MEDIA LAW RESOURCE CENTER

ANNUAL DINNER Wednesday, November 9, 2011

MLRC will bestow its WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on

ANTHONY LEWIS

Author of Make No Law: The Sullivan Case and the First Amendment Former New York Times Columnist and Supreme Court Reporter Two-time Pulitzer Prize Winner

Introduced by

JEFFREY TOOBIN

Staff Writer at *The New Yorker* Senior Analyst at CNN

Interview of Mr. Lewis by

TERRY MORAN

Co-Anchor of ABC News "Nightline"

Cocktail Reception at 6:00 P.M. Sponsored by AXIS PRO

Dinner at 7:30 P.M.

New York Marriott Marquis

Broadway Ballroom – 6th Floor 1535 Broadway, between 45th and 46th Streets

RSVP by Monday, October 24, 2011

Business Attire

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RSVP for Dinner by Monday, October 24, 2011					
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For further information please contact Debra Danis Seiden at dseiden@medialaw.org or 212-337-0200 ext. 204					

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Thursday, November 10, 2011

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Meeting will begin promptly at 12:30 P.M.

Proskauer Rose (in their NEW location!) Eleven Times Square - Conference Room 2700

Visitor entrance is on the NE corner of 41st Street and Eighth Avenue.

Price per person: \$35.00

We are required to submit a list of attendees prior to the event for security purposes so please send in your reservation as soon as possible!

RSVP by October 28, 2011

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2011 ANNUAL MEETING

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MLRC Fall Events November 9-10, 2011

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November 9, New York, NY

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October 2011

Virgin Islands Supreme Court Issues Its First Opinion Addressing Defamation Law

Affirms Directed Verdict In Favor Of Newspaper

By Michael Berry

On September 21, 2011, the Supreme Court of the Virgin Islands <u>affirmed</u> a trial court's directed verdict in favor of a local newspaper in a libel suit brought by a former judge. *See Kendall v. Daily News Publ'g Co.*, 2011 WL 4434922 (V.I. Sept. 21, 2011). The former judge, Leon A. Kendall, claimed that The Virgin Islands Daily News and two of its reporters, Joy Blackburn and Joe Tsidulko, defamed him through their reports on his bail decisions and an editorial published by the newspaper.

At trial, the jury found for Mr. Tsidulko, and the trial court entered a directed verdict in favor of the newspaper and

Ms. Blackburn. On appeal, the Supreme Court unanimously affirmed the trial court's ruling, concluding that the plaintiff had not met his burden of establishing actual malice nor had he shown that the defendants intended the defamatory implications alleged in his complaint.

The Court also ruled that the editorial in question reflected constitutionally protected opinion. The decision represents the first time that the Virgin

Islands Supreme Court, which was established less than five years ago, has addressed the law of defamation, and it stands as a very strong statement about the First Amendment protections afforded to reports on public officials. This ruling is a welcome development in the Virgin Islands, where no fewer than three other public officials have pending libel cases against the Daily News.

Background

While on the bench, Judge Kendall was known for being an outspoken critic of other Virgin Islands judges' bail practices, claiming that other judges violated criminal defendants' rights by requiring money bail. In contrast to

This ruling is a welcome development in the Virgin Islands, where no fewer than three other public officials have pending libel cases against the Daily News.

those practices, Judge Kendall routinely released defendants on personal recognizance or unsecured bonds. In his suit against the Daily News and its reporters, Judge Kendall complained about their coverage of his bail rulings and the fallout from those rulings, alleging that the Daily News and its reporters defamed him in sixteen articles and one editorial. At trial, the jury found in favor of one of the newspaper's reporters, but rendered a verdict against the Daily News and the other reporter, awarding Judge Kendall \$240,000 in compensatory damages. The presiding judge, however, granted the Daily News' motion for a directed verdict, ruling that the newspaper's publications were not materially false,

> were protected by the fair report privilege, did not convey the defamatory meanings that the plaintiff ascribed to them, were constitutionally protected opinions, and/or were not published with actual malice. *See generally Kendall v. Daily News Publ'g Co.*, 2010 WL 2218633 (V.I. Super. Ct. May 27, 2010). (For a more complete description of the procedural history of the case, the trial, and the trial court's directed verdict, please see the April and June 2010 issues

of MLRC MediaLawLetter.)

Judge Kendall appealed the directed verdict to the Virgin Islands Supreme Court. His appeal focused on four sets of publications. First, he complained about the newspaper's coverage of Daniel Castillo, who had murdered a young girl soon after Judge Kendall released him on his own recognizance following a bail hearing on domestic violence charges. Second, Judge Kendall challenged the Daily News' reporting on Ashley Williams, a convicted rapist whom Judge Kendall did not remand into custody following his conviction. After Williams later refused to report to prison, he threatened to blow up his house, causing his *(Continued on page 4)*

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neighborhood to be evacuated and prompting a lengthy standoff with police. Third, Judge Kendall claimed that he was defamed by an editorial in the newspaper that criticized his bail rulings and called for his resignation. Finally, he asked the Supreme Court to review the headline of a newspaper article reporting on his announcement that he was retiring from the bench.

The Supreme Court's Decision

Given the breadth of the trial court's directed verdict ruling, on appeal Judge Kendall was forced to argue that the reports and editorial at issue were materially false, were not privileged, conveyed the defamatory meaning alleged in his complaint, did not reflect protected opinion, and were published with actual malice. The Supreme Court, however, primarily decided the case on actual malice grounds.

The Court began its opinion by quoting the U.S. Supreme Court in describing the actual malice standard and its own obligation to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold" of "clear and convincing proof of actual malice." The Court then discussed each of the allegedly defamatory statements and implications raised by Judge Kendall's appeal.

The Daniel Castillo Statements - Judge Kendall alleged that several Daily News reports implied that he knew that Castillo had a violent criminal history when he released Castillo on his own recognizance. He based this claim on the Daily News' statement that Castillo was released "despite his history of violence." The Court held that to prevail on this theory Judge Kendall was required to "produce clear and convincing evidence that the Daily News and [its reporter] intended to convey [the] impression" that he knew about Castillo's criminal record. After reviewing the reporter's testimony and the other evidence at trial, the Court held that Judge Kendall had failed to meet this burden. For example, while the plaintiff claimed that the reporter's testimony showed that she "intended to imply that Judge Kendall knew that Castillo had a history of violence, but released him anyways," the Court found that the reporter's actual testimony in response to questioning by plaintiff's counsel was far more limited - she "intended to convey exactly what she wrote," not what the plaintiff alleged. That is, the reporter intended to convey that Judge Kendall released Castillo and that Castillo had a history of violence. She did not intend to imply that Judge Kendall actually knew about Castillo's history at the time he was released.

The Ashley Williams Statements - Judge Kendall complained that the Daily News falsely reported that he had allowed Williams to "spend the weekend in the community unsupervised" following his rape conviction, when, according to Judge Kendall, he had actually been placed under house arrest. Again, the Supreme Court carefully reviewed all of the relevant testimony and evidence and rejected Judge Kendall's claim of actual malice. Thus, for example, although plaintiff argued that the reporter had "no source" for her reporting, the Court said this argument "mischaracterize [d]" the evidence. While no one specifically told the reporter that Williams was "unsupervised," two prosecutors told her that Judge Kendall had allowed Williams "to go home for the weekend," and the reporter herself saw that Williams was "in the community unsupervised" when she was covering the stand-off at his home. The Court further explained that "while further investigation may have allowed [the reporter] to more accurately report the specific circumstances surrounding Williams' release," this alleged failure to investigate did not establish actual malice.

The Editorial - In 2007, in the wake of the community trauma caused by Castillo and Williams, the Daily News published an editorial on its Opinion page criticizing Judge Kendall's bail rulings and calling on him to resign. Judge Kendall claimed that the editorial defamed him. The Supreme Court rejected this claim for two reasons. First, the Court held that the statements in the editorial were either pure opinion, such as the charge that Judge Kendall "display[ed] an arrogance that we've not seen from any other judge," or were supported by accurate facts disclosed in the editorial. The Court also concluded that Judge Kendall "failed to present any evidence of actual malice." At trial and on appeal, the plaintiff's theory of actual malice hinged on his claim that the editorial was written by the newspaper's editor. But, after reviewing the record, the Supreme Court ruled that "Judge Kendall ha[d] mischaracterized the testimony," found that the evidence "tended to show" that someone else had written the editorial, and held that the plaintiff had not presented any evidence that the author of the editorial knew (Continued on page 5)

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any statements in it were false or recklessly disregarded the truth.

The Report on Judge Kendall's Retirement - The final claim on appeal related to Judge Kendall's contention that he was defamed by the headline of the Daily News' report on his retirement, which stated that judicial conduct complaints that had been filed against him were "still pending." According to Judge Kendall, this headline was false because a federal district court had enjoined the commission in charge of disciplining judges from proceeding against him. Judge Kendall contended that he could establish actual malice because the Daily News article itself reported that the commission's proceedings had been enjoined and the headline's author had testified that she relied on the article in writing the headline. The Supreme Court rejected this claim, noting that the article also stated that the district court's decision had been appealed. Thus, the Court held, "even if, technically speaking, the complaints [against Judge Kendall] were not 'still pending," the substance of the article itself was insufficient evidence of actual malice because a writer's "erroneous interpretation of the facts does not meet the standard.""

Conclusion

The Virgin Islands Supreme Court's decision in the *Kendall* case represents a significant step in disrupting the stream of libel suits filed by public officials in the Virgin Islands. In following the bedrock First Amendment principles set forth by the United States Supreme Court, the Virgin Islands court has made clear that public officials face very high hurdles when pursuing defamation claims.

Under the law governing Virgin Islands practice, Judge Kendall can petition the United States Court of Appeals for the Third Circuit to review the Supreme Court's decision. As of the date this article was written, no petition has been filed.

Michael D. Sullivan and Michael Berry of Levine Sullivan Koch & Schulz, LLP represented the defendants, together with Kevin Rames of the Law Offices of K.A. Rames, P.C. Plaintiff was represented by Howard M. Cooper and Julie Green of Todd & Weld LLP together with Gordon Rhea, of Richardson, Patrick, Westbrook & Brickman. Lucy Dalglish and Gregg Leslie of The Reporters Committee for Freedom of the Press filed a brief as amicus curiae supporting the defendants.



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Florida Appeals Court Affirms JNOV Throwing Out \$10.1 Million Libel Award

Trial Court Found "Insufficient Proof" to Sustain Judgment for Public Official

Florida's Second District Court of Appeal this month affirmed without opinion a judgment notwithstanding the verdict in favor of the *St. Petersburg Times* newspaper in a public official libel suit. <u>Kennedy v. Times Publ. Co.</u>, No. 2D10-3136 (Fla. App. Oct. 19, 2011) (per curiam).

In August 2009, a Florida jury awarded a former Veterans Administration doctor \$10.1 million in damages (\$5,149,137 compensatory and \$5 million punitive) over an article headlined "Bay Pines ousts chief of medicine" which reported that plaintiff was "reassigned as he is being investigated on accusations of misuse of money and sexual harassment."

Plaintiff was deemed to be a public official because of his position at a government hospital. At trial plaintiff argued that the articles were false and contradicted his statements to the reporter.

One of the complicating factors in the case was that the reporter died before trial. The trial court precluded the publisher from introducing the reporter's handwritten notes for the story finding the publisher lacked independent evidence of the dates and circumstances of their creation. The publisher's motion for JNOV argued that there was insufficient evidence of falsity or fault to support the verdict – and that the damage award was unsupported by the evidence and/or constitutionally excessive. In a short one and a half page order, Judge Anthony Rondolino, who had presided over the trial, wrote that the case involved constitutional considerations subject to "critical independent review" and that after reviewing the evidence presented at trial "the proofs were insufficient to cross the threshold required by the First Amendment."

Plaintiff appealed the JNOV. The *St. Petersburg Times* cross-appealed the trial court's refusal to admit the reporter's notes into evidence. Oral argument was heard September 28 and the appellate court summarily affirmed on October 19. Plaintiff's lawyer stated he is considering filing a petition for certiorari to the U.S. Supreme Court.

Alison Steele of Rahdert, Steele, Reynolds & Driscoll, P.A. in St. Petersburg, Fla. represented the newspaper. The plaintiff was represented by Timothy W. Weber of Battaglia, Ross, Dicus & Wein in St. Petersburg, Fla.; and Ira M. Berkowitz of St. Louis, Mo.

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Directed Verdict for Daily Nebraskan in Public Figure Libel Trial

Former University Regent Sued Over Editorial in Student Newspaper

Following a day of trial, a Nebraska County Court entered a directed verdict in favor of the *Daily Nebraskan*, the independent student newspaper at Nebraska University, in a libel suit filed by a former university regent. *Prokop v. The Daily Nebraskan*, No. 07-4401 (Lancaster Cty. Verdict 10/5/11) (Nelson, J.).

At issue in the case was a 2006 editorial published in the newspaper during the public election campaign for University

Regents. The Regents are elected officials who supervise the general operations of the university. The plaintiff, Robert Prokup, had served as a Regent in the 1970s and early 1980s and was running for election to the board in 2006.

The staff <u>editorial</u> published a few weeks before the 2006 election was headlined "Regents should be held to ethical standards." Among other things, it criticized Prokop for a 40-year old plagiarism incident, stating:

> In the early 1970s, NU Regent Robert Prokop, who is again running for the District 5 regents seat this year, plagiarized a guest column about homosexuality that he submitted to the Daily Nebraskan and other newspapers. Daily Nebraskan editors declined to print the column at first because of its content and later learned parts of it were copied out of a book.

Prokop lost the election and in 2007 sued the newspaper for libel. Describing himself as a public official, he <u>alleged</u> that the editorial was false and maliciously published to make him lose the election. He filed a separate libel suit against his opponent in the election, Regent James McClurg who had made statements to the press about the plagiarism incident.

