



LIBELLETTER

September 1995

SCIENTOLOGISTS SEIZE CRITICS' COMPUTER FILES AND RECORDS BUT FAIL TO OBTAIN TRO AGAINST WASHINGTON POST

Although the Church of Scientology and its licensees have again met with mixed results in its attempts to use the judicial system to restrict dissemination of L. Ron Hubbard's writings, they have clearly sent a chilling message to Church critics — be careful or we will invade your homes and seize your personal property and records.

In a flurry of recent and decidedly ominous activity, federal marshals — acting under writs of seizure *ex parte* obtained from federal courts in Virginia and Colorado — entered the homes and confiscated and turned over to Scientology officials the computers and personal records of former church members who were active critics of the church. Although the basis of the seizure orders were alleged copyright and trade secrets violations resulting when the critics "posted" church documents on the Internet, Scientology officials were permitted to remove not only the computer files allegedly containing these documents but to confiscate the critics' computers and floppy disks as well, in addition to such privileged and sensitive material as their personal phone books and mailing lists.

Moreover, as was reported in the August 23 issue of the *Denver Post*, the federal marshals in Colorado provided no inventory of the material seized. "They just hauled the stuff out the door. I have no idea of what just walked out of here," complained one of the victims,

(Continued on page 7)

PRIOR RESTRAINT ISSUED AGAINST BUSINESS WEEK IN OHIO FEDERAL COURT

On motion brought on *ex parte* by The Procter & Gamble Company and Bankers Trust Company, a federal district court in Cincinnati, Ohio on Wednesday, September 13, issued an injunction against the publication by *Business Week* of the contents of documents previously filed with the same court. *Procter & Gamble Co. v. Bankers Trust Company, et al.*, C-1-94-735 (S.D. Ohio, Western Div. Sept. 13, 1995) Copies of those documents were lawfully obtained by the publication, but without knowledge that they were filed with the court under a pre-existing protective order.

The documents in question were filed in connection with a motion for leave to amend the complaint in a well-

publicized derivatives suit pending between Procter & Gamble and Bankers Trust. Procter & Gamble, the plaintiff in the on-going litigation, is seeking to add RICO claims. Pre-existing in the suit was a protective order, issued by the same federal district court judge, that applied to the documents as well as to other documents in the court file. *Business Week*, knowing of the motion to amend the complaint, sought and obtained copies of the motion and the attached documents from a confidential source. At the time *Business Week* requested the documents, it was unaware that they were governed by a protective order. The notice of motion, filed on the record, did not indicate that the

(Continued on page 2)

ACCENTUATING THE POSITIVE IN THE PHILIP MORRIS/ABC SETTLEMENT

By Rodney A. Smolla

In settling the libel suit brought against it by Phillip Morris, Capital Cities/ABC has endured both the embarrassment of having to issue its correction and the jeering of some sideline critics who complain that the network should have battled it out to the bitter end. But second-guessing is easy sport. It's not hard to scream "go for it" from the stands on fourth down and one; but wise and winning coaches often punt. I believe that ABC may well have been better off settling this case, and I worry that if the cries of woe are too shrill they may be their own self-fulfilling prophecy. Not all settlements are bad business or bad journalism. The media as a whole has little to gain from piling on ABC at one of its low moments. ABC has acted honorably in

many important respects, for which, in my view, it deserves due credit.

The dispute arose from a 13-minute segment on ABC's *Day One* entitled "Smoke Screen," in which ABC described the process by which cigarette manufacturers add nicotine to cigarettes as part of the process of using "reconstituted tobacco," characterizing the practice as "spiking." A cigarette that was manufactured from pure tobacco leaf would have a high nicotine content. But nearly all cigarettes are manufactured with some filler, "reconstituted tobacco," made with tobacco stems and crushed leaves. In the process of manufacturing this filler nicotine is lost. Tobacco companies then add nicotine back. The program reported that a "powerful tobacco

(Continued on page 4)

LANHAM ACT CLAIM FAILED

Editing of Copy Insufficient

In the Southern District of New York, Federal District Court Judge Michael Mukasey recently granted summary judgment to defendants Fordham School of Law and Fordham International Law Journal on Lanham Act and "moral rights" claims brought by a former law student. *Choe v. Fordham University School of Law*, No. 93 Civ. 5992 (S.D.N.Y. July 12, 1995) Plaintiff contended that various errors, seemingly primarily typographical in character, had so altered and diminished the article that he had submitted to the publication that it constituted not only Lanham Act and moral rights violations, but libel, privacy, breach of contract and negligence claims as well.

Judge Mukasey found that in order to constitute a violation of the Lanham Act, the errors (assuming that they were the fault of the journal editors and not those of the plaintiff) would have to depart substantially from the original article, rendering the article so "deformed" as to present to the public as the author's that which is not his own creation. (citing, *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976). That simply was not the case here.

In addition, Judge Mukasey held that there was no federal claim for violation of plaintiff's alleged "moral rights." Finding no basis in federal case law for such a claim, the judge also rejected the notion that the Berne Convention conferred jurisdiction in the federal courts for such a claim.

Having dismissed the federal claims, the judge also dismissed pendent state law claims for lack of jurisdiction.

THE 1995-96 LDRC 50-STATE SURVEY: MEDIA LIBEL LAW

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BUSINESS WEEK

(Continued from page 1)

attachments to it were under seal. Counsel for The McGraw-Hill Companies, publisher of *Business Week*, received notice of the injunction by telephone just hours before the edition of the magazine containing the allegedly offending article on the P&G/Bankers Trust suit was due to be published.

