounts due under the contract.

Pretrial Motions

Prior to trial, the defense moved for summary judgment on the grounds that the plaintiff was alleging libel by innuendo. The summary judgment motion was denied.

The Mississippi Supreme Court has repeatedly held that "defamation must be clear and unmistakable from the words themselves and not be the product of innuendo, speculation, or conjecture." *Hamilton v. Hammons*, 792 So.2d 956, 960 (Miss. 2001), *overruled on other grounds by Dedeaux v. Pellerin Laundry, Inc.*, 947 So.2d 900 (Miss. 2007); *accord Baugh v. Baugh*, 512 So.2d 1283, 1285 (Miss. 1987); *Ferguson v. Watkins*, 448 So.2d 271, 275 (Miss. 1984). But the court has also stated that the overall tone or structure of a story may distort the truth as to make the underlying implication false, even where no material omissions are involved. *Journal Publ'g Co. v. McCullough*, 743 So.2d 352, 360-61 (Miss. 1999) (*citing McCullough v. Cook*, 679 So.2d 627, 632 (Miss. 1996)). Plaintiff's counsel in the trial against WLOX, Chuck McRae, was a judge on the panel that heard and concurred in the opinion in *McCullough v. Cook* in 1996, during his 11-year tenure on the Mississippi Supreme Court; but did not participate in *Journal Pub. Co. v. McCullough* in 1999.

Trial

At trial, the plaintiff argued that the tone of the article harmed his reputation, although he did not present evidence of pecuniary loss, and did not make a specific demand until closing. Plaintiff also argued that the station should have taken more time to research the story, and that the station's

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high reputation in the community created a higher responsibility for its reporter to confirm the facts of the story before airing it.

WLOX argued truth as a defense, and that the station had done the best job it could under the circumstances. During the defendant's case, an employee of the state's contractor board testified about problems with the website that made it difficult to search except by the exact name entered in the database. In the final closing, plaintiffs' counsel suggested that $1 million would be sufficient compensation for their damages.

After a week and a half of trial, at the conclusion of evidence the court partially granted a defense motion for a directed verdict, dismissing the tortious interference claim on the grounds that plaintiff had not shown common law malice.

The court allowed the defamation count to go to the jury. Over the objection of the defense, one of the instructions stated that "a statement which is true on its face may, in fact, be false because it leaves out crucial information.

Furthermore, the overall tone of a story may so distort the truth as to make the underlying implications of the story false."

Another instruction stated:

The Court instructs the jury that the Defendant has alleged in this case that its telecast did not exactly and literally state either that the Plaintiffs "were not licensed contractors" or that Plaintiffs "had been sued for defective work by Wayne Fairley." However, I charge you that Plaintiffs are not required to prove that they used the exact language "were not licensed contractors" or "had been sued for defective work by Wayne Fairley."

They are only required to demonstrate that the Defendant made statements substantially the same as saying that Plaintiffs "were not licensed contractors" or substantially the same as saying they "had been sued for defective work by Wayne Fairley." After less than two hours of deliberation, the 12-member jury voted unanimously for WLOX. It appears that the plaintiffs are planning to file a motion for a new trial.

Luther Munford is a partner at Phelps Dunbar LLP in Jackson, Mississippi. WLOX was represented at trial by Henry F. Laird, Jr. and S. Trent Favre of Watkins Ludlam Winter & Stennis in Gulfport, Miss. The plaintiffs were represented by Jim Waide of Waide & Associates in Tupelo, Miss. and Chuck McRae of Jackson, Miss.

Jury Awards $16.57 Million in Wrongful Death Lawsuit Over Radio Contest

Woman in "Hold Your Wee for a Wii" Contest Died of Water Intoxication

After 26 days of testimony and nine days of deliberations, a California jury awarded $16.58 million in wrongful death damages to the family of a women who died after participating in a radio contest in which participants had to drink large amounts of water and not urinate. *Strange v. Entercom Sacramento LLC*, No. 07AS00377 (Cal. Super., Sacramento County jury verdict Oct. 29, 2009).

Jennifer Strange, a 28-year-old mother of three who participated in the "Hold Your Wee for a Wii" contest, was found dead about six hours after she dropped out of the contest after drinking one and a half gallons of water over the course of three hours, coming in second and winning tickets to a Justin Timberlake concert. The cause of death was determined to be hyponatremia, a form of water intoxication in which the level of sodium in the blood is abnormally low, and the body's cells swell. This swelling, especially of the brain cells, can lead to seizures.

The contest was staged on the "The Morning Rave" show on KDND-FM in Sacramento on January 12, 2007. At first, contestants were required to drink eight, eight-once bottles of water every 10 minutes, then 16-ounce bottles every ten minutes. First prize in the contest was a Wii video game, worth about $250, which was in short supply at the time.

Strange's husband and children sued KDND-FM's owner, Entercom Sacramento, parent corporation Entercom Communications and several individual managers and employees. The station's employees, which included the station's manager, its promotions manager, the "Morning Rave" show's producer, thee DJs, and two on-air personalities, were all fired by the station in the aftermath of the contest.

The employees paid $100,000 in settlement of the claim and were dropped from the case in early September. The claim against the regional manager was dropped from the case during trial, leaving Entercom Sacramento and Entercom Communications as the defendants at trial.

The jury award of $16,577,118 was solely against Entercom Sacramento; the jury rejected plaintiffs' claim that the parent company should also be liable because its legal department should have better trained the subsidiary and its employees.

Trial

In pretrial proceedings, Judge Lloyd A. Phillips barred evidence of the settlements and of prior Entercom contests at trial. He also required jurors to sign declarations that they would not use personal electronic and media devices to research or communicate about the case.

At trial, the plaintiffs argued that the contest was meant to be "cutting edge," and "dangerous," in a crass effort to increase ratings. They presented testimony from three other contestants about the physical effects of the contest, and various family members on the loss of Strange.

The three contestants who testified for the plaintiffs, included the winner of the contest. All three filed their own lawsuits over the contest, which were combined, then settled: two for $5,000, and one for $10,000. *Davidson v. Entercom Sacramento*, No. 07AS02328 (Cal. Super., Sacramento County settled Aug. 11, 2009).

The plaintiffs' case also included recordings of the contest, in which callers to the station warned that it was a dangerous stunt.

John Geary, regional manager of Entercom's six stations in Sacramento, testified that while he had little to do with the stations' contests, the company had a written policy that contests "which are illegal, dangerous, misleading, rigged, or in bad taste must be avoided." An in-house Entercom attorney testified in a videotaped deposition that she had her own policy of requiring medical personnel be present at any contests involving "physicality" or "ingestion." No medical personnel were present at the contest.

Station manager Steve Weed, who was fired over the contest, testified that the contest was similar to other contests run by the station, and to television programs such as Fear Factor and Survivor. He also said that he had not received any cor-

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porate training regarding contests, and was unaware of any written policies. Weed filed his own wrongful termination suit, although the suit was dismissed for failure to state a claim and Entercom eventually collected $275,142 in attorney fees. *Weed v. Entercom Sacramento LLC*, No. 2008-112 (Cal. Super).

The plaintiffs concluded their case with testimony from Strange's immediate family. Her husband, Billy Strange, testified with a slideshow of him and his wife at their wedding, their childrens' births, and other family activities.

The defendants presented their case in one day, calling just four witnesses. Their argument was that Strange's death was not foreseeable, and that the local station personnel acted without consulting management.

A forensic pathologist with the Sacramento County coroner's office testified about the rarity of hyponatremia. But a recurring theme during the trial was the death of a Chico State University student after a hazing in which the student drank a large amount of water.

Jennifer Strange, a 28-year-old mother of three who participated in the "Hold Your Wee for a Wii" contest, was found dead about six hours after she dropped out of the contest after drinking one and a half gallons of water over the course of three hours, coming in second and winning tickets to a Justin Timberlake concert.

The other defense witnesses were an engineer for the radio station, and two other contest participants. The two contestants testified that they understood that they could drop out of the contest at any time. Overall, the trial included 41 witnesses and 192 exhibits.

Closings

In closing arguments, plaintiffs argued that the KDND employees were acting within the scope of their employment, and were inadequately trained and supervised by Entercom. They asked for an award of $34 to $44 million.

The defense argued that the death was not foreseeable, and that the Entercom corporate parent should not be held liable for the "serious, tragic mistakes" of its local employees. Even if the company is held liable, defense counsel argued, the award should be only about $4.5 million.

In rebuttal argument, plaintiff's counsel Roger A. Dreyer showed a photograph of the Strange family, then showed the same picture with Jennifer Strange removed.

In his instructions the jury, Superior Court Judge Lloyd A. Phillips said that the parent company could not be held liable for the actions of employees of the subsidiary, "merely by reason of ownership or control."

Verdict

After deliberating for nine days, the 12-member jury found that Entercom Sacramento was entirely responsible for Strange's death. The jury also unanimously found that Entercom's corporate parent was not liable in the death, and found by a vote of 10-2 that Strange was not contributorily negligent in her own death.

The award total of $16,577,118 consisted of economic and non-economic damages. $1,477,118 – approved by the jury 10-2 -- was for economic damages based on Jennifer Strange's potential future earnings.

One juror told the *Sacramento Bee* that the more contentious issue was non-economic damages, for which the jury approved $15.1 million by a 9-3 vote. The final amount, the juror said, was an average of the amounts that various jurors wanted to award.

On its sixth day of deliberations, the jury asked for access to a computer spreadsheet program. The court initially gave then jury a pad of paper and calculator instead, then provided a 10-digit adding machine when the jury requested it. The same juror also told the *Bee* that the evidence against Entercom Sacramento was "overwhelming." "These stations need to be more cognizant of what they're doing," another juror told the newspaper, "and they need to take the time to do the research to make sure no one's harmed."

Entercom Sacramento and Entercom Communications were represented by Donald W. Carlson of Carlson Calladine & Peterson LLP in San Francisco; and Douglas W. Sullivan of Folger Levin & Kahn in San Francisco. Plaintiffs were represented by Roger A. Dreyer of Dreyer, Babich, Buccola & Callaham, LLP in Sacramento; and Harvey R. Levine of Levine, Steinberg, Miller & Huver in San Diego.

Radio host wins New York libel trial

Curtis Sliwa Sued for Comments Made at Televised University Forum

After a two-day trial, a New York jury decided that radio host, television commentator and Guardian Angels founder and director Curtis Sliwa had not libeled a Brooklyn imam by stating that members of the imam's mosque had taken guns into Canada. *Wahaj v. Sliwa*, No. 026671/2003 (N.Y. Sup. Ct., Kings County verdict Oct. 10, 2009).

Sliwa made the statement during a forum at the City University of New York on "The Limits of Freedom: Civil Liberties in Wartime," which was taped in March 2003 and aired several times on the university's cable television station the following month. (The show is archived on the station's web site.)

After naming plaintiff Siraj Wahhaj's Masjid at-Taqwa mosque as the "epicenter of terrorist activity in our city," Sliwa was asked whether undercover police should attend services at the mosque to monitor its activities and speakers. "Oh, I definitely do, because I know that they trafficked in guns up to Canada already," Sliwa said about 23 minutes into the program. "I definitely know that," Sliwa added, in response to catcalls from fellow panelists.