Both cases were assigned to Judge Jodi Nelson. In August 2010, Judge Nelson denied summary judgment to the



newspaper. The judge refused to consider copies of other articles reporting the same allegations about plaintiff, finding they were not properly authenticated. In a short order Judge Nelson denied summary judgment stating that genuine issues of material fact existed on the issues of falsity and actual malice. However, she granted summary judgment to McClurg, holding the statements were true since Prokop did face allegations of plagiarism. The Court of Appeals of

> Nebraska affirmed summary judgment for McClurg. See <u>Prokop v. McClurg</u>, (July 12, 2011) ("The statements that Prokop was so accused, not being false, could not have been made with knowledge of falsity.").

Trial

According to news reports of the trial in the *Daily Nebraskan*, the one day of trial centered on events in 1971 and 1972. The plaintiff's 1971 column was submitted to the paper, but it declined to publish it and it was published in another local paper. In 1972, the Daily Nebraskan published an article accusing plaintiff of copying his column from another book. The Faculty Senate made a

motion to censure Prokop, but no action was taken.

Prokop testified that he did copy large portions of his column from a book that described homosexuality as a disease. He also testified that his column included a disclaimer that it was copied from another source, but that disclaimer did not appear in print.

On October 5th, Judge Nelson granted a defense motion for a directed verdict, finding insufficient evidence of falsity or actual malice.

The Daily Nebraskan was represented by Shawn Renner of Cline Williams Wright Johnson & Oldfather, L.L.P., Lincoln, NE. Plaintiff acted pro se.

California Appeals Court Affirms Judgment for Korean Broadcaster

Allegation That School Is "Degree Factory" Protected Opinion

In a decision certified for publication, a California appellate court affirmed judgment in favor a Korean broadcaster sued for libel by a Los Angeles-based university. <u>Yuin University v. Korean Broadcasting System</u>, B226977 (Cal. App. 2d Dist. Oct. 5, 2011) (Hiroshige, Rubin, Flier, JJ.).

The Korean language broadcast accused Yuin University of essentially being a diploma mill. The broadcast referred to it as a "suspected degree factory" that "confers degrees to persons who have not properly studied at their place." Giving wide berth to reporting allegations of misconduct, the court concluded that under a totality of circumstances test the broadcast was protected opinion.

The case is also notable for its unusual posture and procedures. The broadcaster filed a cross-complaint for libel against the founder of the university accusing him of libeling the network. The Superior Court held a bifurcated bench trial on both the complaint and the cross-complaint, holding that neither side had a claim. Plaintiff appealed the dismissal of its libel claim.

Background

Plaintiff Yuin University is an unaccredited school located in Compton, California. In September 2007, Korean Broadcasting System (KBS) broadcast a segment on its Sunday news program entitled "Degree Factory Confers Doctorate Degrees even to Persons who Plagiarize." The broadcast aired in Korea and in the United States on cable systems that carry Korean language programming. The topic was a matter of public interest in South Korea because there was an ongoing controversy about high profile Korean professionals lying about their academic credentials.

In preparing the report, KBS reporters visited the University and interviewed two graduates. The report stated that reporters visited the school but "found no students, teachers and no officials except a signboard that is the only indication showing that this is a university." A graduate told the reporters that he twice stayed one week in Los Angeles to obtain his degree from Yuin but otherwise never came on campus. The report also looked at dissertations written by Yuin University students and found some to be identical and others of extremely poor quality. The broadcast concluded that "the school in question is virtually a ghost school that cannot be found on any ... reliable websites including that of the State of California. Without being controlled, this school that recklessly issued degrees not admissible even in [the] U.S.A. has invited new students by maintaining an admission office in Korea until last year."

Trial Court Proceedings

Yuin sued KBS on January 8, 2008, alleging libel, fraud, negligent misrepresentation and intentional infliction of emotional distress. The trial court dismissed all but the libel claim. KBS filed a cross-complaint against Yuin's founder, Henry Yu, for libel. The broadcast was in Korean and the parties stipulated to a English language translation.

The Superior Court then held a bifurcated bench trial on both sides' libel claims. Yuin University argued that descriptions of it as "vacant" and a "ghost school" were false and defamatory because this meant or implied that the school was abandoned and not operating, but KBS knew it had enrolled students. Yuin also argued that the allegation that there were identical dissertations was false.

In April 2010, the trial court dismissed all the libel claims. It held that the statements by KBS were "not reasonably susceptible to a defamatory interpretation as a matter of law." References to Yuin being vacant or a ghost university were hyperbolic speech. Moreover, "to the extent the statements were factual, the statements were true in that there were no students, faculty or staff at the school and it was closed at the time KBS visited the campus."

As for the dissertations, there was conflicting evidence. KBS submitted the documents it relied on which were identical except for the first two pages. Yuin attributed that to an administrative error and submitted what it deemed that actual PhD dissertations. The trial court ruled against Yuin, holding that "the evidence does not establish that the statement made by KBS, based on the dissertations available (Continued on page 9)

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to it at the time the broadcast was made, was utterly false. Yuin University appealed. Because KBS did not appeal dismissal of its libel claim, none of the facts of that claim are discussed in the Court of Appeal decision.

Appeal

Applying a "totality of circumstances" analysis the Court of Appeal held that none of the disputed statements were libelous as a matter of law. "While the broadcast may very well have cast doubt on the merits of a graduate degree from Yuin," the court stated, "we do not find it to be actionable when considered in context."

The court emphasized that the broadcast began with a statement that it had investigated a school "that is *suspected* as a degree factory." Moreover, KBS provided the underlying facts to support its opinion, such as identifying dissertations that were identical or of very poor quality. The description of the school as "vacant" was accurate at the time the reporters visited the campus. The term "ghost school" was merely "attention-grabbing or hyperbolic speech." "Given the context in which KBS presents its characterization of Yuin as a 'suspected degree factory," the Court held, "it is apparent that the statement was an expression of opinion, which cannot support a defamation action, rather than a statement of fact which may be demonstrably false."

The Court also dismissed as irrelevant plaintiff's objection that KBS's failed to contact Yuin before broadcast to obtain information about its curriculum and coursework.

" Even if we agree that the KBS broadcast was not fully researched, slanted reporting is not actionable, the Court wrote. The Court concluded:

> As noted by the California Supreme Court, "[f]air and objective reporting may be a worthy ideal, but there is also room, within the protection of the First Amendment, for writing which seeks to expose wrongdoing and arouse righteous anger; clearly such writing is typically less than objective in its presentation."

Yuin University was represented by Charles D. Yu and Andrew Kim, Los Angeles, CA. KBS was represented by Jiyoung Kym, KL & Kim, PC, Los Angeles, CA.



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Section 230 Protects Financial News Website *Not Liable for Selecting Third Party Articles for Publication*

A New York trial court dismissed a libel claim against a financial news website, holding that Section 230 of the Communications Decency Act immunized it for third-party created content. *Deer Consumer Products v. Little*, No. 650823/2011, 2011 N.Y. Misc. LEXIS 4397 (N.Y. Sup. Aug. 31, 2011) (Edmead, J.).

Following the New York State Court of Appeal's decision in <u>Shiamili v. Real Estate Group of New York, Inc.</u>, 2011 N.Y. LEXIS 1452 (2011), giving wide scope to Section 230 protection, the court held that the website was protected even when it exercised editorial discretion in choosing content for publication.

Background

Plaintiff Deer Consumer Products ("DCP") makes and sells home appliances. Defendant Seeking Alpha Ltd. ("SAL") is an online financial news and investment advice site that primarily publishes third-party content. Users can post information to blogs. In addition, SAL selects pieces written by others to highlight, and it edits the reports prior to publication.

DCP sued SAL and Alfred

Little, a third-party contributor, over Little's statements accusing plaintiff of "misappropriating company funds through a questionable land purchase."

The complaint alleged that Little made the false statements to lower DCP's stock value and profit from short sales. It also alleged that SAL published the statements with actual malice and was involved in the creation of the defamatory content.

SAL moved to dismiss, relying on Section 230 of the Communications Decency Act, 47 U.S.C. §230, which gives immunity to interactive computer services that publish information from third parties. The term "interactive computer service" refers to any information system that provides access to a computer server. 47 U.S.C. §230(f)(2).

Among other things, plaintiff argued that dismissal was

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Defendant's website

not warranted because SAL was aware of the identity of the person or persons who published under the name "Alfred Little" and was in communication with them about the content. SAL also argued that discover was necessary to determine whether SAL's editorial staff was involved in developing the content and involved in a short selling scheme.

Trial Court Decision

Granting the motion to dismiss, the trial court followed the recent ruling by New York State's highest court in *Shiamili* which emphasized that a a publisher's editorial

> control does not affect Section 230 immunity, and it is allowed to "decid[e] whether to publish, withdraw, postpone, or alter content." *Shiamili v. Real Estate Group of New York, Inc.*, 2011 N.Y. LEXIS 1452, *10 (2011).

> Here the complaint and the documents submitted by SAL demonstrated that SAL was not an "information content provider." In its motion to dismiss, SAL included its instructions to users on submitting articles. Among other things, these state that SAL selects

"articles from credible authors and edits them for clarity, consistency and impact." The instructions further state that SAL's "editors follow the following criteria in deciding whether or not to accept an article for publication: 1. The author must agree in writing to Seeking Alpha's disclosure standards.2. Articles must interest our readership. . . .3. Articles must conform to Seeking Alpha's standards of rigor and clarity. . . .4. Articles may not focus on stocks that trade below \$1.00"

These documents were not challenged and demonstrated unambiguously that SAL was not the creator of the content. Thus there was no need for discovery.

Plaintiff was represented by Park & Jensen, LLP in New York. Defendant was represented by Miller Korzenik Sommers LLP in New York.

October 2011

Seventh Circuit Panel Hears Arguments in ACLU v. Alvarez

Judge Posner Concerned With "Snooping" by Reporters and Bloggers

By Mickey H. Osterreicher

On September 13, 2011 a three judge panel of the United States Court of Appeals for the Seventh Circuit heard <u>oral argument</u> in <u>ACLU v Alvarez</u>, during which the well-respected jurist, Richard A. Posner, pointedly and often antagonistically questioned the appellants' attorney.

This appeal of a lower court dismissal involves issues similar to the First Circuit's decision in <u>Glik v Cunniffe</u> in that Massachusetts and Illinois both have wiretap statutes that make it a crime to record police. The difference between the two is that in Massachusetts – audio may not be secretly recorded; while in Illinois – audio may not be recorded without the consent of all parties (it makes no difference whether the recording is being done secretly or openly).

Illinois Eavesdropping Act

In *Alvarez the ACLU is* "challenging the constitutionality of the Illinois Eavesdropping Act, 720 ILCS 5/14 ("the Act"), as applied to the audio recording of police officers, without the consent of the officers, when (a) the officers are performing their public duties, (b) the officers are in public places, (c) the officers are speaking at a volume audible to the unassisted human ear, and (d) the manner of recording is otherwise lawful." *Id.* at 1. The ACLU is seeking a declaratory judgment and a preliminary injunction against the application of the eavesdropping law because it violates the First Amendment.

The complaint filed in the United States District Court for the Northern District of Illinois in August 2010 stemmed from the ACLU's intention to "undertake a program of monitoring police activity in public places by means including common audio/video recording devices" in order to document police misconduct. ACLU staff feared arrest and prosecution under the act if they implemented the program, which is the underlying reason for the lawsuit against Anita Alvarez, in her official capacity as Cook County State's Attorney. The complaint alleges that the ACLU has "a First Amendment right to gather this information, disseminate that information to the public and with courts and government agencies in petitioning for redress of grievances."

The <u>Act</u> states that "[a] person commits eavesdropping when he ... [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation ... unless he does so ... with the consent of all of the parties to such conversation...." The <u>Act</u> further defines "conversation" to mean "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."

This added definition stems from *People v. Beardsley*, 115 Ill. 2d 47 (1986) where the Illinois Supreme Court held that "under the prior version of the Act, the criminal offense of eavesdropping occurred only where the conversation at issue took place under circumstances which entitle [the parties to a conversation] to believe that the conversation is private and cannot be heard by others who are acting in a lawful manner." *See <u>ACLU's Brief</u> citing Beardsley* at 53.

In *Beardsley* the Illinois Supreme Court concluded that the defendant motorist did not violate the Act because the conversation with a police officer that he recorded during a traffic stop was not private. Reacting to that ruling the Illinois legislature amended the Act in 1994 pursuant to Public Act 88-677. The bill's apparent purpose was "to reverse the Beardsley eavesdropping case ... which expressly includes non-private communications."

On January 10, 2011, U.S. District Court Judge Suzanne B Conlan, granted the government's motion to dismiss the case, finding that "[t]he ACLU has not met its burden of showing standing to assert a First Amendment right or injury" but instead "proposes an unprecedented expansion of the First Amendment." The ACLU appealed that decision to the Seventh Circuit.

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Media Amicus

The National Press Photographers Association joined with the Illinois Press Association, the Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors, the Association of Capitol Reporters and Editors, the Citizens Media Law Project, the Radio-Television Digital News Association and the Society of Professional Journalists in an <u>amicus curiae brief</u> supporting the ACLU's position and requesting "that the Court reverse the lower court's ruling denying the ACLU's motion to file an amended complaint and find that the Illinois Eavesdropping Act's criminalization of recording of conversations to which parties have no reasonable expectation of privacy violates the First Amendment rights of all people, whether journalists or not, to gather information."

Oral Argument

During what has now become a <u>highly publicized</u> <u>exchange</u>, Judge Posner immediately interrupted the argument with "Once all this stuff can be recorded, there's going to be a lot more of this snooping around by reporters and bloggers." ACLU attorney Richard O'Brien countered, "Is that a bad thing, your honor?" To which Judge Posner stated, "Yes, it is a bad thing. There is such a thing as privacy." (Oral Argument at 8:04 to 8:15).

What the judge seemed to be asserting in his hypotheticals, which characterized recording in public as a "bad thing" done by "snoopers," was that citizens and officials in a public area have a reasonable expectation of privacy when they are speaking. He appeared not to distinguish between matters of public concern and discussions that are private in nature or appropriate time, place and manner restrictions.