McGraw-Hill immediately sought to reach the district court judge who had issued the injunction. Unable to locate him, McGraw-Hill was able to contact only one Sixth Circuit judge, who was asked to overturn the prior restraint. Found in his kitchen at home and unable to review the papers in the case, the judge refused to do so. McGraw-Hill on Thursday, September 14, filed a notice of motion seeking an expedited appeal from the Sixth Circuit. The edition of *Business Week* was published, but McGraw-Hill pulled the article pending disposition of the injunction.

The district court's order is sparse, noting the existing protective order, which prohibited disclosure of the documents without the consent of the parties or the Court, that McGraw-Hill obtained the documents "in a manner not authorized by the Protective Order," and that it appears that the parties will suffer

irreparable harm if the contents of these documents are released at this time.

No support for the court's conclusions, factual or otherwise, is contained in the order. Indeed, counsel for McGraw-Hill has not seen, or even been advised of the existence of, any supporting affidavits or papers submitted by the parties to the court on the injunction motion. Thus, there is no way for McGraw-Hill to determine the basis for the court's ruling.

And while counsel for the parties were able, seemingly with little difficulty, to reach Ken Vittor, McGraw-Hill General Counsel, on the phone to advise him that the judge's order was in the process of being faxed to his Law Department fax machine, apparently no effort whatsoever was made to contact McGraw-Hill lawyers prior to (and, of course, to allow them to participate in) the hearing on the injunction.

The question of whether a court can issue a prior restraint against the press to protect its pending protective order may be one on which there is limited prior authority. Based on the body of existing law on prior restraints, however, McGraw-Hill is optimistic about its chances of success in having the injunction overturned.

CALIFORNIA WITNESS PAYMENT STATUTE DECLARED UNCONSTITUTIONAL

By Richard S. Hoffman

The California First Amendment Coalition ("CFAC") has succeeded in having the federal court in San Francisco strike down as a violation of the First Amendment a California state statute that made it a crime for potential witnesses in criminal cases to receive "money or its equivalent" for providing information to the public about what they witnessed. The law, Penal Code Section 132.5, was passed in response to the publicity surrounding offers of compensation to potential witnesses in the O.J. Simpson murder trial. It is believed to be the first law of its kind in the United States.

On August 9, U.S. District Judge Fern Smith granted CFAC's motion for a preliminary and permanent injunction barring enforcement of the statute. *California First Amendment Coalition v. Lungren*, No. C 95-0440-FMS (N.D. CAL. Aug. 9, 1995) In a twenty-five page opinion, Judge Smith held that the law violated the First Amendment rights of potential witnesses and the media, and the violations "are so many and so basic" that no construction of the statute could save it from constitutional attack.

CFAC attacked the statute as lacking any compelling state interest, overbroad and unduly vague. The request for injunctive relief included affidavits from newspaper editors (from the *San Francisco Bay Guardian* and *San Diego Union Tribune*), book publishers (Simon & Schuster), television producers (Paramount), a former prisoner turned award winning journalist (Danny Martin), and CFAC's executive director attesting to the impact that statute would have on routine journalism, publishing and producing practices and listing the many acclaimed works that would have been impossible to write or illegal if published for money were this statute in effect. The Court relied on all of the affidavit evidence and held that it demonstrated the unconstitutional "chilling effect" of the

legislation.

The Court recognized that in light of the Supreme Court's decision in the "Son of Sam" case, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991) and the recent decision in *United States v. National Treasury Employees Union ("NTEU")*, 115 S. Ct. 1003 (1995), any statute that imposes a financial disincentive on speech of a particular type — even if it does not bar such speech altogether — is "content based" regulation that must "pass muster under the Supreme Court's strict scrutiny test."

The Court accepted CFAC's argument that the California witness statute was not "narrowly tailored to meet a compelling state interest" for multiple reasons. Moreover, the court recognized that the statutes imposed a prior restraint on speech and that the speech targeted was at the "core of protected expression." Slip op. at 15.

The asserted interest of the state was to prevent an incentive for witnesses to fabricate testimony in order to maximize compensation and to remove from criminal trials the impact of media compensation on witness credibility. But the statute was so broadly and poorly written that it operated to prevent compensated speech by anyone who arguably witnessed a crime even if there was no arrest, prosecution or trial.

Even at its core (addressing the fair trial concerns of witness fabrications in high-profile criminal trials), the Court held that the statute was not "necessary" because less restrictive means are readily available to promote the interests of a fair trial. The court cited, among the alternatives, various criminal perjury statutes, the prospect of cross-examination, the introduction of evidence of bias, and appropriate jury instructions on witness credibility. Moreover, the court found no legislative history of actual harm to fair trial interests having occurred from witness compensation. The mere prospect of dealing with the "taint" on witnesses

who receive compensation was not sufficiently compelling to support a broad limit on speech.

The Court accepted CFAC's argument that no ban on compensated speech by witnesses could satisfy the First Amendment unless there was at least a specific showing of "substantial likelihood of material prejudice" to an actual judicial proceeding caused by particular statements. The Court also rejected the State's efforts to distinguish the impact of compensation provided by the media from payments made by the state itself: "The Court does not understand how a jury can adequately assess the paid witness' testimony when the witness is an expert or paid governmental informant but cannot do so when the witness receives compensation from a news organization."

Judge Smith's opinion is a comprehensive review of the constitutional infirmities of the statute and should give pause to other state legislatures considering similar statutes, and considerable ammunition to those attacking such statutes if they are passed.

CFAC is a coalition of more than one-hundred fifty California newspapers and other California based supporters of free speech and government access.

