

# LDRC

Libel  
Defense  
Resource  
Center

## LIBELLETTER

Reporting Developments Through September 22, 2000

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### **NOTE THE CHANGES IN SCHEDULE**

#### **LDRC ANNUAL DINNER**

MONDAY, NOVEMBER 13, 2000

7:30 P.M.

*Cocktail Reception at 6:00,*

*Sponsored by Media/Professional*

#### **DCS BREAKFAST**

TUESDAY, NOVEMBER 14, 2000

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

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

#### **NAA/NAB/LDRC CONFERENCE**

##### **PLANNING MEETING**

TUESDAY, NOVEMBER 14, 2000

12:00 P.M.

*All LDRC Members are Welcome*

#### **THE LDRC INSTITUTE/FIRST AMENDMENT CENTER EDUCATION PROJECT**

#### **TEACH-IN ON FRED-FRIENDLY SEMINARS**

WEDNESDAY, NOVEMBER 15, 2000

10:00 A.M.

*See Enclosed Flier for Sign-Up*

All of these changes in the schedule have been the result of the last-minute change in the scheduling of the PLI Communications Law Conference and our efforts to accommodate those of you who attend PLI in addition to the LDRC events (and in addition to enjoying the just great get-together feeling of these annual days in No-

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## NOTE THE CHANGES IN SCHEDULE

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vember). Invitations to the ANNUAL DINNER and the DCS BREAKFAST were mailed and are enclosed with this issue of the LDRC *LibelLetter*.

A description of THE LDRC INSTITUTE/FIRST AMENDMENT CENTER EDUCATION PROJECT is also enclosed with the LDRC *LibelLetter*. Contact David Heller, LDRC, with any questions.

The first meeting of the Planning Committee for the NAA/NAB/LDRC Conference will be held at the offices of:

Davis Wright Tremaine LLP  
1740 Broadway  
New York, NY 10019

starting at noon. Bring your own sandwich please. This Committee is a self-styled group of volunteers, so please come to the meeting if you have any interest in the participating in this project. You need no special invitation. If you have any questions about the Planning Committee, contact Peter Canfield (Dow, Lohnes & Albertson, Atlanta, GA), Dan Waggoner (Davis Wright Tremaine, Seattle, WA), or Sandy Baron, LDRC.

defamatory meaning in an article which refuted the very implications about which the plaintiff complained.

In June 1998, CNN broadcast an investigative report regarding "Operation Tailwind," a secret American military operation in Laos in 1970. The report alleged that U.S. operatives deployed nerve gas on a civilian population, and that American defectors were the targets of the raid. CNN later retracted the story, although the story's producers continue to insist that the story was accurate.

On June 8, 1998, Major John L. Plaster, a retired Green Beret who was in contact with special forces personnel during the execution of Operation Tailwind, posted a refutation of the nerve gas allegations on an Internet web site called specialforces.com. The posting referred to Lieutenant Robert Van Buskirk, who was also involved in the mission, as a primary source of the CNN story. Subsequently, Plaster sent an article making similar points to the *New York Times*, which edited it and printed it as an op-ed piece on June 18, 1998.

On June 14, 1999, more than one year after the Internet posting, Van Buskirk sued Plaster and the *Times* for defamation and intentional infliction of emotional distress.

Curiously, in his suit against Plaster and the *Times*, Van Buskirk claimed that by naming him as a source of the Tailwind story, the op-ed implied that Van Buskirk committed war crimes, although Plaster's very purpose was to deny that any war crimes were committed in the operation.

The *Times* filed motions to dismiss the claims based on the web posting and on the op-ed piece. It argued that Van Buskirk had filed suit after the statute of limitations had run with respect to the Internet posting, and that the op-ed piece was a substantially true, protected opinion under the rule of *Moldea v. New York Times*, 22 F.3d 310 (1994), cert. denied 513 U.S. 875 (1994), and not defamatory.

The court applied New York law to the case, which has a one-year statute of limitations on defamation claims.

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## Tailwind Redux: Federal Court Dismisses Internet/Print Libel Suit Single Publication Rule Applied To Web Posting

U.S. District Judge Michael B. Mukasey in the Southern District of New York recently dismissed defamation and intentional infliction of emotional distress claims brought against an individual and the *New York Times* over an op-ed piece and an internet posting refuting the allegations of CNN's infamous report on "Operation Tailwind." *Van Buskirk v. The New York Times Co.*, No. 99 Civ. 4265, 2000 U.S. Dist. LEXIS 12150 (S.D.N.Y. Aug. 23, 2000).

Applying the single publication rule, the judge found that the plaintiff had missed New York's one year statute of limitations with regard to a claim arising from the publication of the letter on the Internet. He further invalidated the claim against the *Times*, finding a lack of

## Fed. Ct. Dismisses Internet/Print Libel Suit

(Continued from page 2)

Van Buskirk argued that since the web article could be removed at any time, it was effectively “republished” continuously while posted on the web. District Judge Michael Mukasey rejected this argument, noting that New York has adopted the “single publication rule,” originally applied to newspapers and books, for Internet publication. *See Firth v. New York*, 184 Misc. 2d 105, 706 N.Y.S.2d 835 (N.Y. Ct. Cl. 2000).

Under this rule, “the publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of thousands of copies widely distributed, is, in legal effect, one publication which gives rise to one cause of action and that the applicable Statute of Limitation runs from the date of that publication.” *Gregoire v Putnam's Sons*, 298 N.Y.119, 123, 81 N.E.2d 45, 47 (1948).

The district court also rejected the plaintiff's argument that the single publication rule applies only to commercial publishers, since no New York case has held as such.

Therefore, since Van Buskirk filed his claim one week after the one-year limitations period applicable to defamation actions in New York had run, the claim based on the Internet posting failed.

Regarding the claim based on publication of the *Times* op-ed piece, the court said that the allegedly defamatory statements (essentially, those recounting that CNN had advanced claims that the military had dumped nerve gas on a village during an operation in which the plaintiff was involved) could not be defamatory in the context of the entire op-ed piece, the purpose of which was to completely refute CNN's allegations.

The court also dismissed the negligent infliction of emotional distress claim. “The *Times* article was an effort to disprove statements attributed to Van Buskirk suggesting that he had committed ‘war crimes,’ not an accusation of such crimes,” the court wrote. “Its authorship cannot reasonably be described as outrageous behavior. Accordingly, this claim should be dismissed.”

## Website Host Server Not Enough to Establish Personal Jurisdiction in Trademark Infringement Case

In the first case of its kind published in the Third Circuit, the U.S. District Court for the District of New Jersey has ruled that running a web site through a host server located in New Jersey is an insufficient connection to establish personal jurisdiction over a California-based newspaper. In *Amberson Holdings LLC, et al. v. Westside Story Newspaper, et al.*, 2000 U.S. Dist. LEXIS 12102 (D.N.J. August 22, 2000), the court declared, “[i]t is unreasonable that by utilizing a New Jersey server, defendants should have foreseen being haled into a New Jersey federal court. To hold otherwise would open the door to an unlimited scope of personal jurisdiction in the Internet world.”

The plaintiffs alleged two levels of trademark infringement in this action, both involving the defendants' use of a trademark owned by plaintiffs, “West Side Story.” The first involved the defendants' use of the trademark in their newspaper title. The second allegation of trademark infringement involved the defendants' registration and use of “West Side Story” as the basis for an Internet domain name, which defendants then assigned to a host server operated by a corporation in New Jersey. The web site earned substantial advertising revenue for the defendants.

When the plaintiffs contacted the defendants about the alleged infringement, the defendants invited them to purchase the domain name, an offer which the plaintiffs declined. A short time later Congress passed the Anticybersquatting Consumer Protection Act (P.L. 106-113 § 3010 (1999), *codified at* 15 U.S.C. sec. 1125 (d)), making it illegal to register a trademark as a domain name with the intent to later make a profit by selling it to the owner of the trademark. Defendants promptly added a disclaimer to the web site that stated it was not affiliated with *West Side Story*, the musical.

Since New Jersey's long arm statute allows courts to exercise jurisdiction to the maximum extent allowed by the Constitution, the court in this case centered its analysis on whether general Fourteenth Amendment Due Process considerations had been satisfied. In attempting to establish specific personal jurisdiction over

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## Website Host Server Not Enough to Establish Personal Jurisdiction

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the out-of-state defendant within New Jersey, the plaintiffs first highlighted the contract formed between the defendant and the New Jersey host server. The court, however, responded that “[i]t is unimaginable that such a contract, without any additional contacts, could serve to subject a defendant to personal jurisdiction.”

The plaintiffs further argued that the use by the defendants of a server in New Jersey bolstered the finding of minimum contacts. Citing *GTE New Media Services, Inc.*, 199 F.3d 1343 (D.C. Cir. 2000), the court said that “[a]ccess to a website reflects nothing more than a telephone call by

a district resident to the defendant’s computer servers.” The court rejected the idea that inter-computer transfers of information, “analogous to forwarding calls to a desired phone number through a switchboard,

should somehow establish sufficient contacts that would subject a defendant to personal jurisdiction,” and the court found that the contract alone was not enough justification to support a finding of minimum contacts.

In attempting to decide whether jurisdiction over the web site was warranted, the court looked to *Mink v. AAAA Development, Inc.*, 190 F.3d 333, 336 (5th Cir. 1999) and *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997). These cases established three different categories of Internet sites, with “interactive sites” used regularly to carry out business on the web by repeated transmission of computer files at one end of the spectrum, and “passive sites” for advertisement where information exchange is not possible on the opposite end. In between, there are “semi-interactive sites” that allow information to be exchanged with the host computer.

*Mink* held that for interactive sites, it is always proper to exercise personal jurisdiction, for passive sites it is never proper to exercise jurisdiction, and for the intermediate semi-interactive sites, the determining

factors are the amount of interactivity and commercial disposition of the site.

*Cybersell* instructs that in making this determination, the court must discover “something more” than mere advertisement or solicitation to show that the defendant purposefully directed his activities towards the forum state. If a website only gives its users product and contact information, or if it merely receives the name, address, and indication of a browser’s interest (without any opportunity to sign up for the service), then there are no grounds upon which to exercise personal jurisdiction in

the state where the host server is located.

To assess the level of interactivity, the court in this case carried out its own research of the website, discerning that the site in question displayed only information about the company, advertise-

ments for other vendors, and a chance to e-mail the company. The court therefore judged the site to be a “passive advertisement,” which alone was an insufficient basis for personal jurisdiction.

The court went on to note that even assuming for the sake of argument that defendants had purposefully availed themselves of the forum state, customary notions of “fair play and substantial justice” would still be offended if the defendants were subject to personal jurisdiction in New Jersey. The court held that the defendants could not have foreseen being hauled into a New Jersey court simply by using a New Jersey server. In addition, all of the “administration, maintenance, and upkeep” of the defendants’ website occurred in California. Finally, the defendants had never advertised, solicited, or conducted any kind of business in New Jersey. Accordingly, the court granted the defendants’ motion to dismiss since there were not enough “minimum contacts” to establish personal jurisdiction.

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***“It is unreasonable that by utilizing a New Jersey server, defendants should have foreseen being hauled into a New Jersey federal court. To hold otherwise would open the door to an unlimited scope of personal jurisdiction in the Internet world.”***

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## Wisconsin Prosecutors Revive Criminal Defamation To Combat Online Insults

By Paul Enzinna

More and more people disappointed in love or otherwise are turning to the Internet for retaliation. “Revenge sites” — some dedicated to individual targets — allow users to send anonymous curses, or even to post photos and comments. It may be “therapeutic,” as the *New York Times* recently quoted one user, but it can land you in jail. At least that’s the case in Wisconsin, where prosecutors have resurrected the law of criminal defamation to punish speech on the Internet.

Last month, a Waukesha, Wisconsin man pled guilty to criminal defamation for listing his ex-boss — who had recently fired him for stealing — on an Internet site for women seeking “sex on the side.”

David Dabbert, who was sentenced to 15 days in jail and two years probation, may be the first person convicted of criminal defamation for anonymous speech on the Internet, but he is not the first person charged with the crime. Earlier this year, state authorities investigated a Dodge County man accused of posing as his ex-wife’s new husband and posting an Internet solicitation for sex. Last year, Walter Karnstein of Pewaukee was charged with criminal defamation for posting nude photographs of his former girlfriend and her new boyfriend, along with “wording indicating a desire [to] engage in sadomasochistic behavior.”

As the court said in *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978), criminal defamation is most often used by the “ins” to prosecute the “outs.” Justice Douglas called it a “creation of the Star Chamber,” which made “everyone . . . a libeler who outraged the sentiments of the dominant party.” *Garrison v. Louisiana*, 379 U.S. 64 (1965).

Intended to prevent public unrest (by suppressing private insults, but primarily criticism of those in power) the English “common law of seditious libel” offered no defense for truthful statements. Remarkably, it survived the enactment of the First Amendment, and while most states allowed truth as a defense, they did so only when the truth was spoken “with good motives and for justifiable ends.” Only in *Garrison* did the Supreme Court begin to rein in criminal defamation by applying the standards of *New York Times v. Sullivan*.

But even with the gloss of that landmark case, crimi-

nal defamation remains a threat to unpopular speakers, and the Wisconsin cases raise the elemental question whether insults should ever be subject to criminal punishment. The acts being punished may have been the equivalent of writing numbers on a bathroom wall, but in these cases, Wisconsin prosecutors have applied the law of criminal defamation in a way that would be unthinkable had the “wall” been in a local bar. Even before *Garrison*, criminal defamation had fallen into virtual disuse, and in 1963, one commentator wrote that “under modern conditions, where the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.” Emerson, “Toward a General Theory of the First Amendment,” 72 Yale L.J. 877, 924 (1963). The drafters of the Model Penal Code agreed, writing that “[I]t seems evident that personal calumny . . . is inappropriate for penal control. . . .” Model Penal Code, Tent. Draft No. 13, 1961, 250.7, Comments, at 44.

Nevertheless, although it has largely disappeared from the courthouse, the law of criminal defamation survives in many states’ statute books, and at least in Wisconsin, prosecutors appear to have embraced it as a response to the special challenges posed to law enforcement by the Internet. One Wisconsin prosecutor suggested that the “enormous power” the Internet gives anonymous speakers may justify unusual tactics, such as the rebirth of criminal defamation. To be sure, the Internet gives insults a far wider audience than most other forums, and this increased exposure can frighten, or even endanger, the targets of the speech. Dabbert’s and Karnstein’s victims received e-mail in response to their postings from around the world and close to home. But while criminal defamation may be “the closest crime [prosecutors can] find” to reach this conduct, cases like these may have far-reaching effects that go beyond cyberspace, and they indicate that the new realities of the marketplace of ideas in the twenty-first century may test the limits of the First Amendment in unexpected ways.

David Dabbert pleaded no contest and was convicted, but Walter Karnstein’s motion to dismiss the charges against him on First Amendment grounds is pending.

*Paul Enzinna is a partner with Miller, Cassidy, Larroca & Lewin, LLP in Washington, D.C.*

## Actual Malice a Must for Presumed Damages in All NJ Public Issues Cases

By **Bruce S. Rosen**

Extending its “heightened” free speech protection to damages where there are issues of public concern, the New Jersey Supreme Court has ruled in a non-media case that an allegedly defamed teacher cannot rely on the doctrine of presumed damages absent a showing of actual malice. *Rocci v. Ecole Secondaire*, 165 N.J. 149, 755 A.2d 585 (August 1, 2000)

The 6-1 decision affirming but modifying a 1999 appellate ruling was significant as much for its authorship as its widening of libel protections. The author was Justice Peter Verniero, a 39-year-old newly appointed justice who was a Republican attorney general in the administration of New Jersey Governor Christine Whitman, and whose views on defamation

issues were previously unknown. Ironically, the lone dissenter was Justice Daniel O’Hern, who was a member of the liberal Wilentz Court in the 1980s.

The case involved a letter written by a chaperone who criticized a private school teacher for her behavior during a school trip. The letter, sent only to the plaintiff’s supervisor, alleged that the plaintiff drank excessively on the plane and failed to adequately control her students. The plaintiff alleged that as a result of the publication of the letter she suffered loss of earnings, grievous mental injury and was exposed to contempt and ridicule. However, plaintiff was unable to support any of the allegations for damages except her feelings of embarrassment in front of her students. The Court noted that it was the plaintiff, and not her supervisor, who distributed the letter to her students.

The trial court granted summary judgment, ruling the letter was not defamatory and that the plaintiff suffered no apparent money damages. The Appellate Division (323 N. J. Super 18, 731 A.2d 1205) affirmed, but acknowledged that the letter could be defamatory and concluded that the topic of the letter - a European vacation - did not implicate a public interest. The court held that pursuant to *Sisler v. Gannett Co.*, 104 N.J. 256, 516 A. 2d 1083 (1986), a plaintiff must prove that her reputation has been injured,

that she suffered pecuniary loss, or that she suffered extreme emotional distress.

One panel member dissented, concluding, just as Justice O’Hern of the Supreme Court would do, that proof of actual harm is not a prerequisite to plaintiff’s right to recover damages. (He said the plaintiff should be permitted to present her case to the jury without having to prove special damages other than “the damage to her good name”)

The majority of the NJ Supreme Court ruled that the public’s strong interest in the behavior of teachers led it to conclude that the plaintiff may not rely on the doctrine of presumed damages. “[W]e must ensure that our jurisprudence does not act to chill complaints about a teacher’s behavior in the presence of students or similar matters involving public interest,” the Court said, citing New Jersey’s key case involving

comment on issues of public interest, *Dairy Stores v. Sentinel Publishing Co.*, 104 N.J. 125, 516 A.2d 220 (1986). The reference to “public

interest” should allow defense attorneys a foothold against presumed damages in most every media case.

The Court noted that that the plaintiff did not incur medical expenses, missed no work, did not lose her job, did not miss any work and was permitted to chaperone subsequent European trips. In all, the Court said, the case was ideal for summary judgment:

The alleged defamatory material involves a matter of public concern, which is at the heart of the First Amendment and thus requires enhanced protection. We do not believe that in such a setting a plaintiff should be able to survive a motion for summary judgment when she has failed to provide any evidence of harm beyond her embarrassment.

The Court expressly reserved the question of whether the doctrine of presumed damages would apply to a private-figure plaintiff when no public interest is implicated.

*Bruce S. Rosen is a member of McCusker Anselmi Rosen Carvelli & Walsh in Chatham, New Jersey.*

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***The majority of the NJ Supreme Court ruled that the public’s strong interest in the behavior of teachers led it to conclude that plaintiff may not rely on the doctrine of presumed damages.***

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## Judgment For St. Martin's Press and Author Upheld

By Paul J. Slevin

In a decision dated August 2, 2000, the First Circuit Court of Appeals denied in its entirety libel plaintiff Robert Gray's appeal from various decisions of the United States District Court for the District of New Hampshire. *Gray v. St. Martin's Press and Susan Trento*, 221 F.3d 243 (1st Cir. 2000).

The case arose from a book entitled *The Power House: Robert Keith Gray and the Selling of Access and Influence in Washington* written by Susan Trento and published in 1992 by St. Martin's Press. As described by the First Circuit, "Focusing on Gray's career, the book sought to show the influence of powerful and well-connected lobbyists on the federal government." Nearly three years after the book's publication, Gray sued for libel over eight separate statements about him scattered throughout the 394-page book.

The trial court dismissed three of the eight statements as opinion and granted summary judgment on a fourth, finding that Gray was a limited-purpose public figure and could not establish actual malice as to that statement on the part of either defendant. The remaining four statements were tried in June 1999 to a jury, which returned verdicts in favor of the defendants.

Gray appealed from (a) the pre-trial dismissal of the four statements, (b) a ruling upholding Trento's assertion of the confidential source privilege with respect to one of her sources for one of the statements tried to the jury, and (c) the trial court's denial of his motion to amend his complaint to add twenty additional allegedly libelous statements.

### *The Ruling on Opinion*

The first issue that the First Circuit examined was the opinion issue. The three statements dismissed as opinion were:

1. "A senior Gray and Company executive insisted that Gray's closeness to the President and others was often faked. 'He completely faked his closeness with a number of senior administration officials.'" *The Power House* at 156.

2. "In the end, several Washington lobbyists feel

that Gray and Company ultimately failed because it offered very little real substance." *The Power House* at 322.

3. "Robert Crowley believed that '[William] Casey may have asked Gray to take on these controversial clients -- for the very purpose of spying on them.' If that were so it would explain why Gray considered countries like Libya, and took clients like Angola." *The Power House* at 260.

On the "faked closeness" statement, plaintiff contended that, whether or not his "closeness" to administration officials was capable of being proven true or false, the claim that he faked it could be proven false through his own testimony. Defendants responded by pointing out that the book made it clear that Gray did have a relationship with President Reagan and other administration officials. Therefore, when read in context, the statement at issue did not mean that he pretended to have a relationship he did not have, but rather that he had faked the degree of "closeness" he had -- an assertion that, defendants argued, could not be proven true or false.

### *Context is Key*

The Court accepted the defendants' argument, holding that:

"the book made quite clear that Gray did have contacts at the highest levels; the word 'fake' was used to imply that Gray was exaggerating his 'closeness.' This is just the kind of subjective judgment that is only minimally about 'what happened' but expresses instead a vague and subjective characterization of what happened. As we read the case law, the statement is protected opinion."

Context provided elsewhere in the book also proved dispositive as to the "ultimately failed" statement. Plaintiff had offered a hyper-literal reading of the statement as meaning that Gray and Company failed — *i.e.*, "stopped functioning" — *because* it offered little of

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real substance when in fact, according to plaintiff, it stopped functioning because it was bought up by a competitor for \$21 million.

The Court rejected the argument. As with the “faked closeness” statement, the Court stated that if the book had said that Gray and Company went bankrupt or did not make a profit, those would have been potentially actionable statements of fact. In fact, however, the book had clearly stated the purchase price, making clear, in the Court’s view, “that Gray’s company did not fail in any absolute sense.” Rather, the book suggested that the sale, while profitable, had “shattered” what the Court described as “Gray’s dream of owning the world’s largest public communications firm.” The Court concluded:

“Some might think it a success, rather than a failure, that his former employer found him competitive and competent enough to buy him out for millions ...; but what is ‘success’ in a situation like this one is very much a matter of opinion.”

The First Circuit’s decision on both of these statements reinforces a very important point in drawing the line between fact and opinion: an allegedly defamatory statement must be viewed in the overall context in which it appears. The Court refused plaintiff’s invitation to read the two statements literally and in isolation from the rest of the book. Rather, it read the statements in the context of facts provided elsewhere in the book, and rejected literalistic, dictionary meanings that it viewed as inconsistent with what the statements were really communicating.