Judge David F. Hamilton pressed Assistant State's Attorney Jim Pullos to articulate the "legitimate privacy interest in conversations that are going on in public with a public official that are audible to passerby." The judge also questioned him about the police exemption to the Act whereby they are permitted to record others without their consent under certain circumstances. Judge Diane S. Sike also questioned Mr. Pullos about another so-called exemption to the Act allowing journalists to make such recordings

without permission in light of the broad ruling in Glik that recognized citizen-journalists.

In <u>comments</u> made after the arguments in the Seventh Circuit, Harvey Grossman, Legal Director for the ACLU of Illinois said "In order to make the rights of free expression and petition effective, individuals and organizations must be able to freely gather and record information about the conduct of government and its agents– especially the police." "Organizations and individuals should not be threatened with prosecution and jail time simply for monitoring the activities of police in public, having conversations in a public place at normal volume of conversation, he added"

In a related case an Illinois woman charged under the same statute was acquitted on August 25, 2011 by a Chicago jury on charges that she secretly recorded her conversation with Chicago police officers without their permission. Tiawanda Moore was found not guilty by jurors who deliberated for less than an hour, thus avoiding a possible 15 year prison term.

According to the <u>Chicago Tribune</u>, Ms. Moore had recorded her conversation with two internal affairs officers when she became concerned that they were trying to persuade her to drop a sexual harassment complaint against another officer. A key element in Moore's defense centered upon another exemption in the Act that permits citizens who have a "reasonable suspicion" that a crime is being committed to make such secret recordings. *See* <u>720</u> ILCS <u>5/14</u> <u>3(i)</u>. Jurors were able to listen to portions of the recording. After the verdict <u>one commented</u> "the two cops came across as intimidating and insensitive." "Everybody thought it was just a waste of time and that (Moore) never should have been charged."

As Mr. O'Brien concluded in his argument, the case really hinges on whether the statute is narrowly tailored to serve a substantial government interest to be a reasonable time, place and manner restriction on speech or whether the court finds the Act to be so overly broad as to be unconstitutional despite the specific legislative intent of the 1994 amendment granting police officers performing their public duties a reasonable expectation of privacy when speaking in a public place. A decision by the Seventh Circuit is expected in early 2012.

Mickey H. Osterreicher is the general counsel for the National Press Photographers Association (NPPA) and was one of the amici in this case. The ACLU is represented in the case by Richard O'Brien, Sidley Austin LLP, Chicago, IL.

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Financial Newsletter Not Liable for Investor's Losses

By Thomas J. Williams

The author of a financial newsletter cannot be liable under the Texas Securities Act to an investor who claimed to have lost money in the market based on the author's advice, a Texas appeals court held this month in a long-running dispute between a newsletter's author and one of its subscribers.

In <u>Murphy v. Reynolds</u>, No. 02-10-00229-CV, 2011 WL 4502523 (Tex. App. – Fort Worth, Sept. 29, 2011, no pet. history), Ernest Reynolds III, an attorney, sued Michael Murphy, a technology sector stock analyst and author of a newsletter, book and telephone hotline, for losses suffered

from investments Reynolds claimed he based on recommendations Murphy made in a financial newsletter, *Technology Investing*.

Reynolds sued Murphy in 2002, and the case had been to the Fort Worth Court of Appeals three times previously on various issues. See. Reynolds v. Murphy (Reynolds III), 266 S.W.3d 141 (Tex. App. - Fort Worth 2008, pet. denied); In re Reynolds (Reynolds II), No. 02-07-00356-CV, 2007 WL 2460279 Tex. App. - Fort Worth Aug. 31, 2007, orig. proceeding); Reynolds v. Murphy (Reynolds I), 188 S.W.3d 252 (Tex. App. – Fort Worth 2006, pet. denied) (op. on reh'g), cert. denied, 549 U.S. 1281 (2007).

After the Court of Appeals decided *Reynolds III*, Reynolds amended his complaint to seek damages and attorneys fees based on alleged violations of the Texas Securities Act, breach of fiduciary duty, common law fraud, gross negligence and negligence. The trial court granted summary judgment in favor of Murphy on Reynolds' negligence and gross negligence claims, but denied summary judgment on the remaining claims.

Murphy took an immediate appeal from the partial denial of his motion for summary judgment under the Texas Interlocutory Appeal statute, V.T.C.A. Civ. Prac. & Rem. Code 51.014 (a)(6), and the Court of Appeals reversed and rendered judgment that the suit be dismissed.

Texas Securities Act

The Texas Securities Act sets out the potential civil liability that "investment advisors" have to their clients. The Texas statute, which is similar to the Federal Investment Advisors Act, defines an "investment advisor" to be one who "for compensation, engages in the business of advising another, either directly or through publications or writings,

> with respect to the value of securities or to the advisability of investing in, purchasing, or selling securities. . . ." Tex. Rev. Civ. Stat. Ann. art. 581-4(N). However, the definition excludes "the publisher of a bona fide newspaper, news magazine, or business or financial publication of general or regular circulation." Tex. Rev. Civ. Stat. Ann. Art 581-4 (N) (4). In Reynolds I, the Court of Appeals held as a matter of law that Technology Investing was a general circulation publication, and therefore addressed the remaining questions, whether Murphy was (a) a publisher of (b) a bona fide financial publication.

> Reynolds argued that Murphy was not entitled to the "publisher's exemption" because he was only the

"author" of the newsletter and not its "publisher" (the newsletter being owned by a separate corporate entity). In rejecting Reynolds' argument, the Texas Court noted that the United States Supreme Court, in interpreting similar language in the federal statute, concluded that the statute should be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes," citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

The Court cited *Ginsburg v. Agora*, 915 F. Supp. 733 (D. Md. 1995), a federal case which focused on the potential *(Continued on page 14)*

In rejecting Reynolds' argument, the Texas Court noted that the United States Supreme Court, in interpreting similar language in the federal statute, concluded that the statute should be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2011 Media Law Resource Center, Inc.

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liability of an author, which concluded that if a newsletter were generalized in nature and contained "impersonal commentary" as distinguished from "individualized advice," the publication would not be subject to the federal Act and by extension the newsletter's author would not be an "investment advisor." The Court of Appeals "agree[d] with *Ginsburg's* analysis," and held that an "author" is included within the term "publisher" for purposes of the exemption "when the author is not offering personalized advice to individual investors."

The Texas Court next examined whether Technology Investing was a "bona fide" financial publication, and in doing so looked for guidance to Lowe v. SEC, 472 U.S. 181 (1985), in which the United States Supreme Court interpreted the federal statute's similar language. The Supreme Court in Lowe had concluded that a publication might lose the benefit of the exemption if it contained false or misleading information or if it "touted" a security in which the author had an interest. The Texas Court found that there was no evidence that Murphy "received compensation from the companies he recommended or that he personally gained by promoting the companies discussed in the newsletter," and therefore no evidence of "touting," nor was there evidence that Murphy made any false or misleading statements to Reynolds. On the contrary, the Court concluded that Murphy, much like countless other financial journalists, "made generalized assertions as to investment opportunities, performance, and expected or estimated returns – essentially ... gave his opinion as to future market events."

The Court disposed of Reynolds' claims for breach of fiduciary duty and fraud by finding that Reynolds had no evidence of essential elements of those claims. First, the Court concluded that Reynolds' only relationship with Murphy was as a subscriber to *Technology Investing*, which does not create a fiduciary relationship, and therefore he could not maintain a claim for breach of fiduciary duty.

Similarly, Reynolds' fraud claim was dismissed because Reynolds suffered his market losses when he sold stock in 2002 *against* Murphy's advice to "hold" the recommended stocks for the long term. As a result, the Court concluded that Reynolds had no evidence that reliance on Murphy's statements caused his losses, and therefore no evidence of an essential element of his fraud claim.

On October 14, 2011, Reynolds filed a Motion for Rehearing in the Court of Appeals, which remains pending as of the end of October.

Thomas J. Williams is a partner in the Fort Worth office of Haynes and Boone, LLP. Along with Haynes and Boone partners David Harper and Karen Precella and Haynes and Boone associate Josh Borsellino, he represented Michael Murphy in Murphy v. Reynolds.

MLRC Forum 2011 Combating Online Piracy: The Protect IP Act and Alternatives

Wednesday, November 9, 2011, 3:45-5:45 p.m.

(preceding the MLRC Reception and Annual Dinner) New York Marriott Marquis, New York City

- with -

Timothy Alger, Partner, Perkins Coie LLP (Moderator) Mary Snapp, Vice President and Deputy General Counsel, Microsoft Corporation David Green, Vice-President for Public Policy, NBCUniversal Katherine Oyama, Policy Counsel, Google Inc.

Suggested Reading List

To RSVP, email dseiden@medialaw.org.

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Daily Mirror Wins Privacy Trial Over "Kiss 'n' Tell" Article about Footballer

Public Interest in Article about Team Captain's Private Life

By Keith Mathieson

Max Clifford is Britain's best-known publicist. His particular speciality is the "kiss 'n' tell" story, whereby women who have dated celebrities sell their stories to tabloid newspapers. Mr. Clifford is usually the middle-man for these stories, for which he charges a commission of 20%.

Kiss 'n' tell stories may not be the most elevated form of journalism – and their detractors may be pleased that the demise of the *News of the World* means their biggest marketplace has disappeared – but they do sell newspapers and for that reason may serve a useful purpose in supporting

media plurality in difficult economic times.

Kiss 'n' tell stories have not always found favor with the courts. Many injunctions have been granted in recent years to prevent such stories being published. The traditional analysis at the interlocutory stage is that the threatened intrusion of personal privacy is self-evident with no countervailing public interest to justify the intrusion. The stories are usually characterized in the famous expression coined by Baroness Hale in Campbell v

<u>Mirror Group Newspapers Ltd</u> [2004] UKHL 22: "vapid tittle -tattle".

Rio Ferdinand Case

The recent judgment of Mr. Justice Nicol in Ferdinand v MGN [2011] EWHC 2454 (QB) contains a much fuller discussion of the issues of privacy and public interest surrounding such stories than we have been used to. To the surprise of some, and the delight of others, Nicol J dismissed a privacy action by the former England football captain arising out of a Max-Clifford-sponsored kiss 'n' tell story by an old flame of Mr. Ferdinand. The judgment shows that actions based on sex stories are not quite the slam-dunk (or claimant lawyers may have thought. The story Mr Ferdinand sued over was published by the

open goal, to use the more appropriate soccer term) that

Sunday Mirror in April 2010. It was headlined "My Affair With England Captain Rio" and was an account by Carly Storey of her relationship with Mr. Ferdinand, one of England's most successful footballers and for a short time captain of the national team.

At the time of writing, Nicol J's judgment has been redacted pending a possible appeal by Ferdinand and it is not therefore possible to describe the contents of the article in full

> without breaching the court's order. What can be said is that the article revealed that Mr. Ferdinand and Ms Storey had had an on-off sexual relationship over many years, including the period when Mr. Ferdinand was in a long-term relationship with the woman who is now his wife and the mother of his three children. The article included screen shots of text messages passing between Mr Ferdinand and Ms Storey and a photograph of the two of them in a hotel room some 13 years previously.

The article began with the quoted

remark of Fabio Capello, the Italian manager of the England team who had appointed Mr Ferdinand as captain: "I ask always that the captain is an example to the young, for the children, for the fans...a role model outside the game – in life as well." A panel that formed part of the two-page article contained some quoted remarks of Mr. Ferdinand himself. Headed "Rio Reformed," it described how Mr. Ferdinand had

"earned a reputation in his early career as a football bad boy with driving convictions, sex scandals and a missed drugs test ban."

But when he was about to become a father *(Continued on page 16)*

The judgment shows that actions based on sex stories are not quite the slam-dunk (or open goal, to use the more appropriate soccer term) that claimant lawyers may have thought.

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in 2006, he vowed to change his ways, saying, "I've strayed in the past but I'm going to be a family man now. My priority now is Rebecca, the baby and having a stable family life."

Rio also recognised that failing to consign his wild man ways to the past could harm his career playing for Manchester United under Sir Alex Ferguson, "You have to take charge of your conduct and the way you live outside football or you'll be out of the door," he said.

Rio set about transforming his image. He signed up as the Prince's Trust patron and in 2008 announced plans for his

own charity, the Rio Ferdinand Live the Dream Foundation to help disadvantaged youngsters. He also invested in a record label and became the face of his own celebrity life style magazine #5. Recently he was described as a 'role model' in press releases for *Dead Man*

Running - a film starring rapper 50 cent which he helped finance."

Mr. Ferdinand sued for infringement of his privacy, misuse of his private information and breach of confidence.

Evidence at Trial

During the trial the court heard evidence (some of it in private, i.e. with press and public excluded) about Mr. Ferdinand's personal background, including his somewhat "wild" reputation arising from such incidents as a filmed sex session while on holiday in Cyprus with his soccer teammates. Mr. Ferdinand accepted in cross-examination that he had given an interview to the *News of the World* in 2006 in which he had said "I've strayed in the past, but I'm going to be a family man now" and that this conjured up an image of himself that was not consistent with extra-marital affairs.

The newspaper argued that Mr. Ferdinand had created a false image of himself as a reformed character and had done so partly in order to boost his career.

He also accepted he had made other statements about his character with particular reference to his family life, including a passage in his autobiography in which he had said "I have realised that we do have a responsibility off the field because children look up to us and want to be like us."

Nicol J first had to decide if Mr. Ferdinand had a reasonable expectation of privacy. If so, he had then to decide if there was nonetheless a sufficient public interest to justify the infringement of his privacy.

The judge decided that the information in the article was in principle protected by the right to privacy enshrined in Article 8 of the European Convention on Human Rights. The sexual relationship was not widely known and even if known to a small number of family and acquaintances, this was not conclusive on the question of whether the relationship was capable of protection: see <u>Browne v Associated Newspapers</u> Ltd [2007] EWCA Civ 295.

> The text messages were examples of "correspondence" which is explicitly protected by Article 8. The photograph was "closer to the borderline," according to the judge. While it showed "nothing remarkable," it was taken in a hotel bedroom and was therefore in principle protectable.

The newspaper argued that Mr. Ferdinand no longer had any reasonable expectation of privacy because he had

discussed his private life extensively in media interviews and the newspapers had also frequently published details of his other alleged affairs. That was rejected by the judge, who also rejected a further argument that Mr. Ferdinand's recklessness in pursuing the affair meant he could not reasonably expect the courts to step in and protect him.