Richard S. Hoffman is a partner in the Washington, D.C. law firm of Williams & Connolly. He is counsel to CFAC in CFAC v. Lungren, No. 95-0440 (N.D. Cal.)

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PHILIP MORRIS/ABC SETTLEMENT

(Continued from page 1)

extract containing nicotine and flavor" is applied to the filler, and talked of five outside companies who supply the extract.

Philip Morris argued that the *Day One* segment implied that it "added "extra" nicotine to its cigarettes to hook and hold smokers. The tobacco extract that it buys from outside suppliers, it claimed, is added only for flavor, and contains negligible amounts of nicotine. For its part, ABC maintained that once nicotine is taken out during the process of manufacturing reconstituted tobacco, adding any nicotine back in is "extra," because the cigarette could be manufactured without it.

In the settlement ABC admitted that it "did not take issue" with Philip Morris' statements that "it does not add nicotine in any measurable amount from any outside source for any purpose in the course of its manufacturing process, and that its finished cigarettes contain less nicotine than is found in the natural tobacco from which they are made." Stating that it now agreed that it should not have reported that Philip Morris adds "significant amounts of nicotine from outside sources," ABC acknowledged that this was "a mistake that was not deliberate on the part of ABC, but for which we accept responsibility and which requires correction. We apologize to our audience and Philip Morris."

In the next paragraph of the statement, however, ABC was not contrite:

ABC and Philip Morris continue to disagree about whether the principal focus of the reports was on the use of nicotine from outside sources. Philip Morris believes that this was the main thrust of the programs. ABC believes that the principal focus of the reports was whether cigarette companies use the reconstituted tobacco process to control the levels of nicotine in cigarettes in order to keep people smoking. Philip Morris

categorically denies that it does so. ABC thinks the reports speak for themselves on this issue and is prepared to have the issue resolved elsewhere.

ABC paid no damages, but agreed to pay the plaintiffs' legal fees. Reports on the amounts of those fees have ranged from \$2.5 to \$3 million (as reported by *The New York Times*) to \$15 million (as reported by *The Wall Street Journal*).

Some of the critics of the settlement point to the substantial truth and actual malice defenses and with an air of certitude assert that ABC would have won if it had just stuck it out. But who really knows whether ABC would have won or lost at trial? The case would have been tried in tobacco country, before Judge Theodore J. Markow in Richmond. As Judge Markow characterized the crux of the case, no one disputes that Philip Morris takes nicotine out during the reconstitution process and then adds it in later. The question is, why? "If the purpose is benign, Philip Morris wins. If it is to addict, it loses."

It has been reported that during pretrial discovery documents appeared to demonstrate that Philip Morris did not obtain most of its additive from outside suppliers, and that it would be difficult for ABC to establish that the amounts of nicotine added were significant. If the facts did indeed play out in this way, was the ABC story "substantially true?" I would like to think yes, and that a jury would have so found. But is that wishful thinking or sound prediction? Going to trial on these facts would have been dicey for both sides; I could easily imagine a jury going either way on the substantial truth defense.

As to actual malice, again, I have a difficult time believing that ABC and its producers acted with knowledge of falsity or reckless disregard for the truth. After all, ABC continues to believe that it got the gist of the story correct--and for all I know, they may well have. Yet again, according to published reports, ABC might have had some vulnerability. Both before and

after the settlement, there were reports that ABC's editing process might have been exposed to some embarrassments at trial. ABC, it has been reported, may have been guilty of splicing interview footage so as to portray the manufacturing process in a more sinister light than even its confidential source, "Deep Cough," had intended. If there were some liberties taken with editing (and I have no way of knowing if there were), such incidents, even if minor and not intentionally misleading, might well have been successfully exploited by the plaintiffs at trial. At the very least, there may well have been enough to get the actual malice question before a jury, where anything might have happened.

ABC did not concede that it had erred in what was, in my judgment, the principal focus of the story. While it may well be that ABC was wrong about whether the added nicotine comes from outside sources, and whether the amounts added are substantial, the gist of the *Day One* segment was that cigarette companies use the reconstituted tobacco process as a device for controlling the levels of nicotine in order to keep smokers hooked. ABC's correction pointedly did *not* concede that it was wrong on that central point, and the public debate on that issue has now shifted to the Food and Drug Administration. The suspicion that cigarette manufacturers manipulate nicotine levels with full awareness of the addictive consequences of such practices is at the heart of the FDA's new attempt to regulate cigarettes as drugs. Indeed, on this issue, ABC can be quite proud of its journalistic courage; it has raised serious questions about the nicotine levels of cigarettes and helped to inject those questions into the top of the agenda of the political debate over the regulation of smoking.

Rodney A. Smolla is a Professor of Law and Director of the Institute of Bill of Rights Law at The College of William & Mary in Williamsburg, Virginia.

JUDGE ITO RULES ON CONFIDENTIAL SOURCES

In yet another sidebar to the O.J. Simpson trial, Judge Lance Ito has ruled that two reporters, Tracie Savage and Joseph Bosco, do not have to reveal their sources for reports they made concerning the DNA-testing of the bloody socks found at Simpson's home. *People v. Orenthal James Simpson*, Case# BA 097211 (Cal. Super. 8/9/95)

Reasoning that the source of the "misinformation," as Judge Ito put it, was immaterial to the issues involved in the murder trial, the judge held that both Savage and Bosco were entitled to the protection of the California Shield Law, Evidence Code Section 1070. Under California law, set out in *Delaney v. Superior Court*, 50 C3d 785 (1990), Judge Ito pointed out, "the shield law's limited immunity 'must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose the information would unduly infringe on that right.'" *Slip op.* at 1, citing *Delaney* at 793.