While Wahhaj has been praised for organizing anti-drug patrols and his other community activities, he has also been criticized for hosting militant Islamic speakers at his mosque. Among the speakers was blind Sheik Omar Abdel-Rahman, who was convicted in 1996 of conspiring to carry out terrorist attacks on several New York City landmarks. At one point, Wahhaj was also identified as one of 170 "unindicted persons who may be alleged as co-conspirators" in the 1993 bombing of the World Trade Center.

"I have never trafficked guns," Wahhaj testified at trial, according to the *New York Daily News*. "I felt a sense of outrage. I felt embarrassed that someone would say that about me." In his suit, Wahhaj sought $5 million in damages.

According to the *New York Post*, during the libel trial Sliwa testified that he once respected and worked with Wahhaj, and that in the late 1980s Wahhaj approached Sliwa about how the drug patrols could be effective without weapons. Sliwa testified that several members of the patrols told him that they had illegal guns, and that they went "on vacation" to Canada when they feared being discovered.

The jurors unanimously decided for Sliwa (above) in their first vote. "We all said in one shot, 'No,'" juror Jacqueline Lopez told the *Post*.

Sliwa added that his opinion of Wahhaj changed when the imam served as a defense character witness for Sheik Abdel-Rahman during the conspiracy trial.

The jurors unanimously decided for Sliwa in their first vote. "We all said in one shot, 'No,'" juror Jacqueline Lopez told the *Post*. According to the newspaper, as she left court Lopez asked Sliwa for a hug, saying, "I love you guys."

Sliwa was represented by Paul Siegert of New York. Wahhaj was represented by Richard A. Klass of Brooklyn, N.Y.

Compounding the Felony: California's Amended Anti-Paparazzi Statute

By Douglas E. Mirell

Effective January 1, 2010, California's attempt to rein in the conduct of rogue paparazzi will gain added teeth. For the first time, media outlets that initially purchase audio, video or still photos they know to have been taken in violation of this state's 10-year-old anti-paparazzi statute may now be subject to treble general and special damages, punitive damages, disgorgement of profits and a civil fine ranging from $5,000-$50,000 if they publish, broadcast, sell or offer to sell those recordings or images.

Background of Section 1708.8

In response to the tragic death of Princess Diana in 1997, the California Legislature sought to further protect its indigenous celebrities by enacting a law that it hoped would limit the intrusive conduct of aggressive paparazzi. Ignoring the findings of French authorities attributing the car crash that killed Diana to the recklessness of her intoxicated chauffeur, and not to the actions of the paparazzi, the Legislature nevertheless soldiered on. The result was Civil Code Section 1708.8, a statute that had nothing whatsoever to do with the real or imagined circumstances of Diana's death. Instead, Section 1708.8 sought to substantially expand the reach of California trespass law by creating a civil damages cause of action for three distinct types of activity.

First, a "physical invasion of privacy" was made actionable where a "defendant knowingly enters onto the land of another person without permission or otherwise committed a trespass . . . with the intent to capture" (whether successful or not) "any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity, and the physical invasion occurs in a manner that is offensive to a reasonable person." Civil Code § 1708.8(a).

Second, it created a new statutory tort denominated "constructive invasion of privacy." This so-called "technological trespass" law rendered liable anyone who "attempts to capture" (again regardless of success), "in a manner that is offensive to a reasonable person," the same sort of conduct described in the "physical invasion" tort "through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used." Civil Code § 1708.8 (b). In short, the Legislature sought to limit the use of parabolic microphones and telephoto lenses to capture sounds and images that could not have otherwise been recorded absent a physical trespass.

Finally, Section 1708.8 also made actionable any assault "committed with the intent to capture" (also regardless of success) "any type of visual image, sound recording, or other physical impression of the plaintiff." Civil Code § 1708.8(c)

The penalties for violating any of these provisions are treble general and special damages, punitive damages and, upon proof that the invasive conduct was "committed for a commercial purpose," disgorgement of "any proceeds or other consideration." Civil Code § 1708.8(d). The phrase "for a commercial purpose" is defined to mean "any act done with the expectation of a sale, financial gain, or other consideration" and includes unsuccessful attempts to sell, publish or transmit the image or recording. Civil Code § 1708.8(k). Liability for some or all of these damages extends to those who direct, solicit, instigate, induce or otherwise cause this conduct to occur. Civil Code § 1708.8(e). In addition, equitable relief is available to preclude future violations of both the "physical invasion" and "constructive invasion" categories of intrusion. Civil Code § 1708.8(h).

In an attempt to limit the impact upon third-party media entities for the wrongful acts of paparazzi from whom they might acquire audio, video or still photos, Section 1708.8, as originally enacted, provided immunity for the "[s]ale, transmission, publication, broadcast or use of any image or recording of the type, or under the circumstances, described in this section" – though this provision also made clear that such immunity did not extend to liability for common law torts such as publication of private facts. Civil Code § 1708.8(f).

Finally, the statute provides exemptions for public law

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enforcement entities as well as for private investigators (including the media) which seek "to obtain evidence of suspected illegal activity, the suspected violation of any administrative rule or regulation, a suspected fraudulent insurance claim, or any other suspected fraudulent conduct or activity involving a violation of law or pattern of business practices adversely affecting the public health or safety." Civil Code § 1708.8(g). The statute does not provide a defense to an ordinary intrusion tort claim, nor to a paparazzo who fails to capture or sell an image or recording. Civil Code § 1708.8(i) and (j).

Cases Implicating Section 1708.8

Over the course of the past decade, Section 1708.8 has not been extensively litigated. Perhaps the most famous attempt to use this statute came in 2003 when Barbra Streisand filed a $50 million lawsuit in state court against Kenneth Adelman, a photographer who captured an aerial image of her Malibu estate and posted that photo on a website that includes over 12,000 frames which form "a scientific photographic database documenting the California coast." In his anti-SLAPP motion, Adelman successfully argued that his aerial photographs did not capture "personal and familial activity" – a term defined by the statute as including, without limitation, "intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant others, or other aspects of plaintiff's private affairs or concerns." Civil Code § 1708.8(l). Thus, Streisand's lawsuit was dismissed and the trial court ordered her to pay over $177,000 in attorneys' fees. *See* http://www.californiacoastline.org/streisand/lawsuit.html.

In another case, ABC was sued in federal district court by a number of actors whose voices and images were surreptitiously captured in connection with "Pay to Play," a 2002 episode of the network's "20/20" news program. The premise of this episode was that aspiring actors and actresses in Hollywood must now pay $25-$45 to meet casting directors. In an attempt to avoid liability under Section 1708.8, ABC brought a summary judgment motion in which it argued that it didn't commit trespass, didn't record personal activity and didn't act in a manner offensive to a reasonable person. The district court denied ABC's summary judgment motion on these grounds and likewise rejected its attempt to avoid the disgorgement remedy on the claim that the First Amendment would not permit the "commercial purpose" language of Section 1708.8(d) to "encompass a news broadcast even if it happens to turn a profit." *See J.P. Turnbull v. American Broadcasting Companies*, 2004 U.S. Dist. LEXIS 24351, 32 Media L. Rep. 2442 (C.D. Cal., Aug. 19, 2004).

Assembly Bill 524

At the urging of the Screen Actors Guild, and with support from the City of Los Angeles and the Los Angeles County Sheriff's Department, State Assembly Speaker Karen Bass (D-Los Angeles) introduced Assembly Bill 524 on February 25, 2009, in an attempt to also hold those who purchase and use paparazzi-generated images and recordings responsible for any invasive conduct the purveyor may have committed in order to obtain audio, video or still photos. The legislation was opposed by, among others, the California Newspaper Publishers Association and the American Civil Liberties Union. Following a number of amendments resulting from conversations with lobbyists for the motion picture and television industries, A.B. 524 was signed into law by Governor Arnold Schwarzenegger on October 22; it will apply to conduct occurring on and after January 1, 2010.

(*See* http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_524_bill_20091011_chaptered.pdf.)

As signed into law, A.B. 524 contains legislative findings and declarations which recite that "[i]ndividuals and their families have been harassed and endangered by being persistently followed or chased" and that the "legitimate privacy interests of individuals and their families have been violated" by those who use "intrusive modern visual or auditory enhancement devices, such as powerful telephoto lenses and hyperbolic [sic] microphones."

A.B. 524 makes a number of changes to Section 1708.8, including the potential imposition of civil fines ranging from $5,000 to $50,000 upon all those who violate (as well as those who direct, solicit, induce or cause violations of) the statute. County counsel and city attorneys are empowered to bring legal actions to recover these fines.

From the perspective of media entities, perhaps the most significant change is that the former immunity accorded to those who sell, transmit or publish improperly captured images or recordings has now been eliminated if, "in the first transaction" following its taking or capture, a person had "actual knowledge" that the image or recording was obtained

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in violation of Section 1708.8. In turn, the term "actual knowledge" is defined as "actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired" the image or recording that it was taken in violation of the statute; such "actual knowledge" must be proven "by clear and convincing evidence." Another requisite for liability is that rights to the unlawfully obtained image or recording must have been procured through "compensation, consideration, or remuneration, monetary or otherwise."

Notwithstanding the efforts of the California Broadcasters Association and the Motion Picture Association of America, Assembly Speaker Bass refused to include an exemption for "matters of public concern." The opponents of A.B. 524 unsuccessfully argued that such an exemption was mandated by the First Amendment in light of the U.S. Supreme Court's opinion in *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (media is constitutionally protected from liability even for publication of information unlawfully obtained by a third party and then transmitted to the media where that information concerns a matter of public concern and media did not participate in unlawfully obtaining that information).

Nevertheless, A.B. 524 makes clear that any subsequent transmission, publication, broadcast, sale or offer to sell unlawfully obtained images or recordings beyond the "first" usage or transaction remains exempt from liability. This immunity applies to all subsequent publishers – *i.e.*, both those who were not parties to the "first" usage or transaction as well as to the "first" person whose use or acquisition of the image or recording was not unlawful, even if that first user *subsequently* obtains "actual knowledge" that the image or recording was originally captured in violation of 1708.8.

Two final pieces of good news: First, A.B. 524 provides that the entirety of Section 1708.8 "shall not apply to any visual image, sound recording or other physical impression taken or captured outside of California" – a restriction not previously imposed by the statute or case law. Second, the amended statute also make explicit that lawsuits brought under Section 1708.8 are fully subject to California's anti-SLAPP statute, Code of Civil Procedure §§ 425.16-425.18.

Nevertheless, the amended statute continues to pose a host of practical problems. How will a media outlet know with certainty whether a particular image or recording was illegally obtained? Can it rely exclusively upon the word of the paparazzo? What if the subject claims to the contrary? What if the material comes from a stock photo agency under a quitclaim? In future years, how will one be able to prove that a particular image or recording was taken or captured before January 1, 2010? Are aerial photographs or satellite imagery of a California location excluded? Who is the first user if a particular image is simultaneously broadcast or published by multiple media outlets on the very same day (or, on the Internet, at the very same moment)? These and many other questions are sure to provide ample grist for future litigation mills.

Douglas E. Mirell is a partner in the Los Angeles office of Loeb & Loeb LLP, where he practices media, entertainment and intellectual property litigation.