Balancing Test Applied

Having found for Mr. Ferdinand on the first part of the analysis, the judge then turned to the balancing exercise. He reminded himself that in assessing the public interest he had to apply an "intense focus" on the comparative importance of the two competing rights in the specific context of the particular case.

The judge noted that one aspect of public interest can be the correction of a false image, but such a defense "can only (Continued on page 17)

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begin to succeed if the claimant's image is indeed false and if there is something to be corrected." In *Campbell* the claimant had had to accept that the newspaper was entitled to correct the false image she had presented of herself as someone who had not taken illegal drugs, but she nonetheless won her case on the basis that the newspaper had gone further than it needed to correct that false image by publishing additional details of her attendance at Narcotics Anonymous.

The newspaper argued that Mr. Ferdinand had created a false image of himself as a reformed character and had done so partly in order to boost his career; that this impinged on his professional responsibilities because, as he conceded, he had broken team rules by conducting and attempting to conduct the affair in team hotels; and there was a public debate about the personal conduct and character of the person chosen as England captain (Mr. Ferdinand's predecessor had been dismissed as captain following an alleged affair of his own – as featured in an unsuccessful, and highly publicized, application for an injunction – see John Terry ("LNS") v Persons Unknown [2010] EWHC 119 (QB)).

Mr. Ferdinand contended that he had not lied about his image because he had been talking about his personal life so far as it touched on his professional career, most specifically his missed drugs test and his attendance at late-night parties. He denied that his role as England captain deprived him of the right to a private life. He rejected the comparison with John Terry, who he said had been dismissed as England captain because of an alleged affair with the girlfriend of a team-mate, which was perceived to have had a possible effect on team relationships.

Mr. Ferdinand was scornful of the notion that the newspaper and Ms Storey were pursuing a public interest. He suggested that Ms Storey's receipt of £16,000 from the newspaper was evidence of her real motive. He noted that the paper had waited for almost three months after Mr. Ferdinand's appointment as captain before publishing its story (discrediting the idea that it was contributing to a debate about the captaincy) and there had been almost no reaction to the published story judging from the absence of other media comment.

He also suggested that if the paper had been confident about the public interest in its publication, it would have contacted him in advance of publication, which it had failed to do. Finally, Mr. Ferdinand argued that the details published by the newspaper in any event went far further than was necessary to correct any allegedly false image.

The judge held that there was a public interest in the article. He noted that the interview Mr. Ferdinand had given to the *News of the World* in 2006 had been the result of a deliberate choice by Mr. Ferdinand, acting on the advice of his publicity agent, to portray himself as a family man who had reformed himself from the "wild" character he used to be. That image had been further promoted in his autobiography and other media articles.

The judge also held that Mr. Ferdinand's appointment as England captain was a further factor in the consideration of whether there existed a public interest in the article:

> "The Claimant voluntarily assumed the role of England captain. It was a job that carried with it an expectation of high standards. In the views of many the captain was expected to maintain those standards off, as well as on, the pitch. By way of example, in 2008, Brian Barwick, the Chief Executive of the Football Association said,

> 'one of the most important early decisions [Fabio Capello] will have to take will be to decide who is going to be his captain. ... There isn't the degree of importance laid at the door of captains of other countries, but Fabio is aware of the importance of this decision...the captaincy, currently held by John Terry, is a very significant part of the English sporting and social fabric... England players are special players. And that carries with it an extra weight of expectancy and responsibility ... If you are an England player you are living out the dreams of thousands and thousands of kids and millions of people. And while you don't want that weight of moral expectation weighing too heavily on anybody's shoulders, it is part of your responsibility. They have to accept that off the field they are role models.""

At a press briefing on 26th February 2010 Fabio Capello said why he had taken the

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captaincy away from John Terry,

"It was not good because I always asked that the Captain is an example for the young, the children, for the fans. It was not good. This is the reason and I told him this...The England shirt is very important and for me this will be one of the most important points we speak about... part of that is to talk about how important it is to behave well when you are representing England."

The judge noted that it was not a universal view that the only aspect of a football captain's private life that might be of public interest was behavior that affected his performance on the pitch.

While John Terry's behavior might have so affected his performance, he noted that others had expressed the view that an England captain's personal qualities should be viewed in a broader context.

He noted an article on *Mail Online* in February 2010. That article was published under the headline "Boozer, love cheat and drug-test dodger. Meet the NEW England captain Rio Ferdinand." The story began,

> "England's new football captain Rio Ferdinand hardly represents a return to the Corinthian ideals; an eight month ban for missing a drugs test in 2003 will forever blight his record. Perhaps the most persuasive argument to the Manchester United defender's promotion is that he has belatedly matured, to become the least worst of potential Terry replacements."

The article concluded:

"His home life is settled, it seems. Last year he married his long-time girlfriend and mother of his two children, Rebecca Ellison, in a ceremony which was not sold to a celebrity magazine. Miss Ellison had shown considerable forbearance in previous years as the footballer was linked with a number of models, including the then ubiquitous Abi Titmuss. Now aged 31 and articulate in interview, Ferdinand seems to have put his wilder days behind him. Time will tell."

The judge was not persuaded that the gap of almost three months between Mr. Ferdinand's appointment as captain and the published article was indicative of a lack of public interest as the personal suitability of the England captain was a matter which "seemed to have perennial interest" and was not restricted just to the time of his appointment.

The judge also dismissed the alleged importance of the limited public reaction to the story on the ground that liability has to be established at the time of publication, not by reference to the extent of the debate that may be generated later.

The details of the relationship were not, in the judge's view, excessive. The paper was entitled to put the matter in context. The photograph was not an unacceptable intrusion. The couple were clothed and not engaging with one another. Mr. Ferdinand was shown speaking on a mobile phone. It was an "unexceptionable" picture that could have caused none of the additional harm that was referred to in *Campbell* and none of the embarrassment that a picture of sexual activity may cause.

Finally, the judge said Mr. Ferdinand's reliance on the absence of notice was a "red herring." Mr. Ferdinand had suggested this betrayed a lack of confidence in the public interest of the publication.

The judge said the argument was unhelpful. First, it was speculation, there being no evidence about what the editor thought. Second, it was immaterial what he thought anyway as it was up to the judge to make an objective assessment of the public interest at the time of publication.

Mr. Ferdinand is seeking permission to appeal. If he gets permission to appeal, his appeal is likely to focus on his arguments that (a) there was no false image to correct and (b) his role as England captain did not justify any infringement of his private life. A decision on permission to appeal is likely to be made in the next few weeks.

Keith Mathieson is a partner at Reynolds Porter Chamberlain in London. Reynolds Porter Chamberlain represented Mirror Group Newspapers together with Gavin Millar QC of Doughty Street Chambers. Rio Ferdinand was represented by Hugh Tomlinson QC and solicitors Simons Muirhead Burton. the Claimant in moving the action forward? Yes, according to the High Court in the recent decision in <u>Adelson v.</u> <u>Anderson</u> [2011] EWHC 2497 (QB). This judgment gives a useful insight into the circumstances in which the UK court may be willing to use

By Niri Shan and Mark Dennis

circumstances in which the UK court may be willing to use its case management powers to strike out a claim as an abuse of process. A secondary issue was whether the potential unenforceability of the damages award (in this case, because the defendants resided in the US) could be a reason for striking out the claim. As such, the judge considered interesting issues relating to the

similarities and differences between UK and US defamation law.

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Facts

The Claimants were Sheldon Adelson and his Las Vegas Sands Corporation, a Las Vegas corporate group which runs and develops resorts incorporating entertainment facilities such as casinos. The Defendants were

Unite Here!, a US labor union operating in Las Vegas (amongst other places), and its International Affairs Coordinator, Debbie Anderson. The claim related to allegations made about the Claimants in September 2004 at a meeting at the UK Labour Party Conference which was attended by about 100 people.

The Claimants issued a Claim Form on 26 September 2005 and served it six months later in March 2006, seeking damages and an injunction. The Defendants defended the claim on the basis of qualified privilege, fair comment and justification. A trial was scheduled for October 2007.

Meanwhile, Mr. Adelson commenced a separate legal action against Associated Newspapers over similar allegations published in the *Daily Mail*. In view of this, the trial was adjourned to allow the Associated Newspapers action to go first, and it was contemplated that this action

Can a UK libel claim be struck out because of delays by the Claimant in moving the action forward? Yes, according to the High Court in the recent decision in *Adelson v. Anderson*

would be tried in January 2009. The action against Associated Newspapers was settled in March 2008, with the settlement terms including a Statement in Open Court.

In July 2008, the solicitors then acting for the Claimants telephoned the Defendants' solicitors to say that their clients wanted to get on with the case, but nothing further was said or done at that time. Between October 2008 and March 2011, various without prejudice letters were exchanged and there was an attempt at mediation in March 2011. Later in March 2011 (i.e. three years after the Associated Newspapers action was settled), the Claimants sought to revive the claim by proposing a revised pre-trial timetable to the Defendants.

In June 2011 the Defendants applied for the claim to be struck out as an abuse of process. They submitted that the two periods of delay – namely, the 15 or so months between the publication complained of in September 2004 and the letter before action in January 2006, and the three years between March 2008 and March 2011 – were inexcusable and gave rise to the inference that Mr. Adelson had lost interest in pursuing the proceedings to trial. They argued that the action would

serve no useful purpose. They also argued that any award of damages would be unenforceable in the US and that this was a relevant consideration.

Delay

Mr. Justice Tugendhat found for the Defendants and struck out the claim as an abuse of process on the basis (primarily) of the delays. In reaching his decision, he considered whether there were any good explanations for the delays, the gravity of the alleged libel, and the inferences that could accordingly be drawn.

In terms of the reasons for the delays, the judge noted that Mr. Adelson had not provided any good explanations for them. Mr. Adelson had, for example, been unable to recall (Continued on page 20)

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Delayed Libel Claim

Struck Out as Abuse of Process

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why it took over 15 months to send the letter before action.

On the gravity of the alleged libel, the judge noted that the allegations complained of related to Mr. Adelson's way of doing business. While the allegations might be important to him as a businessman, the judge considered that they did not *"rank amongst the most serious libels."*

Further, a reasonable reader of the words complained of reading them in 2011, or in the future, would consider Mr. Adelson's activities since September 2004. It was significant that there was no suggestion that any of the words complained of had been repeated since 2005. As such, the reasonable reader would understand that less weight should be given to them than if the allegations had been made recently. Further, the Statement in Open Court from Associated Newspapers would be available to anyone who searched for archived information about Mr. Adelson.

From the initial delay in bringing proceedings, the judge inferred that Mr. Adelson did not regard the allegations as particularly grave in 2004 and 2005. This may have been because he had made his own attempts to vindicate his reputation by publishing his side of the story. While Mr. Adelson may at some point have intended to pursue the action to trial, Tugendhat J was willing to infer that he had ceased to have that intention after the settlement of the Associated Newspapers action in March 2008.

As such, it was held that the reputational interests at stake were not proportionate to the time and cost of resolving the matter at trial, and the claim was struck out as an abuse of process.

Enforceability of English Judgments

The judge, however, rejected the Defendants' submission that it was relevant that any award of damages would be unenforceable in the US where the Defendants were resident. Tugendhat J reached this view for two main reasons. First, he commented that he was unable to reach a view as to whether a UK judgment would or would not be enforceable in the US on the evidence provided by the Defendants. This evidence amounted to an apparently brief witness statement from their UK lawyer which referred to advice received from an American lawyer. No expert report, for example, was filed on the issue. Secondly, and in any event, the judge noted that judgments are commonly given by English courts even where there is little expectation of recovery of money from the defendant (e.g. because the judgment would make the defendant bankrupt). As such, damages awards should reflect the vindication required for the claimant (amongst other things), and not the extent to which any such judgment may be enforceable against the defendant.

In reaching this decision, Tugendhat J gave some interesting consideration to similarities and differences between UK and US defamation law. The witness statement made on behalf of the Defendants referred to the enactment, in August 2010, of the Securing the Protection of our Enduring and Established Constitutional Heritage Act. The Defendants submitted, in essence, that this Act means that foreign defamation judgments are "unenforceable in the United States unless it can be shown that such judgments satisfy the freedom of speech and press protections guaranteed by both the United States and the state constitutions in which the domestic court is located."

In considering the differences between the UK and US positions, the judge noted, for example, that English law does not give a greater degree of protection to freedom of speech where the claimant is a public figure. This differs to the approach that the US Supreme Court took in *New York Times v Sullivan* (1964).

The judge also considered the general presumption of falsity under English law, which means that the burden of proving truth is placed on defendants. In this regard, he noted that claimants in the UK generally choose to assume the burden of proving falsity anyway, as otherwise they would not be entitled to a declaration of falsity under the Defamation Act 1996 and would be unlikely to be awarded substantial damages or an injunction.

Similarly, the judge noted that claimants commonly assume the burden of proving malice, even where they are not required to do so. He commented that the witness statement given on behalf of the Defendants did not explain how the US legislation would apply to a case in which the English court has found that the claimant has proved falsity and malice to the same standard as he would have been required to do if he had sued a public figure in the US.

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Tugendhat J also considered the differing levels of damages awards in the UK and US. He noted that it is a matter of common knowledge that, for public policy reasons, the two jurisdictions have different views on the proper level of damages for torts, which is one reason why the UK has no treaty with the US for the reciprocal enforcement of tort judgments.

Comment

This case shows that, as in *Jameel v Dow Jones* and *Williams v MGN*, the court is willing to use its case management powers to strike out a claim where the time and costs in pursuing the claim to trial would not be proportionate to the vindication sought.

The case is a salutary reminder to libel claimants that, once they have started an action, they need to ensure that they keep it moving forward or else run the risk of the claim being struck out. In this case, the judge was particularly influenced by the fact that Mr. Adelson was unable to provide a convincing explanation for the delays. If he had been able to give a good explanation, this may have led to a different result.