The defense had argued that Savage's KNBC report detailing the results of the DNA-testing upon the bloody socks before the socks had in actuality even been sent to the lab, and Bosco's June 1995 *Penthouse* article describing a "certain police officer" as the source of the leak, lead to the conclusion that only a person with knowledge that Nicole Brown Simpson's blood had been placed on the socks would or could have been the source of the news leak. Judge Ito pointed out in his decision that the defense's argument "assumes the source . . . either participated in the alleged nefarious acts or spoke with persons with first hand knowledge." *Slip op.* at 3.

The prosecution countered the defense's allegations by suggesting that the DNA results obtained on some other evidence items which were known by the LAPD crime lab, the prosecuting attorneys and the investigating officers and the preliminary non-DNA genetic marker typing of blood on the socks which had produced results consistent with Nicole Brown Simpson were simply "combined, confused and passed along as

the latest hot tip." *Slip op.* at 3. Speculation that the LAPD could be the sole source of the misinformation, the prosecution continued, was "speculative at best" especially in light of the fact that the results of the testing were known by the involved staff at Cellmark, LAPD SID, the LAPD robbery and Homicide Division and the Los Angeles County District Attorney's Office.

Judge Ito, in reaching his decision, noted that the fact that the misinformation was reconfirmed by the source "supports [the] conclusion that the source was not knowledgeable or closely connected to the investigation." *Slip op.* at 4. Reasoning that the "leaker's access to the actual scientific results has not been established," and further that "the argument that access to information equates with access to physical evidence is not supported by the record," Judge Ito concluded that "a prima facie showing of materiality has not been shown." *Slip op.* at 4.

In addition to this holding Judge Ito went on to find further support for the result by applying the balancing test involved in challenges to the shield law's protection set out in *Delaney*. Under the judge's analysis the court found that the factors involved in the balancing test; "1) whether the information is confidential or sensitive, 2) the interests to be protected by the shield law, 3) the criminal defendant's need for the information, and 4) whether there are any alternative sources of the same information," *slip op.* at 4, citing *Delaney* at 809-813, all weighed against forced disclosure and therefore supported Savage's and Bosco's rights under the shield law.

CALIFORNIA CORRECTION STATUTE HELD TO APPLY TO TELEVISION TALK SHOWS

By Rex Heinke and Edith Ramirez

In *Martinez v. Rodriguez, et al.* (LASC No. BC 111271 August 2, 1995), Judge Paul Boland, of the Los Angeles Superior Court, held that the protection afforded by California's correction statute, Civil Code § 48a ("Section 48a"), applies to television talk shows. He ultimately rejected arguments that Section 48a only applies to "hot news."

This slander case involved the broadcast by Univision, the largest Spanish language television broadcaster in the United States, of an allegedly slanderous statement made by a celebrity guest on one of its television talk shows. Section 48a expressly limits a plaintiff's recovery in an "action for damages for the publication of a . . . slander by radio broadcast" to special damages unless the plaintiff, within twenty days, serves on the broadcaster "a written notice specifying the statements claimed to be [slanderous] and demanding that the same be corrected." Civ. Code § 48a(1). (The term "radio broadcast" includes both visual and sound radio broadcasting, i.e., television and radio. Civ. Code §48.5(4).) Special damages are defined in Section 48a as out-of-pocket economic losses; they do not include general damages, i.e., loss of reputation or emotional distress, nor do they include punitive damages. Relying on Section 48a, the Univision defendants filed a motion *in limine* seeking to exclude at trial all evidence of general and punitive damages on the ground that the plaintiff had failed to serve them with any demand for a correction within the statutory time period.

The plaintiff opposed the motion, contending that Section 48a does not apply to all television broadcasts, but rather only to those involving "the immediate dissemination of news." Plaintiff argued that the Univision talk

(Continued on page 6)

CALIFORNIA CORRECTION STATUTE HELD TO APPLY TO TELEVISION TALK SHOWS

(Continued from page 5)

show was "entertainment" and not "news," and thus did not fall within the protection of Section 48a. In support of this position, the plaintiff relied on *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991 (1983), which held that the *National Enquirer* did not come within the purview of Section 48a because it was a "magazine" rather than a "newspaper." *Id.* at 1000-01. In reaching its decision, the *Burnett* Court had noted, among other things, that the *Enquirer* did not carry timely news stories.

The Univision defendants contended that the question in *Burnett* was wholly unrelated to the one at issue in *Martinez*. In *Burnett*, the opinion focused on whether the *National Enquirer* could be characterized "as a newspaper [] within the contemplation of section 48a," *id.* at 1004, as opposed to a magazine, which the *Burnett* Court held is not protected by Section 48a. The Court did not even address the issue of television broadcasts and, more importantly, it never addressed the issue of whether Section 48a covers only news. Indeed, the Univision defendants pointed out that while *Burnett* involved a libelous gossip column, the Court never suggested that Section 48a did not apply because the column was entertainment rather than news.

Relying on *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121 (1950), the plaintiff also argued that the most fundamental consideration in determining the applicability of Section 48a is "the manner of operation of the publisher or broadcaster," with a focus on the issue of timing. *Werner*, countered the Univision defendants, stands for no such principle. The *Werner* Court addressed the constitutionality of Section 48a, and in the process of concluding that the statute is constitutional, the Court, among other things, discussed "the interests of the public in the dissemination of news." 35 Cal. 2d at 136-37. In other words, because *Werner* simply did not address

the scope of Section 48a, it was neither controlling nor instructive in this case.