California Governor Signs Libel Tourism Bill

On October 12, California Governor Arnold Schwarzenegger signed into law SB 320, a new state measure to combat libel tourism. The bill had been overwhelmingly approved by the state legislature: 75-0 in the state assembly and 39-0 in the state senate.

The new law amends the state's Uniform Foreign-Country Money Judgments Act so that foreign defamation judgments need not be recognized if obtained under law that provides less protection for speech than the First Amendment and California state constitution. The bill also amends the state long-arm statute to provide for a declaratory judgment action to obtain an order that the foreign judgment is unenforceable.

California is the fourth state to have enacted new legislation against libel tourism, joining New York, Illinois and Florida.

For more information on these and the federal libel tourism proposals see MLRC's website page on Libel Tourism available here.

The California bill was sponsored by the California Newspaper Publishers Association, supported by the California First Amendment Coalition, American Book Sellers Foundation for Free Expression, Californians Aware, and the American Civil Liberties Union; and was authored by Senate Judiciary Committee Chairwoman Ellen Corbett (D-San Leandro).

Appeals Court Applies Shield Law in Libel Case

Privilege Not Waived by Inadvertent Disclosure or Fault Defense

A Florida appellate held that a financial news publisher sued for libel was entitled to rely on the Florida shield statute to protect confidential sources of information. *TheStreet.com v. Carroll,* No. No. 4D09-2649, 2009 WL 3110102 (Fla. App. 4 Dist. Sept. 30, 2009) (Gross, Taylor, May, JJ.) (per curiam). The court reversed a trial court decision granting plaintiff's motion to compel.

The trial court ruled that the privilege was either waived because of inadvertent disclosure of some source information or inapplicable because the publisher raised a fault defense and was using the privilege as a "sword and a shield." The appeals court reversed on both grounds, and went on to hold that plaintiff failed to demonstrate that the information was relevant or unobtainable from other sources.

Background

At issue was a May 2008 article by online financial news publisher, TheStreet.com, entitled "ArthroCare Unit Keeps Troubling Company." The article described the plaintiff, Gary Donald Carroll, as a "convicted felon," "con artist" and "troubling character." TheStreet.com later published a correction stating that while plaintiff "was charged with making a false/fraudulent insurance claim and with third-degree grand theft, the charges were ultimately dismissed."

Plaintiff sued for libel. In its answer, the publisher alleged among other defenses that it had used "reasonable care in making and publishing the statements challenged." In discovery, the publisher raised the Florida shield law, F.S.A. § 90.5015(2), in response to document requests but inadvertently produced two unredacted documents which identified confidential sources. Plaintiff's counsel informed defense counsel of the error. The publisher sought to compel the return of the documents and plaintiff moved to compel disclosure.

The trial court granted the motion to compel disclosure, finding that the published waived the shield law by raising lack of fault as a defense and failing to raise the shield law at the earliest opportunity.

Appellate Court Decision

The appeals court first held that it could hear an appeal from the discovery ruling, finding that the publisher demonstrated that the trial court order "constitute[d] a departure from the essential requirements of law resulting in material harm of an irreparable nature."

The court agreed that irreparable harm would occur if the publisher's confidential sources were revealed, stating: "The well-recognized newsgathering privilege affords protection to information that reporters obtain in the course of newsgathering. This protection has been historically applied to prevent compelled disclosure of the identity of confidential sources as well as the information acquired from confidential sources in the newsgathering process." Quoting 669 So.2d at 317

The appellate court then reversed the trial court's conclusion that the publisher was using the shield law "as both a sword and shield," adding in dicta that even if that were the case it would be improper to compel disclosure of protected source information. The court also found that the shield law was was asserted unequivocally and that any disclosure "was purely inadvertent."

Finally, the court held that the shield law privilege was not overcome where plaintiff failed to make a clear and specific showing that the information sought was relevant or unobtainable from other sources.

TheSteet.com was represented by Stephen Hunter Johnson, Onier Llopiz, Joan Carlos Wizel and Ric ard Lydecker of Lydecker, Lee, Behar, Berga & De Zayas, LLC, Miami, FL. Plaintiff is represented by Steven J. Rothman, Jones, Foster, Johnston & Stubbs, West Palm Beach, FL.

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News Report on Investigation of Classroom Assault Allegation Did Not Invade Teacher's Privacy

By Eric M. Stahl

A federal district court in Washington state has rejected an elementary school teacher's novel privacy theory, ruling that a news story accurately reporting that authorities were investigating her for an alleged classroom assault did not amount to invasion of privacy. *Cawley-Herrmann v. Meredith Corp.*, 2009 WL 3152186 (W.D. Wash. Sept. 8, 2009), *motion for reconsideration denied*, 2009 WL 2913828 (W.D. Wash. Sept. 30, 2009), *notice of appeal filed* October 6, 2009.

Judge Robert Bryan granted the defendant television station's motion to dismiss, holding as a matter of law that the reporting did not encompass private or intimate information sufficient to state an intrusion claim.

Plaintiff's theory was based on a 2008 Washington Supreme Court case holding that the identity of public school teachers accused of sexual misconduct was exempt from disclosure under the state Public Records Act if the wrongdoing was found to be "unsubstantiated." The plaintiff in *Cawley-Herrmann* argued unsuccessfully that the 2008 case created a standard that could be applied to common law privacy torts.

A federal district court in Washington state has rejected an elementary school teacher's novel privacy theory, ruling that a news story accurately reporting that authorities were investigating her for an alleged classroom assault did not amount to invasion of privacy.

The plaintiff, teacher Linda Cawley-Herrmann, was the subject of allegations that she had assaulted a young student in her Battle Creek, WA, classroom in the spring of 2007. KPTV, a television station in nearby Portland, aired a news story accurately reporting that the assault was being investigated.

The story identified Cawley-Herrmann by name and displayed her picture. According to the complaint, the story aired before police and the school district had released her name. The complaint also states that the assault allegation was eventually deemed to be unsubstantiated.

Cawley-Herrmann sued the station for invasion of privacy. Notably, the complaint did not assert a claim for defamation, nor quarrel with the accuracy of the reporting. As stated by the court, "Plaintiff's complaint is not about the content of the reports, but of the fact they were broadcast."

KPTV filed a motion to dismiss, arguing that the reported facts – plaintiff's identity, her image and her alleged activities in the classroom – were not within the zone of privacy protected under Washington law. The court agreed. Applying Washington law (which follows the definition set out in the *Restatement (Second) of Torts* § 652D), an invasion of privacy claim requires proof that the defendant publicized a matter concerning another's private life that both (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. The court relied on Washington law limiting such private facts to "intimate details of [one's] life" that are shared with, at most, family or close friends.

Plaintiff argued that the release of her identity in connection with an unsubstantiated allegation of misconduct amounted to an invasion of privacy under *Bellevue John Does 1-11 v. Bellevue Sch. Dist No. 405*, 189 P.3d 139 (Wash. 2008). That case concerned a Public Records Act request seeking the names of teachers accused of sexual misconduct with students. A divided state supreme court held that public agencies could withhold such names to the extent the allegations were unsubstantiated, under a privacy-based statutory exemption for personal information contained in an employee's personnel file.

Cawley-Herrmann argued that *Bellevue John Does* stands for the proposition that teachers have a right to privacy in their identity any time they are the subject of unsubstantiated allegations of misconduct involving a student. She seized on the following language in the decision: "In short, when there is an allegation of sexual misconduct against a public school teacher, the identity of the accused teacher may be disclosed to the public only if the misconduct is substantiated or the teacher's conduct results in some form of discipline." *Id.* at 143.

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The district court concluded that the above-quoted language was *dicta*, and that the actual holding of *Bellevue John Does* is simply that the identities of public school teachers who are the subject of unsubstantiated allegations of sexual misconduct are exempt from disclosure under the PRA. The court held that *Bellevue John Does* does not establish "a right to privacy, enforceable against the news media, in the circumstances presented here." Accordingly, the court dismissed the complaint.

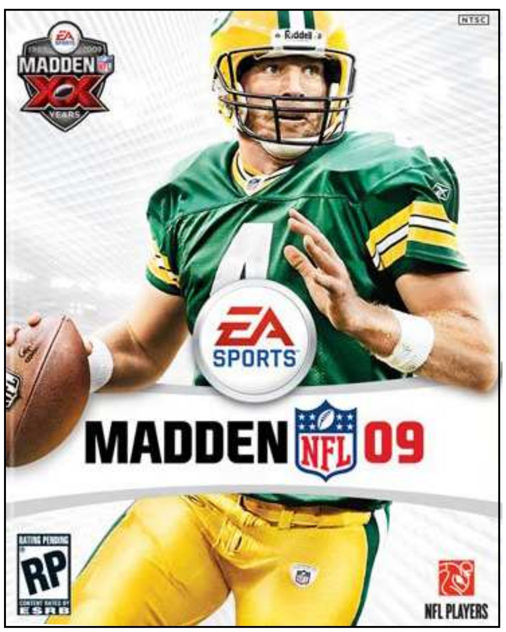
Cawley-Herrmann has filed a notice of appeal to the Ninth Circuit. She is represented by Haglund Kelly Horngren Jones & Wilder, LLP, of Portland Oregon. Defendants in the case are represented by Davis Wright Tremaine, LLP.

Eric M. Stahl is a partner at Davis Wright Tremaine LLP in Seattle.

NFL Hall Of Famer Jim Brown's Lanham Act Claim Against Electronic Arts Dismissed

By Karen A. Henry

Former Cleveland Browns running back and NFL Hall of Famer Jim Brown sued video game developer and publisher Electronic Arts in federal district court in Los Angeles in March, alleging causes of action for statutory misappropriation (California Civil Code § 3344), common law misappropriation, unfair competition (California Business & Professions Code § 17200), and violation of Section 43(a) of the Lanham Act, arising from EA's alleged use of Brown's purported likeness in its *Madden NFL* video game.



The game allows users to select among the 32 current NFL teams, and editions of the game for some platforms also have allowed users to select from dozens of "historical" teams, including the 1965 Cleveland Browns team and an All Browns team. (The virtual players on the current NFL teams bear the names and wear the jersey numbers of the real-life players, while the virtual players on the historical teams are anonymous, identified only by a jersey number.)

In his First Amended Complaint, Brown alleged that one of the virtual running backs on the 1965 Cleveland Browns and All Browns teams – the avatar wearing jersey number "37" – unlawfully used his likeness. (When Plaintiff played for the Browns, his jersey number was "32.")

EA responded to Plaintiff's First Amended Complaint with a motion to dismiss each of his claims, and a special motion to strike his state-law claims under California's anti-SLAPP statute.

In its opinion, the Court addressed only EA's motion to dismiss, in which EA offered two basic defenses to Plaintiff's claims. First, EA argued that Plaintiff's claims should be dismissed because the virtual player at issue does not depict Plaintiff's likeness. Second, EA contended that, even if Plaintiff's likeness were used in the video game, the First Amendment would protect that use. Assuming for purposes of the motion to dismiss that the virtual player at issue was Brown, the Court nonetheless concluded that the First Amendment barred his Lanham Act claim. *See Brown v. Electronic Arts, Inc.*, CV09-01598, *2 (C.D. Cal. September 23, 2009) (Cooper, J.).