### *Disclosed Facts Support Speculation*

As to the “spying” statement, the issue in the Court’s view was whether the statement “is shielded because it is conditional” and hence “speculative.”

The test, admittedly a very crude one, is

whether the statement is properly understood as purely speculation or, alternatively, implies that the speaker or writer has concrete facts that confirm or underpin the truth of the speculation. *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997); *Restatement (Second) of Torts* § 566, comment (c) at 173.”

The Court held here that “we see nothing that suggested that Crowley or the defendants were relying upon undisclosed facts.” Rather, the Court found that the use of the phrase “may have” and the disclosure of the supporting facts, not challenged by Gray, that he had “considered countries like Libya, and took clients like Angola” demonstrated that “the writer or publisher is merely speculating (‘if so’) about the inference.”

This holding, together with the Second Circuit’s decision in *Levin*, provides considerable leeway to writers who speculate on the possible implications of disclosed facts even if those implications would, if asserted as fact, be untrue and defamatory. The prerequisite for such leeway is that the speculation not suggest reliance on undisclosed facts.

While the Court noted the “spying” statement’s recitation of the unchallenged supporting facts that Gray had represented the Communist government of Angola and considered representing Libya, it said nothing about whether those facts were necessary to its holding. Query whether the result would have changed if the stated supporting facts had been false, or if there had been a disputed issue of fact as to their falsity, but not separately actionable (either because they were non-defamatory or because they were not stated with the requisite degree of fault).

It is worth noting that before reaching the opinion issue, the Court rejected defendants’ argument that since spying for one’s country is laudatory conduct, the statement was not in any event capable of a defamatory meaning. Rather, the Court held, a jury

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*The Court refused plaintiff's  
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statements literally and in isolation  
from the rest of the book.*

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could reasonably have found the implication that Gray had spied on his clients to be capable of a defamatory meaning since "it could easily harm Gray in dealing with clients."

### *Challenge to Public Figure Finding*

The fourth statement dismissed by the trial court prior to trial was:

4. "I think there's a degree of venality on the part of Bob [Gray] and lack of integrity which always took me aback. A lot of it he would justify as being a businessman, but there was very little real basic principle and an awful lot, to me, of over charging." *The Power House* at 165.

The trial court had denied defendants' early motion to dismiss this statement as opinion, but on a subsequent defense motion granted summary judgment to the defendants on the ground that Gray was a limited purpose public figure with respect to lobbying and would be unable to prove that either defendant had published the statement with actual malice.

On appeal, plaintiff challenged both the public figure and actual malice rulings.

The First Circuit first held that the relevant time period for determining the existence of a public controversy is the period "prior to and continuing up to the book's publication." The period had to stop at the book's publication, the Court stated, "to avoid bootstrapping."

The Court then held that the numerous press reports defendants had submitted to the trial court clearly demonstrated the existence of a public controversy about Washington lobbying from the early 1980s forward. Finally, the Court held that since he was one of the best known Washington lobbyists of the period and his lobbying and billing practices had themselves been the subject of press comment, "Gray was a central figure in this controversy." As a result, the Court affirmed the ruling that Gray was a limited purpose public figure.

In so holding, the Court rejected in a two-sentence

footnote Gray's arguments that (1) lobbying was too general a subject to be a public controversy for public-figure purposes and (2) Gray was no longer a public figure at the time of the book's publication. (One of Gray's claims in support of the latter argument was that of the 188 articles in the record from the period 1986-92 that mentioned Gray, "only 11 articles reference Gray in a headline." (emphasis added))

### *Not Vicarious Malice for Book Publisher*

Turning to the issue of defendants' actual malice, the Court first noted the parties' agreement that malice had to be established separately for each defendant. The Court added a cf. cite to a reference to vicarious liability in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253 (1974), thereby noting an important difference between newspapers such as the defendant in *Cantrell*, whose reporters are typically employees and who therefore would have vicarious liability for torts committed by their reporters, and book publishers, whose authors are typically independent contractors and who therefore do not have vicarious liability for their authors' torts. Since book publishers in any case have direct liability for what they publish, the significance of vicarious liability would be to burden the publisher with the author's knowledge of falsity (or, in a private-figure case, negligence).

The Court then turned to plaintiff's argument that he had produced sufficient evidence of reckless disregard on the part of each defendant to get to the jury. The Court's analysis of this issue reinforces principles of tremendous importance to libel defendants.

### *Malice and Sources*

As to Trento, plaintiff's argument on reckless disregard focused on the fact that the statement in suit had been made by Barry Zorthian, a former Gray and Company executive who was indisputably hostile to Gray. Zorthian had been fired by the company and then had sued it. The Court held, however, that "[p]rejudice...on the part of a source may suggest caution but does not preclude reliance."

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## Judgment For St. Martin's Press and Author Upheld

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Trento had also relied on a number of other sources for the statement. Plaintiff argued that those sources had little knowledge of the billing side of Gray's business, and that Trento should instead have relied on another source who said he had never heard of overbilling and should have interviewed other top Gray and Company executives who, Gray claimed, would have denied overbilling. The Court gave that argument short shrift, holding that:

"while refusing to seek out decisive witnesses may be a mark of recklessness in some circumstances, Trento already had multiple sources and was under no obligation to exhaust every possible witness before winding up her investigation."

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*The importance of the First Circuit's decision as to actual malice lies in its holdings that neither the source's hostility to the subject nor the subject's denial are sufficient to create an issue of fact as to actual malice.*

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### Prepublication Letters and Malice

As to St. Martin's, plaintiff's argument emphasized pre-publication letters his lawyer had sent to St. Martin's in which his lawyer alleged that there were inaccuracies in Trento's book proposal. The Court found those allegations insufficient to raise an issue of fact as to actual malice:

"[A]part from the fact that in this original protest [the statement in suit] was not specifically identified as false, simple denials by the subject are commonplace and, absent more, are normally not enough to premise a finding of actual malice."

Thus, the Court concluded, even if St. Martin's had some doubts about the accuracy of Trento's book proposal (which the Court mistakenly stated it had), "the proposal was followed by more than two years of research and there is no evidence that St. Martin's employees doubted the accuracy of Trento's final product."

The importance of the First Circuit's decision as to

actual malice lies in its holdings that neither the source's hostility to the subject nor the subject's denial are sufficient to create an issue of fact as to actual malice. Indeed, those holdings are apt to be quoted in many a libel defense brief. Plaintiffs like to take the position that negative statements by hostile sources are biased and should therefore be disregarded, while denials by the plaintiff himself and positive statements by friends and business associates should be treated as the unbiased truth.

The fact of the matter, however, is that denials by the subject and glowing references by friends of the

subject or people whose livelihoods depend on remaining in the subject's good graces are at least as unreliable, and probably more so, than negative statements

by enemies who may dislike the subject but have to worry about the potential consequences to themselves of spreading damaging lies.

### Source Privilege Upheld

The First Circuit's holdings on the final two issues were very fact-specific and therefore of less general interest.

First, the Court rejected plaintiff's appeal from the trial court's upholding of the confidential source privilege as to one of the sources for one of the statements tried to the jury. The Court, however, did not even reach the merits of the issue since the only prejudice plaintiff could have suffered from the trial court's ruling, to his ability to establish actual malice, was moot because the jury had found for the defense on the separate and independent ground that the statement was not a false and defamatory statement of fact of and concerning plaintiff (those four issues having been combined in a single special verdict question, although the only one defendant seriously contested

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## Judgment For St. Martin's Press and Author Upheld

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at trial was falsity).

Gray's only argument that the issue was not moot was a claim that, had the privilege been rejected and Trento still refused to reveal her source, the jury might have believed the source did not exist and therefore found the statement to be false. The Court rejected that argument, noting that Gray's own testimony was much better evidence of the statement's falsity, that the source's statement was inadmissible hearsay as to falsity and that in any event there was no real basis to doubt that a source did exist "since Trento produced redacted notes of her conversation with the source."

As a result, the Court affirmed — despite some sympathy for the plaintiff's position on the merits of the privilege issue.

### *No Right to Amend Complaint*

Finally, the First Court affirmed the trial court's denial of Gray's motion made three years after the start of the case to amend his complaint to add 20 additional allegedly defamatory statements. Defendants, in opposing the motion before the trial court, had emphasized that in a libel case each statement in suit is in many ways a separate trial (since the issues of falsity, fault and even public-figure status often have to be tried separately on a statement-by-statement basis) and here many of the statements Gray sought to add covered time periods and incidents far removed from those covered by the five statements then remaining in suit. Therefore, defendants argued, plaintiff's motion, if granted, would have quintupled the scope of the trial and hence its burden on defendants and the court. We suspect this made a tremendous impression on the trial court, which denied the motion as untimely and unduly prejudicial.

The First Circuit, reviewing the trial court's decision using an abuse-of-discretion standard, affirmed, noting that "Gray had the book for six years before he moved to amend and at the outset of the litigation could have easily decided which charges he believed to be false."

*Paul Slevin is V.P. & Associate General Counsel for St. Martin's Press, Inc.*

## Clinton's "War Room" Not Actionable

By Laura R. Handman and Carol Fein Ross

If you are suffering from Jennifer – Paula – Monica fatigue, read no further. If you can bear to revisit these sordid subjects one more time, the decision by a Nevada federal judge in *Flowers v. Carville, et al.* CV-5-99-1629 (DWH/LRL), (D. Nev. Aug. 24, 2000) is worth examining, both for useful procedural defenses and broad protection for statements made in a political context.

In November, 1999, Jennifer Flowers brought defamation, false light and conspiracy claims initially against James Carville, George Stephanopoulos and Little, Brown and Company, the publisher of Stephanopoulos' 1999 book, *All Too Human: A Political Education*. In January of 2000, she amended her complaint to add First Lady Hillary Rodham Clinton as part of the conspiracy and for intrusion into seclusion and publication of intimate private facts. The thrust of the complaint is that these three individuals had banded together, starting with the campaign "war room" in 1992, to smear and defame Ms. Flowers. Ms. Flowers is represented by Larry Klayman of Judicial Watch, a conservative legal advocacy group which has brought some 30 suits against the Clinton Administration or those connected with the Administration. (See [judicialwatch.org](http://judicialwatch.org) for the up-to-date listing).

For specifics, Flowers cited statements that Carville and Stephanopoulos made in their respective campaign memoirs and on separate appearances on "Larry King Live" in January and February of 1998, shortly after the Lewinsky story broke. The statements included accounts of the contemporaneous reaction of the 1992 Clinton campaign to the initial publication by the *Star* magazine of allegations of an affair, denouncing the story as "tabloid trash," "crap" and "garbage day."

Stephanopoulos and Carville also discussed Flowers' disclosure of her tape-recordings of telephone conversations with then-Governor Clinton. Both men referred to contemporaneous news reports on CNN and KCBS (the CBS owned and operated station in Los Angeles), which had each hired tape experts who analyzed copies of the Flowers tapes and suggested on air they might have been

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## Clinton's "War Room" Not Actionable

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"selectively edited."

As to Mrs. Clinton's alleged acts of intrusion, Flowers relied on an account in a third-party book, suggesting that Mrs. Clinton had allegedly hired a private investigator in 1982 to discover the "other" women, and cited suspicious break-ins in Flowers' Little Rock apartment in 1991. Flowers, herself the author of two books, *Passion and Betrayal* and *Sleeping with the President*, also alleged that Hillary Clinton invaded her right to privacy by publicly disclosing private facts, although Flowers did not specify other than to say generally that they involved "parental, family, marital and sexual relations and insurance claims."

When challenged to allege special damages (as required under Nevada law for broadcast slander in the absence of a retraction demand), Flowers sought to amend her complaint to claim that various hotels and lounges in Las Vegas refused to engage her as a singer in 1995, 1998 and 1999, and that an invitation to perform in 1994 at an annual "Greer Garson Gala" event in Dallas was rescinded.

On August 24, 2000, Judge Philip M. Pro granted defendants' motions to dismiss and rejected plaintiff's motions to amend the complaint a second and third time. The claims arising out of Carville's 1994 book, *All's Fair: Love, War and Running for President*, co-authored with his wife, Mary Matalin, and Stephanopoulos' February 1998 appearance on "Larry King Live" were all dismissed on statute of limitations grounds. The February 1998 appearance was dismissed despite the fact that it was within Nevada's two-year statute of limitations.

### *Borrowing Statute Analysis*

Similar to many other states, Nevada has a borrowing statute which applies the statute of limitations of the jurisdiction where the cause of action arose. Under Nevada law, the cause of action for this purpose is deemed to arise where defendant Stephanopoulos was residing in February 1998 – in this case, New York, which has a one year statute of limitations which had expired by the time plaintiff commenced this action in November, 1999.

The court held Nevada's narrow exception to the borrowing statute, applicable to a Nevada citizen who "has

held the cause of action from the time it accrued," did not apply since Flowers conceded that she was not a citizen of Nevada at the time the cause of action accrued in February of 1998.

The court rejected plaintiff's two efforts to counter the limitations bar. Citing language in *Keeton v. Hustler*, 465 U.S. 770, 777 (1984) ("[t]he tort of libel is generally held to occur wherever the offending material is circulated"), she contended that, since the circulation of "Larry King Live" is nationwide, the cause of action accrued in every state, including Nevada, making the borrowing statute inapplicable. The court rejected that theory, noting that the "practical effect would be the exemption of defamation claims from borrowing statutes altogether." The borrowing statute, where applicable, can thus be an effective tool against forum-shopping designed to take advantage of longer statutes of limitation, at least when the claim has little connection to the forum state.

### *Not Continuing Violations*

Flowers also argued that the claims of defamation and invasion of privacy were continuing violations for which the limitation period did not commence until cessation of the tortious conduct, which plaintiff claimed continued to the present. The court rejected this argument as well, holding that the defamation claim accrues upon occurrence of each tortious statement. In this case, these were separate and distinct defamatory statements, differing in time and content.

### *Hyperbole and Rhetoric*

Turning to the merits of Carville's statements on "Larry King Live" and Stephanopoulos' account of the 1992 campaign events in *All Too Human*, the court counseled "vigilance in protecting political speech," citing *Nevada Independent Broadcasting Corp. v. Allen*, 664 P.2d 337, 342 (Nev. 1983) ("In cases involving political comment, there is a strong inclination to determine the remarks to be opinion rather than fact.") The court easily found Stephanopoulos' campaign spin on the *Star* story of the affair ("tabloid trash," "garbage day," and

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## Clinton's "War Room" Not Actionable

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"crap") to be rhetorical hyperbole. Carville's reference to the tapes being "doctored" and Stephanopoulos' reference to their being "selectively edited" were also held to be protected opinion, an opinion based on the previously broadcast reports of CNN and KCBS, to which Carville and Stephanopoulos had specifically referred. The court cited as signals to the reader various literary devices employed by Stephanopoulos (such as italics, question marks) to identify his personal observations, as opposed to objective facts.

### *An Argument for Neutral Reportage*

Having found all the statements were protected opinion, the court did not reach whether Stephanopoulos' memoir, as an accurate historical account of what he said during the campaign and what was reported by news organizations in 1992, was protected as a neutral report of newsworthy events. While the neutral report privilege was first recognized in a hard news context, the context here is even more compelling: how can history be written if statements, even if libelous when initially said, can not be recounted as part of the historical record of what happened?

Flowers questioned whether Stephanopoulos, a partisan participant in the events he was recounting, could now qualify as a neutral journalist entitled to claim the privilege. (A somewhat similar argument had been advanced by Judicial Watch in another case and Stephanopoulos, by then an ABC commentator, had been deemed a journalist entitled to assert reporter's privilege as to information he had gathered. See *Alexander v. Federal Bureau of Investigation* ("Filegate"), 186 F.R.D. 21, 48-49 (D.D.C. 1998)).

Whatever his role in 1992, Flowers had not sued when the statements were initially made by Stephanopoulos in the campaign or when the news organizations broadcast their reports about the tapes in 1992. It is only his memoir seven years later, which accurately recounts the events of 1992, that is now the basis for her suit.

While holding that Flowers was at least a limited-purpose public figure — she had initially refused to concede this — the court did not reach whether republication of and reliance on the reporting of CNN and KCBS could

not constitute actual malice, as a matter of law. This species of "wire service defense" was also argued in the motion to dismiss.

### *False Light Dismissed as Redundant*

The privacy claims were too vague to be actionable, the court ruled. In a significant development for Nevada law, the court held that the false light claims, based on the same allegations as the libel claim, were "superfluous" and, therefore, must be dismissed to "eliminate redundant causes of action." The conspiracy claim, "derivative" of the claims of defamation which had been held not actionable, was likewise dismissed. In addition, the court suggested that the statute of limitations had run on the conspiracy claim since Flowers was aware of sufficient facts of the so-called conspiracy as early as 1994, based on Carville's description of the campaign's "war room" in his 1994 book, *All's Fair*.

Finally, the court denied plaintiff's motion to amend the complaint for a third time to add a May, 2000 interview of Stephanopoulos by Tim Russert on CNBC in which he again referred to the tapes being "selective edited" to "create some — some impression." The court held that since this comment was likewise opinion based upon previously broadcast news reports, granting leave to amend would be "futile."

Among the many ironies is Flowers' claim that Stephanopoulos is part of an ongoing Clinton cabal, still accusing her of lying despite the President's admission in his deposition in the Paula Jones case to some sexual contact with Flowers. *All Too Human*, written after the Lewinsky scandal and Stephanopoulos' very public estrangement from the Clintons, is, instead, as the title suggests, tinged with second thoughts and regrets. The doubts expressed are at least as much or more about the President's veracity on this subject as about Flowers'.

*Laura Handman, along with Matt Leish and Denise Gough, of Davis Wright Tremaine LLP, represented Stephanopoulos and Little, Brown and Company. Carol Fein Ross is Senior Vice President, Business Affairs and General Counsel of Time Warner Trade Publishing, of which Little, Brown is a subsidiary. Pat Lundvall and Andrew Gordon of McDonald Carano Wilson McCune Bergin Frankovich & Hicks, LLP acted as local counsel.*

## UPDATE: *Wild Cowboys* Defamation Case Dismissed

### *Fair Report Issue Unresolved*

The Appellate Division of the Supreme Court of New York has dismissed a defamation claim based on *Wild Cowboys: Urban Marauders & the Forces of Order*, a nonfiction book describing gang activity and drug dealing in New York City, written by defendant Robert Jackall and published by defendant Harvard University Press. *Crucey v. Jackall*, No. 10415-0300 (N.Y. App. Div., 1st Dept. Aug. 24, 2000). The order reversed a decision by the trial court denying the defendants' motion to dismiss.

The defamation action stemmed from a passage in the book about a private investigation initiated by New York Congresswoman Susan Molinari, Ohio Congressman James A. Traficant, Jr., and Staten Island Borough President Guy Molinari, in an attempt to exonerate an Immigration and Naturalization Services officer named Joseph Occhipinti.

Occhipinti spearheaded "Operation Bodega" in the late 1980s, seeking to expose illegal immigrants and unlawful activity at small grocery stores. Occhipinti's inspection included a warrantless search of a grocery store owned by plaintiff Altigracia Crucey, revealing gambling records and a handgun. Occhipinti was later convicted for violating the civil rights of twelve bodega owners (including the plaintiff) and making false statements in INS reports. Meanwhile, Crucey's criminal conviction for weapon possession was vacated because it arose from Occhipinti's perjured testimony and from the illegal search.

The politicians believed that Occhipinti had been wrongly convicted based upon perjured testimony by bodega owners who were subjects of Occhipinti's INS investigations. Congressman Traficant placed the affidavits of people questioned in the investigation in the Congressional Record; the book's authors used the Congressional Record and other sources to write the allegedly defamatory passages.

One of the book passages alleged to be defamatory described affidavits of a DEA informant who had contacts with several other key witnesses against Occhipinti. The passage included the affidavit of one

witness bragging to the DEA agent that he lied in order to convict the federal immigration agent who investigated his bodega, and that Crucey also falsely testified. The plaintiff also claimed as defamatory the book's reporting that "three Dominican drug dealers all admitted . . . that Altigracia Crucey was their source of heroin."

The court ruled that since it was "unequivocally clear that the defendants did not act with gross irresponsibility," dismissal of the complaint was warranted.

In supporting the dismissal, Judge Saxe's concurrence stated that when a person publishes a written work concerning a private individual that is "arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," that person can be found liable for defamation only if acting with "gross irresponsibility," citing *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196 (1975), and *Gaeta v. New York Times*, 62 N.Y.2d 340 (1984). Judge Saxe said that the defendants had "incontrovertibly" demonstrated that they had not acted with gross irresponsibility, noting that the book's statements were accurate reports of the results of the politicians' investigation as stated in affidavits.

Although the majority found it unnecessary to decide whether the investigation was an "official proceeding" under N.Y. Civil Rights Law Section 74, Judge Saxe's concurrence found Section 74 inapplicable. Section 74 affords an absolute privilege to any "fair and true" report of a judicial, legislative, or "other official proceeding."

The mere fact that the investigation results were published in the "Extensions of Remarks" portion of the Congressional Record, which is unrelated to the proceedings, did not render the investigation a "legislative proceeding," Judge Saxe wrote.

## Right Name, Wrong Photograph

### *District of Utah Grants Summary Judgment in Official's Defamation Claim Against Associated Press*

**By Randy Dryer, Richard N. Winfield and C. Neil Gray**

The U.S. District Court for the District of Utah recently granted summary judgment in favor of the Associated Press ("AP") on a libel claim brought by former Utah State Senate Majority Leader Craig Peterson, based upon the erroneous use of plaintiff's photograph. *Peterson v. The Associated Press*, No. 106 — F.Supp.2d 1227 — (D. Utah 2000). Based upon the erroneous use of plaintiff's photograph to illustrate an article about an official with the same name, the suit raised some intriguing issues: (1) may a former public official escape the actual malice standard when the article is not about his public controversy and alleged official misconduct; and (2) how well-known must a plaintiff be to become a general purpose public figure?

#### ***A Mistaken Identity***

The complaint was filed by Mr. Peterson in October 1999 against *The New York Times* after the *Times* mistakenly used a photograph of plaintiff in connection with a story about another "Craig Peterson" who was involved in the Salt Lake Olympic bid scandal. The photograph was provided by the AP.