The Univision defendants noted further that not only did none of the case law interpreting Section 48a purport to draw a distinction between television programs based on their content, the clear language of Section 48a makes no such distinction. Section 48a expressly applies to "radio broadcast[s]" which are defined by Civil Code § 48.5(4) to include both visual and sound radio broadcasting, i.e., television and radio, without restriction. Thus, the clear and express language of Section 48a was not open to interpretation. The Legislature had clearly stated when Section 48a applies, and it was not open to the Court to reverse that legislative judgment.

The Univision defendants also emphasized that plaintiff's interpretation of Section 48a was unworkable -- courts would have great difficulty in drawing meaningful distinctions between "news" programs and, for example, "entertainment" programs. Such vague standards would lead to inconsistent results and incessant litigation.

Although the Court had tentatively ruled in favor of the plaintiff, it ultimately adopted the position advanced by the Univision defendants. After extended oral argument and after taking time to review all of the cases interpreting Section 48a, the Court held that "courts impliedly have found that the statute encompassed more than news, at least with respect to television and radio broadcasts. Further, by deciding such a wide gamut of cases involving slander by television under section 48a, these courts convey the impression that section 48a applies to *all* television broadcasts." *See, e.g., Arno v. Stewart*, 245 Cal. App. 2d 955 (1966) (television dance show); *White v. Valenta*, 234 Cal. App. 2d 243 (1965) (commercial).

Having concluded that Section 48a applied to the Univision talk show, the Court then held that a letter written by plaintiff to the Univision defendants within twenty days of his knowledge of

the broadcast did not demand a correction or retraction as required by Section 48a. In his letter, the plaintiff had identified the allegedly slanderous statements, stating that he found them "humiliating and degrading," but then concluded with the statement, "I am consulting with an attorney to find out my options in responding to this bizarre and slanderous attack." No demand for correction was made, although the plaintiff enclosed a letter he had sent to the celebrity guest demanding that he apologize for the statements that he had made. The Court held that under Section 48a the plaintiff was required to "specifically demand a retraction or correction" and that he had not done so here. *See, e.g., O'Hara v. Storer Communications, Inc.*, 231 Cal. App. 3d 1101, 1106 (1991) (concluding that a conditional demand for correction failed to satisfy Section 48a); *Farr v. Bramblast*, 132 Cal. App. 2d 36, 43 (1955) (holding that letter demanding that defendants attend a meeting to arrange for a retraction did not comport with the requirements of Section 48a), *disapproved on other grounds, Field Research Corp. v. Superior Court*, 71 Cal. 2d 110, 114 n.4 (1969). The Court thus limited any recovery plaintiff could obtain to his out-of-pocket economic losses, which were only a few thousand dollars.

The Univision defendants were represented by Rex Heinke and Edith Ramirez of Gibson, Dunn & Crutcher and Henry Baray and Rachelle Bin of the Univision Law Department.

SCIENTOLOGISTS SEIZE FILES & RECORDS

(Continued from page 1)

Lawrence Wollersheim of Boulder. "They took thousands and thousands of pages, maybe 100,000 pages or 50,000 pages. This information is mailing list and records from 8,500 victims of cults. Their confidential stories of how their lives were ruined by cults are now in the hands of Scientology. This is absolutely insane. There was no due process."

Indeed, in both instances the seizure orders were obtained *ex parte* and apparently neither court gave much consideration to the Fourth Amendment, let alone the First Amendment, implications of their actions.

After reporting on the dispute and the seizure in Virginia, *The Washington Post* found itself a defendant in the Virginia litigation, successfully fending off an attempt by the Scientologists to enjoin any further use of what is alleged to be confidential, copyrighted L. Ron Hubbard writings and to seize what documents were in the possession of the *Post*.

Defendants in Colorado have now defeated a preliminary injunction motion in the federal district court and the court has ordered immediate return of all of defendants' property that was previously seized. A hearing on a preliminary injunction and a motion by defendant to vacate the seizure order is pending in Virginia, with a hearing scheduled for Friday, September 15, 1995.

As reported in the March *LDRC LibelLetter*, the church was successful in federal court in California earlier this year in enjoining a church critic from "posting" church documents onto the Internet but failed to obtain a preliminary injunction against the bulletin board operator or the Internet provider. Nevertheless the underlying suit for violation of copyright and trade secret is proceeding against all three defendants in the Northern District of California. *Religious Technology Center v. Netcom On line Communications Service, Inc.* Case No.

SCIENTOLOGISTS SEIZURE ORDERS : An Editor's Note

Most media lawyers are familiar with the Scientologists and their use of litigation and threats of legal action with respect to material they find unfavorable. The concept of using the seizure provisions of the Copyright Act, however, is a new development and one that we think you should all look at very seriously. Found in 17 U.S.C.A. Section 503, the Rules of Practice As Amended which were adopted by the Supreme Court seemingly decades ago to effect the remedies under the Act, appear after Section 501 in 17 U.S.C.A.

While this current troubling group of cases primarily involve disputes between Scientology and former members, there is nothing to suggest that the same remedy provisions could not be used by aggressive plaintiffs against newsletter publishers, freelance writers, and even major media, to seize allegedly copyrighted materials in their possession. The First Amendment Privacy Protection Act, 42 U.S.C.A. Section 2000aa (1980), intended to inhibit searches by law enforcement in newsrooms — enacted post-*Zurcher* — does not seem to apply to the use of federal marshals to effect searches and seizures authorized in civil cases under the Copyright Act.