As a threshold matter, the Court noted that it was necessary to establish the type of speech at issue, because "the type of speech determines the appropriate First Amendment test."

The Court then cited the "well-established" principle that "video games are a form of expression protected by the First Amendment." Noting the "virtual stadiums, athletes,

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coaches, fans, sound effects, music and commentary" embodied in *Madden NFL*, the Court had no trouble finding that the game contained sufficient creative elements to qualify as an expressive work.

Because such "video games are entitled to as much First Amendment protection as the most profound literature," the Court continued, plaintiff's Lanham Act claim could succeed only if "the public interest in avoiding consumer confusion outweighed the public interest in free expression." The court found the Ninth Circuit's decision in *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc*. "especially instructive on the interplay of Lanham Act claims and the First Amendment in the context of video games."

In *E.S.S.*, the Ninth Circuit adopted the artistic relevance test announced by the Second Circuit in *Rogers v. Grimaldi* to strike the balance between the Lanham Act and the First Amendment.

The artistic relevance test has two prongs. "The first prong requires that the defendant's use of the plaintiff's trademark be relevant to the underlying work." If the plaintiff can establish that the level of relevance is "above zero," "the Lanham Act claim is still precluded unless the use explicitly misleads consumers about the source or content of the work."

Applying the artistic relevance test to *Madden NFL*, the Court resolved each prong of the test in EA's favor. With respect to the first prong, the Court reasoned that use of a "legendary" NFL player in *Madden NFL* was "clearly relevant" to the games' premise.

Addressing the second prong of the test – whether the alleged use of Plaintiff's likeness in the games explicitly misleads consumers as to the game's source or content – the Court determined that "it would require a leap of logic to conclude that the anonymous, mis-numbered player's presence in the games equates to Brown's endorsement of the games."

Since *Madden NFL* satisfied each element of the artistic relevance test, the Court held that, to the extent that the game used Plaintiff's likeness, "that use is protected by the First Amendment" and "there lies no remedy under Section 43(a) of the Lanham Act."

The court thus dismissed the Lanham Act claim with prejudice and declined to exercise supplemental jurisdiction over Plaintiff's state law claims.

EA is represented by Al Wickers, Kelli Sager, and Karen Henry of Davis Wright Tremaine LLP's Los Angeles office.

The New York Appellate Court Dismisses Dan Rather's Case Against CBS Corp.

By Anthony M. Bongiorno, Mary Catherine Woods and Yehudah Buchweitz

In a recent decision, the First Department of the New York State Supreme Court, Appellate Division unanimously dismissed in its entirety the complaint brought by former CBS News anchor Dan Rather against CBS Corporation, Viacom Inc., and individual defendants Leslie Moonves, Sumner Redstone and Andrew Heyward. *Rather v. CBS Corp.*, No. 603121/07, 2009 N.Y. App. Div. LEXIS 6593 (1st Dept. Sept. 29, 2009).

In his original complaint, filed in September 2007, Rather alleged claims of breach of contract, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing against CBS, fraud against CBS, Moonves and Heyward, tortious interference with contract against Viacom, CBS and all three of the individual defendants, and prima facie tort and tortious interference with prospective business relations against all of the defendants. Through two decisions of the trial court, five of the seven claims had been dismissed. In its unanimous decision, the appeal court affirmed dismissal of those claims and reversed the trial court's refusal to dismiss the remaining two claims.

Background

Several of these claims arose from the aftermath of a *60 Minutes II* segment that CBS broadcast on September 8, 2004. The broadcast, of which Rather was the correspondent, concerned former President George W. Bush's service in the Texas Air National Guard during the Vietnam War. After the broadcast, in what some in the news media dubbed "Rathergate," numerous sources challenged the authenticity of the documents used in the broadcast. After nearly two weeks, CBS conceded that it could not authenticate the documents, and Rather personally apologized. Rather later alleged that he was induced to make that apology, despite his personal belief in the truth of the broadcast.

Also, in March 2005, Rather stepped down as anchor of the *CBS Evening News* and was assigned to *60 Minutes II* until it was cancelled, and then to *60 Minutes*. In his complaint, Rather alleged that, pursuant to his employment agreement, CBS was obligated to either assign him to *60 Minutes* or *60 Minutes II* or release him from their agreement and accelerate payment of his compensation. While Rather admitted that he was assigned to *60 Minutes II* until it was cancelled, and that he was then assigned to *60 Minutes*, he claimed that CBS only nominally assigned him to these programs after he left the anchor chair, and that CBS should have terminated his agreement in March 2005 and paid him his remaining compensation at that time.

In Rather's view, CBS underutilized him by keeping him on its payroll but preventing him from covering particular news stories that he wanted to cover, and by not putting him on the air as frequently as he wanted to be. In June 2006, CBS and Rather entered into a separation agreement, ending Rather's employment, and, at that time, CBS paid Rather his remaining compensation.

Breach of Contract Claim

Regarding the breach of contract claim against CBS, the First Department held that the trial court had misconstrued the employment agreement and improperly refused to dismiss Rather's claim. At the heart of the dispute was a "pay or play" provision in Rather's employment agreement, which provided that, as long as CBS continued to pay Rather, CBS could use Rather's services at its discretion. There was also a provision that provided that, if Rather were no longer anchor of *CBS Evening News*, he would be assigned to *60 Minutes II* or, if that program had been cancelled at that time, he would be assigned to *60 Minutes*. If there was no such assignment, then the employment agreement could be terminated and CBS would be required to accelerate payment of Rather's remaining salary. The First Department engaged in a lengthy analysis of the two provisions, finding that CBS did not breach either provision. The court found that "neither [provision] requires that CBS actually *use* Rather's services or broadcast any programs on which he appears, but simply retains the option of accelerating the payment of his

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While Rather admitted that he was assigned to *60 Minutes II* until it was cancelled, then *60 Minutes*, he claimed that CBS only nominally assigned him to these programs and that CBS should have terminated his agreement in March 2005 and paid him his remaining compensation.

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compensation under the agreement if he is not *assigned* to either program." In that regard, the court agreed with CBS that "'the notion that a network would cede to a reporter editorial authority to decide what stories will be aired is absurd.'" Accordingly, because CBS had paid Rather his salary of $6 million per year up until June 2006 and because Rather admitted that CBS assigned him to *60 Minutes II*, the First Department found that CBS had performed its obligations under each provision, and therefore there was no breach.

Rather also alleged that, due to his long relationship with CBS and his position as the "face" of CBS News, a fiduciary relationship existed between CBS and Rather. In essence, in CBS's view, Rather was urging the court to adopt a "celebrity" or "longevity" exception to the well-established rule in New York that an employment relationship does not give rise to fiduciary duties. Finding that the trial court erred in failing to dismiss this claim and relying on the settled laws of every New York appellate division, the First Department held that "employment relationships do not create fiduciary relationships," and that "[t]he length of Rather's tenure at CBS is irrelevant to, and does not support, this claim of a fiduciary relationship, nor does Rather's status as 'the public face of CBS News after Walter Cronkite retired [. . .] .'"

In arguing for a fiduciary relationship, Rather relied heavily on the First Department's prior decision in *Apple Records v. Capitol Records*, 137 A.D.2d 50 (1st Dept. 1988). In *Apple Records*, the First Department found a special relationship between the Beatles and their record company beyond their contractual relationship and refused to dismiss their breach of fiduciary duties claim. However, here, the First Department strongly distinguished *Apple Records* on its facts, stating that, when the Beatles entered into their contract with the record company, they were "fledgling musicians" and had "'entrusted their musical talents' to the defendant over a period of many years," while Rather, on the other hand, was already "an established correspondent represented by a leading talent agent, who negotiated [his] contract. . . ." The court went so far as to say that it doubted that the fact scenario presented by *Apple Records*, where a relatively unknown and new group rocketed to global fame, would ever arise again, not even in the *American Idol* era.

Fraud Claim

Rather's third cause of action for fraud, which was based primarily on purported misrepresentations made by CBS after the *60 Minutes II* broadcast, was dismissed at the trial court on one of several grounds. The First Department upheld that decision, holding that Rather had not adequately pled out-of-pocket pecuniary loss, as required for a fraud claim, but found that the trial court could have dismissed the claim on any of the several grounds. The court also held that Rather's subsequent proposed pleading, adding an allegation that his financial compensation at his new position at HDNet was less than what his compensation would have been if CBS had renewed his employment agreement, would not change its ruling.

The court, relying on Court of Appeals precedent from *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413 (1996), held that Rather was "required to plead that he had something of value, was defrauded by CBS into relinquishing it for something of lesser value, and that the difference between the two constituted Rather's pecuniary loss."

The court concluded that Rather could not demonstrate the required pecuniary loss from his allegation that "but for CBS's fraud, he could have had more remunerative employment than that which he ultimately obtained at HDNet. . ." because it was undeterminable and too speculative. The court noted that "there [was] no basis to conclude that his employment status would not have changed, regardless of CBS's actions, once he determined to make the broadcast . . . ." Moreover, the court found that "Rather never identified a single opportunity with specified terms that was actually

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available to him and which he declined to accept because of CBS's actions."

As to the other grounds for dismissal, notably, the court relied on *Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453 (1967), to conclude that a claim for fraud, where based on "statements [made by defendants] to the general public," was actually a claim for defamation in disguise. Since more than one year had passed from such alleged statements, any defamation claim that Rather may have had, as well as his fraud claim in disguise, were time-barred. The court also concluded that Rather's fraud claim was duplicative of his breach of contract claim. Thus, the allegation that CBS underutilized Rather after he was removed from the *CBS Evening News* "merely recasts his breach of contract claim in terms of fraud." Similarly, the court held that Rather's claim that "he should have been released from the agreement earlier to pursue other opportunities. . . is duplicative of his breach of contract claim." The court then upheld the trial court's dismissal of Rather's claim of breach of the implied covenant of good faith and fair dealing as duplicative of his breach of contract claim.

Lastly, the First Department affirmed the dismissal of Rather's cause of action for tortuous interference with contract against all defendants, because Viacom was not a proper party, CBS was acting in its own economic interests, and Rather did not allege that the individual defendants acted beyond the scope of their employment or for personal gain.

Rather has stated publicly that he plans to seek leave to appeal the First Department's ruling, which would require permission from the New York Court of Appeals.

Anthony M. Bongiorno and Mary Catherine Woods, CBS Law Department, and James W. Quinn, Mindy J. Spector and Yehudah L. Buchweitz, Weil, Gotshal & Manges LLP, represented CBS Corporation. Dan Rather is represented by Martin R. Gold, Gary Meyerhoff, and Edward J. Reich, Sonnenschein Nath & Rosenthal LLP. The authors would like to thank Andrew Nieh, a third-year law student at New York Law School and Law Clerk in the CBS Law Department, for his assistance with this article.

Illinois Supreme Court Bolsters Innocent Construction Rule and Raises Pleading Standards For Certain Defamation Per Se Claims

By Wade Thomson

In a non-media case involving private individuals and a suburban Chicago Little League baseball program, the Illinois Supreme Court raised the pleading standard for defamation *per se* claims in which a plaintiff alleges the defamatory statements on information and belief. *Green v. Rogers*, No. 107129, *2009 Ill. LEXIS 1303* (Sept. 24).