The *Times* moved to dismiss the complaint based on the wire service defense. On the eve of oral argument on the *Times*' motion, plaintiff voluntarily dismissed the *Times* and amended his complaint to add the AP as a defendant. After limited discovery, the AP moved for summary judgment on the grounds that plaintiff was a public official/figure and no actual malice had been pled in the complaint. Judge Dale A. Kimball granted summary judgment, finding that plaintiff was both a public official and a general purpose public figure at the time of the alleged defamation and that plaintiff's complaint should be dismissed because he could not show the AP published the incorrect photo with the requisite actual malice under *New York Times v. Sullivan* and its progeny.

The case arose out of the scandal surrounding Salt Lake City's bid for the Olympic Winter Games of 2002, and the actions of the Salt Lake Organizing Committee

("SLOC"), the organization set up to win the opportunity to host the games. On February 9, 1999, an ethics committee investigating the bribery scandal released a report detailing their findings at a press conference attended by hundreds of journalists. The ethics report identified several individuals allegedly involved in improprieties with regard to the bid, and briefly mentioned "Craig Peterson," a former administrative officer in SLOC.

An AP writer in the Salt Lake City bureau assigned to cover the press conference as part of the AP's ongoing coverage of Olympic news reviewed the ethics report and wrote several stories for circulation on the AP wires. An AP photo editor in New York read the stories and searched the AP's archives for photos of the key individuals named in the report, including "Craig Peterson." The photo editor selected a photo of former Utah State Senate Majority Leader Craig Peterson, wrote a new caption for the photo, and circulated the photo and associated caption on the AP's photo wire. The photo of Craig Peterson was published in the February 10, 1999, edition of *The New York Times* along with excerpts from the ethics report.

In fact, the Craig Peterson that had been associated with the bribery scandal in the ethics report was not the same person as former Senator Craig Peterson. Upon learning of the error, the AP immediately issued orders to "kill" the photo and caption, obtained a photo of the correct Craig Peterson and issued a corrective asking all members who published the incorrect photo to publish the new photo to identify the correct Craig Peterson. *The New York Times* published a correction on February 11, 1999.

#### ***The Public Figure/Official Argument***

The AP moved for summary judgment on the grounds that Mr. Peterson was both a public official and a public figure at the time of the alleged defamation. Accordingly, AP argued, plaintiff must prove that the AP acted with actual malice — that is, that Mr. Peterson must prove with convincing clarity that the AP published the photo with knowledge that it was of the wrong individual or that the AP entertained serious doubts as to whether it was the cor-

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## Right Name, Wrong Photograph

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rect photo. Further, the AP argued, because Mr. Peterson did not allege and regardless could not prove actual malice, the case should be dismissed.

Mr. Peterson did not contend that the AP acted with malice. Instead, Mr. Peterson argued that he was neither a public official nor a public figure when the alleged defamation took place and was therefore not required to prove actual malice but, as a private citizen, need only prove that the AP acted negligently. In support of these contentions, Mr. Peterson argued that (1) a communication concerning a former public official must relate to such individual's official conduct in order to be privileged, and that the incorrect photo could not in any way relate to his official conduct because it was not even about him, and (2) he was not a public figure because he had not attained general fame or notoriety in the community, citing a public opinion poll he commissioned following publication of the alleged defamation which revealed that "only 8% of those polled by Dan Jones and Associates believed that a 'Craig Peterson' was either a state senator or otherwise involved in politics."

### ***Court Finds He is Public Official***

The court found that Mr. Peterson, who had retired his seat in the Utah State Senate less than three months before the publication in question, had retained his public official status. The court concluded that the defamation related to Mr. Peterson's official conduct, accepting the AP's argument that the alleged wrongdoing occurred while Mr. Peterson was in office and, if true, "would bear upon Mr. Peterson's fitness for office and his public stewardship as Senate Majority Leader." Judge Kimball found "immaterial" the fact that the defamation arose from facts concerning the alleged improprieties of another Craig Peterson. The court noted:

Mr. Peterson appears to be asking this court to establish a different standard for "mistaken identity" defamation than for the more typical "mistaken information" defamation.

[T]he court finds no support in the law for such a proposition. Under *New York Times* [*v. Sullivan*, 376 U.S. 254 (1964)] and its progeny, there is no indication that, barring malicious error,

one type of error (a reporter who incorporates incorrect facts, for example) deserves more protection than another (a photo editor who couples a photo of an individual with a story about a different individual with the same name). Moreover, there is no material distinction between defamation caused by mistaken identity and defamation due to any other reason.

In addition, Judge Kimball relied upon the rationale behind *New York Times* and its progeny: that punishment of the errors inevitably resulting from a free press "runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press" and that public officials and public figures enjoy greater access to "channels of effective communication" and therefore have a "more realistic opportunity to counteract false statements." (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). Specifically, that a correction was run the very next day and local print media published several articles regarding the lawsuit, was evidence of Mr. Peterson's public official status.

### ***Plaintiff was Public Figure As Well***

The court also found that Mr. Peterson is a public figure. Judge Kimball adopted the AP's argument that a prominent and influential politician such as Mr. Peterson, "who promptly enters the revolving door to act as a paid lobbyist representing scores of powerful interests before his former colleagues in the Legislature," is a public figure.

A politician is the archetypal public figure. . . . Given Mr. Peterson's prominent and long history in Utah politics, the fact that he had resigned from his seat in the Legislature less than three months before the article was published, and his continued involvement in shaping public policy, this court finds that Mr. Peterson has attained special prominence in the affairs of society and is a general purpose public figure.

Judge Kimball again relied on the rationale behind *New York Times* and its progeny, noting Mr. Peterson's

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## Right Name, Wrong Photograph

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“significantly greater access to the channels of effective communication” than that held by private individuals, and the fact that Mr. Peterson has voluntarily exposed himself to the risk of just such an injury as occurred. Moreover, the court found that the 8 percent recognition figure in the Dan Jones and Associates survey “is not inconsistent” with finding that Mr. Peterson is a public figure.

Having previously dismissed defendant The New York Times, and there being no further defendants, Judge Kimball dismissed the case in its entirety.

*Randy L. Dryer is a shareholder of Parsons Behle & Latimer in Salt Lake City and was co-counsel with Richard N. Winfield and C. Neil Gray of Clifford Chance Rogers & Wells in New York.*

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## A New Trial For Late Justice McDermott’s Libel Suit in Pennsylvania

By Amy B. Ginensky and  
David J. Caputo

Another chapter has been written in the 17-year old lawsuit brought by the late Pennsylvania Supreme Court Justice James T.

McDermott — and pursued by his sons, the executors of his estate, since his death in 1992 — against Philadelphia Newspapers, Inc. (“PNI”), publisher of *The Philadelphia Inquirer*. For the second time, the Superior Court of Pennsylvania has affirmed vacating the 1990 verdict in this case and granting a new trial. *McDermott v. Biddle*, Nos. 2665 Phila. & 2794 Phila. (Pa. Super. Aug. 28, 2000) (per curiam). Confirming the fundamental principle that a jury must be permitted to consider the entire context of an allegedly defamatory publication to decide its meaning, the court held that the unprecedented decision to submit redacted versions of the publications in suit to the jury was an abuse of discretion warranting a new trial.

### *Factual Background*

The saga began on May 15-17, 1983, when the *Inquirer* published a series of articles (the “series”) reporting on a broad range of issues involving the conduct of the Pennsylvania Supreme Court, its member justices and the people who work for or practice before the Court. The series, authored by Daniel R. Biddle, was a lengthy and carefully documented study, most of which related to justices other than Justice McDermott, and was recognized by awards and citations from the Pennsylvania Bar Association and respected journalism organizations. In 1984, PNI reprinted the series, along with additional material including: articles and transcripts concerning then Justice Rolf Larsen (who, among other things, was later convicted of drug conspiracy charges); a May 8 editorial about the Larsen transcripts; two editorial cartoons originally printed in the *Inquirer* on days the Larsen transcripts were printed; and a May 22, 1983 editorial that referred to the series and the Larsen transcripts. The “reprint” was not widely circulated.

Justice McDermott claimed the series and reprint were defamatory in two respects. First, the publications

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*... the unprecedented decision to submit redacted versions of the publications in suit to the jury was an abuse of discretion warranting a new trial.*

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reported that Justice McDermott’s votes or actions in two cases, the “Coal Case” and the “Filbert Partnership Case,” were favorable to clients represented by attorneys

who were friends and campaign contributors. These reports related to one of the questions raised by the series — whether a judge ought to recuse himself from cases in which his friends or campaign contributors are involved, and whether participation in such circumstances presents an appearance of impropriety or conflict of interest. The publications included the varying views of scholars, judges, judicial administrators and practicing lawyers on the subject, and stated that while Justice McDermott agreed that the combination of circumstances might have made an opposing lawyer question the judge’s impartiality in the Coal Case and Filbert Partnership Case, he believed there was “no impropriety, nor even the appearance of impropriety.”

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## A New Trial

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The second disputed portion of the series and reprint was the report that Justice McDermott had spoken with the District Attorney regarding his son's application for a job in the District Attorney's office. The series quoted Justice McDermott as saying in connection with this matter that "nepotism will never die," though the justice testified that what he actually said was "charges of nepotism will never die."

Other portions of the series and reprint depicted Justice McDermott in a positive light. For example, one article noted that Justice McDermott declined to follow

then existing Supreme

Court tradition of not questioning other justices' failure to recuse themselves and issued a "sharp dissent" when Justice Larsen voted with the majority to

block the reopening of

an investigation directed at his own conduct. The articles also reported that Justice McDermott criticized another justice for voting on an issue that had been before the state legislature while the justice was a representative, and that Justice McDermott was the only justice who returned unused travel expense money at the end of the year.

### ***Procedural History***

In June 1983, Justice McDermott filed separate lawsuits concerning the series and reprint, alleging that each implied that he (1) consciously favored his friends or campaign contributors by his actions in cases before the Supreme Court, and (2) used his official position to aid his son in obtaining a government job. The two cases were consolidated for trial.

### ***The "Scissoring" of the Publications in Suit***

Before trial, plaintiff argued that the series and reprint should be dramatically redacted in order to contain only those materials that he contended were harmful to

him. Remarkably, the trial court accepted the argument and allowed the jury to see only those portions of the series and the reprint that plaintiff claimed were defamatory and such other limited portions as the Court deemed appropriate to give context to the allegedly defamatory materials. The trial court reasoned that the redactions were necessary to "limit[] the issues and the evidence to what was raised in the pleadings and to allow the jury to focus its attention on the meaning of the allegedly defamatory innuendoes about Justice McDermott in context."

The court then took a scissors to the publications in

suit, producing a cut-

and-paste version of the series and reprint.

The court excised not only materials relating to justices other than the plaintiff, but also portions that were laudatory of Justice

McDermott; in all, the court removed 75 percent of the content of the series and 85 percent of the content of the reprint. The trial court also allowed the jury to see the editorial cartoons and the May 22, 1983 editorial, none of which plaintiff ever claimed was false or defamatory. As a result, the exhibits shown to the jury bore little resemblance to the actual publications. They gave the jury a grossly incomplete and distorted view of what PNI had published and how little of the series and reprint actually pertained to Justice McDermott.

Not surprisingly, the trial court's scissoring severely hampered the defense. For example, throughout trial, PNI's witnesses were cross-examined on statements referring to the questionable conduct of other justices in such a way as to suggest that the statements were directly solely at Justice McDermott and were not borne out by the facts. The trial court compounded the problem by excluding material in the publications *favorable* to Justice McDermott, which demonstrated that PNI was not out to destroy Justice McDermott and did not act with actual malice.

(Continued on page 19)

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***Plaintiff argued that the Series and Reprint should be dramatically redacted in order to contain only those materials that he contended were harmful to him. Remarkably, the trial court accepted the argument.***

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## A New Trial

(Continued from page 18)

Plaintiff's counsel made full use of the redactions. For example, he questioned his own expert, "Is there anywhere in this article that the Inquirer takes a position that Justice McDermott is an honest judge . . . that [the] title does not apply to him?" The answer was that there was such material in the article, and every lawyer and witness in the room knew it, but the jury was left in the dark.

Similarly, Justice McDermott stated, that he believed PNI failed to tell its readers that campaign contributions to judicial candidates were "perfectly legitimate" and that lawyers are allowed to make contributions. Of course, although the jury was not allowed to know it, the Series had an entire article discussing such contributions at length and making plain that such contributions are legal.

### *The Verdict*

On December 7, 1990, following a seven week trial, the jury returned its verdict. In the series case, it returned a defense verdict, finding that the series was defamatory but not false. In the reprint case, however, the jury found that the publication was false, defamatory and published with actual malice, and awarded Justice McDermott \$3 million in compensatory and \$3 million in punitive damages.

### *Post-Trial Motions and the First Appeal*

The parties have litigated the post-trial motions and appeals in this matter for nearly ten years, and the procedural history is so tortured that any synopsis may be as incomplete and misleading as the redacted publications themselves. The highlights may be briefly summarized as follows:

The trial court held that the verdicts were fatally inconsistent and granted a new trial on both the series and the reprint. The Superior Court affirmed this ruling, see *McDermott v. Biddle*, 647 A.2d 514 (Pa. Super. 1994), but the Supreme Court reversed, holding

that the jury must have found that the reprint, which was "enhanced by editorials and cartoons," had a different defamatory meaning than the series as a result of the additional material and concluded that this different meaning was false. See *McDermott v. Biddle*, 674 A.2d 665 (Pa. 1996). The case was remanded for consideration of the remaining post-trial issues, including whether the scissoring of the reprint entitled PNI to a new trial. On remand, the case was assigned to a new judge, who granted a new trial and held that the jury must be permitted to review the entire publication in suit. Plaintiff appealed this ruling.

The court granted a new trial for a second reason.

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*The parties have litigated the post-trial motions and appeals in this matter for nearly ten years.*

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It mistakenly found that the original trial court had instructed the jury not to consider the portions of the series and reprint concerning the Coal Case and Filbert

Partnership Case in reaching its verdict. The court concluded that these portions of the publications were actionable and the jury should have been permitted to consider them. In fact, though the plaintiff and PNI dispute whether the Coal Case and Filbert Partnership Case reports are actionable, the parties agree that the jury was permitted to, and did in fact, return a verdict on these portions of the publications. Because this ruling led the court to award a new trial in the series case, in which there was a defense verdict, PNI appealed.

### *The Second Superior Court Appeal and the Court's Opinion*

On appeal, plaintiff cited no precedent supporting the redaction of the Series or Reprint and he made little effort to defend the decision on its merits. Instead, he focused on procedural arguments in an attempt to persuade the Court that, even though PNI claimed throughout trial and at every step thereafter that the decision was error, it was somehow insulated from appellate review.

PNI, on the other hand, was armed with unani-

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## A New Trial

(Continued from page 19)

mous authority, including the “long line of cases cited in this Commonwealth [holding] that the defamatory language must be considered in the context of the entire publication.” See, e.g., *Thomas Merton Center v. Rockwell International Corp.*, 442 A.2d 213 (Pa. 1981). Further, the only published appellate decision that PNI found anywhere in the country reviewing a trial court’s decision to redact the publication in suit, *Smith v. Cuban American National Foundation*, 731 So.2d 702 (Fla. App. 1999) (*per curiam*), review denied, 753 So.2d 563 (Fla. 2000), held that the decision was an abuse of discretion warranting a new trial.

The statements at issue in *Smith* were broadcast over the course of a PBS documentary. The trial court excluded all of the broadcast except for the statements made by the defendant, finding the remaining portions of the broadcast “irrelevant.” The appellate court reversed, holding that “[t]he context cannot be irrelevant, because the average viewer would have been watching the entire broadcast, not merely a twenty second clip or two minutes of clips interspersed throughout the program.” *Id.* at 705-06.

On August 28, 2000, a majority of the three-judge panel held that the redaction was an abuse of discretion and affirmed the ruling that PNI is entitled to a new trial on this basis. The court also reversed the lower court to the extent it granted a new trial based on its mistaken conclusion that the jury was instructed not to consider the Coal Case and Filbert Partnership Case (though it did not reach the merits of whether these portions of the publications were actionable).

On the scissoring issue, the Superior Court relied on the Pennsylvania Supreme Court’s decisions in *Thomas Merton Center*, *supra*, and *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050 (Pa. 1996). In *MacElree*, the court held that an article may be capable of a defamatory meaning where only a limited portion of the article is allegedly defamatory and the remainder concerns other matters.

The majority reasoned that just as an isolated statement in an otherwise non-defamatory article may render the publication as a whole capable of a defamatory meaning (as in *MacElree*), so too may additional mate-

rial give context to an allegedly defamatory, isolated statement such that the publication as a whole may be non-defamatory. The court concluded that, either way, the issue is one the jury must decide based on a publication’s “entire context.” It held that “[t]o isolate certain portions of the articles did not evoke its true journalistic sentiment and may have, in fact, clouded the reasonable judgment of the jurors with regard to the allegedly defamatory statements of [sic] Justice McDermott.”

Given the unanimous authority and the unassailable common sense on which it is based, it is particularly disturbing that one member of the panel actually dissented on this issue. The dissenting judge held that it is within the trial court’s discretion to force the jury to decide how the average reader understood the publication in suit based on a cut-and-paste version of what the average reader actually read. In the dissent’s view, Pennsylvania precedent does not “specifically limit the trial court’s discretion to determine the proper context in which the court and, in turn, the jury may then consider the defamatory statements.” The dissent did not address the incredibly unfair consequences of the scissoring at trial, but simply stated that the “reasons” the trial court gave for its decision satisfied her that there had been no abuse of discretion.

### *The Next Step in the Odyssey*

The plaintiff has already petitioned the Superior Court for re-argument and it is expected that, should that petition be denied, plaintiff will petition the Pennsylvania Supreme Court for review. Regardless of whether either petition is granted and the result in either case, this lawsuit will likely head into its third decade of litigation before it is resolved.

*Amy B. Ginensky is a partner and David Caputo is an associate in the Media Law Department at Dechert Price & Rhoads. Dechert represents the defendants in McDermott v. Biddle.*

## Privilege for Accurate Reporting of Court Records Reaffirmed

By Debora K. Kristensen

The Idaho Court of Appeals recently found that *The Idaho Statesman* is privileged from civil liability for its accurate publication of the contents of a 40 year-old affidavit contained in a publicly accessible court file, despite the fact that the subject of the affidavit claimed that the information published was false, the affidavit was never actually “used” in a court proceeding, and the information contained in the affidavit had lost all “newsworthiness” through the passage of time. *Uranga v. Federated Publications, Inc.*, 2000 Ida. App. LEXIS 59, 2000 WL 1056095 (Idaho App. 2000). In so doing, the court significantly strengthened the *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) privilege associated with the publication of information derived from court files.

### “Boys of Boise” Scandal

The case has its origins in the fall of 1955, when three men were arrested for engaging in “immoral acts involving teen-age boys in Boise.” The public hysteria that followed from these arrests resulted in a witch-hunt for homosexuals in and around Boise, which was dubbed the “Boys of Boise.” One of the men interrogated and arrested during the “Boys of Boise” scandal was Melvin W. Dir. During his interrogation by law enforcement officers, Dir drafted a hand-written, sworn affidavit, describing a homosexual encounter between himself and Frank Anton Jones, the son of a prominent Boise City Councilman. The affidavit also states “[a]fterwards we [Dir and Frank] talked about gay affairs that he [Frank] had had with Gary Mills and his cousin Fred Uranga.” The affidavit was filed in the criminal case files of the Ada County Courthouse, and is located there today and available for public inspection. The Dir affidavit was responsible for implicating Frank in the “Boys of Boise” scandal, but Uranga was never charged nor convicted of any crimes associated with the scandal.

### Anti-Gay Sentiment in 1990s

In November 1994, the citizens of Idaho rejected an anti-gay initiative known as Proposition One, which would have significantly limited the rights of homosexu-

als in Idaho. Almost immediately thereafter in early 1995, conservatives worked to introduce a new initiative on the November 1996 ballot that would ban state and federal laws protecting homosexuals from discrimination, creating much public discussion. In the midst of this debate, *The Idaho Statesman* published an article entitled “The Boy Most Likely,” describing how Frank Anton Jones was caught up in — and ultimately destroyed by — the “Boys of Boise” scandal. The *Statesman* published the article “as a cautionary tale for times when emotions lead to hysteria, when the great commonsense center of our society is overwhelmed by the fringe.” Included in the article was a photograph of the unedited, handwritten Dir affidavit. Uranga’s name did *not* appear in the text of the article, but did appear in the photograph of the unedited Dir affidavit.

### Uranga Files Suit

After the article was published, Uranga submitted a written request for retraction of that portion of the Dir affidavit that named him. *The Idaho Statesman* denied his request in reliance on *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), but did offer to publish Uranga’s comments on this matter on the Editorial Page or to publish an explanation of its inclusion of the Dir affidavit in the article, together with a statement to the effect that it did not have an opinion as to the veracity of Dir’s allegations. Uranga did not accept either offer. Instead, Uranga brought suit nearly two years later against *The Idaho Statesman* for intrusion upon seclusion, public disclosure of embarrassing private facts, false light invasion of privacy, and intentional or reckless infliction of emotional distress based on the paper’s publication of the Dir affidavit.

*The Idaho Statesman* prevailed at trial on a motion for summary judgment, successfully arguing that it was privileged from civil liability for accurately reporting the contents of a court file, under *Cox Broadcasting*. Uranga appealed, arguing that the Dir affidavit should not be protected by the First Amendment because it was not utilized in an official proceeding, was not true, and through the passage of time had become unnewsworthy.

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## Privilege for Accurate Reporting Reaffirmed

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### *Court of Appeals Decision*

On appeal, the Idaho Court of Appeals rejected each of Uranga's contentions and unanimously affirmed the district court's decision. In so doing, it clarified a once murky area of law and put arguments about the longevity of a constitutional privilege to rest.

First, the Court flatly rejected Uranga's contention that the Dir affidavit cannot be privileged under *Cox Broadcasting* because it was never "used" in a judicial proceeding, as unworkable.

The rule suggested by Uranga — requiring the press to determine whether a particular document in a court file has been introduced into evidence or otherwise "used" in an official proceeding before publishing a story about it — would impose an arduous burden on the press that would be inimical to the public interest, the court said.

The key, the Court held, "was the Dir statement's presence in a court file, not the extent of its use in judicial proceeding, that cloaked its later publication with the constitutional privilege."

Second, Uranga argued that he had never engaged in homosexual activity and, therefore, the publication of false information in the Dir affidavit was not protected under *Cox Broadcasting*. As support for this argument, Uranga relied on language in *Cox Broadcasting* that "the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of *truthful information* contained in official court records open to public inspection." *Cox Broadcasting*, 420 U.S. at 495 (emphasis added).