It is notable that undue delay was not the only reason for the decision. The judge was also influenced, for example, by the fact that the allegations were not of the most serious type, that they had not been repeated in the years since original publication, and that Mr. Adelson had made his own attempts to vindicate his reputation. A defendant seeking to strike out a claim for significant delays should consider whether such factors apply in their case, as they may help with convincing the court that there is no real and substantial tort worth pursuing to trial.

The case also clarifies that, even if the damages awarded may ultimately be unenforceable against the defendant, for example because the defendant resides in a different jurisdiction where the judgment would not be enforceable, this is not in itself a justification for striking out the claim.

Niri Shan and Mark Dennis are media lawyers at Taylor Wessing LLP in London. Claimant was represented by Andrew Caldecott QC and David Sherborne (instructed by Harbottle & Lewis LLP). Defendants were represented by Heather Rogers QC (instructed by Simons Muirhead & Burton).



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MLRC MediaLawLetter

Another Adwords Judgment from the European Court of Justice

By Rogier Overbeek

On 22 September 2011, the European Court of Justice once again rendered a judgment about the use of Google AdWords consisting of a competitor's trademark. <u>Interfora</u> <u>v. Marks & Spencer</u>.

The Facts

This case concerns proceedings between Interflora, a flower delivery network and proprietor of the well-known INTERFLORA trademark, and the British department store Marks & Spencer (M&S). M&S, which also sells and delivers

flowers but does not belong to the Interflora network, had 'purchased' various "Interflora" AdWords from Google. Consequently, after entering the search term "Interflora" and related terms on the Google website, an advertisement of M&S appeared at the top or on the right side of the search results under the heading 'Sponsored links.' According to Interflora this constituted a trademark infringement, and therefore it started proceedings against M&S in England. Subsequently, the English Court posed various preliminary questions to the European Court of Justice ("ECJ") about this infringement issue.

If the use of another party's trademark as AdWord for identical products is detrimental to the goodwill of the competing trademark, there is trademark infringement. When exactly this is the case does not become very clear.

referred to by the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.

The Judgment of the ECJ in the Interflora Case

In the Interflora case the ECJ has confirmed the abovementioned case law. However, with respect to the (a) cause (use of another person's trademark for identical products) it still adds to this that there is also infringement if the use of the AdWord has an adverse influence on the competitive

trademark's investment function. The ECJ understands this investment function as the use of the trademark proprietor:

to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty.

In other words: if the use of another party's trademark as AdWord for identical products is detrimental to the goodwill of the competing trademark, there is (still) trademark infringement. When exactly this is the case does not become very clear. The ECJ has only observed that for the

assumption of detriment to the investment function it is not sufficient that:

the trademark proprietor must increase his efforts to acquire or maintain the goodwill of his trademark; or some consumers may switch to the competitor's products.

The reference by the ECJ to the investment function within the framework of the (a) cause is similar to the (c) cause of infringement. Only the proprietor of a trademark with a reputation may rely on the latter ground, when unfair (Continued on page 23)

The Existing Case Law of the ECJ on AdWords

In the Google France case and four subsequent AdWord judgments the ECJ already decided that the use of another party's trademark or similar sign as AdWord to advertise one's own identical or similar products, (only) constitutes a trademark infringement – on the basis of the so-called (a) and (b) causes of infringement – if the advertisement:

does not enable the average internet users, or enables them only with difficulty, to ascertain whether the goods or services

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advantage is taken of or detriment is caused to the distinctive character or repute of the trademark with a reputation. In the *Interflora* judgment the ECJ uses this (c) cause for the first time in the AdWords issue.

The ECJ starts with the obvious remark that the proprietor of a trademark with a reputation may take action against the use of his trademark as AdWord if (one of) the (c) conditions mentioned (take advantage of; detriment to....) have been met. According to the ECJ this is the case, for instance, if the trademark with a reputation is at risk of becoming a generic name. On the other hand, the ECJ has ruled that the proprietor of a trademark with a reputation cannot take action if a third party uses that trademark as an AdWord to offer the internet user an alternative for the products of the trademark proprietor. However, there is a *proviso*, namely that AdWords may not be used for counterfeit products, may not be detrimental to the distinctive character or the repute of the trademark with a reputation, and may not adversely affect the functions thereof.

Conclusion

Also in the field of AdWords the case law of the ECJ does

not seem to make things much easier. What is and remains clear is that the use of another party's trademark as an AdWord does not automatically constitute a trademark infringement.

At first sight, the infringement threshold even seems to be high: the advertisement may only not be misleading or confusing with regard to the origin, and even trademarks with a reputation may be selected as AdWords by third parties in order to offer an alternative for the well-known trademark products. However, possible detriment to the investment function of a trademark is lurking in the corner, while the ECJ has given the trademark proprietors the necessary sticks to beat the Adword user.

We will have to wait and see how the lower courts will apply the 'guidelines' of the ECJ, starting with the English court in the case between Interflora and Marks & Spencer. There is also the issue of how all this relates to the comparative advertising rules. The Court of The Hague in preliminary relief proceedings already ruled in the <u>Tempur</u> <u>cases</u> on AdWords in a comparative-advertising legal framework, but undoubtedly the final word on this issue has not been heard yet.

Rogier Overbeek is a lawyer with Kennedy Van der Laan in Amsterdam, Netherlands.

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Dutch Gangster Asks for Injunction Against Movie on Kidnapping of Tycoon Alfred Heineken

By Jens van den Brink & Emiel Jurjens

On Oct. 28, 2011, the Court of First Instance in Amsterdam delivered its full judgment in the case of *Willem Holleeder v*. *IDTV*. The judgment contains important guidelines for makers of historical movies (or other works of art) that mix fact and fiction. The court also confirms the principles laid down in the recent ECHR Mosley ruling.

The facts

In 1983, beer tycoon Freddy Heineken and his chauffeur Doderer were kidnapped by a group of five men, among whom the claimant in this case, Willem Holleeder. After having been locked for three weeks in two damp cells, without heating and chained to the wall, Heineken and Doderer were freed by the police. The kidnappers escaped with EURO 13.6 million ransom money, but were eventually caught and convicted. These dramatic events are the basis of the movie "De Heineken Ontvoering" (The Heineken Kidnapping), starring Rutger Hauer as Alfred Heineken and produced by IDTV, which was planned for release on Oct. 27, 2011 in The Netherlands.

The movie does not claim to be a reconstruction of what happened. A disclaimer appears before the start of the actual movie, which reads (translation authors):

> This movie is a cinematographic interpretation of the 1983 kidnapping of Alfred Heineken and does not aim to document what actually happened. Facts are mixed with fiction. The characters that appear in this movie are also to a large extent based on fiction.

Holleeder is not, in fact, a named character in the movie. In the group of kidnappers in the movie, a character called "Rem Hubrechts" appears. His character development in the movie is based on elements of Holleeder and one of the other kidnappers, sprinkled with a liberal dose of fiction. Willem Holleeder, dubbed "The Nose" in Dutch media, did not just become a public figure through the kidnapping, for which he was sentenced to 11 years in 1986. He is currently serving a new nine-year sentence in an unrelated extortion case and is generally seen as the most infamous criminal in The Netherlands.

Holleeder started summary proceedings against IDTV, the producer of the movie, from his cell in the high-security prison. He asked for an injunction banning the release of the movie and, alternatively, demanded a private pre-screening of the movie to enable him to check it for 'harmful content'. He based his claims on a violation of the right to privacy (art. 8 ECHR) and a violation of his image rights. The latter because the character 'Rem' is (partly) modeled after him in terms of his actions, but also because the actor who plays Rem and Holleeder look alike physically.

Artistic freedom v. right to privacy

The Court first establishes that both parties agree the public may associate Rem with Holleeder. The Court considers that Holleeder's demands infringe on the right to freedom of expression (art. 10 ECHR), which encompasses the right to artistic expression. Also, his demand for a prescreening encroaches on the prohibition of censorship, as enshrined in the Dutch Constitution. In effect, the Court finds Holleeder's demands would amount to censorship.

The right to privacy may limit the right to free speech. However, as the European Court of Human Rights determined, the right to privacy does not encompass a right to prior notification of content that may harm someone's privacy (ECHR 10 May 2011, 48009/08, *Mosley v. UK*). Whether or not an expression is lawful can in principle be determined only *after* publication.

With respect to the Heineken movie, the Court finds no facts or circumstances which would result in an exception to this principle. At the hearing, counsel acting for Holleeder had highlighted several scenes in the movie which Holleeder considered defamatory. They had not yet seen the movie (it was only shown to limited audiences before its nationwide opening) but had come across these scenes in the trailer and in a script of the movie which, as the Court formulates it, "counsel for Holleeder found on her desk" (par 3.2).

The Court concludes that on the basis of what is known so *(Continued on page 25)*

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far of the contents of the movie, the movie is not unlawful to the extent that it would justify encroaching on the freedom of expression and the prohibition of censorship. The Heineken kidnapping was a major event in Dutch history and shocked Dutch society. Art. 10 ECHR protects the public interest which is served by making a movie about the kidnapping. The fact that Holleeder participated in the kidnapping ensures that any movie about it will somehow be connected to him. That does not make such a movie unlawful.

The core consideration of the court is as follows:

The maker of a movie about a historical event is, in principle, free to add new, fictitious elements to his depiction of this event. He is also free to use actors who show a certain likeness to persons who were actually involved in the event depicted in the movie. (...) This freedom, however, is limited by the interest of someone who was involved in the actual event to not be linked with such fictitious elements."

With respect to the Heineken

movie, the Court finds that the boundaries of the freedom of expression were not crossed.

IDTV made sufficiently clear that the movie is a mix of fact and fiction.

Image rights

Holleeder also argued that the film makers violated his

image rights. On this ground, he demanded a complete stop on the use of his 'image' (i.e. the image of the actor playing the fictitious character 'Rem') in the movie as well as in advertisements for and on the website of the movie. The Court finds that it will be clear to the movie-going public that the person behind the character Rem is actually an actor, and not mr. Holleeder. This is especially so given the fact that the events in question occurred almost 20 years ago and that it is not unusual for actors in movies based on historical events to show similarities to the persons they are modeled after. The

character Rem, as a result, is not a portrait of Holleeder.

Conclusion

The movie was released on October 27 as planned, as the Court had already rendered a dressed down version of its judgment on Oct. 21. As is common in urgent cases, the motivation of the judge followed a week later. The judgment is good news for filmmakers who aim to make a historical or biographical movie: they are given considerable leeway to add fictional elements and do not have to seek explicit approval of the people they want to depict before the movie is released.

The court appreciated the strong

chilling effect that would occur if prior notification would be imposed, especially in case a crime is depicted. Obviously film makers will think again if basing a film on a true crime would force them to ask for the input of the criminals.

Jens van den Brink & Emiel Jurjens are attorneys at Kennedy Van der Laan, Amsterdam. Co-author Jens van den Brink (Kennedy Van der Laan) acted on behalf of movie producer IDTV.



November 10, 2011, New York, NY

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Statutory Damages and Constitutional Limits Sony BMG Music Entertainment v. Tenenbaum

By Lincoln Bandlow

Proving actual damages in a copyright infringement action can sometimes prove difficult. In some circumstances, a plaintiff has no prior licensing history or perhaps that licensing history is not particularly lucrative, so a "lost licensing fee" recovery is not attractive. Often times the defendant did not profit from the infringement (so defendant has no profits to disgorge to the plaintiff) or the plaintiff cannot demonstrate that he or she would have faired any better (so there is no "lost profit" for the plaintiff to recover). In such situations, however, the Copyright Act provides an attractive alternative: the opportunity to seek to recover statutory damages in lieu of actual damages. *See* 17 U.S.C.

§504(c). (Such a right is available only if the plaintiff has registered the work prior to the alleged act of infringement. *See* 17 U.S.C. § 412.)

The amount of statutory damages that a plaintiff can recover ranges from \$750 to \$150,000 per work infringed and the amount depends on a number of factors,

particularly whether the infringement was innocent or willful. When a single work is infringed, this range may not raise significant issues. But what about peer-to-peer file sharing where a defendant may have downloaded and shared dozens, if not hundreds and thousands, of copyrighted works?

A statutory damages award (particularly where it is found that the infringer was acting willfully) can soar into the millions. Is there a constitutional due process restraint that prevents such a result? The First Circuit addressed the law relating to that issue last September in *Sony <u>BMG Music</u> <u>Entertainment v. Tenenbaum</u>, 100 U.S.P.Q.2d 1161 (1st Cir. 2011), although it ultimately held that resolution of the issue will have to wait for another day.*

Background

Sony v. Tenenbaum arose out of a shift in strategy by the record labels when it came to addressing rampant peer-to-peer file sharing of copyrighted musical recordings. For

The Court first rejected the notion that Tenenbaum was simply a "consumer copier."

years, the labels had gone after the internet companies that were engaging in or facilitating such infringement by individual internet users. See, e.g., A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Metro-Goldwyn -Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005). For years, however, the labels had stayed away from going after the actual users. Sony v. Tenenbaum involved an action against an individual user.

Joel Tenenbaum was "an early and enthusiastic user of peer-to-peer networks to obtain and distribute copyrighted music recordings." In 1999, while still a teenager, Tenenbaum installed the Napster program on his family home computer in Providence, Rhode Island, and began

> downloading and distributing copyrighted musical recordings without authorization. After the Napster network was shut down in 2001, Tenenbaum was undeterred, turning to other peer-to-peer networks such as AudioGalaxy, iMesh, Morpheus, Kazaa, and Limewire to download and distribute music. He continued to do so

through 2007, using "a panoply of peer-to-peer networks for these illegal purposes from several computers" at both his home and his laptop computers that he took with him to college.

Over the years, Tenenbaum "intentionally downloaded thousands of songs to his own computers from other network users" and "purposefully made thousands of songs available to other network users" despite the fact that numerous lawsuits had been brought, and publicized, against individuals who engaged in such conduct. At one point he had over a thousand songs on his shared directory on the Kazaa service and Tenenbaum admitted at trial that he followed when other users were accessing his shared directory and it "wasn't uncommon" for other users to download music from his computer.