This heightened standard may not have a significant impact for routine media cases, which rarely involve defamatory statements alleged on information and belief, but media defendants may take heart in the Supreme Court's broad application of the "innocent construction rule."

Background

Plaintiff John Green (a lawyer and dentist) and his son were actively involved in the Clarendon Hills Little League ("CHLL") program. In December 2004, plaintiff applied to be a coach in CHLL's 2005 season. On March 3, 2005, the CHLL board met. On March 4, defendant, the president of CHLL, sent plaintiff an email stating that the CHLL board had decided not to assign plaintiff a coaching position "based on a long pattern of behavior which is not consistent with what we feel is acceptable for our coaches." He added that although plaintiff would not be assigned an official coaching position on his son's team he was free to assist his son's team as a volunteer.

Plaintiff appealed that decision. The appeal was denied. The defendant later wrote that CHLL was willing to put plaintiff's son on a team coached by a friend of the plaintiff, whom plaintiff could assist.

In January 2006, plaintiff again submitted his name for a coaching position in the upcoming CHLL season. The CHLL board again rejected his request.

Plaintiff then filed a two-count complaint against defen-

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dant alleging defamation *per se* and civil conspiracy. In Count I, plaintiff alleged, on "information and belief" that during the March 3, 2005 CHLL board meeting, defendant "made false and defamatory statements about plaintiff to other board members including that plaintiff should not be selected as a coach because of a long pattern of misconduct with children and other misconduct." Plaintiff also alleged that on March 4, 2005, defendant told members of the CHLL board and residents of Clarendon Hills:

> (a) that Plaintiff exhibited a long pattern of misconduct with children which was not acceptable for CHLL coaches; (b) that Plaintiff abused players, coaches, and umpires in CHLL; and (c) that Plaintiff was unfit to be assigned as a CHLL coach to insinuate to the community that Plaintiff was guilty of inappropriate behavior with children and others associated with CHLL.

2009 Ill. LEXIS 1303 at *21.

In Count II, which dealt with the CHLL board meeting held in February 2006 (and the second denial of plaintiff's request to coach), plaintiff pled on "information and belief" that defendant made defamatory statements, which plaintiff set forth in the exact same way as the alleged statements made in March 2005 (Count I).

Trial Court Dismisses Action

Defendant moved to dismiss on the grounds that plaintiff had only made vague and conclusory allegations about the defamatory statements and to whom, if anyone, they were made. The trial court granted the motion and dismissed without prejudice. It also dismissed on the additional ground that to the extent the alleged statements were defamatory *per se*, they were capable of an innocent construction and were opinion. (Under Illinois law, statements which are reasonably capable of a non-defamatory *per se* or "innocent" meaning are not actionable *per se*.)

Appellate Court Reverses

The Illinois Appellate Court reversed most of the dismissal, holding that two alleged statements -- that Plaintiff "exhibited a long pattern of misconduct with children" and "abused players, coaches, and umpires" -- were defamatory *per se* because they imputed a lack of ability and prejudiced the Plaintiff in his dental and legal professions. The court also held that neither statement was capable of an innocent construction because "although there are varying levels of misconduct and abuse of children, any degree of such behavior can hardly be considered innocent." *2009 Ill. LEXIS 1303* at *14.

The court held that these two statements were not opinion given that they were readily understood and susceptible to objective verification, and the context of a Little League board meeting was not one where fiery rhetoric or hyperbole would be expected.

In addition, the court held that the third statement -- that plaintiff "was unfit to be assigned as a CHLL coach" -- was not defamatory *per se* because the statement could not reasonably impute a lack of ability in either of plaintiff's professions and meant nothing more than that plaintiff "did not fit in with the board members of the CHLL." This holding, which plaintiff did not challenge in his appeal to the Illinois Supreme Court, is helpful for libel defendants. Illinois courts have at times struggled with whether statements that do not specifically impute a lack of ability or prejudice someone in their profession fall within a *per se* category. Here, the appellate court did not allow negative statements about plaintiff's non-professional endeavors to be shoe-horned into this *per se* category.

Higher Pleading Standard

The Illinois Supreme Court (which is not known for choosing to hear many cases) surprisingly agreed to hear this relatively garden variety private dispute. What apparently intrigued the Court was how to deal with complaints that allege defamatory *per se* statements only upon information and belief. In language likely to be latched onto by defamation plaintiffs, the Supreme Court initially held that a defamation *per se* claim need not set forth the allegedly defamatory words *in haec verba*. Significantly, however, the Court mitigated that conclusion, holding that a defamatory *per se* statement must be pled "with sufficient precision and particularity so as to permit initial judicial review of its defamatory content…[and] so that the defendant may properly formulate an answer and identify any potential affirmative defenses."

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The Supreme Court explained that a complaint alleging defamatory *per se* statements on "information and belief" requires additional factual allegations as to the basis for the information and belief, such as how the plaintiff learned about the alleged statements. The court viewed these allegations to be particularly important in this case because, given the wide range of potential meanings of "misconduct" and "abuse," the defendant could not formulate a response without them. The Supreme Court then held:

> [a]lthough this court has never been called upon to consider the conditions under which the essential elements of defamation *per se* may be plead "on information and belief," we have addressed the issue in relation to the analogous tort of common law fraud. Like defamation *per se*, common law fraud demands a "higher standard" when it comes to pleading….We see no reason why this same principle should not also apply to defamation *per se* claims. Like a common law fraud claim, a defamation *per se* claim must be pled with a heightened level of precision and particularity. This higher standard is premised upon an important policy consideration, namely, that a properly pled defamation *per se* claim relieves the plaintiff of proving actual damages. *2009 Ill. LEXIS 1303* at *23.

The Court noted that a plaintiff can always avoid this heightened pleading standard by asserting a defamation *per quod* claim, but concluded a defamation *per se* claim based on alleged "on information and belief" can proceed only if the facts information plaintiff's belief are sufficiently pled.

The Court also noted that the plaintiff set forth defamation claims for the 2005 and 2006 statements with "identical allegations *word for word*." According to the Court, the fact that Plaintiff could not distinguish in any way between Defendant's alleged statements in 2005 and 2006 "is just further confirmation that plaintiff is not pleading precise and particular facts but rather only conclusions, inferences and assumptions."

In all likelihood, this heightened standard will not impact routine media cases where the content at issue will not be disputed.

Innocent Construction Rule

The Supreme Court alternatively ruled that even if defendant made the statements as alleged in the complaint, they could be innocently-construed because defendant had also written that plaintiff could still serve as a volunteer coach and assist in coaching. Given that context, it was reasonable to assume that defendant was not accusing plaintiff of the types of "abuse" and "misconduct" that would be defamatory *per se*. *2009 Ill. LEXIS 1303* at *32-34.

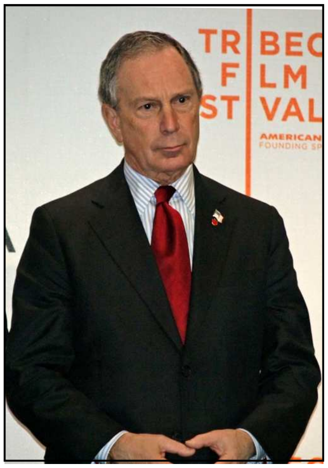
This ruling is significant in two ways. First, it is the latest affirmation of the innocent-construction rule, which has been repeatedly challenged by plaintiffs. Second, the holding demonstrates that the innocent construction rule requires statements to be read in the broadest of contexts. Here, the Court took into account statements by defendant made a day or more *after* the allegedly defamatory statements in order to give the alleged defamatory statements their proper context.

Moreover, although the plaintiff had not appealed the dismissal of the third statement at issue (that plaintiff "was unfit to be assigned as a CHLL coach"), the Supreme Court went on to support the appellate court's holding that it was not the type of statement that prejudiced plaintiff in either of his professions.

Finally, it is interesting to note that Justice Robert R. Thomas – who was recently a successful plaintiff in a high-profile media libel case in Illinois – authored this opinion, which resulted in the dismissal of a defamation claim.

Wade A. Thomson in an associate in the Chicago office of Jenner & Block LLP and a member of the firm's Media and First Amendment Practice Group. Plaintiff was represented by Wilson Elser Moskowitz Edelman & Dicker LLP. Defendant was represented by Freeborn & Peters LLP.

Georgia Court's Anti-SLAPP Ruling Ends Gun Dealers' Suit Against Michael Bloomberg, Others



Adventure Outdoors and its owners have vowed to continue pursuing the Georgia case vigorously. Meanwhile, Mayor Bloomberg (left) announced a major new City illegal gun initiative.

Applying Georgia's anti-SLAPP statute, a Georgia trial court has dismissed a lawsuit brought by Georgia gun dealers who claimed New York Mayor Michael Bloomberg and other city officials had libeled them in public statements announcing the filing of a lawsuit aimed at curbing the flow of illegal guns into New York City. *Adventure Outdoors, Inc. et al. v. Bloomberg, et al.*, No. 06-1-9667-18 (Ga. Super. Ct., Cobb Cnty., September 30, 2009).

The court found that the dealers' claims arose from the defendants' acts in furtherance of their free speech and petition rights, and that dismissal therefore was required because neither they nor their attorneys had filed good-faith verifications along with their complaint as required by the Georgia anti-SLAPP law.

Background

The case arose from a New York City initiative aimed at reducing gun violence by curbing gun sales to individuals for whom, gun ownership is prohibited (*e.g.*, felons). Such sales often are accomplished through "straw purchases" – transactions in which a person banned from purchasing guns uses an intermediary to illegally purchase weapons on their behalf.

Focusing on out-of-state gun dealers whose guns most frequently ended up in the hands of New York criminals, New York sent undercover investigators into a number of gun stores to engage in simulated straw purchases. Dealers who allowed the investigators' apparently unlawful purchases were named as defendants in a 2006 federal nuisance suit filed by the City in the Eastern District of New York. Bloomberg and other City officials announced the suit in a press conference and press releases in which the defendant gun dealers were identified as gun-law violators.

One of the dealers, Adventure Outdoors of Smyrna, Georgia responded by retaining National Rifle Association board member and former Georgia congressman Bob Barr to file a Georgia state-court action. The store and its owners Jay and Cecilia Wallace alleged, among other things, that the New York City officials had defamed them and tortiously interfered with their business by announcing the filing of the New York lawsuit.

After removing the case to the Northern District of Georgia, defendants moved to dismiss on a variety of grounds, including that the plaintiffs had failed to comply with the Georgia anti-SLAPP statute's verification requirement. Under the statute a plaintiff must file verifications along with any complaint advancing a claim based on "an act . . .which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances . . . in connection with an issue of public interest or concern." O.C.G.A. § 9-11-11.1(b).

The required anti-SLAPP verifications must affirmatively certify that the filing parties and their attorney of record have reviewed the claim, that it is well grounded in fact and law and that it has not been "interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation." *Id*. A claim that is not verified as required under the statute "shall be stricken," a phrase which Georgia courts have construed as requiring dismissal with prejudice.

Although the federal court dismissed much of the case on alternative grounds, it declined to consider the anti-SLAPP argument, holding that the statute's verification requirement conflicted with federal pleading standards and therefore could not be applied in federal court.