Again, the Court rejected this contention, finding that, the underlying policy expressed in *Cox Broadcasting* and its progeny calls for a rejection of Uranga's contention that the press may be subject to liability for accurately reporting the untruthful content of court records. A rule that the press must independently verify all allegations found in a court record before publishing the information would create the sort of chilling effect on press coverage that the United States Supreme Court has consistently admonished against.

The Court found that this was the only logical interpretation of *Cox Broadcasting* since, "[i]f only truthful infor-

mation were protected, the press would risk liability for reporting that a person had been accused of a crime, as the truth of the accusation would not be known until after trial."

Third, Uranga argued that publication of the Dir affidavit should not be privileged under *Cox Broadcasting* because of the significant passage of time, which "dissipated any possible newsworthiness and effectively removed the information about him from the public domain," thereby inviting the Court to adopt a California line of cases, including *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34 (Cal. 1971) and *Melvin v. Reid*, 297 P. 91 (Cal. 1931).

The Idaho Court of Appeals rejected this invitation, noting that a number of courts have "questioned the continued validity of the *Briscoe* and *Melvin* line of cases because they pre-date *Cox Broadcasting*." Instead, the Court concluded that "a rule allowing liability for publication of a court record, based solely upon the passage of time, would not be consistent with *Cox Broadcasting*." In so finding, however, the Court was "not without sympathy for Uranga's position." Indeed, the Court stated that,

The notion of a newsworthiness or staleness test is appealing to permit redress for truly gratuitous intrusions on individual privacy. The flaw in that notion, however, is that such a standard could only be applied on a case-by-case basis with outcome uncertainty and would result in the sort of self-censorship by the press that *Cox Broadcasting* sought to prevent.

Finally, the Court rejected Uranga's contention that even if his privacy claims could not stand, summary judgment was inappropriate on his claim for intentional or reckless infliction of emotional distress. Relying on *Dworkin v. Hustler Magazine, Inc.*, 87 F.2d 1188, 1193 (9th Cir. 1989), the Court held that "a privileged publication by the press retains its protected status, regardless of the label selected by the plaintiff for his cause of action."

Uranga filed a petition for rehearing with the Idaho Court of Appeals on August 22, 2000.

*Deb Kristensen is a partner in the Boise firm of Givens Pursley LLP and was lead counsel in this case for The Idaho Statesman.*

## Why Your News Director Ought Not Testify For The Plaintiff

By Patricia Anderson

Suppose a television station is being sued by two of its former investigative reporters, who claim that a succession of news managers and two of the station's lawyers all ordered them to broadcast lies — all in the guise of pre-broadcast review. Suppose also this claim is brought under a state whistleblower statute, because these valiant souls threatened to report the station to the FCC should the station persist in its efforts to get the particular story on the air. And finally, suppose further this unusual claim makes it all the way to a jury trial.

### *It's Your Man They Call*

You, yourself, may represent a television station in its newsroom matters, and your news director has called you, asking if he should testify for the plaintiffs as an expert witness about the pre-broadcast review process. Now, of course, this is a free country and your news director has a perfect right to express his opinion about anything he chooses. The question is: Should he do it under oath? Should he do it as a plaintiff's witness? Is there any downside?

Let's suppose you're off your feed when the news director calls for advice about this, and you tell your news director to go ahead and testify. Only later do you find out what he has said.

### *The Issue Was Balance*

A brief aside might be instructive here. All of us know that the tripartite mantra for good journalism is "fairness, accuracy and balance." All good news stories, at a minimum, must be fair, they must be accurate, and they must be balanced. We depend on the good sense of the reporters and the editors everywhere to achieve this goal. As a lawyer, those three little words are your ticket to victory, should a story be challenged in a defamation suit.

But I digress. We are not in a defamation suit. We are in a whistleblower suit. The plaintiffs claim the edits foisted upon them would have so slanted and twisted and distorted the truth as to violate the FCC's news distortion policy, an arcane bit of agency navel-gazing that is not often undertaken by the FCC (judges do find it

interesting, though). The station claims the edits were necessary in order to create balance in the news story, so balance has become an issue.

Now, in this case the editing focused on balance; as in getting balance into the report, which concerned a relatively new veterinary product. One of the reporters, when first asked for documentation wrote a memo calling the subject product manufacturer "liars." This raised everyone's antennae, of course, and the documentation was pretty thin and pretty long in coming.

### *Suspicious Rise Notably*

The editing became so wildly out of control that within a few months (!) the reporters were attacking the very documents they had offered for support of their scripts, arguing that the various agencies and organizations issuing these documents could not be trusted or

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## A SNAPSHOT OF THE CASE

*Wilson v. New World Communications of Tampa, Inc.* 98-24939 Div. D. (Fla. Cir. Ct.) pitted the husband-and-wife investigative reporting team of Steve Wilson and Jane Akre against their former employer, Fox owned and operated WTVT-TV. The duo brought a breach of contract and state whistleblower suit against the station based on investigative series, "The Mystery in Your Milk."

An early script of the broadcast said that some believe that Bovine Growth Hormone ("BGH"), a drug marketed by the Monsanto Company, could lead to higher cancer rates in humans.

After a strongly-worded letter from an attorney for Monsanto, station managers decided to postpone the broadcast for further review. Wilson and Akre claim that the station forced them to remove any direct reference to the feared association between BGH and higher cancer rates, alleging that while they would have been able to include a quote from a scientist about the possi-

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## Why Your News Director Ought Not Testify

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that they had "other" undocumented information that contradicted the documents. Eventually, their suspicion of anyone who did not share their view of the deadly nature of this product extended, predictably, to their managers and lawyers, whom they came to believe represented everything that's wrong with journalism today.

They did not want to tell the viewer that all of the government agencies and universities and independent researchers that looked at the product they were attacking

found no cause for concern or that their on-camera critics were from the alarmist fringes. What happened is that the reporters lost whatever objectivity they had early in the process, and they became crusaders or advocates.

And in preparing their news director / expert witness for trial, of course, the plaintiffs had not given him the mountains and mountains of information finding the product to be no cause for concern. It certainly is true that a report on Hitler need not mention that he was a music-lover as balance to an exploration of the Holocaust, but this product was not the Hitler of the drug world, and this trial was not going to prove that one way or the other. In retrospect, the news professionals probably immediately should have re-assigned the story to someone less wild-eyed about it and figured out what to do with two reporters who resented virtually every attempt at editing.

### A Snapshot of the Case

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ble link, they were not allowed to elaborate on the basis for the claim or the background of the scientist.

Plaintiffs alleged that despite "full and faithful" performance of their duties, they were suspended and threatened with termination "unless [they] agreed to engage in activities . . . which they believed to be unethical and in violation" of the Federal Communications Act ("FCA") and FCC regulations. Specifically, plaintiffs claimed that by airing the station-approved version of the report, WTVT would be broadcasting false or misleading news reports in violation of the FCA.

The plaintiffs also alleged a violation of Florida's Whistleblower Act, claiming that the station took retaliatory personnel action against plaintiffs because they disclosed violations of laws, rules, and regulations including the FCA, and because they refused to participate "in the activities, policies and practices" of the defendant that violated those laws. *See LDRC LibelLetter*, May 2000, at 34.

On August 18, the jury decided partially in favor of WTVT, ruling that the television station did not intentionally falsify the news. However, the jury went on to find that although WTVT did not fire Akre because she refused to participate in a false news report, the station had fired her in retaliation for her threatening to tell the FCC about the allegedly misleading news report. While Akre was awarded over \$400,000, Wilson was denied relief completely.

On September 7, WTVT filed a motion for a directed verdict in favor of the station. Steve Wilson, meanwhile, filed his own motion for a rehearing regarding jury instructions.

### ***But Back to the Witness.***

"Is balance essential in a good news story?" your news director is asked when he's on the witness stand before the jury in *The Case That Does Not Concern You And Is All The Way Across The Country, Anyway*. This might seem to be a softball question, but this is sort of a backwards and upside-down situation.

So, here is what actually happened:

15 Q. Okay. During the course of your -- as  
16 you were describing what the allegations is in  
17 putting the story on, you said it should be fair and  
18 accurate, you didn't use the word "balanced."

19 Is balance an essential part of the  
20 process by which a story is tested for?

21 A. Balance is normally used synonymously  
22 with the word "fairness," because the expectation is  
23 that if you have something negative you want to say  
24 about somebody that basic principles of fairness say  
25 you're going to find -- going to try to find

1 something, whether there's positive news to report as

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## Why Your News Director Ought Not Testify

(Continued from page 24)

2 well, and you're going to go get a comment from the  
3 person at the center of the negative part and allow  
4 them to respond, that's fairness.

5 I usually try to avoid the word  
6 "balance" because it creates a false impression in  
7 the minds of the public that our job and our goal is  
8 to -- is to have equal time to both, quote, unquote,  
9 sides of the story, that's one problem with the issue  
10 of balance.

11 The other problem with the issue of  
12 balance is that it creates a false presumption that  
13 there are only two sides to the story. When I think  
14 of word "balance" picture of -- creates a picture in  
15 my mind of a fulcrum with scales on it, and the  
16 scales are more or less equal balanced. Two sides.  
17 But most stories have more than two sides. In fact,  
18 many stories have dozens of sides.

19 And your basic principles of fairness  
20 say that you're going to give voice to all sides of  
21 the story, not just two that are conjured up in the  
22 concept balance.

Well, that's not so bad, you might say. But that statement "I usually try to avoid the word 'balance'" and that phrase "the other problem with balance..." Balance is a *problem*? You feel the beginning of a bit of heartburn. Perhaps it wasn't reported accurately, or perhaps your news director didn't really mean that.

Not so fast. Your news director was called back to the stand a second time and once again elaborated on this issue of "balance."

19 Q You would agree that you want to present  
20 the material that you put on the air in a way that  
21 is accurate and fair and the RTNDA also says  
22 balance; is that correct?

23 A I believe accurate and fair. And, as a  
24 matter of fact, we are now in discussion about

25 whether the word "balance" should continue to be  
1 used for all the reasons that I talked about in my  
2 last --

3 Q But in terms of whether the word is  
4 "balanced," or not you agree that the subject of the  
5 investigative piece deserves to have their view  
6 presented within the piece?

7 A What they deserve, as the SPJ code says,  
8 you want to seek them out and give them the  
9 opportunity to respond to any negative comments.

10 Q But you also state that they have an  
11 opportunity to present their views even if you  
12 disagree with it?

13 A You should give them an opportunity to  
14 respond, yes, sir, that's basically in pretty much  
15 every code of ethics.

16 Q When I say "respond," though, that  
17 includes fairly presenting the point of view of the  
18 target in your piece, so that the viewer has both  
19 sides of the controversial question?

20 A Usually, there are more than two sides of  
21 the story, which is why I try to get away from the  
22 word balanced, and certainly when you are dealing  
23 with somebody who is at heart of an investigative  
24 piece, they think they are one side and everybody  
25 else is the other side.

1 It doesn't always work out that way.  
2 Sometimes there are multiple viewpoints. That's why  
3 I try to get away from that word balance because it  
4 will conjures up the idea that every viewpoint  
5 deserved equal time.

6 But to answer what's at the heart of  
7 your question, yes, you seek out their response and  
8 you want to fairly present what they have to say.

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## Why Your News Director Ought Not Testify

(Continued from page 25)

No, you must conclude, he really does not subscribe to the notion that “balance” is part of the equation. He was not misquoted, and he did not misspeak when he first testified. And his words were given under oath, in a court of law.

In any future law suit challenging either him or his newsroom’s practices, these words will come back to haunt this well-meaning fellow. If asked, he will need to disclose his participation in this trial. The transcript of his testimony will be unearthed, and he will be questioned endlessly about why he thinks the universally-accepted standard of “fairness, accuracy, and balance” does not apply to him. The challenged news report will be held up as an example of unbalanced reporting, and its alleged lack of balance will be attributed to his leadership. His protestations of “being taken out of context” or “that’s not what I meant” or “you’re distorting what I said” will be met with just about as much sympathy as your average reporter is able to muster when he or she is accused of those things by an interview subject: zero.

None of this is meant to say that this news director (presently working at a station in the Southwest) has not raised some interesting points. They are interesting journalistic points, however, suitable for discussion, say, at a Poynter Institute or RTNDA seminar, not offered up from a witness stand as expert testimony.

The verdict was delivered August 18 in the case of *Wilson v. New World Communications of Tampa, Inc.* The jury awarded Mr. Wilson nothing and awarded Miss Akre about \$425,000. To what extent the news director’s testimony played a role in the verdicts is not knowable. Under a new Florida statute, the jury was permitted to ask witnesses questions, read to the witness by the presiding judge. The news director was asked two questions:

1) "In reference to a lawyer's role in a news story, is it possible that the lawyer's concerns about a story very well could end up in the news story as well as help shape the story content, especially given the risk factors in investigative reports?" and

2) "Is it ethical for a reporter to convey or express their personal opinion in an investigative story, either verbally or by their attitude or tone, or should the reporter remain on neutral ground?"

The first question is one that all media attorneys who provide pre-broadcast or pre-publication review services to media clients might well contemplate. The second question demonstrates just how dangerous it is to have your news director testify as a plaintiff’s expert witness. As in the “balance” testimony, the news director’s answer to that question can do nothing but come back to haunt him.

The defendant’s renewed motion for directed verdict will be heard on October 12, but regardless of the ultimate outcome of the case, the news director’s testimony will survive forever.

Just say “not a good idea” if you ever get that call from a news director or editor.

*Pat Anderson is a partner in the St. Petersburg firm of Rahdert, Anderson & Steele, P.A. and was co-counsel in this case with William McDaniels of Williams & Connolly, LLP, Washington, D.C.*

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## Yankees Fan Strikes Out on Book Cover Right of Publicity Claim

By Jessie F. Beeber

In *Caraccio v. Verso, et al.* Index No. 3885/00 (N. Y. Sup. Ct., Nassau Cty., 2000). Justice Allan L. Winick recently ruled that the publication of a photograph of a New York Yankees fan on the cover of a book about the Yankees was not a violation of the fan's right of publicity under N.Y. Civil Rights Law sections 50 and 51.

The photograph in question was taken by a *New York Times* photographer right before the first game of the 1998 World Series. It shows a man, allegedly the plaintiff, dressed in a tuxedo, sunglasses and an "Uncle Sam" hat, protruding through the sunroof of a Rolls Royce decorated with pinstripes and a "NY" emblem. The photograph originally appeared in *The New York Times*, and was subsequently incorporated onto the cover of a book called *Those Damn Yankees: The Secret Life of America's Greatest Franchise* by Dean Chadwin. Plaintiff sued the publisher of the book, the author, *The New York Times*, the photographer and the graphic artist who designed the book cover. All of the defendants moved to dismiss the complaint.

### *The Book Cover Was Not an Advertisement in Disguise*

In dismissing the plaintiff's complaint with prejudice, the Court relied on the recent New York Court of Appeals case *Messenger v. Gruner + Jahr*, 94 N.Y.2d 436 (2000) for its articulation of the "newsworthy" exception to a right of publicity claim -- there is no liability for the publication of an individual's picture where that picture is used to illustrate a matter of public interest, unless that picture has no relation to the article, or the article is an advertisement in disguise.

As to the relation of the photograph to the book, plaintiff's protestations that he was not dressed as a Yankees fan, and that the book was not about baseball, or Yankees fans, were unpersuasive. The Court held that the book was indeed about the Yankees, and their fans, and was newsworthy because the New York Yankees were undoubtedly a newsworthy topic. It held that whether plaintiff considered himself a Yankees fan or not, he was dressed in Yankees regalia, and drew special attention to himself by his noticeable participation in a public event. See *Murray v. New York Magazine Co.*, 27

N.Y.2d 406 (1971) (no right of publicity claim where photograph of plaintiff at a St. Patrick's Day parade, wearing an "Irish" hat, green bow tie and green pin, appeared on the front cover of defendant's magazine in connection with article on "The Last of the Irish Immigrants.")

The Court also specifically held that the book cover was not an advertisement in disguise, again presumably because the book was about the New York Yankees and their fans, a newsworthy subject "not deemed produced for the purposes of advertising or trade." Citing *Messenger, supra*.

### *The Graphic Artist Did Not "Use" the Photograph*

Plaintiff's claim against the graphic artist who designed the book cover was also dismissed because the Court found that she did not "use" his likeness for the purposes of sections 50 and 51.

Under New York law, a defendant "uses" a plaintiff's image where it was the one that took the photograph, sold it, published it, or otherwise exercised any control over it. See *Anderson v. Strong Mem. Hosp.*, 140 Misc. 2d 770, 773 (Sup. Ct. Monroe Cty 1988); *aff'd*, 151 A.D.2d 1033 (4th Dept 1989); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 442-443 (1982). In this case, the Court found that the graphic artist simply designed the cover of the book, and thus did not "use" the photograph.

The plaintiff has not filed an appeal.

*Jessie F. Beeber, with Frankfurt, Garbus, Kurnit, Klein & Selz P.C. in New York, New York, represented defendant Billard Design.*

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

## A Duty to Do Follow-Up Journalism?

By William Robinson

Do the media have a legal duty (i.e., a duty that can expose them to legal liability as contrasted with an arguable journalistic duty) to conduct follow-up inquiries before broadcasting an admittedly accurate videotape of police activity? That is the interesting question with which the Rhode Island Superior Court was recently confronted and decided in a ruling from the bench, and which is now before the Rhode Island Supreme Court in the context of a petition for certiorari. *Jorge Ulloa v. Narragansett Television, L.P.*, C.A. No.: 94-6919 (heard on July 11, 2000)

The Superior Court for Providence County (Rhode Island) recently denied summary judgment to a television station (WPRI-TV Channel 12) where the following were the undisputed facts:

On a Saturday afternoon at about 2:30, shots were fired in the vicinity of two bicyclists in the city of Providence.

Police immediately went to the neighborhood where the shooting occurred, and they noticed a young man in the otherwise vacant school yard of Central High School.

For reasons that the police undoubtedly considered good and sufficient, the young man was placed on the ground and was handcuffed while several guns were pointed at his head.

A television camera crew observed and photographed this rather vivid example of police activity.

The tape of the above-described events was then broadcast on the 6:00 p.m. news under the rubric of "breaking news."

In the record as it presently stands, there is no evidence that, before actually televising its tape of what had transpired at Central High School, the television station made inquiries of the police as to the status of the plaintiff. In other words, there were no "follow-up" inquiries after the original filming of the police activity that had taken place at about 2:30.

It turns out that the Providence police released the young man at the scene shortly forcibly detaining him and before 6:00 p.m., deciding not to press charges against him.

The young man (now the plaintiff) filed suit alleging defamation, false light invasion of privacy, and infliction of emotional distress.

The defendant's principal argument in support of its mo-

tion for summary judgment was that the station had no legal duty as a matter of tort law to make follow-up inquiries before broadcasting the police activity that it had accurately filmed. The station further contended that, since there was no untrue utterance, there could be no actionable defamation or false light invasion of privacy.

The plaintiff's basic argument in response was that the station's view of tort law was myopic and that it had defamed the plaintiff by suggesting (through the use of the "breaking news" rubric) that the plaintiff was *still* being detained by the police at 6:00 p.m.

The Motion Justice in the Superior Court for Providence County found that the piece, shown during the 6 p.m. and 11 p.m. newscasts, could carry the implication that plaintiff was a suspect at the time of the broadcasts. She ruled that the media could have some sort of legal duty to conduct follow-up inquiries in such circumstances, although the Justice stated that at some point in time that duty would cease to exist. (The latter part of the Motion Justice's ruling appeared to be a response to the defendant's argument that it cannot be the law that the media have a duty to report an appellate reversal of a criminal conviction when that appellate decision is issued years after the original verdict. The Motion Justice cited no authority in support of her view as to the purported duty of the media to conduct follow-up inquiries).

Applying what she considered to be the fault standard that plaintiff must meet, she ruled that a plaintiff may be able to show that the publication of a false and defamatory statement that plaintiff is still a suspect at the time of publication (here, an implication at best) was made negligently as a result of a failure to do follow-up research.

Undoubtedly, media defense lawyers will find especially problematic the notion that there might be a duty to conduct follow-up inquiries for an undefined period of time, even though that duty would evaporate at some imprecise time. It is submitted that unclear standards like this are inconsistent with what the First Amendment demands.

The defendant television station is presently seeking interlocutory review by the Supreme Court of Rhode Island through a petition for issuance of the common law writ of certiorari.

*William P. Robinson is a partner in Edwards & Angell, LLP, Providence, Rhode Island, and represents the defendant in this matter.*

## U.S. District Court Rejects Privacy Claims Premised on Hidden Camera Footage

By Robert L. Rothman and Roger Chalmers

A federal district court in Atlanta has dismissed invasion of privacy claims premised on a January 1999 broadcast of a *Fox Files* report entitled "Cults on Campus." *Lucas v. Fox News Network, et al.*, (N.D. Ga., June 27, 2000).

The report profiled college and university campus activities of the International Church of Christ. A short segment of the report showed hidden camera footage of the plaintiff — a member of the Atlanta International Church of Christ and the Women's Campus Ministry Leader at Georgia State University — conducting what she described in the lawsuit as the Church's "sin and repentance study" for prospective members. In the study, the plaintiff asks an undercover *Fox Files* producer to reveal intimate details of her past sex life.

### *Libel And Slander Claims Abandoned, Publication Damages Sought By Amended Complaint For Invasion Of Privacy*

The plaintiff initially asserted libel, slander and invasion of privacy claims, alleging chiefly that the report defamed her and cast her in a false light in the public eye. After the defendants moved to dismiss the complaint, the plaintiff voluntarily dismissed the action. Several months later the plaintiff filed a new complaint, in which she abandoned the libel and slander claims but sought publication damages for each of the intrusion, false light, public disclosure of private facts, and misappropriation of likeness variations on the invasion of privacy claim.

At the heart of the amended complaint were allegations that the secretly recorded sin and repentance study occurred in the bedroom of the plaintiff's apartment, and that the *Fox Files* producer gained entry to the plaintiff's bedroom, and the right to participate in the "intimate" sin and repentance study, by fraud and misrepresentation — i.e., by failing to reveal her true identity and purpose.