As you will see from the discussion of the cases in the adjoining article, the media was handled differently from the dissidents, at the very least because the Scientologists did not seek an *ex parte* seizure order against the *Washington Post*. But even were we all to believe that no one would attempt *ex parte* proceedings to seize material right out from the newsrooms of major media, this use of the Copyright Act remedies provisions against sources or smaller publishers or authors could have an impact on various stories of interest to the public and ultimately, how the media is able to operate. Perhaps just as importantly, the major media should be sensitive to what we see as a gross invasion of First Amendment rights (and quite possibly Fourth Amendment as well) of those who seek to discuss a controversial issue clearly of public importance.

C95-20091 RMW, (N. D. Cal.)

What follows is a brief summary of the recent seizures, and the opinions issued to date in *The Washington Post* preliminary injunction hearing and the Colorado district court preliminary injunction hearing.

Plaintiff in all of these actions is Religious Technology Center. Described by defendants in the Colorado suit as the "alter ego" of the Church of Scientology, Religious Technology Center purports to hold the license to the copyrights in the writings of L. Ron Hubbard, founder of Scientology.

Religious Technology Center v. Lerma et al., Civ. Action No. 95-1107-A (E.D. Virginia.)

On August 12, 1995, acting under a seizure order and accompanied by federal marshals, lawyers for and representatives of the plaintiff and computer technicians entered the home of Arnaldo Lerma and removed his computer, all his floppy disks which

included his client list and his telephone directory.

The order, along with a TRO, was granted *ex parte* on August 11 by Judge Leonie M. Brinkema of the Eastern District of Virginia, in connection with a copyright and trade secrets suit brought by Religious Technology Center. The suit, brought against Lerma and his Internet provider, Digital Gateway Systems ("DGS"), was filed after Lerma "posted" copies of an affidavit from a California suit which, in its exhibits, included portions of various "Advanced Training" (AT) tracts that the church contends are protected by copyright and as trade secrets. The TRO enjoined defendant from all unauthorized use, distribution or copying of the Advanced Technology and from destroying, altering, concealing or removing from the district any work of the L. Ron Hubbard in his possession.

A hearing on the preliminary injunction and on Lerma's motion to

(Continued on page 8)

SCIENTOLOGISTS SEIZE FILES & RECORDS

(Continued from page 7)

vacate the seizure is scheduled for September 15, 1995, before Judge Brinkema. Although Lerma has now received back a "cleansed" computer, allegedly only plaintiff's copyrighted materials removed, other of Lerma's property remains in the hands of plaintiff or a third-party computer analyst. Lee Levine, Michael Sullivan and Elizabeth Koch, of D.C.S. member Ross, Dixon & Masback, are representing Lerma.

The same evening, agents of the church paid a surprise visit to the home of a *Washington Post* reporter to whom Lerma had sent copies of the affidavit and its attachments, seeking their return. Although the *Post* — at Lerma's request — subsequently returned the documents, it later obtained them from the court file in which they were originally entered, a now-discontinued libel suit filed several years ago by the church against another former Scientologist, Steven Fishman.

On August 19, the *Post* ran a story on the Lerma suit and the seizure of his computer in which it quoted briefly from the Scientology tracts. The church responded by filing an amended complaint that added the *Post* and two of its reporters to the copyright and trade secret suit and sought to enjoin the paper from "copying, disclosing, using, displaying, or reproducing" the AT materials. Christopher Wolf and Charles Sims, of D.C.S. member Proskauer Rose Goetz & Mendelsohn, and Hazel & Thomas of Virginia represented the *Post*. Judge Brinkema issued her opinion on August 30, 1995.

The *Post*: No Prior Restraint

In analyzing the church's motion for a preliminary injunction, the court balanced the risk of "irreparable harm" to the church if the motion was denied against the harm to the *Post* if it was granted, examined the church's likelihood of success on the merits, and considered the interest of the public.

Slip opinion. at 3. On essentially all these measures, Judge Brinkema found for the defendants.

The court held that the balance of equities profoundly favored the defendant. Given the obvious newsworthiness of the dispute between the church and its critics, an injunction would have impaired the ability of the paper and its reporters to report on the news. Moreover, Judge Brinkema found that the church did not even remotely meet the "heavy burden" needed to overcome the "strong presumption against the constitutionality" of a prior restraint on expression:

"Plaintiff argues that the dismissal of the AT documents would cause an irreparable injury, namely future copyright infringement and trade secret misappropriation. . . . If a threat to national security was insufficient to warrant a prior restraint in *New York Times Co. v. United States*, the threat to plaintiff's copyrights and trade secrets is woefully inadequate." *Slip op.* at 4.

Indeed, the court found the possible harm to Scientology from publication of the documents to be "at best slight." *Id.* at 5. The documents were so esoteric that they were capable of being understood only by followers of Scientology and not by the general public. And, in an interesting twist on Scientology's success in prior litigation against the IRS in obtaining status as a church, Judge Brinkema observed that "Scientology's status as a religious organization undermines any theory of loss that would depend on its followers' desire to cheat the Church by obtaining these teachings through unauthorized means." *Id.*

In a section of the opinion that may augur well for Lerma, as well as the *Post*, Judge Brinkema characterized the church's likelihood of success on the copyright and trade secrets claims as "far from a foregone conclusion." *Slip op.* at 5.