The defendants appealed the court's decision to the Elev-

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enth Circuit under the collateral order doctrine. However, that court, after oral argument, declined to address the defendants' anti-SLAPP argument, directing instead that the case be remanded to state court. Although the court held that the case presented an important federal question, the court decided the question was not sufficiently substantial to confer federal question jurisdiction. (*See* "Court Sends Libel Suit against NY Mayor Back to Georgia State Court," *MediaLawLetter, Jan. 2009* at 11).

During the appeal, Adventure Outdoors and its owners admitted that they had made a "considered determination" not to comply with the anti-SLAPP statute's verification requirement. The admission was significant because the statute permits a party to who has failed to file the required anti-SLAPP verifications to remedy that defect within 10 days after it first is brought to their attention. Plaintiffs' admission confirmed that they had been fully aware of the defect at the time they filed their complaint.

Trial Court Decision on Remand

After remand to the Georgia trial court, defendants promptly moved to dismiss all claims based on the plaintiffs' failure to submit anti-SLAPP verifications. Because the plaintiffs did not deny either that they had failed to verify or that they had knowingly declined to remedy that defect within the 10-day limit, the question of whether their claims were subject to dismissal turned entirely on whether they fell within the anti-SLAPP statute.

Plaintiffs argued that their claims were unrelated to the New York officials' exercise of their speech or petition rights, claiming that the challenged comments did not directly relate to the suit the City had filed against Adventure Outdoors. The court rejected this contention, dismissing all of plaintiffs unverified claims as arising from acts that could reasonably be construed as in furtherance of their speech or petition rights and therefore falling within the anti-SLAPP statute.

Adventure Outdoors and its owners have vowed to continue pursuing the Georgia case vigorously. Meanwhile, a week after entry of the order of dismissal, Mayor Bloomberg announced the results of a major new City illegal gun initiative, a national undercover investigation into illegal sales of firearms at gun shows.

Mayor Bloomberg and the defendants have been represented by Peter Canfield, Michael Kovaka and Jared Miller of Atlanta's Dow Lohnes; Kenneth Taber of New York City's Pillbsury Winthrop Shaw Pittman; and Eric Proshansky of the New York City Law Department. Adventure Outdoors and its owners have been represented by Bob Barr and Edwin Marger of Atlanta and Jasper, Georgia.

Fourth Circuit Reverses Intrusion and Emotional Distress Award in Funeral Protest Case

On September 29, the Fourth Circuit reversed a $5 million damage award for intrusion, intentional infliction of emotional distress and conspiracy against a fringe religious group, notwithstanding what the court termed its "distasteful and repugnant" speech at a soldier's funeral. *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009) (King, Shedd, Duncan, JJ.).

The court, citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) held that phrases such as "God Hates Fags" and "Priests Rape Boys" could not be read to assert verifiable facts about the plaintiff (a grieving father of a dead soldier), and that a reasonable reader would interpret the statements as "hyperbolic rhetoric intended to spark debate" about issues of public concern.

The court also noted in a footnote that it did not recognize a media/nonmedia distinction regarding speech on matters of public concern that does not contain provably false factual assertions.

Background

Marine Lance Corporal Matthew A. Snyder died in the line of duty in Iraq in March 2006; his parents held a funeral in Maryland. The Westboro Baptist Church, Inc., founded and run by Fred W. Phelps from Topeka Kansas, decided to protest the funeral as a way to get publicity for their religious belief that "God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the

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United States military." Phelps and his congregants (largely comprised of his family members) issued a press release to announce their intention to come and picket; they also notified police officials in advance.

Although Matthew's father, Albert Snyder, did not see the protestors at the funeral, he later saw footage of the event. He also discovered that, several weeks after Matthew's funeral, a member of Phelps's church published an "epic" poem on the church's website, www.godhatesfags.com, claiming that Snyder "taught Matthew to defy his creator" and "taught him that God was a liar."

He brought suit under Maryland law, alleging invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress, civil conspiracy, publicity given to private life, and defamation.

The last two claims were dismissed at summary judgment in an unpublished, cursory opinion. After a trial on the remaining three claims in October 2007, the jury found the defendants liable for $2.9 million in compensatory damages and a total of $8 million in punitive damages.

On post trial motion, the district court flatly rejected defendants' claim that their speech was was entitled to absolute First Amendment protection. Citing to the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749 (1985), the district court stated that there is no absolute First Amendment right for speech by private individuals against other private individuals. The district court found sufficient evidence for a reasonable jury to conclude that defendants' invaded plaintiff's privacy and intruded upon his seclusion during a time of bereavement. The court, however, remitted the punitive damages to $2.1 million. 533 F. Supp. 2d 567 (D. Md. 2008).

Fourth Circuit Decision

On appeal, the Fourth Circuit noted that the First Amendment protects statements that fail to contain a "provably false factual connotation," as well as rhetorical statements employing "loose, figurative, or hyperbolic language." Milkovich, 497 U.S. at 20-21.

Moreover, the court stated that it was a matter of law whether disputed statements fell into either category. *See CACI Premier Tech, Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir. 2008) (holding that a radio host's reference to CACI and other defense contractors as "hired killers" would likely be understood by a reasonable listener to be "exaggerated rhetoric," not a fact).

Thus, the court held, the district court "fatally erred" by allowing the jury to decide this issue: Instruction No. 21 asked whether the defendants' speech was "directed specifically at the Snyder family," and if so whether it was so "offensive and shocking as to not be entitled to First Amendment protection."

The Fourth Circuit held that the district court also erred by assessing whether Snyder was a public figure under Gertz, without assessing whether the defendants' speech was of the type that was constitutionally protected regardless of the public or private status of the plaintiff, such as in *Milkovich.*

The court considered the legal questions de novo. First, the court noted, the signs displayed by the defendants involved matters of public concern, did not assert verifiable facts, and would clearly be understood as "hyperbolic rhetoric." The court noted that two of the signs ("You're Going to Hell" and "God Hates You") presented a closer question, but came to the same conclusion of law.

Similarly, the court came to the same conclusion about the written Epic noting that the subtitle "immediately connect [ed] its contents to the Defendants' protest and the various signs displayed there."

Furthermore, the court held, "[i]n context, the Epic is a recap of the protest and was distributed through the Church website, which would not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein." The court also studied the "general tenor" of the Epic which used "distasteful and offensive words, atypical capitalization, and exaggerated punctuation, all of which suggest the work of a hysterical protestor."

Ultimately, the court held, "notwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings," they had to conclude that the signs and Epic are constitutionally protected. Judge King wrote the opinion, in which Judge Duncan joined.

Judge Shedd concurred in the judgment but on different grounds, noting that he would hold that Snyder failed to prove at trial sufficient evidence to support the jury verdict. (The majority declined to study this issue as it was only raised in an amicus brief and had "plainly been waived by the only party entitled to pursue it," citing *United States v. Buculei*, 262 F.3d 322, 333 n.11 (4th Cir. 2001).)

Judge Reprimanded for Opening Illinois Courtroom

Seventh Circuit Chief Judge Frank Easterbrook last month formally reprimanded an Illinois federal district judge who permitted camera coverage of a hearing in a high profile discrimination case. *See* *In Re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (Sept. 28, 2009).

Last month, Judge Joe Billy McDade of the Central District of Illinois heard comments from the public on a proposed settlement agreement regarding discrimination in the Champaign school district. *Johnson et al. v. Board of Education of Champaign School District #4*, No. 00-1349 (C.D. Ill. September 15, 2009). Given the public interest in the proposed settlement, Judge McDade granted local television stations access to the proceedings, and then granted a request from a local newspaper, *The News-Gazette*, to attend on an equal basis. As a result, at least four video cameras, two audio recorders, and one still camera were present in the courtroom during the September 15 hearing.

After receiving inquiries about the propriety of Judge McDade's decision to open his courtroom to audio-visual recording, Judge Easterbrook initiated a complaint and inquiry under the Judicial Conduct and Disability Act of 1980. Judge McDade did not contest the inquiry, but issued an apology acknowledging violating the Circuit's rules, explaining that it was the result of an unintentional misunderstanding of the limits of his judicial discretion.

The relevant local rule in the Central District of Illinois prohibits all "electronic devices," including still and video cameras. C.D. Ill. R. 83.7. In addition, in 1996 the Seventh Circuits' Judicial Council acted on the national Judicial Conference's recommendation to ban audio-visual coverage of district court proceedings.

The Seventh Circuit's resolution stipulates that "[t]he taking of photographs, making of audio or video recordings, or electronic broadcasting of judicial proceedings in or from a court room, must not be permitted by any district court … in this circuit." The only exceptions to this provision are narrowly defined to include "ceremonial occasions," "recordings made by court reporters," and those "otherwise expressly required by law, such as closed circuit telecasting to victims of crime under Section 235 of the Antiterrorism and Effective Death Penalty Act of 1996."

In his apology, Judge McDade wrote that he "erroneously thought he had the authority to waive the rule because of the great public interest" and that he did not realize his mistake until some days later when his colleagues informed him of his violation at an annual judge's retreat.

Though the Judicial Conduct and Disability Act of 1980 required that Judge Easterbrook take some action regarding Judge McDade's conduct, the Chief Judge decided that publication of his letter of reprimand and Judge McDade's letter of apology would be sufficient under the circumstances. None of the litigants appeared to be damaged by the presence of the electronics, and none of them complained. In his letter, Judge McDade reaffirmed his commitment to court rules, and emphasized that his "action in no way reflect [sic] any disagreement on my part with the policy of the Judicial Conference or our Local Rule 83.7."

Both letters, which were published with Judge McDade's consent, were posted on his court's website and sent to all Seventh Circuit judicial officers and administrative staff.

Ethics corner

Unsolicited E-mail and Website Design

By Gary L. Bostwick

Long ago, when legal research was accompanied by the smell of dusty leather instead of the sound of keyboard clicks, most attorneys were pleased to receive an unsolicited call, letter or personal visit about potential business from a new prospective client. We all knew how to avoid the pitfalls of possible conflicts and were able to give proper warnings to the prospective client in most cases to avoid ethical perplexities. Today those perplexities are growing every day, unless one has no web site or email address. (Anyone falling into that class may stop reading here.) Worse yet, no solution to the problems caused by the law firm web site culture is without its downside. Every lawyer with a web site has to come to grips with the problems and make some hard choices.

The Problem

What's the problem?

There is more than one. An unsolicited email from someone may

1) establish an attorney-client relationship; and/or

2) require you to maintain the information conveyed to you confidential.

Keep in mind that these are two separate issues, each with its own potential consequences.

You may already represent the Prospective Client's adversary or potential adversary. Alternatively, you may be called soon to represent the adversary. Some examples are:

> A Prospective Client sought representation in an automobile accident, but the lawyer had already consulted another party to the collision. (San Diego County Bar Ass'n Form.Opn. 2006-1).

> A woman seeking a divorce lawyer sent an unsolicited email and in the communication revealed facts regarding her extramarital relations. (State Bar of California Form.Opn. 2005-168). The lawyer already represented the husband.