### *No Privacy in Public Activity*

In holding that even these allegations failed to state a

claim, the district court reaffirmed a fundamental limitation on the right of privacy. Citing *Pavesich v. New England Life Ins.*, 50 S.E. 68, 72 (Ga. 1905), the Georgia Supreme Court case which was the first case nationwide to recognize a legally protectible right of privacy, the Court said: "[A]ny person who engages in any pursuit or occupation or calling which calls for the approval or patronage of the public submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise and proper and expedient to accord to him the approval or patronage which he seeks." The Court then held that the plaintiff, whose claims all arose from her participation on a state university campus in the Church's solicitation of the public to join the Church, had failed to state an invasion of privacy claim because "the only information that the [*Fox Files* report] reveals concerning [the plaintiff] is that she is a member of the Church and that, in her role as a Church member, she solicits and seeks the patronage of the public, including [by] inquiring into the sexual history of prospective new Church members."

In so holding, the Court squarely addressed and rejected the plaintiff's suggestion that the sin and repentance study was presumptively private because it occurred in her bedroom. The Court looked beyond the location of the secret recording to the purpose or function of the activity being recorded. Citing *Lewis v. United States*, 385 U.S. 206, 208-212 (1966), in which the Supreme Court, in the context of a Fourth Amendment claim, found that conduct in a home that has been "converted into a commercial center" is "entitled to no greater sanctity than if it were carried on in a store, a garage, a car or on the street," the court held that the plaintiff "had no expectation of privacy, even in her bedroom, to the extent of her engagement in a public activity."

The court similarly rejected the plaintiff's argument, with respect to the intrusion claim, that any consent she gave to the *Fox Files* producer to enter her home was vitiated by the producer's failure to reveal her true identity and purpose. The court relied on Georgia cases dis-

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## U.S. District Court Rejects Privacy Claims

(Continued from page 29)

cussing implicit waivers of the right to privacy, but also expressly adopted the analysis applied to this question in *Desnick v. American Broadcasting Companies*, 44 F.3d 1345, 1347-1348 (7th Cir. 1995) and in *Food Lion v. Capital Cities/ABC*, 194 F.3d 505, 514 (4th Cir. 1999). In *Desnick*, a case also involving a broadcast of hidden-camera footage obtained by undercover reporting, the Seventh Circuit held that misrepresentations of identity and purpose by undercover reporters did not vitiate the subject's consent to entry onto its business premises. In *Food Lion*, the Fourth Circuit applied the *Desnick* reasoning to reject a claim that Food Lion's consent for undercover reporters to enter its premises was vitiated by their resume misrepresentations.

### *First Amendment Principles Also Foreclose Invasion Of Privacy Claims*

The fact that the plaintiff sought damages relating to the broadcast of the *Fox Files* report — i.e., publication damages — also proved fatal to her claim. The plaintiff argued in response to the motion to dismiss that the defendants had promised her that the sin and repentance study would remain confidential. The court noted that the pleadings contained no such allegations, but held that, even if the plaintiff had alleged and could establish such a promise, under *Cohen v. Cowles Media*, 501 U.S. 668, 671 (1991), she could not on that basis recover the reputational and state of mind damages that she sought in the action.

The court also ruled that fundamental First Amendment principles foreclosed all of the plaintiff's invasion of privacy claims. First, the court found that the pleadings revealed beyond question that the plaintiff could not prove a false statement of fact—at most, the plaintiff “might be able to show that the [*Fox Files* report] truthfully identified her as a member of the Church, and then opines that the Church is a cult based upon facts disclosed in the report.” In any event, the court held, the plaintiff's claims failed because she could not prove a false statement of fact that also contained a particular reference to her. Rather, the pleadings (which on defen-

dants' submission with their motion to dismiss included a video copy of the *Fox Files* report) conclusively showed that the *Fox Files* report simply contained statements concerning the Church, and the plaintiff's allegations of harm from such statements were insufficient to state a claim.

### *Federal Wiretap Claim Rejected*

The defendants also argued, and the district court agreed, that the plaintiff had no reasonable expectation of privacy in information that she voluntarily shared with another person. On this point, the court noted that Georgia law follows the one-party consent rule. Since the *Fox Files* producer did not “intercept” the communications during the sin and repentance study, but was instead a party thereto, there could be no invasion of privacy either in the recording or subsequent broadcast of the study.

Notably, the plaintiff amended her complaint while the defendants' motion to dismiss was pending to assert a claim under 18 U.S.C. § 2520, the civil damages provision of the Federal Wiretap Act. The plaintiff alleged that the defendants' purpose in obtaining the hidden-camera footage “was to cause [ ] *insult and injury*,” and cited *Boddie v. American Broadcasting Companies*, 731 F.2d 333 (6th Cir. 1984), in support of the Section 2520 claim.

In rejecting the Section 2520 claim, the district court noted that *Boddie* was decided at a time when the Federal Wiretap Act provided that a party to a communication could record or divulge its contents *unless* the communication was “intercepted for the purpose of committing any criminal or tortious act . . . or for the purpose of committing *any other injurious act*.” In *Boddie*, ABC broadcast an interview that its television crew had secretly videotaped and recorded. Although the jury found for ABC on the plaintiff's tort claims, the Sixth Circuit held that because the plaintiff alleged that ABC's purpose in recording the interview *was to cause insult and injury*, she could recover for a violation of the Federal

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## U.S. District Court Rejects Privacy Claims

(Continued from page 30)

Wiretap Act under the “other injurious act” language.

Congress amended the Federal Wiretap Act in 1986 to remove the “other injurious act” language, and in doing so expressly criticized the *Boddie* decision as one of many federal decisions that subjected journalists to improper free speech and free press restraints. The district court found that that amendment foreclosed the plaintiff’s Federal Wiretap Act claim.

The case is on appeal to the Eleventh Circuit.

*Mr. Rothman is a partner and Mr. Chalmers an associate in the Atlanta law firm Arnall, Golden & Gregory, LLP. They represent defendant Fox News Network in the Lucas proceeding.*

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## TV Station Present at Drug Search Wins Summary Judgment in Trespass Case

By Sean R. Smith

On August 15, 2000, the Superior Court of Gwinnett County, Georgia, granted summary judgment to WSB-TV of Atlanta in a trespass case brought by two people arrested as part of a law enforcement search of their property for a drug laboratory. *Nichols v. Georgia Television Co.*, No. 99-A-6323-A (August 15, 2000). The search, which was conducted by local law enforcement and the federal DEA, did not find a drug lab. The search only resulted in minor drug possession charges against plaintiffs, charges which were later dismissed for lack of evidence.

Plaintiffs first brought Section 1983 claims and pendent claims for defamation, invasion of privacy and trespass in federal court against law enforcement and the media that were present at the search. The claims against the media were dismissed by the federal court in 1999. *Nichols v. Hendrix*, No. 2:98-CV-

0161-WCO (N.D.Ga., Nov. 26, 1999). After reportedly settling with the law enforcement defendants, plaintiffs then initiated a number of separate lawsuits against the media in various Georgia state courts. As their defamation and invasion of privacy claims were time-barred, plaintiffs alleged common law trespass.

In the case against WSB, plaintiffs alleged that, due to WSB's presence at the search and its airing of news reports about the search, WSB had trespassed on plaintiffs' property and caused “embarrassment and humiliation” to the plaintiffs. Prior to discovery, WSB moved for summary judgment on the basis of the search warrants, the broadcast itself, and the affidavits of its news crew attesting to their belief that law enforcement had a right to invite them onto the property.

In granting the motion, the court noted that “[t]he thrust of plaintiffs' complaint is that WSB-TV may be held liable for libel or invasion of privacy for accurately reporting that plaintiffs and their property were officially suspected of involvement in illegal drug activity. But it is well established that the law is otherwise.” Noting that plaintiffs alleged publication damages and not injury to property — “the interest protected by a trespass to realty tort claim” — the court, citing *Desnick v. ABC*, 44 F.3d 1345 (7th Cir. 1995), held that plaintiffs' complaint was a First Amendment-barred attempt to replead a time-barred defamation or invasion of privacy claim as one for trespass. In addition, the court held that Georgia trespass law did not reach innocent and non-negligent conduct such as following law enforcement directions.

Plaintiffs have appealed the trial court's decision to the Georgia Court of Appeals. Plaintiffs' lawsuits against other media — a weekly newspaper and other television stations — had all reportedly settled earlier.

*Sean R. Smith is an associate of Dow, Lohnes & Albertson in Atlanta, Georgia*

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## UPDATES

### “Hit Man” Hit By New Suit

The publisher of the book *Hit Man: A Technical Manual for Independent Contractors* is facing a new lawsuit brought by a woman who says that a man who tried to kill her used the book as an instruction manual for the crime.

The lawsuit comes four months after the publishing house, Paladin Press of Boulder, Colo., settled a similar suit by agreeing to pay the families of three murder victims in Maryland an undisclosed, multi-million-dollar amount. As part of the settlement, Paladin Press also agreed to stop selling the book and destroy all copies in inventory. See *LibelLetter*, June 1999, at 5.

Paladin settled the Maryland suit three days before trial, and after the U.S. Supreme Court declined to review a decision by the U.S. Court of Appeals for the 4th Circuit allowing the suit to proceed. *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), cert. denied sub. nom. *Paladin Enterprises, Inc. v. Rice*, 523 U.S. 1074 (1998).

Paladin’s attorney, David Harrison, told the Associated Press that the publisher settled the suit at the insistence of its insurance carrier.

The new lawsuit was filed in Springfield, Ore. by Bobby Jo Wilson, who survived an attempted murder by Robert Vaughn Jones and Vincent Wayne Padgett. Wilson’s estranged husband, Robert Leslie Goggin, hired Jones to kill his wife; Jones induced Padgett to help him. Goggin hoped to collect on a \$100,000 life insurance policy on his wife.

All three are now serving prison sentences of 17½ to 20 years after being convicted.

Wilson’s lawsuit against Paladin Press claims that Jones bought *Hit Man*, and he and Padgett used 25 of the book’s specific instructions in their attempt to kill Wilson. These included directions to wear latex gloves, buy new shoes and wear disguises.

sues: whether invasion of privacy is recognized under Colorado law, and whether a plaintiff’s name or likeness must have monetary value in order to support a claim of appropriation. No. 00SC115 (September 5, 2000). *Dittmar* reversed a grant of summary judgment to a private investigation firm that printed the name and likeness of a convicted thief in a firm newsletter.

Hired to investigate plaintiff Rosanne Dittmar in a child custody matter, defendant firm Joe Dickerson and Associates learned that she possessed bearer bonds under suspect circumstances. After the private investigation firm reported this information to the police, Dittmar was ultimately convicted of theft. A report of Dittmar’s conviction and the firm’s investigation appeared later in a firm newsletter, “The Dickerson Report,” which was sent to attorneys, employees of financial institutions, and other investigators. Dittmar sued the firm for invasion of privacy based on appropriation of another’s name and likeness.

The first issue, whether a claim for invasion of privacy exists under Colorado law, had not previously been addressed by a Colorado appellate court. The appellate judge ruled that there was “no reason why a claim for appropriation of another’s name or likeness should not be recognized in Colorado.”

The Colorado Supreme Court will also review the second issue of whether a claim for appropriation of a name or likeness is sustainable when the person’s name or likeness does not have any commercial value. The appellate court found that the article’s purpose was not to take advantage of any value associated with the plaintiff’s identity, but rather to report on the firm’s exposure of Dittmar’s criminal activity. Furthermore, the appellate court noted that, “this tort is generally not applicable when a person’s name or picture is used to illustrate a non-commercial, newsworthy article. . . . Nor can a plaintiff recover if use of the name or likeness is merely incidental.” See *LDRC LibelLetter*, January 2000, at 33.

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### Colorado Supreme Court Will Review Privacy Suit And Misappropriation Cause of Petition

On September 5, 2000, the Supreme Court of Colorado decided to review a Colorado Court of Appeals decision, *Dittmar v. Joe Dickerson & Assocs.*, No. 98CA1228 (Ct. App. Colo., Div. 3 Dec. 23, 1999), to determine two is-

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## UPDATE S

### Second Circuit Affirms That Staged Perp Walk Violated Fourth Amendment

In late July, a panel in the Second Circuit U.S. Court of Appeals held that a police detective violated an arrestee's Fourth Amendment rights when he walked the suspect into the station house a second time particularly so that a television news crew could obtain footage. *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000). The court held that a staged version of the common "perp walk" made the arrest an unreasonable seizure violating the suspect's privacy rights under the Fourth Amendment because it was not rationally related to a legitimate government purpose.

However, the individual defendant to the action, Detective Michael Charles, was absolved from liability for damages under a qualified privilege extended to law enforcement defendants in 42 U.S.C. § 1983 actions where the preceding case law had not established the unconstitutionality of the action before it occurred. The Court of Appeals holding partially affirmed and partially reversed the findings of the district court, which held that Charles was not protected by qualified immunity. *See Lauro v. City of New York*, 39 F. Supp. 2d 351 (S.D.N.Y. 1999); *LibelLetter*, March 1999, at 33.

#### *Cops Asked to Talk to Perp*

The plaintiff in this action, John Lauro, was a doorman in a Manhattan apartment building. A tenant, who had requested that Lauro enter his apartment to deliver mail and water plants while the tenant was on holiday, videotaped Lauro with a hidden camera looking into drawers and cabinets. The tenant filed a complaint against Lauro with the New York Police Department. He also sold the videotape to Fox 5 News, a local news program.

After he arrested Lauro on charges of burglary, petit larceny, and possession of stolen property, Detective Charles received a telephone call from the NYPD's Office of the Deputy Commissioner of Public Information, telling him of the media interest in the case and instructing him to take Lauro on a perp walk for the media's benefit. Charles then led Lauro out of the station house, drove him round the block, and led him back into the station house so that Fox 5 News could capture the reentry on videotape.

Ultimately, the criminal charges against Lauro were dismissed. The former suspect brought a § 1983 action against Detective Charles and the N.Y.P.D., naming numerous constitutional violations. Upon cross motions for summary judgment, Judge Allen Schwartz in the Southern District of New York held that the perp walk constituted an illegal seizure, citing *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), in which the Second Circuit upheld a Fourth Amendment claim against federal agents who permitted a news crew to videotape a search of the plaintiff's apartment. Furthermore, the district court held that *Ayeni* established a clear precedent applicable to perp walks; therefore Lauro was not entitled to qualified immunity. Detective Charles appealed.

#### *Court Relies on Ayeni and Wilson*

The Second Circuit, in an opinion by Judge Calabresi, affirmed the lower court decision on the more significant ruling: the viability of Lauro's Fourth Amendment claim.

First, the court noted that the reasonableness of searches and seizures depends not only on whether they should be carried out at all but also on the manner in which they are performed. Judge Calabresi cited to *Ayeni*, as well as to the more recent Supreme Court opinion, in *Wilson v. Layne*, 526 U.S. 603 (1999), as guiding precedents regarding whether the perp walk made Lauro's arrest unreasonable in character.

Both prior cases involved unreasonable search claims brought by former criminal suspects who were the subjects of media ride-along coverage. The Second Circuit in *Ayeni* and the Supreme Court in *Wilson* held that the presence of reporters in a suspect's home at the execution of a search or arrest warrant did not relate to the legitimate governmental purpose involved, and infringed on the suspects' privacy interests. Therefore, law enforcement facilitation of ride-alongs made the searches unreasonable.

The court found that these precedents left it, in analyzing Lauro's claims, with two instrumental questions: "First, did the perp walk intrude upon interests protected

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## UPDATES

### Second Circuit Affirms

*(Continued from page 33)*

by the Fourth Amendment? Second, if it did, was it nevertheless reasonable in light of legitimate law enforcement purposes?"

As to the first question, the court rejected the defendant's argument that the holdings in *Ayeni* and *Wilson* turned on the presence of media in the suspects' homes. Judge Calabresi emphasized the "humiliating position" (handcuffed) in which Lauro was "forced to walk back into the precinct house, in front of television cameras." This, the opinion seems to assume, would have "adverse effects on Lauro's privacy and dignity."

#### *No Legit Purpose*

Turning to the second question, that of reasonableness, the court followed *Wilson* in rejecting the argument that the importance of the press in informing the public about the administration of criminal judgment has a relationship to law enforcement objectives. The court, however, distinguished the media's interest in viewing an actual perp walk from the convenience of staging one, noting: "Even assuming that there is a legitimate state interest in accurate reporting of police activity, that interest is not well served by an inherently fictional dramatization of an event that transpired hours earlier."

Therefore, in this case the court found that "Detective Charles engaged in conduct that was unrelated to the object of the arrest, that had no legitimate law enforcement justification, and that invaded Lauro's privacy to no purpose." He thus violated Lauro's Fourth Amendment rights.

The court specifically limited its holding to this type of staged perp walk, declining to address the more common form where the suspect is photographed during the necessary process of transit. Furthermore, the opinion is careful to characterize the perp walk as an unreasonable *exacerbation* of Lauro's arrest, rather than holding that the videotaping constituted a "seizure of intangibles" in its own right.

At the end of the day, however, the court reversed the district court opinion on the issue of qualified immunity. The lower court held that the precedent of *Ayeni* "clearly established" that the staged perp walk would be

unconstitutional. However, factual distinctions between the two cases (such as the outdoor setting and the fact that Lauro was already in custody) led the Court of Appeals to hold differently. As the perp walk at issue here occurred several years before *Wilson* was decided, that case was irrelevant to this issue.

### Ohio Media Ask to See Executions

Nearly a month after U.S. District Court Judge Vaughn Walker ordered San Quentin prison officials in California to allow official witnesses to view the full process of lethal injection executions (*see LibelLetter* August 2000, at 29), Ohio reporters seek a similar order. The state has thus far resisted their efforts and the debate continues, pitting the public's right to know against the prison official's right to privacy.

Currently, reporters and other witnesses in Ohio are only permitted to see a portion of the execution to hide members of the execution team from view. Prison officials argue that they want to protect the identities of the prison staff who volunteer to serve on the execution team and are concerned that staff would be more hesitant to volunteer if there was an audience.

Ohio reporters, death penalty opponents and others contend that the public has the right to full disclosure of the execution process that is carried out in their name.

#### *Any developments you think other LDRC members should know about?*

Call us, send us an email or a note.

Libel Defense Resource Center, Inc.  
404 Park Avenue South, 16th Floor  
New York, NY 10016

Ph: 212.889.2306

Fx: 212.689.3315

ldrc@ldrc.com

## Court Denies Prior Restraint on O.J. Simpson Mini-Series

By Gary Bostwick

In 1996, Lawrence Schiller and James Willwerth wrote the book *American Tragedy: The Uncensored Story of the Simpson Defense*. Although counsel for O. J. Simpson complained, no legal action was ever brought as a result of the book or the publication of the paperback one year later.

### *Mini-Series in Production*

Now, Schiller is in the midst of producing and directing a two-part miniseries of the same name that is to be broadcast on November 12 and 15, 2000 on CBS Television Network. The photoplay is written by Norman Mailer and Schiller. On August 15, 2000, in the midst of actual filming and two weeks before shooting was to be completed, a complaint against Schiller and his production company appeared on the website of Gross & Belsky, Simpson's San Francisco attorneys. A few days earlier, they had given notice to Davis Wright Tremaine lawyers in Los Angeles, counsel for Schiller and his production company, that they would appear seeking a temporary restraining order which, although somewhat amorphous in its requests, would have resulted in shutting down the soundstage.

Simpson's papers included declarations from prominent members of the O.J. Simpson defense team, including Alan Dershowitz, Barry Scheck and F. Lee Bailey, but not including Johnnie Cochran or Robert Shapiro. Another defendant in the action is Robert Kardashian, Simpson's long-time friend and a core member of the defense team.

### *Was O.J. Promised Final OK?*

The essence of Simpson's allegations was that Schiller insinuated himself into the good graces of the defense team through Kardashian, who was also a friend of Schiller, and took advantage of that situation to obtain privileged and confidential information. A declaration by Simpson stated that he had given permission to the attorneys to speak to Schiller, but only because he felt the book was being done together with Kardashian and that it would be shown to either O. J. Simpson or to one of his

counsel prior to publication. Schiller denies that he ever promised anyone that any lawyer except Kardashian was going to look at the manuscript. Plaintiff has no evidence of a written agreement to show Simpson the book.

Simpson claimed damages in his complaint, but was initially interested in stopping Schiller from working on the film in any way whatsoever. His theory was that the attorney-client privilege had been breached, that Schiller had waived his First Amendment rights by agreeing to pass the material by Simpson prior to publication (akin to the agreement CIA agents have with the government), that Simpson had been too busy and too penurious at the time of publication of the book to do anything to defend his rights, that the miniseries would reach a much wider audience and therefore do irreparable harm, and that a delay in bringing the film to the public could only make the film more valuable rather than cause damages to the defendants.

### *Hearing on Injunction*

The judge, hearing the motion for a temporary restraining order on August 15, 2000, denied the motion and granted the alternative motion to set the matter for full hearing and briefing on September 6, 2000. On August 31, 2000, shooting was completed for the miniseries.

At the hearing, the judge stated that he wanted to focus the hearing on the Order to Show Cause on how much new material was included in the miniseries that could be considered privileged or confidential that had not already been published in *American Tragedy* in 1996 or in any other sources whatsoever, including books by other attorneys. Schiller's evidence at the hearing included a chart showing that all of the allegedly confidential information listed in Simpson's original motion could be found either in *American Tragedy*, books by other persons (mostly Simpson's attorneys), or articles or public appearances; or was a fictionalization for dramatic purposes drawn from background materials and crafted by Mailer and Schiller into the photoplay.

For the hearing on the Order to Show Cause, most of the same "Dream Team" attorneys who filed declarations on behalf of Simpson, stating that they only spoke with

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## Court Denies Prior Restraint

*(Continued from page 35)*

Schiller because they believed that Simpson would be able to review the book before it was published, filed new declarations to rebut Schiller's evidence that no such agreement existed. Two of the attorneys had been paid \$10,000 for their time and trouble in being interviewed by Schiller for the book, but neglected to explain those payments in their second declarations for the Order to Show Cause.

### *No New Confidences in Mini-Series*

A few minutes before the hearing on the Order to Show Cause, the judge published a tentative ruling in writing. The tentative ruling denied the motion for an injunction, saying that Simpson had not satisfied his burden to show that any confidential material that had not previously appeared elsewhere was not just fictional dramatization.

The judge also based his denial on a second ground — that there was not sufficient evidence to satisfy Simpson's burden of proof that a contract had existed requiring Schiller to show the manuscript of the book to O. J. Simpson or his representatives before publication.

During argument, defendant Schiller's attorneys emphasized the heavy burden on one seeking a prior restraint and upon the fact that no evidence had been presented that any of the statements in the photoplay were either privileged or confidential.

Plaintiff alleged that the statements were confidential and asked the court to presume the same from the content of the photoplay. After extensive argument by both sides, the court held to its tentative ruling and denied the motion for preliminary injunction.