For the purpose of the church's motion, Judge Brinkema assumed that the documents were protected by copyright and that the *Post*'s actions constituted copying, although she noted that both assumptions "would be significant issues in this case." *Id.* at 6. She then confined her evaluation of the copyright claim to the *Post*'s fair-use defense under § 107 of the Copyright Act. *See* 17 U.S.C. § 107 (setting forth a nonexclusive list of factors, including (1) the purpose of the defendant's use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the use, and (4) the effect on the plaintiff's market for the copyrighted work).

With respect to the first of the four fair-use factors, the purpose of the defendant's use, the court concluded that the quotation from the church documents in the *Post* article constituted news reporting, one of the specific examples of fair use contained in the introduction to § 107. *Slip op.* at 7. The original copying of these documents from the California court files constituted research in preparation for news reporting and was also necessary to allow the *Post* to report accurately on their contents.

As to the second fair-use factor, the nature of the copyrighted work, the court noted that the scope of the fair-use doctrine is greater with respect to factual than creative or literary works. *Id.* at 7-9. Although Judge Brinkema pointed to some dispute among courts as to whether L. Ron Hubbard's writings were primarily factual and informational or creative and literary, the church had in its pleadings itself characterized the AT tract as principally informational.

The court rejected the church's contention that the unpublished nature of some of the AT documents somehow precluded a finding of fair use. Although the unpublished nature of a document had assumed a heightened importance in *Harper & Row v. Nation Enterprises*, Judge Brinkema held that it was of minimal concern in the instant

(Continued on page 9)

SCIENTOLOGISTS SEIZE FILES & RECORDS

(Continued from page 8)

action because the *Post* had not interfered with the church's right of first publication and had quoted only sparingly from the text. Moreover, the court noted that Congress had amended the Copyright Act following *Harper & Row*, in order to make clear that the unpublished nature of a work is not dispositive: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the [fair-use] factors."

With respect to the third fair-use factor, the amount and substantiality of the underlying work copied, Judge Brinkema noted that only a "minute portion" of the AT documents were quoted in the article. Slip op. at 10. Although 103 pages were allegedly copied from the court files, the Court found that "the sheer quantity of the documents copied" could not defeat the fair-use claim when only a few lines were included in the article.

Finally, with respect to the fourth fair-use factor, Judge Brinkema found it unlikely that the defendants' use would have a "significant negative effect" on the plaintiff's market for the AT documents. *Id.* For one, the quotations in the *Post* article were so limited as to preclude Scientologists seeking advanced training from using them in place of the full church text. Moreover, by the church's own admission many parts of the advanced training require the presence of a trained Scientology minister, and thus the *Post* article could not have functioned as a substitute.

The church contended that the fair-use doctrine was unavailable because the AT tract was acquired in an unlawful fashion, but Judge Brinkema rejected this argument, noting that it had been copied from public records at a time when no sealing order was in place. Slip op. at 10-13.

Judge Brinkema found the church's trade secrets claim no more promising than its copyright claim. *Id.* at 14. One of the prerequisites of a trade secrets

action is that the material "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its declaration or use . . ." *Id.* at 14 (italics added). Since the material had been posted onto the Internet, the plaintiff could not claim that it was not "generally known." Moreover, the church had not established that the documents provided it with any economic advantage over competitors.

Finally, the court found a strong public interest in "the unfettered ability of the *Post* to report on the news." *Id.* at 15. Combined with the plaintiff's inability to demonstrate a likelihood of success on the merits and a balance of equities that strongly favored the defendants, Judge Brinkema denied the plaintiff's motion: "The balance of harms is heavily tilted towards the defendants, and the plaintiff's likelihood of success on the merits is insufficient to right the scale. Finally, the public interest and the constitutional presumption against prior restraint weigh heavily against the plaintiff."

Judge Brinkema cautioned that her discussion of the fair-use doctrine must be understood in the context of the pending motion, *id.* at 13-14, but it may nevertheless augur well for her ruling on the preliminary injunction against Lerma as well as the *Post*. Although Lerma is not technically in the business of reporting the news, the Internet essentially offers anyone with a computer, a modem, and access the opportunity to function as a publisher. Criticism — in which Lerma was clearly engaged — is one of the examples of fair use provided in the introduction to § 107. Moreover, only by use of their own words could Lerman adequately support his criticism of the church's techniques.

The analysis of the other fair-use factors would not seem to be affected by substitution of Lerma for the *Post*, with the possible exception of the amount and substantiality of the use, although even

here there are questions about the quantity actually used by Lerma.

Religious Technology Center v. Wollersheim et al., Civ. Action No. 95-K-2143 (D.Colo. 1995)

Preliminary Injunction Denied Seizure Order Vacated

Meanwhile, on August 22, in Colorado, the homes of Scientology critics Lawrence Wollersheim of Boulder and Robert Penny of Niwot were raided by U.S. marshals armed with a court order empowering them to seize both men's computers, containing hundreds of thousands of pages of sensitive documents and records, along with the allegedly infringed copyrighted church papers.

Wollersheim and Penny are both former members of the church who established a non-profit corporation, F.A.C.T.Net ("Fight Against Coercive Tactics Network") which maintains a library of information on Scientology, a bulletin board system on the Internet, and publishes a newsletter that appears both in print and electronic versions. Wollersheim, Penny and Lerma are members of the board of F.A.C.T.Net which is dedicated to informing the public about the public controversy surrounding Scientology. With the seizure, F.A.C.T.Net was effectively shut down.

As in the Virginia action, the court issued its seizure order and a TRO *ex parte*, apparently without consideration of the First Amendment implications of its action. The order in the Colorado suit was virtually identical to that issued in the Virginia suit. Tom Kelley, of D.C.S member Faegre & Benson, is representing F.A.C.T.Net, Penny, and Wollersheim.