> In Arizona, an employee sent a letter he had sent to his employer's human resources department to 11 different attorneys seeking representation, one of the 11 being the employer's counsel. (Arizona State Bar Form.Opn. 02-04 (2002))

> In New York, a law firm received an email generated from its website contact site that disclosed confidential information in a matter in which a current client was adverse to the Prospective Client. The information would have been useful to the client and harmful to the Prospective Client if disclosed. (ABCNY Form.Opn. 2001-1)

The above opinions will be discussed more in detail below in order to arrive at some conclusions as to how to deal with unsolicited emails. Another source of authority and aid also needs to be considered.

Model Rule 1.18

In 2002, The American Bar Association amended the Model Rules of Professional Conduct by adopting Model Rule 1.18, entitled "Duties to Prospective Client." It was designed, in part, to define when a party was merely a "Prospective Client" to whom some, but not the full spectrum of, duties were owed. It is accompanied by several comments, a few of which are vital to understanding the new regime. Model Rule 1.18 first defines a Prospective Client.

> (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. (Model Rule 1.18).

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The Rule thus differentiates a "client" from a "prospective client." It does so by making it clear that the mere discussion of the "possibility of forming a client-lawyer relationship" does not form a client-lawyer relationship. Its wording leads to the conclusion that an unsolicited email may make the sender a "prospective client." Comment 2 to the Rule makes this more explicit:

> Comment 2: Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). (emphasis added)

So the bald words of the Rule are mitigated by a rule of "reasonable expectation" on the part of the Prospective Client. This concept is a very important consideration, as discussed below, for any lawyer or firm of lawyers seeking to avoid the establishment of a client-lawyer relationship based only upon the fact that someone sends an unsolicited email.

The problem is that even if someone is only a Prospective Client, duties are owed to the party and problems may arise. Most significantly, the rule goes on to prohibit the use or revelation of information obtained in a discussion (i.e., the email) with the Prospective Client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

More importantly, perhaps, a conflict with other clients may arise by the mere receipt of the email. Representation of a client with interests adverse to the Prospective Client may be precluded, whether that is through representation by the lawyer who received the unsolicited communication or any other lawyer in his or her firm.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

The recipient of the email may be saved by one fact. If the information received is not "significantly harmful," adverse representation is not barred. Comment 6 of the Rule confirms that principle.

> Comment 6: Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

Approximately 35 jurisdictions in the United States have adopted Rule 1.18, some in slightly altered form. If you determine that you are in one of these jurisdictions, it would be advisable to review the applicable adoption in the relevant state and, in some cases, the differing language of the adopted language and comments in the jurisdiction. In other jurisdictions, the issues presented will be virtually identical, but dealt with in other ways (statutes, rules, common law) than the adoption of Model Rule 1.18.

What Do Leading Ethics Opinions Tell Us?

In the New York case cited above (ABCNY Form.Opn. 2001-1), the Opinion concludes that the receipt and review of the unsolicited information should not disqualify the firm from representing a party adverse to the prospective client in the same matter. The lawyers had no chance to warn the sender of the email not to provide confidential information and should not suffer from that fact.

The Opinion then addresses whether it would violate the duty of confidentiality under DR 4-101 (then in effect in New York) if the firm disclosed the information to its current client. The answer was that it would and disclosure was barred, even though it was in the interests of the existing client.

> [P]rospective clients who approach lawyers

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> in good faith for the purpose of seeking legal advice should not suffer even if they labor under the misapprehension that information unilaterally sent will be kept confidential. Although such a belief may be ill-conceived or even careless, unless the prospective client is specifically and conspicuously warned not to send such information, the information should not be turned against her. *Id.* at 5.

The Opinion addresses how law firms can avoid giving readers of their websites the "misapprehension that information unilaterally sent will be kept confidential." A disclaimer is necessary. And not just any disclaimer.

The disclaimer that "prominently and specifically warns prospective clients not to send any confidential information in response to the website because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check," (*Id.* at 6) should be sufficient to defeat a claim that the duty of confidentiality or the attorney client privilege had attached. In a footnote, the Opinion stated that: "An optional web site disclaimer that the web site viewer may choose to read prior to sending an e-mail and which merely states that an attorney-client relationship cannot be established by e-mail is not as effective as a large print, prominently placed warning that e-mails with potential clients will not be treated as confidential. Such a disclaimer becomes even more effective if it appears in a 'dialogue box' which materializes upon the website viewer's clicking the firm's link to its e-mail address and which requires that the viewer click 'OK' before composing and sending an e-mail." (*Id.* at 6 n.5).

In the Arizona matter cited above (Arizona State Bar Form.Opn. 02-04 (2002)), the Arizona Committee decided that there had been no legitimate expectation of confidentiality because the sender had sent the email to 11 different employment lawyers and had no reason to believe that the lawyer had agreed to consider the formation of an attorney-client relationship. "On the other hand, if the attorney maintains a website without any express limitations on forming an attorney-client relation, or disclaimers explaining that information provided or received by would-be clients will not be held confidential, the analysis changes. The absence of express disclaimers suggests that the attorney may have implicitly 'agreed to consider' forming a relation. Under these circumstances, duties of confidentiality may arise. Accordingly, the use of appropriate disclaimers with a website may be essential to prevent unsolicited e-mail from being treated as confidential." (*Id.* at 4).

Massachusetts has not adopted Rule 1.18. But the Massachusetts Bar Association in 2007 issued an opinion that closely resembled the reasoning and principles of both Model Rule 1.18 and the Arizona Opinion cited above. (Mass. Bar Ass'n. Comm. on Professional Ethics, Op. 07-01). The Committee concluded that an email sender could not unilaterally create a duty of confidentiality imposed upon a lawyer addressee and that if the email address was obtained from a listing other than a firm-sponsored website, it would conclude that the attorney had not agreed to consider forming a relationship. (*Id.* at 2).

But the Committee had more to say about websites. For one thing, it said that firm web sites were marketing tools. And firms have the ability to filter messages they receive by requiring the sender to click on an agreement. "Such terms of use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a prospective client will not prevent the firm from representing someone else in the matter." (*Id.*)

In the San Diego matter cited above regarding the vehicle collision (San Diego County Bar Ass'n Form.Opn. 2006-1), the Opinion concluded that the lawyer was not barred from continuing to represent the existing client nor was the lawyer precluded from telling his client that the email sender had admitted to drinking before the collision. The panel considered it significant that the email sender had obtained the email address from the State Bar web site. This made it clear to the panel that the sender did not reasonably expect that the lawyer had agreed to consult.

In the California matter of a woman seeking to hire her husband's divorce lawyer and admitting to an extramarital affair in the communication (State Bar of California Form.Opn. 2005-168), the woman had used an electronic form on the firm's website to provide basic information. Further, she was required to agree electronically that no attorney-client or confidential relationship was formed. The committee found the agreement invalid. It barred representation of the husband. The terms of the agreement that the wife had

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signed off on electronically were not in sufficiently plain terms. The suggested language of the committee was: "I understand and agree that law firm will have no duty to keep confidential the information I am now transmitting to law firm." In the committee's view, that would have been sufficient to allow the firm to represent the husband even after the admission by the wife.

In California, the 9th Circuit Court of Appeals, applying California law, held that "[p]rospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer. *Barton v. U.S. Dist. Court for Central Dist. of Cal.*, 410 F.3d 1104, 1111 (9th Cir. 2005). The court went on to hold that "[t]here is nothing anomalous about applying the privilege to such preliminary consultations. Without it, people could not safely bring their problems to lawyers unless the lawyers had already been retained. 'The rationale for this rule is compelling,' because 'no person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney after hearing his statement of the facts decided to accept the employment or decline it.' The privilege does not apply where the lawyer has specifically stated that he would not represent the individual and in no way wanted to be involved in the dispute, but the law firm did not do that in this case-it just made it clear that it did not represent the submitter *yet*." (*Id.*) (citations omitted)

As rare as they might be, unsolicited email communications seeking legal advice can be more than irritating: they can cause you to lose good clients and good cases.

The synthesis of these opinions and Model Rule 1.18 and its comments leads to a fairly clear conclusion. Serious thought must be given to web site design to avoid the pitfalls of unsolicited email communications and to how to respond to unsolicited email if it arrives by a channel other than the firm's website…

What To Do To About Unsolicited Email

Many law firm websites list the background of the attorneys and many websites tout notable cases, awards, associations, writings and other public recognition. Most websites provide the email addresses of the lawyers and allow the viewer to send email to the lawyer by clicking on the email address. Some sites do not provide email addresses, but permit the viewer to send an email to a specific lawyer by clicking on an icon on the lawyer's page.

In order to avoid allowing an unsolicited email becoming the basis for the sender being considered a Prospective Client, with all the bad consequences of that classification, the lawyer needs to take some steps to make sure that the sender has no "reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship."

The best way is to place a clearly phrased warning on the website on any page that allows unsolicited contact by email and require the sender to accept the terms of the agreement. This mechanism works much like the terms of use in commercial websites and in software downloads. "Clearly phrased" means using language that a reasonable person not trained in the law would understand, not legalese. It could say something similar to this:

"DISCLAIMER"

"You understand that sending this email does not mean that this firm is your lawyer or that an attorney-client relationship will exist by sending this email. Your email by itself does not establish an attorney-client relationship. Unless we agree to represent you, we do not represent you.

Do not send us any information at all by email, either in the body of the message or in attachments that you believe is confidential.

By clicking "accept," you agree that submitting unsolicited e-mail information to us does not constitute a request for legal advice and that you are not forming an attorney-client relationship with us by sending the email.

[You recognize that our review of your information, even if it is confidential and even if you hope possibly to retain us, does not prevent this firm from representing another client that is your opponent or is attorney-client relationship adverse to you, even

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> where that information could and will be used against you.]
>
> or
>
> [Unless and until this firm agrees in writing to represent you, (a) no information contained in your message will be treated as secret, confidential, or privileged, and we may use the information that you provide against you; and (b) no lawyer in our firm will be precluded, by reason of your communication, from representing parties adverse to you.]"

In considering the sample above, consider that one version may be sufficient to avoid the establishment of a lawyer-client relationship, but not clear enough to avoid the second concern of the receipt of confidential information that hampers representation of existing or future clients. The two issues must be considered separately.

One must keep in mind that some senders might avoid the agreement and simply copy an email address to send an unsolicited email without agreeing to anything. This evasion may cause significant problems, even though the tenor of the opinions cited above might suggest that the ruse would be ineffective. However, this and other possibilities are reasons why some firm web sites do not list attorney emails on the web site at all.

The overriding point of this analysis is that each lawyer must consider all of the above to determine whether his or her website adequately protects the lawyer's interests when faced with unsolicited emails. Also, emails that arrive without having signed a disclaimer are problematic. As rare as they might be, unsolicited email communications seeking legal advice can be more than irritating: they can cause you to lose good clients and good cases.

Gary L. Bostwick is a partner with Bostwick & Jassy LLP in Los Angeles, CA.

Notes

1. Association of the Bar of the City of New York.

2. Comment 1: Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

3. The cited sub-paragraph (d) of the Rule is unremarkable in that it merely recites normal rules of conflict waiver.

4. This sample disclaimer should not be taken as anything more than a brainstorming suggestion, designed to provoke thought and discussion. Independent analysis by each lawyer and law firm in the jurisdiction in question should be undertaken to draft a disclaimer tailored to the specific circumstances.

5. This observation conforms to Comment 5 of Model Rule 1.18. "A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client."