Lawyers for Schiller and Kardashian have filed separate anti-SLAPP motions under California law for expedited dismissal of the complaint that defendants allege is an attempt to chill speech regarding a matter of public interest.

Under California law, if the motion is granted, the entire complaint will be stricken and defendants will obtain attorneys' fees incurred in bringing the motion. If the motion is denied, a new provision of California law will make it possible to file an immediate appeal.

On September 13, Simpson filed an appeal from the

denial of the preliminary injunction.

*Gary Bostwick is a partner at Davis Wright Tremaine LLP in Los Angeles and is the lead counsel of a team of lawyers from that firm, including Alonzo Wickers, A.J. Thomas, Jeff Blum and Susan Seager, all of whom contributed to the victories to date.*

## Survey Reveals Broadcast News Budgets on the Rise

### *Average of Four Hours of Local News Per Day*

The latest annual *Broadcasting and Cable* magazine survey of TV news directors indicates that budgets for news departments are up, with 55% of respondents reporting an increase over last year. The study, which polled 137 news directors, showed an average budgetary increase of 6%.

The majority (59%) of news directors said their station aired three to five hours of local and national news programming daily, with an average of four hours broadcasted. Another 23% of respondents stated that they aired six hours or more of news programming.

Web sites have become increasingly important for their role in boosting the news image of television stations. Forty-seven percent of news directors said that their station's web site was "extremely important" in helping their station enhance its news image, with another 42% percent answering that it was "somewhat important." This is a significant increase over last year's results, when only 33% said the web site was "extremely important" in their station's news image, while 48% said it was "somewhat important."

News departments usually work independently of sales when preparing special reports, sweeps series, and feature stories, according to poll results. Less than one-fifth reported that the groups work "somewhat" (12%) or "very" (4%) closely together on such projects, 42% said that they never worked together, and an equal 42% said that they only worked together "once in a while."

Finally, news directors overwhelmingly responded (90%) that there is no pressure on their news departments to broadcast feature stories regarding upcoming entertainment programming.

## “Shooting the Messenger:” A Media Coalition Report on Violence and Media

The Media Coalition recently released its report, “Shooting the Messenger – Why Censorship Won’t Stop Violence,” a study of particular interest in light of the recent debate over violence and its connection to the media. The issue has been a hot topic in the presidential election, with each candidate jumping on the censorship bandwagon to a different extent. The ABA has also gotten into the mix, with its “Technical Assistance Bulletin,” a guide to “help educators combat TV violence” (see next month’s edition of the *LibelLetter* for a review of the ABA “Bulletin”). The survey, based upon detailed analysis of compiled statistics and studies, aims to dismantle the commonly accepted belief that media-depicted violence encourages real-life violence. Judith Levine, the author of “Shooting the Messenger,” examines the results of these studies to conclude that the causes of societal violence are much more complex and multi-faceted than generally recognized.

The first section of the study, “The Social Science: Studies Don’t Support the Conclusion that Media Causes Real-Life Violence,” analyzes social-science data based on popular studies that are generally cited to prove violence portrayed by the media fosters actual violence. Levine closely re-examines these studies to show the evidence supporting such claims is inconclusive or even erroneous. In fact, the survey concludes that violent crime has fallen to its lowest level in nearly 30 years despite the ever-increasing presence of media. Levine asserts that instead of looking to those psychological studies commonly carried out to support restrictive social policies, examining broader social trends better indicates the causes of violence.

She then tracks the effects of censorship on youth and the regulations placed on media content. Levine determines censorship and regulation are ineffective methods of controlling actual violence based on historical precedence. In the section, “How Not to Stop Violence,” Levine cites examples of demands for media regulation and the “protection of children” throughout generations, from the actions of the New York Society for the Suppression of Vice in the late

19th Century to the aftereffects of Columbine.

The study focuses next on the complexity of the roots of violence and the danger in using the media as a scapegoat, which ignores deep-seeded social and cultural factors. Levine cites many interrelated societal factors, such as family dysfunction, poverty, poor schools and the prevalence of guns as “The Real Causes of Violence and Crime.”

The final section, “How to Help Kids Be Smart Media Consumers,” discusses the advantages of teaching children to view media critically through adult guidance, heeding voluntary media ratings and teaching media literacy.

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### Even the Media Falls Into the Trap of Assuming Causality...

Lest you think that only zealous plaintiffs are trying to assume a causal link between the media and violent acts, the *Tennessean* newspaper on-line shows that the media itself sometimes stumbles into that trap. The lead paragraph of a September 18 article about a boy arrested and charged with the rape of a 6-year-old-boy and 7-year-old-girl imparts, “A 13-year-old Rutherford County boy this week showed what can happen when a child logs onto pornographic Internet sites.” The article states that the rapes were “an idea he allegedly got from viewing porn sites.”

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## **Curley v. NAMBLA Re-Opens the Question of a Publishers Liability for Its Readers' Actions**

The question of a publisher's liability for the crimes of those who view its material is again at issue in recently filed suit of *Curley v. NAMBLA et. al.*

The family of murder victim Jeffrey Curley alleges that NAMBLA contributed to their son's death by motivating Charles Jaynes, via material he viewed on NAMBLA's website, to abduct, rape, and kill their ten-year-old son. Defendants include NAMBLA (the North American Man Boy Love Association), several individual members and the internet service providers (ISPs) that maintain NAMBLA's website.

*The Boston Globe* reported on August 31st that the Massachusetts chapter of the ACLU will defend NAMBLA at trial.

### ***Charge NAMBLA Site is "How-To"***

The Curleys' complaint charges that NAMBLA falsely claims to be a non-profit organization which "exists for the purpose of changing society's attitudes about man/boy love through publications, educational and political activities and membership conferences." Rather, the complaint alleges, NAMBLA and various named members maintain information on NAMBLA's site explicitly describing how members can achieve the organization's goals of promoting pedophile activity and exchanging child pornography.

As evidence of NAMBLA's true purpose, the complaint cites the NAMBLA bulletin which "contains various articles and letters encouraging men to have sex with young male children." The complaint further alleges that NAMBLA tries to associate itself with the gay rights movement in order to justify this activity.

### ***Charge ISPs with Culpability***

The complaint next charges two ISPs which maintained NAMBLA's website (which, consequently, has been taken down) with having provided NAMBLA with the ability to distribute their materials internationally. The complaint argues that both ISPs allowed NAMBLA to reach a wider audience and to more successfully evade law enforcement.

According to the complaint, Best Internet Communication Inc., NAMBLA's first access provider, "intentionally, negligently, recklessly and carelessly" supported the creation and maintenance of NAMBLA's site. Further, Verio Inc., which acquired Best Communications, violated its own "acceptable use policy" by continuing that support.

Together, NAMBLA's members and its access providers "promoted, advocated, conspired and urged" the general public to have sexual relations with male children and provided it with access to child pornography, the complaint says.

Plaintiffs charge that as a "direct and proximate result" of these activities, Jaynes became obsessed with male children when he accessed NAMBLA's website. Specifically, they claim that Jaynes viewed NAMBLA's website at the Boston Public Library "immediately prior" to committing his crime. As a direct and proximate result of NAMBLA's and the ISPs' activities, the complaint continues, Jaynes stalked, raped and murdered Jeffrey Curley.

The plaintiffs seeks to hold each defendant (NAMBLA, certain named members and both ISPs) liable for wrongful death and conscious suffering.

In taking the case, Massachusetts ACLU director John Roberts told the *Globe*, "for us, it is a fundamental First Amendment case."

The ACLU will act as surrogate for NAMBLA in the case, allowing individual NAMBLA members to remain anonymous. Roberts said that the organization would rely on precedents from the 1960s, which protected civil rights organizations such as the NAACP from having to reveal their memberships.

One anonymous NAMBLA member has refuted these charges through an e-mail sent to The Boston Coalition For Freedom Of Expression. In the e-mail, the member asserts that NAMBLA's website does not contain any material that would incite an individual to an act such as Jaynes'. Rather, the site only contains philosophical statements and information for contacting the organization.

## Judge Refuses to Apply Choice of Law to NJ Shield

By **Bruce S. Rosen**

A New Jersey trial court has quashed a subpoena against an MSNBC Interactive reporter pursuant to New Jersey's tough Newsperson's Privilege, rejecting arguments that Georgia's shield law should apply instead because the subject matter of the subpoena was more vital to Georgia's interest. *Mullen v. Nezhath* (Law Div., Salem Cty, Sept. 8, 2000).

Superior Court Judge G. Thomas Bowen ruled from the bench that if the privilege was subject to the determination of out-of-state laws, it "would violate and destroy [New Jersey's] shield law as to render it non-effective." The issue, which had been considered in New York in two unpublished cases in the 1990s, was of first impression in New Jersey.

The subpoena for reporter Linda Carroll, an MSNBC health columnist, was issued by lawyers for Drs. Camran and Farr Nez-

hat, two nationally known physicians who pioneered a new surgery for endometriosis, a painful disease where uterine tissue grows outside the womb. The Nezhats, once based in Atlanta and now at Stanford University Medical Center, are the subject of a malpractice lawsuit in Atlanta that alleges in part that the surgery was experimental. Under a confidentiality order, redacted patient records forming the basis for a 1992 medical journal article by the Nezhats on the new treatment were turned over to the plaintiff. The records were also in the possession of the Georgia Composite Board of Medical Examiners.

In June 2000, Carroll reported on MSNBC that after examining the records, the Nezhats falsified data, because they "failed to acknowledge complications and inaccurately reported other pertinent data" in the 1992 article. The articles did not reveal where she obtained the records. Based upon previous reports in the *Philadelphia Inquirer* and the *Atlanta Constitution*, the Nezhats had filed a motion for sanctions, alleging that the plaintiffs had leaked the patient records to the news media. Just days after Carroll's report, she was subpoenaed to appear at a deposition with her materials at the office of local counsel near her home in Salem, New Jersey on a subpoena obtained in New Jersey and based upon a previous

subpoena issued by a Fulton County, Georgia court.

Carroll filed a motion to quash, declaring the New Jersey shield law to be an absolute bar to her examination. Electronic dissemination of news is clearly within the New Jersey statute. The Nezhats' ingenious response acknowledged the absolute nature of the New Jersey privilege but said that choice of law principles should apply and would result in Georgia law being applied.

Under New Jersey law, it must first be determined whether a conflict of laws exists. The Nezhats argued that the Georgia shield law is only a qualified privilege and that because the Internet is not mentioned by name it would not be covered, therefore it would not apply and a conflict existed. They then argued the second prong of

the state's conflict of laws test, that Georgia had a greater "governmental interest" because the matter went to the integrity of the Georgia judicial system and patient confidentiality

rules.

Carroll countered that New Jersey's evidence rules required that all privileges must be applied in all proceedings within the state. In any case, counsel argued, Georgia's shield law would apply to bar her deposition and production and there was no conflict.

Judge Bowen agreed that Carroll and MSNBC were covered under the privilege. He noted that the shield law had been "continually and substantially honored" by the state's courts and concluded: "Under these circumstances, to undertake a conflict analysis and look to a state's interest would violate and destroy the shield law so as to render it not effective."

However, Judge Bowen, presumably responding to plaintiff's authority applying out-of-state rules to admissibility of evidence at trial, said that "if this was not the shield law, a different analysis might take place." Bowen denied Carroll's motion for sanctions, stating that the issues presented required "a great deal of thought." It is unknown whether the Nezhats will appeal.

*Bruce S. Rosen and Andrew E. Anselmi of McCusker Anselmi Rosen Carvelli & Walsh in Chatham, New Jersey, represent Linda Carroll in this matter.*

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*... if the privilege was subject to the determination of out-of-state laws, it "would violate and destroy [New Jersey's] shield law as to render it non-effective."*

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## Media Fight Prior Restraints, But Consider Imposing Their Own

### *Child Sex Cases Bring Court Orders, Ethical Issues*

Usually, nothing gets a reporter's back up more than being told by a judge that she or he cannot publish something. When faced with such an order, the first reaction of many reporters and editors is to call their attorneys, and ask them to fight the prior restraint.

Yet there are other times when the media decides on its own not to publish some information it has obtained, in the interest of some greater good. Three recent cases in Wyoming, Massachusetts and California reflect this. All three cases involved sexual matters related to children.

In Wyoming and Massachusetts, state judges issued orders directly prohibiting the media from disclosing information. A television station is appealing a fine imposed under the Wyoming order and the Massachusetts order was scaled back so as not to include the media.

In California, a judge issued an order to prevent reporters from obtaining information about the case. While the order was modified to allow some sources to speak to the media, it left reporters with an ethical dilemma: should they continue to name an eight-year-old sexual assault and kidnap victim, who they had already widely identified when she disappeared?

#### *Fined in Wyoming*

A Montana television station has asked the Wyoming Supreme Court to lift a finding of contempt and a \$750 fine imposed after the station broadcast some identifying information – but not the name – of a young sexual assault victim. The information had been released during a court proceeding.

The case, *Wyoming v. KTVQ-TV*, Crim. No. 4124 (Dist. Ct., 5th Jud. Dist., Park Cty May 30, 2000), *on appeal* No. 00-183 (Wyo. filed Aug. 29, 2000) arose from the highly-publicized guilty plea of James Eric Peterson, who admitted in October 1998 that he had raped and murdered eight-year-old Christian Lamb, and had also sexually assaulted a second child. The sexual assault confession was part of a plea bargain under which Peterson was sentenced to life in prison without the possibility of parole.

Prior to the entry of Peterson's plea bargain, Park County District Judge Hunter Patrick issued an order pro-

hibiting the disclosure of information which would reveal the identity of the sexual assault victim. At the sentencing hearing, the judge stated that, under the order, "the name of the victim is protected and is not to be disclosed outside the courtroom, either by word of mouth, by media or otherwise."

But other information regarding the second victim, including her age and her relationship with the defendant, was revealed during the hearing. And Janelle Slade, a reporter for KTVQ-TV in Billings, Mont., included that information in her television report on the sentencing; the information also appeared on the station's web site.

Two months later, a rival reporter with the *Billings Gazette* gave a print-out of KTVQ-TV's web site containing the article to the local prosecutor, who filed charges against the television station for violating the court order.

At a hearing on the charges, Slade said that she had not been aware of the order, other than Judge Patrick's admonition that the name of the sexual assault victim could not be published. After the hearing, Patrick found the station guilty of contempt and imposed a \$750 fine, the maximum allowed by law. He added that he would have liked the fine to be much higher.

The fine was suspended to allow the television station to file its appeal of the decision with the Wyoming Supreme Court, which it did in late August. The state has until mid-October to reply.

#### *Teen Seminar Sparks Debate, Restraint*

In Massachusetts, Suffolk County Superior Court Judge Allan van Gestel barred the distribution of both an audio recording and transcripts of a sex education seminar on gay sex and sexuality held with high school and college students. Eight days after issuing the order, van Gestel modified it to apply only to participants in the case. *Netherland v. Camenker* (Suffolk Cty. Super. Ct. May 25, 2000).

The seminar was held in late March and organized by the Gay, Lesbian, and Straight Education Network (GLSEN) and Project 10 East, a tolerance education group.

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## Media Fights Prior Restraint

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It was run by two Massachusetts Education Department HIV/AIDS educators and a HIV/AIDS consultant to the state's Department of Public Health and held at the private Tufts University. It did not receive state funding, although GLSEN has received state funding to promote tolerance at high schools.

The tape, which revealed that the session discussed a variety of sexual activities — often in explicit detail — was made by Scott Whiteman of the Parents Rights Coalition, who paid and attended the seminar even though he was 26 years old. Whiteman's group opposes what it calls the "teaching of homosexuality as an equally valid 'life choice'" in schools.

Whiteman sent a letter to the local district attorney and state officials giving details about the seminars. He also brought the tapes to WTKK-FM talk radio host Jeanine Graf, who played portions of them on the air. Transcripts of the tapes were also published in *The Massachusetts News*, a conservative newspaper.

Whiteman and Parents Rights Coalition President Brian Camenker played the tape at a press conference on April 27, and planned to play it again at another news conference on May 18.

In response, a 17-year-old seminar participant and the group Gay and Lesbian Advocates and Defenders ("GLAD") sued the Parents Rights Coalition and its officials, arguing that distribution of the tapes and transcripts violated the privacy rights of the participants in the seminar.

On May 17, van Gestel issued an order prohibiting disclosure of the tape. In addition to applying to the Parents Rights Coalition and other case participants, the order also applied to "any and all persons who presently possess a copy of the tape and attempt to disclose or use such tape in any forum." This extended the order to the news media, and led a member of the Massachusetts State Legislature to warn his colleagues against revealing the tape's contents during debate over funding for "gay youth" programs.

Graf continued to play the tape on her radio program. Meanwhile, the attorney for Parents Rights Coalition, Chester Darling, argued against the order. He was joined by the Fox News Network, after GLAD faxed the order to Fox News host Bill O'Reilly following a program he did

on the controversy. At the resulting hearing, GLAD agreed that the media should be exempted from the order.

On May 25, van Gestel modified his previous order so that it applied only to Whiteman, Camenker, the Parents Rights Coalition, "and any persons in active concert or participation therewith." The modified order adds, "Nothing in this preliminary injunction shall be deemed to apply in any way to the print or electronic news media."

While the order continues to be in effect against the Parents Rights Coalition and its officers, other groups sympathetic to their cause are now distributing copies and transcripts of the tape.

### *Gag Order Limited; Ethical Issues Abound*

The gag order imposed by Solano County Superior Court Judge Allan Carter in late August, *People v. Anderson*, No. VCR 149104 (Super. Ct., Solano Cty. Aug. 24, 2000), was meant to protect the investigation into the kidnapping and molestation of an eight-year-old Vallejo, Calif. girl.

The local media fought the order, and won a limited

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## Media Fights Prior Restraint

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victory in court. But once the order was scaled back, they faced an ethical dilemma: should they identify the girl?

Curtis Dean Anderson was arrested after the girl escaped from two days of captivity, according to police. After the arrest, local law enforcement officials told reporters that they were investigating Anderson's possible involvement in other kidnappings in California and as far away as the Midwest. Local newspapers reports included these allegations in coverage of the Vallejo case.

Anderson's attorney requested the gag order after these stories appeared, claiming that his client's fair trial rights were being jeopardized. Carter issued an order on Aug. 24 which prohibited the lawyers and court personnel involved in the case, as well as anyone involved in the investigation, from speaking to the media. The order made exceptions for general information about the case, such as the nature of the charges against Anderson and the scheduling of hearings.

Lawyers representing the *San Francisco Chronicle*, *San Francisco Examiner*, and *The Sacramento Bee* submitted papers objecting to the order, but Judge Carter declined to hear their oral arguments until a hearing on Sept. 7.

At the hearing, Carter heard arguments from Northern California newspapers that the order should be lifted. He then issued a modified order which continued to prohibit the attorneys, judicial employees, and members of the Vallejo police department from speaking to the media. The prohibitions against representatives of the FBI and the Solano County Sheriff's Office speaking to the media were dropped.

This meant that local media could get some of the information they needed to cover the story. But it left the media with an ethical dilemma, which the *San Francisco Examiner* examined in an Aug. 17 article.

The media had already identified the eight-year-old when she disappeared. Now that she was back home, police said that she had been kidnapped and sexually assaulted. Should the media now withhold her name?

The *Examiner*, along with the *Contra Costa Times* and the Associated Press, stopped identifying the girl by name. "We decided that that's our policy," *Contra Costa Times* managing editor Sandra Keyes told the *Examiner* regarding her newspaper's decision to no longer publish

the name.

The *San Francisco Chronicle*, the *San Jose Mercury News* and WKTV-TV continued to use the girl's name, reasoning that it had already been released.

"Her name was already out there," *Chronicle* managing editor Jerry Roberts told the *Examiner* regarding her newspaper's decision to continue publishing the name. "As a practical matter, (naming her) wasn't going to have an impact."

Roberts added, however, that his paper may not publish the name when the case comes to trial.



## BULLETIN

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

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## Studios Prevail Over Hackers, Preventing Napsterization of Film Industry

### *Spurious First Amendment Defense Goes Down To Defeat*

By Charles Sims

In what plaintiffs see as an important victory for media companies and copyright owners generally, Judge Lewis Kaplan, in the United States District Court for the Southern District of New York, has enjoined hackers from publicly distributing decryption devices that would circumvent technical measures employed by copyright owners to prevent the widespread copying of their works over the Internet. The Court also entered a declaratory judgment that the public dissemination of decryption keys violates the Digital Millennium Copyright Act (DMCA), P.L. 105-304, *codified at* 17 U.S.C. § 1201-04. The decision obtained by the eight major motion picture studios in *Universal City Studios, Inc. v. Reimerdes*, 2000 U.S. Dist. LEXIS 11696 (S.D.N.Y. Aug. 17, 2000), upheld against a constitutional attack the anti-circumvention provisions of the Act and vindicated the motion picture studios' decision to release films in digital form in reliance on encryption and the anti-circumvention provisions of the DMCA.

### *The DMCA opens the way for DVDs*

Congress enacted the DMCA in 1998 after receiving extensive testimony that digital copying posed dangers that differed in kind from those posed by analog copying on videotape. Among its various provisions, the DMCA prohibits the public offering or provision of "any technology, product, service, device, component, or part thereof" that "is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access" to a copyrighted work, or that "has only limited commercially significant purpose or use other than to circumvent" such control measures, or that is knowingly marketed for use in circumventing" such measures. Content owners who protect their works by encryption or other technological means are assured of a right to have those measures respected, and persons providing the public with the means to circumvent them are subject to injunctive relief and damages.

In view of the dangers of digital copying, the motion picture studios were hesitant to release films in digital form without the technical protection of encryption and the additional legal protection that would prevent hackers from defeating encryption measures. Supporters of the DMCA used

the analogy of locks and keys and the protection afforded those who utilize them to protect property: just as the public provision of burglars tools is illegal, and the public provision of master keys to the automobile fleets of the major auto companies can be criminalized, Congress was persuaded that, in addition to existing protection against infringement, the owners of copyrighted digital content were entitled to protect their property as well by implementing technological access control measures (or "locks") like encryption or scrambling.

### *The Litigation: A PI in January*

The eight major motion picture studios filed suit in January 2000 Shawn Reimerdes, Roman Kazan, and Eric Corley for operating web sites which included a software utility called DeCSS, for decrypting motion pictures released on DVDs. The defendants engaged the Electronic Frontier Foundation ("EFF") to represent them.