Tenenbaum clearly knew that his conduct in downloading and distributing music without authorization was illegal. He knew that the industry had started filing actions against such (Continued on page 27)

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conduct. While in college, his father had warned him that his conduct was illegal and had instructed him to stop, but young Tenenbaum continued. Tenenbaum's college also warned him to stop, providing students with a handbook warning that using the college's network to download and distribute copyrighted materials was illegal and that such conduct could subject an infringer to up to \$150,000 of liability per infringement.

Indeed, Tenenbaum knew that the college took this issue seriously, having taken efforts to stop it and having implemented so many technological restrictions on its network that it caused various peer-to-peer programs to stop working.

Moreover, his home internet service provider warned against using the internet to illegally download music. Finally, the plaintiffs themselves informed Tenenbaum in a 2005 letter that he had been detected infringing copyrighted materials, notified him that his conduct was illegal and threatened to file a lawsuit if he did not stop. (Plaintiffs consisted of Sony BMG Music Entertainment, Warner Bros. Records Inc., Atlantic Recording Corp., Arista Records LLC, and UMG Recording Inc., the major music labels.)

Copyright Infringement Suit

Despite this letter and all the other warnings, Tenenbaum continued to downloaded and distribute copyrighted materials for another two years after the letter from plaintiffs and only stopped when the lawsuit was filed.

The plaintiffs sought statutory damages and an injunction against Tenenbaum, limiting their claims to just thirty music recordings downloaded by Tenenbaum, even though it had evidence that he had downloaded and distributed thousands of recordings. The district court rejected Tenenbaum's fair use defense. The court was not impressed with Tenenbaum's other efforts to avoid liability, finding that he had lied when he first denied that his computers had been used to download and distribute songs and that there was no evidence to support his assertion that others individuals, "included a foster child living in his family's home, burglars who had broken into the home, his family's house guest, and his own sisters" may have used his computers to do so.

Copyright Damage Award

After a five-day jury trial, the district court granted plaintiffs' motion for judgment as a matter of law, holding that plaintiffs' owned the copyrights at issue and that Tenenbaum had infringed them. The jury was left to decide the question of whether Tenenbaum's infringement was willful and the amount of statutory damages to be awarded. The jury found that Tenenbaum had willfully infringed each of plaintiff's thirty copyrighted works and awarded \$22,500 per infringement (which is well within the statutory range), yielding a total award of \$675,000.

Tenenbaum filed a motion for a new trial or remittitur. Absent a grant of a new trial, he sought remittitur to the statutory minimum, arguing that the district court should use the standard that remittitur is appropriate where the result of the award is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." Moreover, he argued that the award was unconstitutionally excessive under the standard for reviewing punitive damage awards articulated in <u>BMW of</u> <u>North America, Inc. v. Gore</u>, 517 U.S. 559 (1996).

Plaintiffs opposed, arguing there was no factual basis for a remittitur and that the district court could not displace a jury verdict in the statutory range set by Congress and doing so would violate plaintiffs' Seventh Amendment rights. Moreover, plaintiff's argued that even assuming the court turned to the due process argument, the standard set forth in <u>St. Louis, I.M. & S. Ry. Co. v. Williams</u>, 251 U.S. 63, 67-68 (1919), and not *Gore*, was the proper standard and, under either standard, the award was not excessive.

The United States was allowed to intervene in the action and it argued that the doctrine of constitutional avoidance required the district court to first consider the question of common law remittitur and if the court addressed the constitutional question, the standard set forth in *Williams* was appropriate and not *Gore* because punitive damages are a distinct remedy from statutory damages. The United States also took the position that an award within the Copyright Act's statutory damage range comported with due process as a matter of law.

The district court bypassed the common law remittitur request, reached the constitutional due process issue, and (Continued on page 28)

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ruled the award excessive under *Gore*. It reduced the award from \$675,000 to \$67,500 and did not give plaintiffs the option of a new trial. The district court believed that plaintiffs had taken the position that they would not accept a remittitur and thus a new trial was inevitable. The court then assumed that a jury would inevitably award a damages sum which would lead Tenenbaum to again raise a constitutional excessiveness challenge, and that the court which heard the new trial would then have to consider those and other objections again.

Thus, the district court determined that since it was inevitable that it would eventually have to rule on the constitutional due process issue, it might as well do so then. The plaintiffs appealed from the reduction of the damage award, and Tenenbaum cross-appealed from the judgment of liability and the award of damages.

First Circuit Decision

In its decision, the First Circuit first rejected Tenenbaum's arguments as to liability. Tenenbaum argued that he was not subject to the Copyright Act for three reasons. First, he asserted that the Copyright Act was unconstitutional under *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), which held that the Seventh Amendment entitles a defendant to a jury trial regarding the amount of statutory damages under 17 U.S.C. § 504(c), although Congress had stated in the statute that judges, not juries, would make this determination. Tenenbaum asserted that this rendered the statutory damages provision unconstitutional until Congress amends the statute.

The First Circuit found that Tenenbaum had waived this argument by not making it to the district court. Moreover, even if it was not waived, the First Circuit pointed out the numerous cases from the First Circuit and other circuits that had rejected this argument. *See Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56 (1st Cir. 2000); *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 191-94 (1st Cir. 2004); *BMG Music v. Gonzalez*, 430 F.3d 888, 892-93 (7th Cir. 2005) (upholding statutory damages award under § 504(c) despite claim that *Feltner* rendered such an award unconstitutional); *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1192 (9th Cir. 2001) (rejecting argument that Feltner rendered

"statutory damages provision of the Copyright Act ... unconstitutional in its entirety" and concluding *Feltner* "in no way implies that copyright plaintiffs are no longer able to seek statutory damages under the Copyright Act"). Indeed, this argument was barred by Supreme Court precedent. *See Tull v. United States*, 481 U.S. 412, 417 n.3 (1987) (upholding enforceability of Clean Water Act even though "[n]othing in the language of the ... Act or its legislative history implies any congressional intent to grant defendants the right to a jury trial" and the Seventh Amendment required that defendants be given such a jury trial right).

Second, Tenenbaum argued that Congress did not intend the Copyright Act to impose liability or damages against infringements that were, as Tenenbaum called them, merely "consumer copying." The First Circuit found that this argument was also waived by Tenenbaum's failure to present it below, but even if not waived, it failed for a variety of reasons. The Court first rejected the notion that Tenenbaum was simply a "consumer copier." He was "not a consumer whose infringement was merely that he failed to pay for copies of music recordings which he downloaded for his own personal use" but was rather someone who widely and repeatedly copied works belonging to plaintiffs and then illegally distributed those works to others who also did not pay plaintiffs. Nor was this simply "non-commercial" use, but was use made for financial gain, which includes the receipt of anything of value, including "the receipt of other copyrighted works."

Setting aside the inaccuracy of Tenenbaum's labels, the Court found that this argument was contradicted by the plain language of the Copyright Act, which does not make a distinction between "consumer" and "non-consumer" infringements. "Indeed, the [Copyright] Act does not use the term 'consumer' at all, much less as a term excluded from the category of infringers. Rather, the statute refers to 'anyone' as potential infringers." *See* 17 U.S.C. § 501(a). Thus, the Copyright Act "contains no provision that could be interpreted as precluding a copyright owner from bringing an action against an infringer solely because the infringer was a consumer of the infringed products or acted with a so-called noncommercial purpose in his distribution of the works to others."

Tenenebaum also argued that statutory damages could not be applied to "consumer copying." The First Circuit found that this argument was refuted by the plain statutory language (Continued on page 29)

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as well, holding that the Copyright Act does not condition the availability of either actual or statutory damages "on whether the offending use was by a consumer or for commercial purposes or not." In fact, where Congress has wanted to draw a distinction based on the nature of the use, it has expressly done so, such as with the fair use defense (which distinguishes "commercial" and "non-commercial" uses, the Sound Recording Act of 1971 (which extended federal copyright protection to sound recordings but exempted certain reproductions made for personal use), and the Audio Home Recording Act of 1992 (which provided some exemptions from liability for certain "noncommercial use by a consumer").

Tenenbaum's third argument as to liability was that statutory damages were unavailable to plaintiffs because statutory damages, as a matter of Congressional intent, cannot be awarded absent a showing of actual harm, and Tenenbaum claimed there was no such harm. The First Circuit rejected that contention as well. "Section 504 clearly sets forth two alternative damage calculations a plaintiff can elect: actual damages and statutory damages" and the statute is clear that "statutory damages are an independent and alternative remedy that a plaintiff may elect 'instead of actual damages."" Statutory damages were put in the

Copyright Act to "give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits."

Before statutory damages were made available, plaintiffs often times could prove infringement but could recover only nominal damages, which could result in encouraging willful and deliberate infringement. With statutory damages, even when there is no "actual harm" the court can "impose a liability within statutory limits to sanction and vindicate the statutory policy." *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952). Moreover, the First Circuit disagreed with the assertion that plaintiffs had not offered evidence of actual harm, citing the "extensive testimony regarding the loss in value of the copyrights at issue that

The First Circuit noted that the Supreme Court did not overrule *Williams* when it decided *Gore*. Moreover, the Supreme Court has never suggested that the *Gore* standards should be extended to the review of statutory damage awards.

resulted from Tenenbaum's conduct, and the harm of Tenenbaum's actions" to plaintiffs and the industry, "including reduced income and profits, and consequent job loss to employees."

Having rejected Tenenbaum's contentions regarding liability and damages, the First Circuit turned to the district court's reduction of the damages award. (The First Circuit also rejected a number of arguments that Tenenbaum asserted regarding the jury instructions given in the case, which are not addressed here.)

The district court, after the jury awarded statutory damages, had bypassed the issue of common law remittitur, and instead resolved a disputed question of whether the jury's award of \$22,500 per infringement violated due process, and

decided itself to reduce the award. The First Circuit found that this was reversible error because the district court had failed to "adhere to the doctrine of constitutional avoidance." The First Circuit rejected the district court's conclusion that resolution of the constitutional due process question was inevitable, holding that it should have first "considered the non-constitutional issue of remittitur, which may have obviated any constitutional due process issue and attendant issues.

The First Circuit pointed out the "bedrock" legal doctrine that "the 'longstanding principle of judicial restraint

requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."" Thus, courts must consider non-constitutional grounds for a decision first. The First Circuit found that there was no valid reason for abandoning this doctrine in this case. Rather, not following this doctrine "thrust the case into a thicket of constitutional issues it was not necessary to enter."

Had the district court ordered remittitur, "there would have been a number of possible outcomes that would have eliminated the constitutional due process issue altogether, or at the very least materially reshaped that issue." First, plaintiffs could have accepted the remitted award, which would have avoided the need to rule on the due process and Seventh Amendment issues. Second, if remittitur had been (Continued on page 30)

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ordered and rejected, a new trial would have ensued and the new jury could have issued an award that might not have led Tenenbaum to again seek a reduction. Finally, even if a new jury issued a comparable award and Tenenbaum once again moved to reduce it on constitutional grounds, it was still premature for the court to reach the constitutional question because "a new trial could have materially reshaped the nature of the constitutional issue by altering the amount of the award at issue or even the evidence on which to evaluate whether a particular award was excessive."

Constitutionality of Damage Awards

By not choosing remittitur, the district court became "unnecessarily embroiled" in several issues of a constitutional dimension. The first was whether the due process standard for statutory damage awards articulated by the Supreme Court in *Williams* was applicable. The second was whether, assuming *Williams* did not apply, whether *Gore*, or a combination of *Williams* and *Gore*, or something else was the due process standard. The First Circuit examined both decisions to point out the nature of the question that the district court could have avoided.

In <u>Williams</u>, the Supreme Court considered a challenge to an Arkansas statute that subjected railroads to

penalties within a certain range. A lawsuit resulted in an award within the statutory range. The railroad challenged the statutory award as unconstitutionally excessive under the Due Process Clause. The Supreme Court held that while the Due Process Clause limits the power of governments to prescribe penalties for violations of their laws, they have a wide latitude of discretion in the matter. Given this latitude, the Supreme Court rejected the railroad's due process argument, holding that a statutory damage award violates due process only "where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."

<u>*Gore*</u>, on the other hand, related to the issue of when a jury's punitive damage award is so excessive as to violate due

Although noting that the case was difficult and contentious "and the parties received a fair trial from an admirably patient and able district judge," the district court's due process damages ruling and reduction of the jury's statutory damages award had to be reversed.

process. Working off the principle that due process requires that civil defendants receive fair notice of the severity of the penalties their conduct might subject them to, the Supreme Court identified three factors to guide a court's consideration of whether a punitive damage award violates due process: (1) the degree of reprehensibility of the defendant's conduct;, (2) the ratio of the punitive award to the actual or potential harm suffered by the plaintiff; and (3) the disparity between the punitive award issued by the jury and the civil or criminal penalties authorized in comparable cases.

The First Circuit noted that in a copyright infringement case, "there are many questions regarding the relationship between *Gore's* guideposts for reviewing punitive damage awards and the *Williams* standard for reviewing statutory

> damage awards." First, there is or may be a material difference between the purposes of statutory damages under the Copyright Act as opposed to the purpose of punitive damages. Second, there may be a difference in the "limits or contours of possible ranges of awards under the different standards." Third, Williams and Gore involved limitations on stateauthorized awards of damages, whereas statutory damages in a copyright case are set by Congress pursuant to its Article I powers and thus setting a damages limitation may be an "intrusion into Congress's power under Article 1, Section 8 of the Constitution."

The First Circuit noted that the Supreme Court did not overrule *Williams* when it decided *Gore*. Moreover, the Supreme Court has never suggested that the *Gore* standards should be extended to the review of statutory damage awards. Indeed, the First Circuit pointed out that the "concerns regarding fair notice to the parties of the range of possible punitive damage awards present in *Gore* are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award."

Indeed, another circuit court declined to apply *Gore* in the statutory damages context and instead applied the *Williams* test. *See Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007). The First Circuit held that the *(Continued on page 31)*

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district court should have ordered remittitur to avoid having to reach these issues.