David Kohler, 1953-2009

On Losing a Colleague and a Friend

By Sandy Baron

I have known David Kohler for years – since his early days at CNN. We talked fairly often when he was General Counsel of CNN about a range of matters, from difficult litigations and worse – yes, Tailspin, I think, fits into the worse category – to the exhilarating and hilarious aspects of working in a television news operation, to our children and their exploits.

I remember the winter day when he wanted to talk about Southwestern Law School, his thinking about his then potential role as director of its Biederman Institute, and how, maybe, we could work together on programs that would benefit the MLRC membership and the students.

Before Dave had even begun his tenure at Southwestern, we had plotted and planned out the first of what would become the annual Media & Entertainment Law Conference (except those years when it was the Entertainment & Media Law Conference) co-sponsored by MLRC and Southwestern Law School.

When MLRC wanted to start its Cal Chapter, Dave was quick to offer Southwestern as a venue. It has served us so well in that regard for years now, to my and Dave's genuine pleasure and pride.

We were able to feel accomplishment from our joint projects and – and you all probably knew this by now – we had tremendous fun in the doing. The fact is, working with Dave Kohler was lively and energizing. The process was always full of ideas and humor and side bars and good food, cause Dave was just that kind of person. Intelligent, energetic, funny – very funny – and creative. And in all regards, a truly honorable and decent man.

A perfect partner -- and if you think he enjoyed his work, don't get me started on his passion for his children and wife!

I, and indeed the entire MLRC community, will miss him terribly. We asked a few of his friends to write notes about Dave.

David Kohler, a long time media lawyer and member of MLRC, died on October 15 after a long battle with cancer. David was Professor of Law and Director of the Donald E. Biederman Entertainment and Media Law Institute at Southwestern Law School in Los Angeles. As director of the Biederman Institute he partnered with MLRC to develop a highly regarded annual media and entertainment law conference. At Southwestern he taught classes on media law and policy, authored numerous scholarly articles on media law and policy and grew the school's media and entertainment law profile. Prior to joining Southwestern Law School he was Senior Vice President and General Counsel at CNN in Atlanta; and before that a partner at Christian & Barton in Virginia.

Memorial Service

The family has scheduled a Memorial Service in Atlanta, Georgia for November 20, 2010 at 11:00 a.m. eastern time at the Morningside Presbyterian Church.

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* * *

By Henry Hoberman

It was always good to see David Kohler. He made you laugh hard and think hard at the same time. This day in 1995 was no exception.

David was enjoying cocktail hour at the MLRC/NAA/NAB Conference, holding court with a CNN producer in the corner of the crowded room. As I walked over to say hello, he explained that he had dragged his friend along so she could "learn a thing or two about the First Amendment and First Amendment lawyers." Those were prescient words.

David introduced his colleague, and then launched into a barrage of questions. Among them: "How is the firm treating you?" "You've been there a long time. Aren't you getting antsy?" And then my favorite: "Tell me the truth. Which clients are the biggest pains in the ass?" I returned his volley with a few flip, alcohol-infused responses. At his urging, I named names (you know who you are). After several minutes, David and his friend excused themselves to work the rest of the room.

The next morning, David took the stage to moderate a plenary program entitled Tricks of the Trade: Old Torts and New Technology covering the then-nascent world of hidden cameras. He announced to the assembled group of First Amendment true believers that his colleague -- the woman he was toting around at the cocktail hour -- had been wearing a recording device concealed in a flower on her lapel.

There was a collective, audible gasp from the crowd. Then a hush. David just smiled.

As we later learned, everyone in the room had the same reaction at that moment. "What did I say to David at the cocktail hour?" "Anything embarrassing?" "Anything . . . *private*?" We replayed the entire conversation with David in our heads and cringed when we recalled something that we would not have wanted to share with the broader group. It was a gut-wrenching feeling.

In the end, although he had the goods on many of us, David embarrassed no one. Typical. He was a mensch. Instead, he showed a package of light, funny highlights from the hidden camera footage, leaving the embarrassing stuff on the cutting room floor. The program and discussion that ensued were among the most memorable in MLRC's long, distinguished history.

David had cleverly turned the tables on the people who authorized and defended hidden camera investigations for the major news organizations on a daily basis.

It was a lesson we never forgot and discussed often over the years, and it was vintage David Kohler.

Henry Hoberman is Executive Vice President and General Counsel of RHI Entertainment.

* * *

By Lee Levine

Dave Kohler did not anger easily. In fact, in all the years I knew him, I can only recall him getting his dander up once. The circumstances that gave rise to that fit of pique, and what Dave did about it, says a lot about our colleague and friend.

It was 1995 and CBS had just been accused of pulling the plug on a piece about the Brown & Williamson Tobacco Company, the now-famous kerfuffle that led to the film "The Insider." Much of the media storm that followed focused on CBS's lawyers, who pundit after pundit accused of being the culprits who had "ordered" the journalists involved not to air the story.

At the time, Dave was Deputy General Counsel at CNN. He could easily have sat back and enjoyed the grief that a rival network's news operation was then experiencing. Instead, he set out to do his part to correct what he perceived as wrong-headed and counter-productive criticism of his professional colleagues, criticism that he knew "obscure[d] the really important issues" on which we, our clients and the public itself ought to be focusing.

So, Dave wrote a column in the *Wall Street Journal*, which is hands down the best piece I have ever read on how newsroom lawyers, at their best, are supposed to practice their craft. The guts of his description is worth quoting in full:

> Lawyers in a newsroom – as in other contexts – serve their clients by explaining the

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> applicable legal rules and counseling them on likely risks. In my experience, the ultimate editorial decision in cases like this rests with journalists, and properly so. In practice, deciding whether to air a legally risky story is usually the product of a collegial process through which those involved – the correspondent, the producer, the lawyer, the news division president – discuss the relative merits of particular courses of action. While the network's lawyers are an easy target, they are the wrong one.

The "right target," Dave explained in an insight as valid today as it was then, "is the uncertainty that pervades our current First Amendment jurisprudence," specifically the Supreme Court's failure to provide meaningful First Amendment protections for a claim ostensibly based on what a plaintiff's lawyer could plausibly allege was newsgathering *conduct* as opposed to the resulting editorial *content*. As Dave recognized some fifteen years ago, "[w]e may not like the message judges . . . are sending, but rather than shooting at those" lawyers who are duty bound to make sure their clients are fully informed about the state of the law, "we should focus on why the law has gotten this way and what can be done to change it."

This is the Dave Kohler I will always remember – loyal, honest, wise, constructive, fearless. He will be greatly missed.

Lee Levine is a partner in Levine Sullivan Koch & Schulz LLP, Washington, D.C.

* * *

By Dan Waggoner

During the month long struggle around the Noriega prior restraint, I truly got to know Dave Kohler for the first time. We spent hours and indeed days parked in a small conference room at CNN, reading cases, fashioning arguments and briefs and just plain kvetching. Through it all, I saw the essence of Dave--calm, thoughtful, rock solid, always looking for the right not the convenient answers. Through the decade after that, I saw those traits many times in his review of stories or decisions about which arguments to make. But most of all, I recall the pure joy he could experience and express, over things like his primitive art collection, a well struck putt for birdie, time with his close friends, or just the taste of his favorite obsession, sorbet!

Dan Waggoner is a partner in Davis Wright Tremaine LLP, Seattle, Washington

* * *

By Steve Korn

No, Really, I'm Dave Kohler:

Dave Kohler spent his entire adult life as a student of the law. His particular passion was for First Amendment and media law jurisprudence. Throughout his career, whether in private practice, as General Counsel of CNN or during his tenure on the faculty of Southwestern Law School, Dave wrote and lectured widely on various legal issues.

So it was that on a fall day in the late 1980's Dave travelled from his home in Richmond to give a talk in Colonial Williamsburg on some aspect or other of the First Amendment. The talk was to take place in the conference center at one of the hotels in Williamsburg. He was running late and when he arrived at the hotel he rushed in and told the concierge that he was Dave Kohler and he was supposed to speak in one of the rooms in the conference center. The concierge consulted his list of events and directed Dave to the appropriate room. Dave rushed to the elevator and walked into the room only a few minutes late.

The group of attendees was already assembled and Dave went to the front of the room and introduced himself. "Hi, I'm Dave Kohler. I'm very sorry to be late." Thereupon everyone in the room got out of their chairs and came up to Dave and shook his hand and introduced themselves to him. Dave thought this a bit odd, but was nevertheless flattered to be so warmly received.

When everyone sat back down, Dave launched into his talk on the First Amendment. Almost immediately Dave noticed that nearly everyone in the crowd had a puzzled look on his or her face. Dave was unaccustomed to failure as a public speaker, but he pressed on. Shortly thereafter some brave

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soul raised his hand and asked Dave to repeat his name. He did. The guy said: "I don't believe you." Others joined in saying that there was no way he was Dave Kohler. There was some tension in the room. Dave was, as you might imagine, quite confused, but he decided to pull out his driver's license to prove his identity.

Most in the crowd came to the front of the room to look at Dave's driver's license. Convinced of his identity, the attendees still wanted to know why Dave was talking about the law, instead of business.

"What business?" Dave asked.

"Our business!" was the response.

"You said your name was Dave Kohler and we are all employees of the Kohler Company. We make plumbing fixtures, toilets and urinals! We're not lawyers." Apparently, this group had been expecting a senior executive from the company's headquarters to address them. They were all impressed when they thought a member of the company's founding family had come to speak to them and they were confused, annoyed and no doubt very disappointed, to be lectured on the First Amendment by some lawyer they thought was impersonating a Kohler! Dave eventually escaped intact and found his way to the proper room and gave his talk to a more receptive crowd.

To this day every time I use a public restroom and see the name KOHLER stamped on the porcelain I think of my dear friend the lawyer, who was not a toilet mogul.

Steve Korn is Former Vice Chairman and Chief Operating Officer of CNN.

* * *

By Kelli Sager

It was appropriate that Dave Kohler became a media lawyer, because he loved a good story. Dave loved hearing good stories - particularly funny ones. And he loved telling funny stories, most of all when he was target of his own humor.

The one that Steve Korn relates is one of my personal favorites, and no one laughed longer or harder than Dave at the odd circumstances he sometimes found himself in. In fact, his laugh was one of the first things I noticed about Dave when we started working together. It was what one might call a "hearty" laugh; nothing cautious or subtle about it. It was infectious, telegraphing to everyone around him that he was having a good time.

His laugh wasn't the only thing that was contagious - Dave had an incredible amount of energy and enthusiasm that affected everyone around him. On many occasions, I would pick up the telephone to hear Dave's voice on the other end, saying: "Hey, I have an idea I want to run by you - what do you think of THIS?" It might be about a new initiative for Southwestern's Entertainment Law Institute, or a proposal for a group of us to play golf at Pebble Beach - but whether it was work or play, you couldn't help but be caught up in his high spirits.

Dave had a lot of wonderful qualities - intelligence, common sense, a generous spirit - but his most defining characteristic was the passion he brought to every aspect of his life, whether it was in his role as a First Amendment advocate, as a dedicated professor, as a proud father, or an avid golfer. He will be sorely missed.

Kelli Sager is a partner at Davis Wright Tremaine LLP in Los Angeles.