Judge Kaplan granted the preliminary injunction sought by the studios, enjoining the defendants from "posting on any Internet web site, or in any other way manufacturing, importing or offering to the public, providing, or otherwise trafficking in DeCSS." *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 211 (S.D.N.Y. 2000) (opinion) and 2000 U.S. Dist. LEXIS 554 (S.D.N.Y. January 20, 2000) (text of preliminary injunction).

Judge Kaplan's preliminary injunction opinion concluded that the defendants were violating the statute, and that a violation of the DMCA's anti-circumvention provisions could not be defended by pointing to hypothetical fair uses that others (not the defendants) might make of plaintiffs' motion pictures if those third parties obtained the decryption devices proscribed by the statute and then decrypted plaintiffs' films.

The Court also rejected the EFF's constitutional attack on the DMCA as applied. Opining that DeCSS was probably not properly categorized as protected speech, the Court nonetheless assumed that the decryption utility was protected speech, but said that was "just the beginning of the analysis." The Necessary and Proper Clause grants Congress the power, the Court held, "to do that which is necessary and proper to prevent others from publishing protected writings

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for the duration of the copyright,” and that interest was ample to uphold any conceivable burden on the defendants’ speech interests in distributing DeCSS to the public. Judge Kaplan also rested his constitutional decision on the long-standing rule — applied, for example, in *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973), and *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) — that courts may proscribe conduct whose principal purpose is to violate the law.

### *Court Defends Prior Restraint*

The court also concluded that the prior restraint doctrine did not bar a preliminary injunction, authorized by the DMCA, against public dissemination of decryption code that would breach the security of plaintiff’s DVDs, noting that

even academic commentators who take the extreme position that most preliminary injunctions in intellectual property cases are unconstitutional prior restraints concede that there is no First Amendment obstacle to preliminary injunctions barring distribution of copyrighted computer object code or restraining the construction of a new building based on copyrighted architectural drawings because the functional aspects of these types of information are ‘sufficiently nonexpressive.’

82 F. Supp. 2d at 226 n75.

Distinguishing the injunction sought from those seeking to bar publication of news stories and the like, the court observed that

The fact that there may be some expressive content in the code should not obscure the fact that its predominant character is no more expressive than an automobile ignition key — it is simply a means, electronic in one case and mechanical in the other, of causing the machine with which it is used to function in a particular way.

### *Discovery Massive*

After the entry of the preliminary injunction, two of the defendant hackers settled with the studios and agreed to stop posting DeCSS permanently. The third, Eric Corley,

and his company, 2600 Enterprises, Inc., which publishes a magazine for hackers, elected to continue the suit, and the EFF engaged Martin Garbus of Frankfurt Garbus Klein & Selz to take over the defense.

Over the next months, defendants commenced massive discovery from the studios and the MPAA, which had organized and coordinated the litigation, obtaining tens of thousands of documents in an attempt to establish a “selective enforcement” defense, and to turn attention from the defendants’ conduct to the studios’ motives in pressing for passage of the DMCA. In what seemed to be an effort to make the case costly for the studios, the defendants undertook massive document discovery and sought to depose MPAA head Jack Valenti and Disney CEO Michael Eisner with the press present, even though neither had any first-hand knowledge of any issues legitimately in suit, on the pretext that each had spoken out publicly about the dangers of copyright infringement in the digital age.

### *Expanded PI Sought for Links*

In the meantime, plaintiffs moved to expand the preliminary injunction to include a prohibition against the defendants’ post-preliminary injunction move to evade the injunction by providing a lengthy collection of hyperlinks, on the 2600.com web site, to other web sites which had posted DeCSS at defendant Corley’s instigation. Although Corley and 2600 made a show of compliance with the injunction by removing DeCSS from their web site, Corley posted a “call to action” to encourage others to do what he had been banned from doing, encouraging others to “take a stand [against the MPAA] and mirror these files” in order to replace and add to those that were removed through the MPAA’s enforcement efforts.

Corley’s web site stressed that because “a handful of sites have gone down due to [enforcement efforts of the MPAA] . . . [w]e need to replace them and add to the number.” Corley managed to persuade others to post DeCSS to their sites and to provide their URLs to 2600.com so that he could link the 2600 site to those sites. Corley and his attorneys attempted to portray the studios’ request for relief from that transparent evasion of the injunction barring him from providing DeCSS to the public as an effort to generally proscribe linking. The studios, however, had been

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careful not to argue that linking to a site containing DeCSS was generally or necessarily a violation of the anti-circumvention statute, and instead predicated their request for relief on the argument that Corley was simply evading the injunction and continuing to provide DeCSS to the public. Defendants cross-moved to vacate the preliminary injunction in response to plaintiffs' motion.

Judge Kaplan reserved judgment on both motions, but set an expedited trial date for mid-July, moved up from December in view of defendants' motion to vacate the preliminary injunction. After several rejected requests for an adjournment, defendants made a last-ditch effort to derail the trial by moving to recuse Judge Kaplan as biased against Martin Garbus, based on an affidavit by Garbus' long-time law partner, Richard Kurnit, recounting a conversation Kurnit had with Judge Kaplan in 1981, and Garbus' own affidavit arguing that the court was biased against him personally. Those motions were denied and the trial commenced on schedule. (The Second Circuit subsequently speedily denied a motion to stay the trial pending disposition of a petition for mandamus, and denied the mandamus petition without calling for a response.)

### The Decision

As there was no genuine dispute that Corley had been providing DeCSS and sought to continue to do so, the trial focused on the defenses that some persons (including three computer science professors presented at trial) might want to make fair use of decrypted DVDs; that their constitutional rights would be violated if they could not obtain DeCSS from a public website; and, most curiously, that the motion picture studios, which were concerned enough by defendants' conduct to be spending substantial sums litigating the case, somehow had nothing to worry about and were feigning injury for some unspecified purpose.

The decision, rendered a few weeks after trial, tracked the preliminary injunction opinion in most respects. Judge Kaplan held that the defendants violated the DMCA, that none of the carefully circumscribed statutory defenses (encryption research, reverse engineering) applied, and that

Congress, after carefully considering and balancing competing interests, had decided not to allow a fair use defense to a claim for providing anti-circumvention devices. The defense that the studios had suffered no harm was quickly dispatched, since "the availability of high speed network connections in many businesses and institutions, and their growing availability in homes, makes Internet and other network traffic in pirated [digital copies resulting from decryption by DeCSS] a growing threat."

### DMCA Does Not Violate First Amendment

Judge Kaplan rejected, as well, the contention that the DMCA violated the First Amendment either on its face or as applied. Viewing the DMCA as aimed at conduct, and not aimed at content or ideas, with at most an "incidental effect" on expression, the court applied intermediate review under *United States v. O'Brien*, 391 U.S. 367 (1968), and upheld the statute as enacted to further a substantial governmental interest, unrelated to the suppression of free expression, and no broader than necessary to accomplish Congress' goals of preventing infringement and promoting the availability of content in digital form.

He again concluded that the prior restraint doctrine was no bar to injunctive relief, as there had been a full trial and the injunction barred not ideas or genuine content but only "a means of causing a machine . . . to perform particular tasks."

And the overbreadth argument — in which defendants argued that the absence of any fair use defense harmed free speech interests — was rejected. After careful consideration of potential fair uses that might be made of films and other materials on DVDs, the court concluded that they could all be pursued notwithstanding the DMCA, and would be impacted if at all only "to a trivial degree." Nothing in the DMCA (or the injunction sought and entered) prevents quoting from, or viewing and listening to, DVD content.

If there turn out to be fair uses that cannot be undertaken by persons with the use of DVD players, DVD computer drives, or analog copying of DVD content (as defen-

*. . . Congress, after carefully  
considering and balancing competing  
interests, had decided not to allow a  
fair use defense to a claim for providing  
anti-circumvention devices.*

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## Studios Prevail Over Hackers

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dants alarmingly complained but were unable to identify), there will be time enough, the court concluded, for those persons to bring those claims. Nothing proved or said at trial suggested that such hypothetical issues had sufficient substance to preclude Congress from protecting incentives to creation by deterring the copying over the Internet of digitized copies of copyrighted works.

### *Draws on New York Times v. Sullivan for Linking Liability*

Finally, the court extended the injunction to bar defendants' provision of DeCSS by any means, including the linking that they had been using. Carefully avoiding any suggestion that linking was generally actionable, Judge Kaplan noted that, when enjoined from providing DeCSS by posting, Corley had simply set about to provide DeCSS in another fashion, by instigating others to mirror his site and then including links to those sites after checking to make sure that the sites he was linking to in fact contained DeCSS.

Judge Kaplan found an analogy to defamation law in analyzing when a defendant should be culpable for linking. Concerned here, as in defamation, not to chill speech, he concluded that:

The solution to the problem is the same: the adoption of a standard of culpability sufficiently high to immunize the activity, whether it is publishing a newspaper or linking, except in cases in which the conduct in question has little or no redeeming constitutional value.

In this case, Judge Kaplan concluded the test required:

clear and convincing evidence that those responsible for the link (a) know at the relevant time that the offending material is on the linked-to site, (b) know that it is circumvention technology that may not lawfully be offered, and (c) create or maintain the link for the purpose of disseminating that technology.

Defendants have said that they will appeal.

### *Implications*

Notwithstanding the "chicken little" publicity campaign of the hacker community and its supporters, the decision breaks little new ground and was entirely predictable from long-standing principles of first amendment and copyright law. It does, however, in upholding the DMCA, restore to copyright owners a measure of effective protection of their expression against uncontrolled, widespread copying over the Internet.

As the experience of the popular music industry shows — Napster, MP3.com, and Scour are prime examples — the ability to make and distribute over the Internet copies of copyrighted work that is not technologically protected is almost irresistible. Protection of the right to exploit the commercial value of copyrighted works that have been made available in digital form requires not only vigilance and a willingness to litigate, but also technological measures that deter copying. By prohibiting and thereby helping to deter circumvention of such measures, the DMCA assists copyright law's primary function of providing incentives for the creation and widespread dissemination of creative work. The decision thereby should help avoid the "Napsterization" of the motion picture industry and other industries — the newspaper and magazine industries are prime examples — whose revenues depend on respect for copyright.

*Editor's Note: DeCSS was developed by a 15-year old boy in Norway and two others he communicated with on the Internet in 1999. According to the court's recitation of the facts, DeCSS became widely available on the Internet within months of its development.*

*As with many of the new technology litigations — and indeed, intellectual property matters generally — one finds LDRC members on many sides of the issues. This article is written by one of the counsel for the plaintiffs. A prior article on the case was written by counsel for the defendants. Defendants, while certainly hackers, have had their supporters as well, including some well known members of the academic community.*

*Charles Sims is a partner in Proskauer Rose, New York, and was part of a team of litigators at Proskauer Rose, including Jon Baumgarten, Leon Gold, and Bill Hart, which represented the motion picture studios in this litigation.*

## Eighth Circuit: “Unpublished” Decisions Are Precedential

By John Borger

A three-judge panel of the U.S. Court of Appeals for the 8th Circuit carried a banner of judicial accountability and integrity across an administrative Rubicon on August 22, declaring that the widespread practice of issuing “unpublished” and therefore non-precedential decisions violates Article III of the U.S. Constitution. *Anastasoff v. United States of America*, No. 99-3917EM, 2000 WL 1182813, 2000 U.S. App. LEXIS 21179 (8th Cir. Aug. 22, 2000.)

The panel struck down part of the circuit’s own procedural rules, stating: “We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the ‘judicial.’”

“Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law,” the court continued, citing *Marbury v. Madison*, 5 U.S. 137 (1803). “This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties.”

Judge Richard Arnold, who served as chief judge of the 8th Circuit from 1992 to 1998, wrote the decision. Senior 8th Circuit judge Gerald Heaney and Minnesota district chief judge Paul A. Magnuson, sitting by designation, also joined the opinion. The decision consists almost entirely of an extended historical analysis of the roots and limits of judicial power and reads as if Judge Arnold had given considerable attention to the issue of unpublished decisions before finding a case to which the analysis could be attached.

The case itself involved Faye Anastasoff’s claim for refund of overpaid federal income taxes. She had mailed her refund claim within the three-year limitation period, but it was received and filed a day after the period expired. The issue was whether a statutory “mailbox rule” applied to save her claim. Unfortunately for the taxpayer, the 8th Circuit had rejected that argument in a 1992 unpublished decision. Anastasoff made no attempt to distinguish the earlier decision, but argued that it was not a precedent because it was unpublished. She cited Rule 28A(i), which provides:

Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.

The 8th Circuit held that the rule was unconstitutional and that the principle of binding precedent limits “the judicial power delegated to the courts by Article III of the Constitution. Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional. That rule does not, therefore, free us from our duty to follow” the prior unpublished decision.

Judge Arnold explained that when the Constitution was adopted, the Framers had inherited a very favorable view of precedent from the seventeenth century, especially through the writings and reports of Sir Edward Coke; the assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government. In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.

Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds. By contrast, in the eighteenth-century view (most influentially expounded by Blackstone), the judge’s duty to follow precedent derives from the nature of the judicial power itself. As Blackstone defined it, each exercise of the “judicial power” requires judges “to determine the law” arising upon the facts of the case. “To determine the law” meant not only choosing the appropriate legal principle but also expounding and interpreting it, so that “the law in that case, being solemnly declared and deter-

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## “Unpublished” Decisions Are Precedential

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mined, what before was uncertain, and perhaps indifferent, is now become a permanent rule....”

The judicial power to “determine law” is a power only to determine what the law is, not to invent it. Because precedents are the “best and most authoritative” guide of what the law is, the judicial power is limited by them.

Quoting Blackstone, the court added, “In addition to keeping the law stable, this doctrine is also essential ... for the separation of legislative and judicial power.”

Although “early Americans demonstrated the authority which they assigned to judicial decisions by rapidly establishing a reliable system of American reporters,” limited publication of judicial decisions remained the rule for many years.

Nevertheless, “judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer’s unpublished memorandum.”

The court emphasized that its ruling did not mean that every opinion would have to be “published.” It stated that this case

is not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general. Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision. The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not. We point out, in addition, that “unpublished” in this context has never meant “secret.” So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk’s office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled “published” or not, available to anyone on line. This is true of our Court.

The court emphatically rejected arguments that adminis-

trative burdens required court to shunt some decisions into an “unpublished” category that rendered them meaningless except in the context of a single case. Judge Arnold wrote:

Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: ‘We may have decided this question the opposite way yesterday, but this does not bind us today, and, what’s more, you cannot even tell us what we did yesterday.’ As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not *fiat*.

Finally, lest we be misunderstood, we stress that we are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is

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## “Unpublished” Decisions Are Precedential

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a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.

In basing its holding on Article III of the U.S. Constitution, *Anastasoff* directly questions every federal district or circuit rule that purports to relegate some decisions to non-precedential status.

Whether that reasoning extends to state courts will depend upon each state's constitutional history. But the concluding paragraphs, quoted immediately above, challenge all courts to accept accountability for every decision they make rather than to resign themselves to a self-deprecatory view that they are grinding out decisions like sausage, with no responsibility for consistency or longevity of their reasoning.

As Judge Heaney observed in a brief concurrence, Judge Arnold “has done the public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished opinions.”

*John Borger is a partner in Faegre & Benson, Minneapolis, Minnesota.*

poenas by criminal defense attorneys.

Neither journalist is regularly represented by counsel and neither had the resources readily available to challenge the subpoenas served upon them. Tim Crews eventually served 5 days in jail, which attracted the attention of Assembly Member Carol Migden and others in the California Legislature. Sommers, a college student, was eventually able to persuade the court to reconsider and vacate its contempt order and to quash the subpoena.

Both journalists would have benefited from the procedural improvements that will become effective January 1, 2001.

Code of Civil Procedure section 1286.1 clarifies that journalists do not waive their constitutional protections when they respond to questions. This should avoid some of the “gotcha” traps journalists have encountered based on seemingly innocuous testimony focused on published material (such as concerning the journalist's practices with respect to use of quote marks).

Second, the statute requires at least five days' notice to journalists that their appearance will be required. This should help journalists locate counsel and give counsel time to prepare responsive documents.

Finally, the new law requires courts to make findings stating, at a minimum, why the information will be of material assistance to the party seeking the evidence, and why alternate sources of the information are not sufficient to satisfy the defendant's right to a fair trial. This should focus counsel and the courts on the alternative source and material assistance issues that frequently result in subpoenas being quashed.

The success of the bill is a tribute to the collaborative efforts of a number of counsel and organizations, but particularly of CNPA legislative advocate Tom Newton.

The chaptered bill is at: [http://www.leginfo.ca.gov/pub/bill/asm/ab\\_1851-1900/ab\\_1860\\_bill\\_20000911\\_chaptered.html](http://www.leginfo.ca.gov/pub/bill/asm/ab_1851-1900/ab_1860_bill_20000911_chaptered.html)

*Charity Kenyon is a member of Riegels Campos and Kenyon LLP in Sacramento, California.*

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## California Amends Shield Law After Recent Contempt Findings

**By Charity Kenyon**

California Governor Gray Davis has signed a new shield law statute sponsored by the California Newspaper Publishers Association. Witnesses in support of the bill included Tim Crews of the Sacramento Valley Mirror and David Sommers of the State Hornet (California State University Sacramento), both of whom were held in contempt earlier this year for invoking their shield law rights (Cal. Const. Art. I § 2 (b)) in response to sub-

## Publisher's Liability for Publication of Confidential Information

By John C. Greiner and Rebecca N. Algenio

In *New York Times v. United States*, 403 U.S. 713 (1971) (more commonly referred to as “The Pentagon Papers” case), the United States Supreme Court decided that the government could not impose a prior restraint preventing publication of allegedly stolen, “top secret” Defense Department documents. This decision, however, addressed only the question of prior restraint. Neither the Supreme Court, nor any other court for that matter, reached the question of whether *The New York Times* or *The Washington Post* could be liable, *post-publication*, for publishing the information.

This article examines the current status of the law on the question of publishing “illegal” information. The article focuses largely on the question as it concerns the use of information obtained in violation of federal and state “anti-wiretap” laws. But with that question a live issue in a case now pending before the United States Supreme court, the principles discussed in these cases may come to apply to other types of “illegal” information.

### *Regulating the Publication of “Illegal” Information*

The question of whether a publisher of “illegal” information may be sanctioned — particularly where the publisher received the information innocently — requires an analytical balancing act. On the one hand, the Constitution fundamentally protects the press. The First Amendment mandates that “Congress shall make no law...abridging the freedom...of speech, or of the press.” U.S. Const. Amend. I. This prohibition applies equally to the states through the due process clause of the Fourteenth Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). The press is entitled to First Amendment protection for routine newsgathering techniques, for “without some protection for seeking out the news, freedom of the press could be eviscerated.” *In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir.1982).

On the other hand, the First Amendment has never been construed to accord the press immunity from torts or crimes committed during the course of newsgathering. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9<sup>th</sup> Cir 1971). The “press has no special immunity from the

application of general laws even though they have an incidental effect on the press’s ability to gather and report the news.” *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

### STATUTORY REGULATION

Technological advances have complicated the analysis in at least two ways. First, with voice mail, e-mail, cell phones, and the Internet, there is more information “out there” and more opportunity to retrieve it by legal and illegal means.

Second, there is more regulation governing the retrieval and use of such information. Congress has found that “the tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communications is seriously jeopardized.” S. Rep. No. 90-1097, at 67 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2154. In 1986, Congress found that the development of cellular telephones, computers and other new means of electronic communications had made the problem even worse. “Tremendous advances in telecommunications and computer technology have carried with them comparable technological advances in surveillance devices and techniques,” increasing the risk that communications “may be open to possible wrongful use and public disclosure by ... unauthorized private parties.” S. Rep. No. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3557.

Congress’ response was to adopt a “comprehensive scheme for the regulation of wiretapping and electronic surveillance,” *Gelbard v. United States*, 408 U.S. 41, 46 (1972), expressing a “fundamental policy adopted by Congress.” *Id.* at 47. This statutory scheme is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, as amended by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 18 U.S.C. § 2510, *et seq.*

Title III broadly prohibits both the interception of electronic communications and the subsequent use of intercepted communications.<sup>1</sup> Title III provides in pertinent part as follows:

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### § 2511. Interception and disclosure of wire, oral, or electronic communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who:

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(c) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[,] shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

The prohibition of the use of unlawfully intercepted communications applies to both private dealings and federal, state, and local government proceedings. 18 U.S.C. § 2515. Title III provides for a civil action by "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of [Title III]." 18 U.S.C. § 2520 (a).

A majority of states have enacted statutes which contain provisions very similar to Title III.<sup>2</sup> These statutes affect the publication of information obtained through the interception of any wire, oral, or electronic communications.

## JUDICIAL REGULATION

To the extent the courts have considered sanctioning the publication of "illegal" information, the fact patterns can be broken down roughly into two categories.

### CONTENT-BASED PROHIBITION

First, courts have reviewed statutes that prohibit the publication of lawfully obtained information based on the content of the information. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (Georgia statute made it a misdemeanor to publish or broadcast the identity of a rape victim.); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 820 (1978) (Virginia statute provided for the confidentiality of judicial disciplinary proceedings and made it unlawful to divulge the identity of a judge subject to such proceedings prior to the filing of a formal complaint with the state's highest court.); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (Florida statute rendered unlawful publication of names of sexual offense victims.).

### MEANS OF ACQUISITION OF THE INFORMATION

Second, courts have reviewed statutes that prohibit the use and/or publication of information based on the means by which the information was acquired. *Peavy v. WFAA-TV, Inc.*, 2000 U.S. App. Lexis 18289 (5th Cir., July 31, 2000) (The court held that liability may be constitutionally imposed under Title III (and Texas law) on media defendants who obtained and published truthful information taken from intercepted telephone conversations, particularly where the media defendants knew that this public information had been illegally obtained from someone else.); *Boehner v. McDermott*, 191 F.3d 462 (D.C. Cir. 1999) (Title III prohibits a person who knows or has reason to know that a wire, oral, or electronic communication was unlawfully intercepted from disclosing or using the contents of that communication.); *Bartnicki v. Vopper*, 200 F.3d 109 (3rd Cir. 1999) (Title III and its state counterparts may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception.)

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### JUDICIAL TREATMENT OF "CONTENT BASED"

#### REGULATIONS

The Supreme Court has held that "content based" regulations which prohibit publication do not survive First Amendment scrutiny. In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. Oklahoma County Dist. Court*, 430 U.S. 308 (1977); and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court struck down statutes (or, in *Oklahoma Publishing*, an injunction) that prohibited the publication of lawfully obtained information based on the content of the information.