Moreover, this would have avoided the court needing to reach issues pertaining to the Seventh Amendment. Under that amendment, in civil lawsuits where the value in controversy exceeds twenty dollars, the parties have a right to a jury trial. When an award of general damages has been made, a trial court's reduction of that award must, to avoid Seventh Amendment error, allow the plaintiff a new trial. In contrast, some cases have held that a punitive damage award may be reduced on due process grounds, without giving the plaintiff a new trial, and this does not run afoul of the Seventh Amendment. Supreme Court' cases on punitive damages

have suggested this as well, but the question has never been directly addressed. No cases have addressed the issue of whether a *statutory* damages award can be reduced, without affording the plaintiff a new trial, and not violate the Seventh Amendment.

In this case, however, the district court ordered a reduction in the amount of damages but did not afford plaintiffs a new trial, assuming that statutory damage awards should be treated largely as punitive, and not compensatory, for

purposes of evaluating Seventh Amendment issues. The First Circuit noted, however, that "statutory damages, unlike punitive damages, have both a compensatory and punitive element." Moreover, the Supreme Court has suggested that punitive damage awards may not implicate the Seventh Amendment for reasons that do not apply to statutory damage Indeed, the Supreme Court held in Feltner v. awards. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998), that "the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself." The First Circuit made clear that it was not deciding any of these issues, but only describing them to "show the importance of adherence to the doctrine of constitutional avoidance "

On the other hand, the First Circuit rejected plaintiffs' contention that the district court properly rejected a consideration of remittitur because remittitur is never

available when an award falls within a prescribed statutory range. The First Circuit rejected the argument "that in enacting the Copyright Act, Congress intended to eliminate the common law power of the courts to consider remittitur" which is a doctrine that "has roots deep in English and American jurisprudence." Moreover, Congress had never shown any intent to eliminate remittitur. Finally, the principle of remittitur is embodied in Federal Rule of Civil Procedure 59. Thus, "the district court's decision not to consider remittitur as requested appears to be contrary to Congressional intent."

Thus, although noting that the case was difficult and contentious "and the parties received a fair trial from an admirably patient and able district judge," the district court's

> due process damages ruling and reduction of the jury's statutory damages award had to be reversed. The First Circuit reinstated the jury's award of damages and remanded for consideration of plaintiff's motion for common law remittitur based on excessiveness. The First Circuit noted that if on remand the district court determines that the jury's award does not merit remittitur, the court and the parties will have to address the relationship between the remittitur standard and the due process standard in a

statutory damages case (assuming the parties continue to raise the issues). If, however, the district court on remand allows any reduction in damages through remittitur, then plaintiffs must be given the choice of a new trial or acceptance of the lower award.

Thus, in *Sony*, the First Circuit addressed a number of challenges to an award of statutory damages in a copyright infringement case, holding that such awards are not unconstitutional as applied to peer-to-peer downloaders and distributors of copyrighted works. What it left for another day is the issue of what standard will be applied when it is argued that the amount of a statutory damages violates the due process protections of the U.S. Constitution.

Lincoln Bandlow is a partner in the Los Angeles office of Lathrop & Gage LLP. Paul D. Clement, King & Spalding, LLP; Timothy M. Reynolds and Eve G. Burton, Holme, Roberts & Owen, LLP, represented plaintiffs. Professor Charles Nesson, Harvard Law School, represented defendant.

What it left for another day is the issue of what standard will be applied when it is argued that the amount of a statutory damages violates the due process protections of the U.S. Constitution.

Copyright Suit Against Producers of Percy Jackson Movie Dismissed

Plaintiff's Works Not Substantially Similar to Popular Book Series and Movie

Building.

An author's suit for copyright infringement against International Television Company, Disney, Twentieth Century Fox, and Dune Entertainment for the popular book series *Percy Jackson and the Olympians*, as well as its film adaption, was recently dismissed. <u>DiTocco v.</u> <u>Riordan et al.</u>, 1:10-cv-04186 (S.D. N.Y. Sept. 9, 2011) (Stein, J.).

The court compared defendants' works to plaintiffs' two books, found no substantial similarity between the works and dismissed the claim.

Background

Plaintiffs Robyn and Toni DiTocco wrote *The Hero Perseus* and *Atlas' Revenge*, whose protagonist is Percy John Allen. The hero of the plaintiffs' novels, thanks to an ancestral relation to Perseus, is a Greek hero living in Athenia, Georgia who lives a dual existence. By day he engages in the prosaic struggles of a young adult existence – high school sports, dating, and later college – while by night he conducts battles in a mythological realm, with episodes drawn from the material of Greek myth, such as slaying the Gorgon Medusa.

By comparison, the defendants' film, based on a popular five-part book series entitled *Percy Jackson & The Olympians*, featured a boy in his early teens who is plagued by ADHD, dyslexia, and childhood abuse. Protagonist Percy Jackson is the son of Poseidon, a demi-God. He learns

this after one day being whisked away to a "Camp Halfblood," a school located in Long Island for fellow demi-Gods. Jackson embarks on adventures from Greek myth, some drawn from the myth of Perseus, though set in the present day United States; the Underworld is located in Los between the works, including that both included Greek mythological themes intertwined with modern life and featured young protagonists that alluded to the hero Perseus. Both protagonists

The plaintiffs argued that there was substantial similarity

Angeles; Mt. Olympus is located high atop the Empire State

alluded to the hero Perseus. Both protagonists experienced the absence of a father, and romance with a female "Andromeda" character.

District Court Opinion

The District Court granting a motion to dismiss, holding that no ordinary observer could find the two works substantially similar. Drawing on established precedent, Judge Stein compared both works for similarities in the elements of narrative structure, characters, themes, setting, plots and scenes, as well as total concept and overall feel, to find that no protectable material had been copied.

The court noted that similarities between the works were based on non-protectable *scenes a faire*, while pointing out that the works diverged substantially in their expressive elements. For example, most similarities in the works came from nonprotectable stock material; the themes of Greek myth, or the character who lacks a father figure.

On the other hand, the court pointed out

numerous differences in the manner in which the two works had been expressed. For example, considering the characters, the plaintiff's protagonist was a cool and athletic young adult, while the defendant's was a young teenager with disabilities.

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The setting between the works differed in that the *Percy Jackson* books interpose a mythological world alive in present day settings, as opposed to the plaintiffs setting mythology in a remote realm. On the element of overall concept and feel, perhaps the most comparable element between the two works, the court found the feel-good tone of the plaintiffs' books to be quite different from the dark, brooding tone of the *Percy Jackson* books.

"Because the similarities between the plaintiffs' books and the Percy Jackson film relate essentially to nonprotectable elements, and the similarities in the works' expression are greatly outweighed by their differences," the court found no copyright infringement had occurred as a matter of law.

Plaintiffs are represented by Toberoff & Associates, P.C., Los Angeles, CA. Defendants are represented by Hogan Lovells US LLP and Loeb & Loeb LLP.

Victory for *The Florida Times-Union* Protects Journalist's Privilege

By Jennifer Kifer

A Florida Circuit Court entered a decision quashing a subpoena issued by the State Attorney to *The Florida Times-Union (Times-Union)* on the basis of the qualified journalist's privilege. <u>Florida v. Susana</u>, No. 201 l-CF-003624 (Fla. Cir. Duval Cty. Sept. 27, 2011) (Senterfitt, J.).

Background

The subpoena sought the production of a letter written by Biannela Susana, the jailed mother of twelve-year-old Cristian Fernandez, who was charged with murder in the death of his two-year-old brother. The State also charged Ms. Susana with aggravated manslaughter in the death. Ms. Susana sent the letter from jail to a *Times-Union* reporter, and the *Times-Union* incorporated the letter into a news article appearing in the newspaper on September 1, 2011, which included quotes of various statements from the letter.

The *Times-Union*, moved to quash the subpoena, arguing that the journalist's privilege, codified at Section 90.5015, Florida Statutes, protected the letter at issue. Under Section 90.5015, "a professional journalist has a qualified privilege not to be a witness concerning, and not to disclose information, including the identity of any source, that the professional journalist has obtained while actively gathering news." Additionally, the *Times-Union* alleged that the letter was also privileged pursuant to Section 33-210.103(1) of the Florida Administrative Code, which provides that inmate mail to and from the news media is privileged.

Judge Senterfitt heard arguments at a hearing on September 8, 2011, and subsequently requested to review the letter in question. After *in camera* review of the letter, the Court found that the State Attorney was not entitled to the letter because the State had not made the clear and specific showing required to overcome the qualified journalist's privilege.

Specifically, the party attempting to subpoena information must show by clear and specific evidence that: (1) the information sought is relevant to the issues in the case, (2) the information cannot be obtained by means less destructive of First Amendment rights, and (3) a compelling interest exists in disclosure sufficient to override the interests protected by the privilege. Judge Senterfitt also agreed with the *Times-Union* that the letter was privileged under the Florida Administrative Code, which appears to be the first time such a ruling was made in the context of a journalist's privilege case.

In upholding the vital First Amendment rights at heart, the Court ensured that the *Times-Union* was not forced to act as an investigative arm of the government. The journalist's privilege embodies a recognition that protecting a free and unfettered press is a sufficiently compelling interest to justify depriving litigants of potential sources of information. The Court's decision marks an important victory for the *Times-Union* and for journalists throughout the State of Florida in preserving the First Amendment rights of the media.

George Gabel and Jennifer Kifer of Holland & Knight represented the Times-Union.

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Idaho Media Win Access to Dead Public Official's Personnel File

Cooperation Between Adversaries, the Judiciary, and the Media

By Charles A. Brown

In a case of first impression, an Idaho court held that the public's right to know justified disclosure of a dead public official's personnel file. <u>Regents of the University of Idaho v.</u> <u>TPC Holdings, Inc., et al.</u>, CV-2011-916 (Idaho Dist., October 7, 2011). The case involved a high profile murder suicide in Idaho.

In this matter, the cooperation that ensued between the

attorney for the governmental agency (the University of Idaho), the attorney for the print media, the sitting Judge on the matter, and the collateral cooperation between the print media was remarkable, resulting in a quick decision that brought much uncertainty to an end in a very timely manner with a well written opinion.

Background

On August 21, 2011, Professor Ernesto Bustamante took the life of graduate student, Katy Benoit and, when cornered by the police, took his

own life. Professor Bustamante had resigned as professor of the University of Idaho three (3) days prior to this tragedy, but during his tenure as professor he had a relationship with Katy Benoit which she had sought to bring to an end. Katy Benoit had been threatened by Professor Bustamante and had made complaint in regard to his actions. The reaction of the University of Idaho to her concerns and that of local police officials became the center of the public focus which ensued.

Record requests were made by the various media and the University of Idaho sought guidance from the U.S. Department of Education in regard to the releasing of Katy Benoit's student records. After obtaining guidance from the U.S. Department of Education, the University of Idaho determined that the confidentiality of student records required

The Court specifically found that the statute was silent regarding what happens upon the death of a former public official, and, because it was silent in that regard, the statute created an ambiguity which was incumbent upon the Court to resolve.

under federal law (FERPA) does not extend after a student's death.

The University also released a detailed time line of its interactions with Katy Benoit between June 10, 2011, and August 22, 2011, concerning her complaint. This detailed time line was printed and published by the media.

Ironically, Professor Bustamante's records had not been disclosed, because Idaho law dictated as to their release. The

remaining question was whether or not the Idaho statute, as is typical throughout most states, excepted from disclosure the personnel files of a public official. Mr. Bustamante's records were at issue. (An affidavit filed in a quickly filed criminal action against Professor Bustamante implied multiple personalities, a violent temper, and erratic behavior.)

Cooperation Between Parties

The attorney for the University then made a personal phone call to me, Charles A. Brown, knowing that I

represent many of the media throughout the state of Idaho and elsewhere. The attorney and I never had any professional or personal dealings with each other prior to his phone call on August 26, 2011, a Friday. He was essentially seeking out a respondent for the Action for Declaratory Judgment he intended to file with the court. He needed and wanted guidance from the Court concerning interpretation of Idaho statute. He was also hoping to move the matter along in a timely way for the benefit of the various entities which had made requests to the University of Idaho, but also to the benefit of the University of Idaho and the various families and friends of the slain student. I, then, contacted various members of the print media I had represented over the years, inclusive of *The Associated Press, The Idaho Statesman*, *(Continued on page 35)*

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Lewiston Tribune, Moscow-Pullman Daily News, Idaho Press Club, and *The Spokesman Review.* They conferred amongst themselves and agreed to be named as respondents in the action.

Mr. Nelson (attorney for the University of Idaho) and I then scheduled a telephone conference with the sitting Judge where the University of Idaho is located in Latah County, Idaho, and asked if he would cooperate with us in setting an expedited briefing and hearing on the matter. The Judge cooperated fully and we agreed to an expedited briefing and then set a date for oral argument. I had not yet had an opportunity to delve into the substantive issues whatsoever, but I applied my 33 years of First Amendment Law and my brilliant analysis of the situation. I clearly divined that this was essentially a singular issue and there would most likely be a tremendous amount of case law upon which I could rely. I was wrong on both counts.

I found that the Idaho statute was fairly typical, in that it ostensibly provided that every person has a right to examine and take a copy of any and all public records of this state, and then it had pages and pages of exceptions. The particular exemption upon which this matter focused read as follows:

> Except as provided in this subsection, all personnel records of a current or former public official other than the public official's public service or employment history, classification, pay grade and step, longevity, gross salary and salary history, status, work place and employing agency. All other personnel information relating to a public employee or applicant including, but not limited to, information regarding sex, race, marital status, birth date, home address and telephone number, applications, testing and scoring materials, grievances, performance correspondence and evaluations, shall not be disclosed to the public without the employee's or applicant's written consent.

Thus, what the statute and most statutes do not define is what constitutes "personnel records." Additionally, does a "former public official" include a dead former public official? Because the statute contemplated the records could be released with the employee's "written consent," did this imply that the statute contemplated that the employee or public official would be alive? Would the nondisclosure provision apply to a biographer of Benjamin Franklin for eternity? (No, Benjamin Franklin did not attend the University of Idaho – but, you get the point.)

Given the language of the statute, I then discovered that there was scant case law throughout the nation upon which to directly rely. The University filed their Action for Declaratory Relief on August 29, 2011. I cooperated with the University and asked them to then amend their petition to include all of the print media that I represented. In the interim, we were contacted by Spokane Television, Inc., who was asking to intervene, but instead of putting them through the costs and expense of intervening, we simply asked the University to include them in their amended action.