A hearing on the plaintiff's motion for a preliminary injunction commenced Friday, September 8.

The judge issued a decision from the bench on September 12, denying plaintiff's request for a preliminary injunction, vacating the seizure order,

(Continued on page 10)

SCIENTOLOGISTS SEIZE FILES & RECORDS

(Continued from page 9)

and ordering the immediate return to defendants at plaintiff's expense of all seized materials, in the exact conditions that they were when taken. He ordered the defendants to maintain the status quo as to the possession of the materials in question and restricted them from making any but fair use, in the copyright sense, of the materials.

The defendants were prohibited from making any additional copies or distributing copies of the materials. This latter requirement is similar to that placed upon the *Washington Post* in the Virginia action.

The court rejected plaintiff's request that he stay the return of the materials until appeal was complete, stating that to do so would continue to leave the defendants unable to continue their very business and would, in effect, act as an injunction upon all of their operations. The plaintiff indicated that they would take an immediate appeal from the

judge's ruling.

Noting that an injunction is an extraordinary remedy, "which is best used sparingly, if at all," and that its purpose is to do no more than preserve the status quo, the court applied a four part analysis to the request for injunctive relief. Reporter's Transcript Ruling at 3.

First, the court found plaintiff had not established a likelihood of ultimate success on either the copyright or the trade secrets claim. Indeed, accepting the defendants' arguments, the judge asserted that there was no probability of plaintiffs succeeding on the copyright infringement claim because the use of the materials by defendants was for purposes of criticism, comment, or research constituting a protected fair use under the Copyright Act.

As to the trade secrets claim, the court found that the evidence showed that the materials were neither secret nor within the definition of trade secrets under Colorado law.

As to irreparable harm, the court found that plaintiff had not met its burden, the evidence showing neither that it would lose competitive advantage nor that the defendants were using the materials for commercial purposes. In balancing the hardships, however, the evidence did show that an injunction would harm the defendants by infringing upon their right to make fair use of the materials and virtually crippling their ability to operate F.A.C.T.Net in its entirety.

Finally, with respect to consideration of public interest, the court held that the "public interest is served best by the free exchange of speech and ideas on matters of public interest". Reporter's Transcript Ruling at 5.

Defendants, true to their assertion before the court at the hearing, filed a notice of appeal on September 13, 1995, with the Tenth Circuit Court of Appeals.

In Brief...

Malcolm's Missing Notes Found!

Janet Malcolm's missing notes, so disputed in the decade long litigation with Jeffrey Masson, appear to have surfaced at long last. According to a column written by Anthony Lewis for *The New York Times*, August 25, 1995, the notebooks containing the statements contested in the suit were found by Ms. Malcolm's two-year old granddaughter on the bottom of a book shelf in her country home. Using the find of these notebooks, and Mr. Lewis' conclusion that Ms. Malcolm was telling the truth all along about the validity of her quotations about what Dr. Masson had to say about himself, Anthony Lewis took the judicial system to task in his *New York Times* op-ed piece.

Having seen the notebooks, which Masson testified were not used during the interviews, and the three crucial Masson quotations which generated over 10 years of litigation, himself, and believing them to be genuine, Lewis came to the conclusion that, "Mr. Masson's sworn statement that [Malcolm] took no notes was as false as his denials of having said things that turned out to be on tape."

Turning his attention to the courts, Lewis argued that, "A sensible legal system would not insist that a plaintiff be able to get his case to a jury when his only evidence is his alleged memory and he has made false claims in that very case." Lewis continued, "A sensible system would not put a writer under a debilitating burden for 10 years because she had a wealth of evidence but could not locate some handwritten notes." Although, as Lewis pointed out the legal bills incurred by Malcolm and her publishers have come to "roughly \$2.5 million," it is, according to Lewis, "the psychological burden of felt injustice that matters."

Finally, Lewis noted the irony in the words of Ninth Circuit Court of Appeals Judge Alex Kozinski, who wrote two opinions favoring Masson, which reminded the press of their responsibility "not to abuse the public trust," by pointing out that, "Judges have a responsibility to prevent such travesties of justice."

DCS Member Moves

Joyce S. Meyers, formerly of Miller, Dunham, Doering & Munson of Philadelphia, has announced that she has recently joined the firm of Montgomery, McCracken, Walker & Rhoads, also of Philadelphia, as a partner in the litigation department.

YOU SHOULD HAVE ALREADY RECEIVED YOUR INVITATIONS TO THE ANNUAL DINNER AND DCS BREAKFAST. PLEASE CALL LDRC IMMEDIATELY IF YOU HAVE NOT AS YET RECEIVED YOURS.

THE LDRC ANNUAL DINNER

Presenting LDRC's *William J. Brennan, Jr. Defense of Freedom Award* to

JUSTICE HARRY A. BLACKMUN

LDRC is truly honored to be able to invite all of you to spend this evening with Justice Blackmun as our esteemed guest.

PLEASE NOTE NEW DATE, TIME AND LOCATION:
THURSDAY EVENING,
NOVEMBER 9, 1995 at 7:30 P.M.

THE ANNUAL DINNER HAS MOVED --

- * New Night: Thursday
- * New Location: The Sky Club Atop the Metropolitan Life Building

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NINTH ANNUAL MEETING OF THE DEFENSE COUNSEL SECTION
THE MORNING AFTER THE ANNUAL DINNER**

**Friday, November 10, 1995
7:00 a.m. to 9:00 a.m.**

**Crowne Plaza Manhattan Hotel
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