In each case, the court applied strict scrutiny analysis.<sup>3</sup> The *Smith* case noted that such a standard was appropriate because a newspaper's publication of truthful information that it lawfully obtained about a matter of public significance may constitutionally be punished *only* when the punishment is narrowly tailored to further a state interest of the highest order.<sup>4</sup> The court held that state action to punish the publication of truthful information seldom can satisfy constitutional standards.

The court concluded that the publication the state sought to punish under the statute "lies near the core of the First Amendment, and the...state's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachment on freedom of speech and of the press which follow therefrom." *Smith*, 443 U.S. at 102.

In these cases, four factors compelled the court to strike down the offending regulations. First, in each case, the challenged statute or court order prohibited only publication, not any other use, of the information in question. Second, in each of these cases, the government had prohibited publication by the media, or by some segment thereof, but had left others free to disclose the information in question. See *Florida Star*, 491 U.S. at 536 n.1, 540 (The statute only applied to "instrument[s] of mass communication."); *Smith*, 443 U.S. at 98 (The statute only applied to newspapers.); *Oklahoma Publishing*, 430 U.S. at 308 (The injunction only applied to publication by the "news media."); *Cox Broadcasting*, 420 U.S. at 471 n.1 (The statute only applied to the mass media.). The limitation only on publication,

only by the media, constituted disparate treatment of speakers and unfairly infringed on the rights of the media. The disparate treatment also undercut the force of the government's argument that there was a vital need to prevent disclosure of the information in question. The offending prohibitions did not prevent *disclosure*, (the asserted objective), they merely punished certain publication by certain parties.

Third, in each of these cases, the government itself had provided the media with the information in question, thus further belying the claim that a vital state interest in the protection of privacy was at stake. See *Florida Star*, 491 U.S. at 527 (The reporter obtained the name of a rape victim from a police report that was publicly available in the police pressroom.); *Smith*, 443 U.S. at 99 (The reporter obtained the name of a juvenile offender "simply by asking ... the police and an assistant prosecuting attorney."); *Oklahoma Publishing*, 430 U.S. at 311 (The reporter learned the name of a juvenile offender from a proceeding in open court.); *Cox Broadcasting*, 420 U.S. at 472-73 (The reporter learned the name of a rape victim from "public records available for inspection").

Fourth, in each of these cases, the government asserted the right to prevent publication only of information on certain specific topics: the name of an alleged victim (*Florida Star*; *Cox Broadcasting*), or perpetrator of a crime. (*Smith*; *Oklahoma Publishing*). Thus, in these cases, the prohibition was related directly to the content of the information. It is difficult to imagine any such regulation surviving a strict scrutiny analysis since content based regulation goes against the very grain of the First Amendment. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

While *Cox* and the later cases reiterated the First Amendment's prohibition on content based regulation, none of these cases reached the issue whether, in a case where information was unlawfully obtained, the publication, as well as the illegal acquisition could be sanctioned. In *Florida Star*, the court reserved the question, noting: "[The court is not deciding] whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Florida Star*, 491 U.S. at 535 n.8.

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## Publisher's Liability for Confidential Information

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### JUDICIAL TREATMENT OF "ACQUISITION BASED" REGULATIONS

Within the last several years, a number of cases involving stories that relied on information obtained from intercepted telephone conversations have provided courts the opportunity to explore the question raised but not answered by *Florida Star*. The United States Supreme Court recently has accepted certiorari in a case involving the issue.

In *Boehner v. McDermott*, 191 F.3d 462 (D.C. Cir. 1999), the Martins, two private citizens who had no connection to defendant Representative James McDermott ("McDermott"), intercepted a call between plaintiff, Representative John Boehner ("Boehner"), and then-Speaker of the House Newt Gingrich ("Gingrich"). In the course of the call, Gingrich engaged in conduct that might have violated the terms of an agreement Gingrich recently had made with the House Ethics Committee. *Boehner*, 191 F.3d at 465. The Martins taped the call and delivered the tape to McDermott, who was then ranking Democratic member of the committee. McDermott allegedly proceeded to give copies of the tape to *The New York Times*, the *Atlanta Journal-Constitution*, and *Roll Call*. *Id.* The District Court found that the First Amendment shielded McDermott from liability. *Id.* at 466.

The D.C. Circuit Court reversed, in a 2-1 decision, finding McDermott could be liable for disclosing the contents of an illegally intercepted conversation under Title III. In reaching its decision, the court applied intermediate scrutiny.<sup>5</sup> The court noted that such a standard was appropriate because liability under Title III is based on the method of acquisition of the information not the content of the information.<sup>6</sup> The court found that the regulation was not based on the content of the communication but rather constituted a "law of general application." In other words, Title III applied based on the manner of acquisition of the information regardless of the content of the information.

The court's analysis focused on the danger of permitting disclosure of intercepted information. The court found that "unless disclosure is prohibited, there will be an incentive for illegal interception ... and the damage caused by an illegal interception will be compounded .... It is essential for Congress to impose upon third parties, that is,

upon those not responsible for the interception, a duty of nondisclosure .... To allow a third party who is provided access to the intercepted communications to use the contents of the intercepted communications knowing or having reason to know that such communication was illegally intercepted would defeat the purpose of both the federal and state act." *Boehner*, 191 F.3d at 170. The court determined that the need to eliminate the demand for illegally obtained information satisfied the intermediate scrutiny test.

The court's analysis implies that there should be a single standard of liability applicable to the individual who intercepted the information, the individual who received the intercepted information, and the entity that disseminated the information (i.e. media). Nevertheless, the court suggested that it would not impose liability on the newspapers which published the details of the illegally intercepted conversation. Because no media representative was a party, however, the court did not need to decide the issue. The court held, however, that the First Amendment did not shield McDermott from liability under Title III.<sup>7</sup>

In *Bartnicki v. Vopper*, 200 F.3d 109 (3<sup>rd</sup> Cir. 1999), Bartnicki was employed by the Pennsylvania State Education Association ("PSEA") to provide services and assistance to PSEA affiliates representing personnel employed by various public school districts. An unknown person intercepted and recorded a confidential conversation concerning contract negotiations between Bartnicki and Kane (the Teachers Union President). Yocum, president of a citizens' organization opposed to the Union's proposals, received the tape from the unknown person, and gave the tape to Vopper, a radio talk show host. Vopper played the tape in its entirety on his talk show carried by two radio stations. The tape also aired on some local television stations and some newspapers published written transcripts.

Title III and Pennsylvania's Wiretapping and Electronic Surveillance Control Act, on their face, prohibit the conduct in which Yocum, Vopper, and the radio stations engaged. The district court denied the Defendant's summary judgment motions, relying on *Cohen*, and noting that the "use and disclosure" prohibitions were gen-

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erally applicable laws that did not single out the media or purposefully restrict free expression.

On interlocutory appeal, the Third Circuit Court of Appeals, also in a 2-1 decision, found that the application of Title III and Pennsylvania's Wiretapping and Electronic Surveillance Control Act violated the First Amendment. In reaching its decision, the *Bartnicki* court, like the *Boehner* court, applied intermediate scrutiny.

The *Bartnicki* court deemed intermediate scrutiny appropriate because the basis for liability under Title III is the method of acquisition of the information, not the communicative impact of the information. Unlike the *Boehner* court, however, the *Bartnicki* court found that neither Title III nor the Pennsylvania statute survived intermediate scrutiny. The court's analysis focused on the tenuous connection between the party that intercepted the communication and the party that used or disclosed the information. The court held that the connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception was "indirect at best." The court further declared that the desired effect of preventing the initial interception can be reached by punishing those who participated in the interception, making unnecessary recourse against third parties who disclose or otherwise use communications that they know, or have reason to know, were illegally intercepted by others.

The court's holding indicates that there is one standard of liability for the individual who intercepted the information *and* a separate standard for the individual who received the interception information and/or the entity that disseminated the information (i.e. the media). The court applied different standards of liability because it was concerned about the adverse impact of the Acts on the dissemination of information. The court held that Title III and its state counterparts may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception.

The fact that the media emerged relatively unscathed in *Bartnicki* and *Boehner* should not lull anyone into a false sense of security. The media's free ride ended with the Fifth Circuit's recent decision in *Peavy v. WFAA-TV, Inc.*, 2000 U.S. App. Lexis 18289 (5th Cir., July 31, 2000).

In *Peavy*, Carver Dan Peavy, a trustee for the Dallas

Independent School District (DISD), had telephone conversations intercepted by a neighbor, Charles Harman, via a police scanner. Harman tape recorded the intercepted conversations (which allegedly concerned bribes related to DISD Insurance) and provided copies to WFAA-TV reporter Robert Riggs. Riggs advised Harman not to turn the tape recorder on and off while recording intercepted conversations, and not to edit them, so that the tapes' authenticity could not be challenged.

WFAA broadcast three reports concerning Peavy's alleged wrongdoing. While Riggs did not play the tapes of the intercepted conversations during the broadcasts, the District Court found that he'd *disclosed* portions of the tapes' contents during them. The federal magistrate judge in his recommendations found that WFAA and Riggs violated the Texas and Federal Wiretap Acts by using and disclosing contents of illegal interceptions, but they should be awarded summary judgment because liability for the proposed conduct would violate the First Amendment. The District Court adopted the recommendations.

On appeal, the Fifth Circuit reversed the District Court's ruling. In doing so, the Court of Appeals first concerned itself with the question whether the defendants had violated the Federal Act by "procuring" the interceptions or the Texas Act by "obtaining" them. The District Court had ruled that the defendants neither "procured" nor "obtained" the interceptions, because the Harmans made an independent decision in which the defendants did not participate.

The Court of Appeals noted that the undisputed facts — Riggs' agreement to accept tapes, his instruction to the Harmans regarding the taping process, and Riggs' continued dialogue with the Harmans — presented a jury question concerning both obtaining and procuring. The Appellate Court also found that defendants' knowledge of the Harmans' alleged taping presented a jury question on the Peavy's civil conspiracy claim. The Court noted, however, that a 1986 amendment to the Federal Wiretap Act eliminated "procures" from the list of activities giving rise to civil liability. Procurement, however, remained a criminal offense.

The Court of Appeals next addressed the question of whether defendants had "used" or "disclosed" the contents

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of the illegally intercepted communication. The District Court had found that defendants had used the contents of the illegally intercepted conversations to analyze, compile, make notes, and develop leads, and had disclosed those contents in their television broadcasts and to other persons.

On a number of grounds, the defendants challenged the finding that they had used or disclosed. The Court of Appeals rejected defendants' "attenuation" defense — that all information broadcast was developed independent of the tapes — on the ground that "the exclusionary rule (to which the attenuation doctrine is an exception) does not excuse a substantive violation of the law." Thus, the Appellate Court affirmed the District Court's ruling that defendants had illegally used the intercepted information.

The Court of Appeals, however, reversed the District Court's ruling that defendants had, as a matter of law, disclosed the intercepted material. The Appellate Court ruled that a reasonable jury could find that defendants did not disclose the intercepted information if defendants established the information broadcast was acquired by non-prohibited means. This was the case even if the information disclosed was also included in the content of the intercepted communications.

The Appellate Court also summarily dismissed defendants' "privilege defenses," finding that privileges based on newsgathering, disclosure to counsel and disclosure to law enforcement officials did not shield defendants from liability.

Defendants also were unsuccessful in asserting that they did not intentionally use or disclose the intercepted information because, based on advice they received from their counsel and from law enforcement officials, they believed the interceptions were lawful. The Court rejected this defense as follows: "We . . . reject defendants' ignorance as mistake of law defense . . . Based on the existence of the acts and their knowledge of the circumstances of the Harman's interception, defendants, at a minimum, had reason to know the interceptions were illegal. They used and disclosed the contents of those interceptions purposefully, not inadvertently."

Having addressed the defendants' non-constitutional defenses, the Appellate Court addressed the District Court's grant of summary judgment to defendants on the ground that imposition of liability would violate the First

Amendment. Like the D.C. and Third Circuits, the Fifth Circuit applied intermediate scrutiny.

This analysis was guided in part by the Court's finding that defendants had, by their active participation in the interceptions, not "lawfully received" the information. The decision also was guided by the factors which distinguished *Peavy* from the *Daily Mail/Florida Star* line of cases. In *Peavy*, the Wiretap Acts (Federal and Texas) were content neutral; the information at issue was not in the hands of the government (which could adequately safeguard it); the information was not otherwise in the public domain; and the Wiretap Acts did not impose undue hardship on the media, since the prohibition applied to everyone.

The Fifth Circuit ultimately ruled that the Wiretap Acts satisfy intermediate scrutiny because: (1) the United States and Texas each have a substantial interest in maintaining the confidentiality of private communications; (2) the use and disclosure proscriptions are unrelated to the suppression of speech, because liability is based on the *means of acquisition* of the information, rather than the content, and the Acts do *not* single out speech for special burdens, but prohibit *all* unauthorized uses and disclosures; and (3) the incidental burdens on speech are *not* impermissibly broad, because disclosure is *not* singled out for special burdens, and the Acts do *not* prohibit the use or disclosure of the same information obtained by non-prohibited means.

### CERTIORARI GRANTED IN BARTNICKI

The Supreme Court granted certiorari in *Bartnicki* to address the following issue: "whether the federal and Pennsylvania wiretapping statutes violate the First Amendment insofar as they prohibit the disclosure or other use of an unlawfully intercepted electronic communication by a person who was not involved in the interception itself, but who knows or has reason to know that the communication was unlawfully intercepted."

To the extent the Supreme Court construes this question narrowly, the *Bartnicki* decision may not affect the *Peavy* holding. The *Peavy* Court framed the constitutional question before it as "whether defendants can be subject to civil liability for use and disclosure of illegally-intercepted private telephone conversations, which they received di-

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rectly from the interceptors, with full knowledge of the circumstances of the interceptions and *with some participation concerning the interceptions.*" (emphasis added) The *Peavy* court noted, "none of the foregoing cases addressed this precise question."

Given the *Peavy* Court's standard for finding "participation concerning the interceptions," the decision in *Bartnicki* may clarify the murky waters surrounding this issue only slightly. The extent of media defendants' "participation" in Peavys' interception was minimal at best. The media defendants merely accepted the tapes and continued a dialogue about them with the Peavys. The defendants' suggestion that the Peavys not turn the recorder on and off during taping, or edit the tape, was not designed to help the Peavys avoid detection, or encourage additional taping. Essentially, mediadefendants' participation consisted of their not declining Peavy's offer to provide the tapes. If "participation in the interception" is subject to such a low threshold, a ruling in *Bartnicki* that "lawful receipt of intercepted material" may not be sanctioned will have limited application.

Perhaps even more troubling is the prospect of the *Peavy* ruling on the "use" of intercepted information. The defendants in *Peavy* were subject to sanction despite their reliance on legal counsel and despite the fact that defendants' broadcast was based entirely on sources independent of the tapes. The Court flatly rejected the defendants' contention that they should not be forever barred from investigating all topics discussed in the intercepted conversations merely because they first learned of those topics as a result of the interceptions.

The full implications of the *Peavy* holding are difficult to fathom. Take for example, Mr. Vopper, the radio-talk show host in *Bartnicki*. There is no dispute that Vopper received the information "innocently." But what if Vopper contacted the parties to the conversation and determined the conversation was illegally intercepted? According to *Peavy*, would Vopper no longer be permitted to develop leads or check sources mentioned in the transcripts without violating the "use" prohibition? Even though the reporter unquestionably acquired the information legally, could he later face liability under the Wiretap Act for merely developing the entire story? Alternatively, Vopper could opt *not* to determine whether the communications were ille-

gally intercepted. If Vopper developed sources and leads while "ignorant" of whether the interception was illegal, presumably he would not be liable for the use. The distinction, however, seems somewhat artificial.

While it is difficult to predict how the Supreme Court will rule on *Bartnicki*, at least some guidelines emerge from the current state of the law. First, neither *Boehner* nor *Bartnicki* permit imposing liability on the media for publishing information lawfully obtained. *Boehner* took pains to emphasize that its finding would not result in liability to *The New York Times*. Given that the *Times* was not a party, however, this assurance is merely dicta.<sup>8</sup> *Peavy* arguably is distinguishable because the court found that the defendants had not lawfully obtained the information.

Second, the extent of the media's involvement in the unlawful acquisition is a critical factual element. If the reporter is involved in the acquisition, courts would not hesitate to enforce the laws as written. If the reporter is not involved in the unlawful acquisition, but merely receives the information, the answer is not as clear. The *Boehner* court was troubled by the fact that Congressman McDermott knew the information was obtained unlawfully. The *Peavy* Court obviously was troubled by Riggs' conduct. The *Bartnicki* court by contrast, noted that Yocum was an "innocent conduit."

The *Bartnicki* court noted that a problem with imposing liability for use or disclosure is that "reporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source .... Reporters may have difficulty discerning whether material they are considering publishing has previously been disclosed to the public. Such uncertainty could lead a cautious reporter not to disclose information of public concern for fear of violating the Wiretapping Acts." *Bartnicki v. Vopper*, 200 F.3d 109, 135 (3<sup>rd</sup> Cir. 1999).

The *Peavy* court dismissed the "uncertainty" concern by quoting the following passage from the *Bartnicki* dissent: "One would suppose that a responsible journalist . . . would be unlikely to propose publication of a . . . conversation without some effort to insure that [it] in fact took place and to authenticate the intention of the parties to

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[it]." The problem of course, is having done so, the reporter must stop the inquiry in his tracks or face liability under the use prohibition.

The fundamental issue presented by *Boehner, Bartnicki* and *Peavy* is whether federal and state Wiretap Acts may be enforced adequately by punishing the interceptions only, or whether enforcement also requires suppression of the intercepted communication through actual or threatened prosecution of those who receive and/or publish the information. At one time it seemed pretty clear that the First Amendment permitted only the former and not the latter. Now, though, the answer is far from certain.

For now, it appears a majority of the circuits would permit the media to use and publish information it obtains lawfully, even if someone else unlawfully obtained that information in the first instance. Whether this will be the same conclusion next year remains to be seen.

<sup>1</sup> An "interception" means the aural or other acquisition of the contents of any oral, wire or electronic communication by use of "any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). "Disclosure" and "use" are not defined. They are presumed to have their ordinary meaning.

<sup>2</sup> 18 Pa. Const. Stat. § 5703; 11 Del.Code Ann. § 1336; N.J. Stat. Ann. §§ 2A-156-A-3; 2A-156-A-24; Fla. Stat. Ann. §§ 934.03, 812.15; Haw.Rev.Stat. §§ 803-42(a)(3), 803-48; Idaho Code §§ 18-6702, 18-6709; 720 Ill.Comp.Stat. Ann. 5/14-2, 5/14-6; Iowa Code §§ 808B.2(1)(c), 808B.8; La.Rev.Stat. Ann. §§ 15:1303 A(3), 15:1312; Md. Code Ann. §§ 10-402(a)(2), 10-410; Mich. Comp. Laws Ann. §§ 750.539e, 750.539h; Minn. Stat. Ann. §§ 626A.02(c), 626A.13; Neb.Rev.Stat. §§ 86-702; N.H.Rev.Stat. Ann. §§ 570-A:2, 570-A:11; N.C. Gen.Stat. §§ 15A-287, 15A-296; Ohio Rev.Code Ann. §§ 2933.52, 2933.65; Tenn. Code Ann. §§ 39-13-601, 39-13-603; Tex. Civ. Prac. & Rem. Code Ann. § 123.001 et seq.; Utah Code Ann. §§ 77-23a-4, 77-23-11; Va.Code Ann. §§ 19.2-62, 19.2-69; W.Va.Code §§ 62ID-3, 62-ID-12; Wis.Stat. § 968.31; Wyo. Stat. Ann. §§ 7-3-602; D.C. Code Ann. §§ 22-542, 23-554.

<sup>3</sup> Strict scrutiny requires that the law be necessary to serve a compelling state interest and narrowly tailored to achieve that end. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).

<sup>4</sup> The Constitution's protection of the press is supported by the overarching public interest in the dissemination of truth and by the considerations that (1) the government retains ample means of safeguarding significant interests upon which publication may impinge, since it is only the publication of lawfully obtained information that is protected, (2) punishing the press for its dissemination of information that is already publicly available is relatively unlikely to advance the state's interests, and (3) timidity and self-censorship may result from allowing the media to be punished for publishing certain truthful information.

<sup>5</sup> Intermediate scrutiny is satisfied when the law furthers an important governmental interest without burdening substantially more speech than necessary. *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180; 117 S. Ct. 1174; 1997 U.S. LEXIS 2078; 137 L. Ed. 2d 369 (1997).

<sup>6</sup> Title III holds an individual liable for use and disclosure of illegally intercepted speech.

<sup>7</sup> The court explained that by accepting an illegally intercepted tape of a telephone conversation between Boehner and other House Republicans, McDermott voluntarily assumed a "duty, if not of 'confidentiality,' then of nondisclosure. The duty stemmed from every citizen's responsibility to obey the law of which [the federal wiretap law] is a party."

<sup>8</sup> Courts from other jurisdictions have not hesitated to hold media defendants liable for publishing illegally obtained information. *Keller v. Aymond*, 722 So.2d 1224, 1998 La. App. LEXIS 3721 (1998) (Defendant newspaper published excerpts from the contents of an allegedly illegally intercepted telephone conversation that it had received from the alleged interceptor, who distributed transcripts of the intercepted conversations at a press conference. The court held that the newspaper can be held civilly liable for publishing truthful information unlawfully obtained.); *Natoli v. Sullivan*, 159 Misc.2d 681, 6060 N.Y.S.2d 504 (1993) (Defendant newspapers published the contents of an illegally recorded oral wire and electronic communications that they had received anonymously. All parties to the call denied doing the taping. The court held that civil action under federal statutes prohibiting illegal wiretaps or other electronic surveillance could be brought against media defendants who, although they did not participate in illegal surveillance, allegedly knew that recorded conversations they were given had been illegally obtained.). In *Scheetz v. Morning Call*, 747 F.Supp. 1515 (E.D. PA 1990), the court noted in dicta that a newspaper could be held civilly liable for the publication of truthful information. Under the facts presented in *Scheetz*, however, the court dismissed a complaint brought against a newspaper for allegedly publishing the contents of a confidential police report.

*John C. Greiner is a partner at the law firm of Graydon, Head & Ritchey in Cincinnati, Ohio. Rebecca Algenio was a summer associate at Graydon Head & Ritchey this summer.*

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**404 Park Avenue South, 16th Floor**  
**New York, NY 10016**  
**(212)889-2306**  
**www.ldrc.com**

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