We immediately began discussing a Stipulated Statement of Facts in order to move the matter along quickly but also in order to alleviate a time consuming process that would involve witnesses and a contested hearing before the Court. Then, on September 9, 2011, we had a scheduling conference with the Judge, at which time we all agreed to have simultaneous briefs filed by September 23, 2011, with a responsive brief due on September 29, 2011, and oral argument on October 3, 2011.

It should also be noted that on October 1, 2011, the Friday before the Monday of oral argument, Katy Benoit's family wrote all counsel and Judge Stegner. They were also seeking the release of the records sought. Again, all counsel involved cooperated and submitted this request to the Court so it was a part of the Court record for the Judge's consideration.

After submitting the Stipulated Statement of Facts and the briefing to the Court, the Court heard oral argument on October 3, 2011, after which he rendered his decision from the bench and allowed access to the records. All parties, including the University of Idaho specifically, waived the right to appeal.

The attorney for the University, the attorney for Spokane Television, Inc., and I again cooperated in an attempt to narrow the tremendous volume of records that the University was uncovering. In this age of mass e-mails, generic updates or notices on departmental matters, etc. there was a *(Continued on page 36)* For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2011 Media Law Resource Center, Inc.

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tremendous volume of records that could be eliminated for obvious reasons.

Even though the Court orally rendered an opinion on October 3, 2011, he then issued an opinion on October 7, 2011, setting forth his complete rationale.

Court Decision

The Court specifically found that the statute was silent regarding what happens upon the death of a former public official, and, because it was silent in that regard, the statute created an ambiguity which was incumbent upon the Court to resolve. The Court felt that three (3) avenues were open to it. The first avenue would be that no records could be released despite the death of a public official, a literal reading of the statutes. The Court felt that this avenue was far too restrictive. The second avenue is that all records could be public in their entirety upon the death of the former public official. The Court felt that this would be too expansive. Then, the Court found:

> Third, which is the middle avenue, and the avenue taken by this Court, is to allow disclosure following the death of the public official, when the public's need to know exceeds the need to maintain confidentiality. Here, the public's need to know clearly outweighs whatever right to privacy exists. Bustamante engaged in behavior that resulted in Benoit lodging a complaint against him. The public needs to know, in as much detail as possible, how the University responded to that complaint and whether its response was appropriate under the circumstances. Bustamante, by doing what he did, has little, if any, right to maintain the privacy of his "personnel Accordingly, before personnel records."

records of a deceased public employee may be released, a court must conduct a balancing test to determine whether the public's interest outweighs the former public official's right to privacy.

In conclusion, although Bustamante is a "former public official" who has a privacy interest in his personnel records under I..C. § 9-340C, in balancing his right to privacy against the public's need to know, the clear weight of the balance tips in favor of public disclosure. As such, the personnel files of Ernesto Bustamante are not exempt from disclosure under the Idaho Public Records Act.

The cooperation in regard to the parties at this time did not stop. Then, the press again cooperated amongst itself in an attempt to assimilate and deal with the significant volume of records anticipated to be revealed as a result of the request. That process is presently ongoing.

Conclusion

Thus, beginning with a phone call on August 26, 2011, four days after the killing, resolution of the entire matter was achieved after briefing, stipulated facts, and oral argument within 38 days. It simply became a matter of applying common sense to a difficult situation. A literal reading of the statute does not discuss a balancing test, but the opinion rendered by Judge Stegner creates such a standard in Idaho, and, based upon my research, there is not a great deal of case law available throughout the nation. I feel that this case would apply not only to a dead public official, but any public official who has acted wrongly or inappropriately where the "public's need to know" is paramount.

Charles A. Brown, sole practitioner in Lewiston, Idaho, represented the media parties in this case.

Planning Meeting for the 2012 Media Law Conference November 10, 2011, New York, NY RSVP to dseiden@medialaw.org

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Voice-Mail Hacking in the United States *Illegal but Not Usually a Federal Felony*

By Michael A. Norwick

In the wake of the shocking News Corporation voice-mail hacking scandal in the United Kingdom, and the arrests in London of reporterss and editors accused of illegally intercepting voice-mail messages, there has been increasing interest in the landscape of U.S. law that criminalizes such conduct in the States. Although there have only been a handful of publicized prosecutions for voice-mail hacking in the United States, there are a number of overlapping state and federal laws that criminalize such conduct. Most famously, Michael Gallagher, the reporter involved in the Cincinnati Enquirer hacking scandal, was prosecuted under Ohio wire fraud and computer laws, and took a plea deal in 1999.¹ He was sentenced to five years probation and 200 hours of community service.²

Federal Statutes

A number of federal laws – including the Stored Communications Act, the Computer Fraud and Abuse Act and the recently enacted Truth in Caller ID Act of 2009 – all have application to at least some voice-mail hacking crimes, but they generally treat the crime as a misdemeanor unless special circumstances are present.

Perhaps the most straight-forward law for federal authorities is to bring charges under is the Computer Fraud and Abuse Act ("CFAA"). There are a wide range of specific offenses under the CFAA that vary in the severity of available punishments depending on the value of the information accessed and the purpose of the intrusion. The most generic instance that would likely apply in a phone-hacking case is under 18 U.S.C. § 1030(a)(2)(C):

Whoever-- intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains-- information from any protected computer shall be punished

A first violation of § 1030(a)(2)(C) (or conspiring to commit such an offense) is deemed a misdemeanor, calling for fines and/or imprisonment of under one year. Felony charges would only be applicable in certain instances, e.g., where the value of the information obtained exceeds \$5,000, or where the defendant accessed information related to national security, or had the intent to defraud the victim or gain commercial advantage, or committed the voice-mail hacking in furtherance of another criminal or tortuous act. *See* 18 U.S.C. § 1030 (a) & (c).

At least one commentator has agreed that that statute is clearly applicable to voice-mail hacking: "Hacking in to another person's voicemail box is clearly an unauthorized access, and the computers that host voicemail files are clearly "computers." See Orin S. Kerr, "Did the 'News of the World' Phone Hacks Violate U.S. Criminal Law?" The Volokh Conspiracy (blog) (July 13, 2011) (citing United States v. Kramer, 631 F.3d 900 (8th Cir. 2011) as exemplary of the broad definition of "computers" afforded under §1030); see also 18 U.S.C. § 1030 (e)(2)(B) (defining "protected computer" as inter alia one "which is used in or affecting interstate or foreign commerce or communication"). One instance of a successful prosecution for voice-mail hacking under the CFAA occurred in United States v. Cioni, 2011 U.S. App. Lexis 8085 (4th Cir.), where the defendant was convicted of voice-mail and e-mail hacking under the CFAA and other related federal charges.

Voice-mail hacking can also be prosecuted under the Stored Communications Act, 18 U.S.C. § 2701 (the "SCA"), however, the SCA most likely only applies to voice-mails that have not yet been listened to. The statute provides that whoever:

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished . . .

Similar to the CFAA, the punishment for a first offense under the SCA is a fine and/or under one year in prison, but (Continued on page 38)

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can be increased to up to five years "if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain, or in furtherance of any criminal or tortious act" 18 U.S.C. § 2701 (b).

Although some voice-mail hacking cases have been prosecuted under the SCA,³ a problem lies in the generally narrow definition given to "in electronic storage" under the Act. Under the SCA, "electronic storage" does not refer to *any* electronically stored information, but only to:

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

18 U.S.C. § 2510(17).

Some federal courts adhere to the view that "electronic storage" refers "only to temporary storage made in the course of transmission by a service provider and to backups of such

intermediate communications made by the service provider to ensure system integrity." Searching & Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations, Department of Justice Computer Crime & Intellectual Property Section (3d Ed. 2009) ("DOJ Computer Crime Manual"), at ch.3, § C.3. "Electronic storage" does "not include post-transmission storage of communications." Id. For this reason, some federal courts, in the context of email communications, hold that e-mails which have already been opened by their recipient are no longer in "temporary, intermediate storage," and are thus no longer subject to the SCA. See, e.g., Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 114 (3d. Cir. 2004) aff'g Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623, 636 (E.D. Pa. 2001); see also United States v. Weaver, 636 F. Supp.2d 769, 772 (C.D. Ill.

A number of federal laws – including the Stored Communications Act, the Computer Fraud and Abuse Act and the recently enacted Truth in Caller ID Act of 2009 – all have application to at least some voice-mail hacking crimes, but they generally treat the crime as a misdemeanor unless special circumstances are present.

July 15, 2009) (interpreting "electronic storage" to exclude previously sent email stored by web-based email service provider).

By contrast, in *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004), the Ninth Circuit held that email messages were in "electronic storage" even if they have been previously accessed, because retrieved email falls under the backup portion of the definition of "electronic storage." Id. at 1075-77. At least a couple of district courts have followed *Theofel. See Bailey v. Bailey*, 2008 U.S. Dist. LEXIS at *15-17 (E.D. Mich. Feb. 6, 2008) (approving of *Theofel*), and *Cardinal Health 414, Inc. v. Adams*, 482 F. Supp. 2d 967,

976 n.2 (M.D. Tenn. 2008) (same).

Importantly, because the Department of Justice adheres to the narrow interpretation of "electronic storage" for the purposes of the SCA under its internal guidelines, and views e-mails and voice-mails similarly, (*see DOJ Computer Crime Manual*, at ch.3, § C.3) it seems unlikely that it would prosecute anyone for hacking an already-listened-to voice-mail under the SCA, even in the Ninth Circuit and in those jurisdictions following *Theofel.*⁴ Obviously, this would pose a serious obstacle for prosecutors in many voice-mail hacking cases.

A third federal statute that could be used in voice-mail hacking prosecutions is the recently enacted

Truth in Caller ID Act of 2009, which went into effect on December 22, 2010. This statute could be applied to voicemail hackers who use a software tool that facilitates the unauthorized access by manipulating caller ID information. The most notorious such computer program, which has been implicated in several voice-mail hacking cases, is called "SpoofCard." See, e.g., United States v. Cioni, 2011 U.S. App. LEXIS 8085 at *6 and, supra, n.1 (the New York state prosecution against the former publicity director for Dolce & Gabbana, Ali Wise, who used the SpoofCard software to hack voice-mail accounts).⁵ Although SpoofCard has some legitimate privacy uses, it also allows the user to by-pass a voice-mail security systems by pretending to be the voicemail owner calling from his or her own phone.

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The recently passed Truth in Caller ID Act of 2009 forbids any person "to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value" 47 U.S.C. § 227(e)(1). Violators may be subject to civil forfeiture proceedings, and "a willful and knowing" violation of the Act may be punishable by fines and imprisonment for a term not exceeding one year. *See* 47 U.S.C. § 227(e)(5); 47 U.S.C. § 501. It is unknown if there have been any prosecutions to-date under this statute.

Thus, while a person accused of voice-mail hacking in the United States could be federally charged under the Computer Fraud and Abuse Act, the Stored Communications Act, and/ or the Truth in Caller ID Act of 2009, an American journalist committing these crimes in pursuit of the type of information obtained in the News Corp. scandal would likely only face misdemeanor charges under these statutes. It will be worth watching to see if the fall-out from the British scandal provokes Congress to enact legislation with more severe penalties. Further, it will be interesting to survey the existing landscape of State laws, such as those used in the Michael Gallagher and Ali Wise prosecutions, to assess the differences in the law throughout the country.

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Notes

1. See Roy S. Gutterman, Note, "Chilled Bananas: Why Newsgathering Demands More First Amendment Protection," 50 Syracuse L. Rev. 197, 200 (2000).

2. Another highly publicized case is that of Ali Wise, the former publicity director for Dolce & Gabbana, who was charged with hacking into the voice-mail accounts of at least four individuals on over 400 separate occasions. See Laura Italiano, "PR princess Ali Wise pleads guilty to felony charge," New York Post (April 29, 2010). She pleaded guilty to New York state charges of eavesdropping and computer trespassing in a deal in which she was sentenced to community service and a small fine, and allowed to avoid a felony conviction.

3. For example, one case that received some publicity is that

of former LegalMatch CEO, Dmitri Shubov, who was federally indicted in connection with hacking the voice-mail of a competitor, deleting messages, and lying to investigators. See Lisa J. Chadderdon, "Legal Match Founder Indicted," 3 ABA Journal eReport 22 (June 4, 2004). Shubov ultimately plead guilty to one count of unlawful access to stored communications, and aiding and abetting thereof, under 18 U.S.C. § 2701. See In the Matter of Dmitry Shubov, 2005 N.Y. App. Div. LEXIS 11185.

In addition, the Cioni case, referred to in the text above, was prosecuted under both the CFAA and the SCA. See also United States v. Moriarty, 1997 U.S. Dist. LEXIS 6678 (D. Mass).

4. The DOJ's position stems from the fact that § 2703 of the SCA controls the circumstances under which a search warrant or other process is required to access stored communications in criminal investigations, and the Department has consistently advocated for less burdensome restrictions on government access to stored communications.

Prior to 2001, stored communications such as voice-mail messages were arguably also subject to the Wiretap Act, with its warrant requirement in investigations and harsher criminal penalties for those who intercept such communications without authorization. But under the 2001 USA Patriot Act, voice-mail communications were placed exclusively under the protection of the SCA, and not the Wiretap Act, to clarify the ambiguity and give law enforcement less encumbered access to such communications in criminal investigations. See Konop v. Hawaiian Airlines, 302 F.3d 868, 878 (9th Cir. 2002); Patriot Act of 2001, § 102.

5. Allegations involving the use of this software to hack voice mail led to the SpoofCard service suspending the accounts of over 50 individuals in 2006, including most famously, socialite Paris Hilton (who publicly denied the allegations). See Alicia Hatfield, Note and Comment, "Phoney Business: Successful Caller ID Spoofing Regulation Requires More Than the Truth in Caller ID Act of 2009," 19 J. L. & Pol'y 827, 837 (2011). In 2008, the company that makes SpoofCard software agreed to an injunction in connection with an investigation brought by the Los Angeles District Attorney's office, in which the company agreed that it would not make misrepresentations about the legality of the product.