

LDRC
*Libel
Defense
Resource
Center*
LIBELLETTER

Reporting Developments Through September 28, 2001

In This Issue . . .

LIBEL		PAGE
Va.	Court Finds That Web Presence Satisfies Nationwide Jurisdiction of Newspapers <i>Judge decides that information placed on a website should be subjected to multistate jurisdiction</i>	7
Tenn.App.	Prisoner in for Life is Libel Proof <i>Plaintiff sued when newspaper identified the plaintiff, not his partner-in-crime, as the murderer</i>	10
N.Y.	Court of Appeals Denies Plaintiff's Appeal in McDonald v. Renford <i>Appellate Division's dismissal of the case will stand</i>	10
Iowa	State Supreme Court Reverses Libel Award Against Iowa City Newspaper <i>Unanimous court holds that the newspaper had no duty to investigate comparative ad merits</i>	13
N.Y.	Jury Awards \$1 Million to Woman Libeled by Drug Brochure <i>Case now proceeds to the punitive damages phase</i>	17
Ohio	State Supreme Court Expands Protections for Opinions Under Ohio Constitution <i>Court expands the state's protection of opinions to non-media defendants</i>	19
N.Y.	State Court Addresses Use of Confidential Sources by Libel Defendant <i>Reliance on confidential source allowed</i>	21
9th Cir.	Ninth Circuit Allows Discovery in Suit Challenged Under California Anti-SLAPP Statute <i>Availability of discovery is governed by federal procedure, not limited by California statute</i>	25
Haw.	Woman Claiming to be Marilyn Monroe's Daughter Loses Libel Suit <i>Court finds that none of the statements were actionable</i>	27

PRIVACY AND NEWSGATHERING

Justice Dept.	AP Reporter's Home Telephone Records Secretly Nabbed by Justice Department <i>Action apparently violated the Department's long-standing guidelines requiring advance notice</i>	4
Ga.	Atlanta Television Station Seeks Georgia Supreme Court Review in Trespass Case <i>Station is seeking review after Court of Appeals reversed the entry of summary judgment</i>	29
9th Cir.	Ninth Circuit Withdraws Wiretap Decision <i>Initial ruling was the first to apply federal Wiretap Act to information stored on a website</i>	31
Tenn.	State Supreme Court Recognizes Tort of False Light Invasion of Privacy <i>Court uses comments in Restatement (Second) of Torts to define parameters and elements</i>	33
D. Conn.	District Court Seals Support for Criminal Charges Against Public Official <i>Judge seals information for fear it would prejudice the "entire community"</i>	37
Penn.	State Supreme Court Allows Tapping of Telephones Without Prior Approval of Tribunal <i>Government can tap telephone conversations after getting permission from one party</i>	39

NEWSWORTHY

5th Cir.	Texas Writer Still in Jail for Refusal to Reveal Sources to Grand Jury <i>Author Leggett remains in jail</i>	6
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(Continued on page 2)

(Continued from page 1)

Cong.	“Official Secrets Act” Dead Again – For Now <i>Sen. Shelby confident the Bush Administration will eventually support the measure</i>	16
Ill.	Judge Dismisses “Sopranos” Suit <i>Individual dignity clause a constitutional lecture, judge says</i>	18
Mass.	Discovery Regarding Editorial Process Limited in Massachusetts Case <i>Civil litigants must show such an inquiry will have concrete relevance to an identifiable issue</i>	23
Cal.	Bill to Ban Secret Settlements Goes Down Without a Vote <i>Intended to protect consumers, the bill fails because of concerns it would expose trade secrets</i>	30
9th Cir.	Ninth Circuit Dismisses Mattel’s Effort to Block Barbie Artwork <i>Photographer had used dolls in poses to portray materialism and sexism</i>	30
Judicial Conf.	Federal Courts to Monitor Surfing <i>New policy will require monitoring of web site visits and downloads from the Internet</i>	31
Judicial Conf.	New Policy Adopted for Remote Access to Federal Case Files <i>Guidelines will prohibit access to criminal case files via the Internet</i>	32
3d Cir.	Court of Appeals Reverses Curbs on Ex-lawyer’s Comments <i>Panel concludes that a perturbed judge is not necessarily a prejudiced judge</i>	38
2d Cir.	New York County May Assert Copyright in Official Documents <i>Government can assert copyright interest in public records</i>	41
D. Md.	Federal Court Declines to Enjoin NAACP Boycott of Adam’s Mark Hotels <i>Issuance of injunction would irreparably harm NAACP’s First Amendment rights</i>	45
INTERNATIONAL		
Australia	Cyber-Defamation Case Against Dow Jones to Proceed in Australia <i>Court rejects argument that allowing the suit to proceed will result in a chilling effect</i>	11
UK	Libel Awards in the UK are Declining in Size <i>At the same time, Australia and Canada see increases in size of libel awards</i>	48

LDRC HAS MOVED

LDRC offices have moved to:

**80 Eighth Avenue
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Our new telephone number is: 212.337.0200

Our new facsimile number is: 212.337.9893

Our website address remains: www.ldrc.com and all of our individual e-mail addresses remain the same.

Yes, in the shadow of the horrors at the World Trade Center, LDRC managed to move, although our email access remains limited. We are now at the corner of Eighth Avenue and 14th Street.

It is a wonderful neighborhood and we invite all of you to come by and visit.

NAA/NAB/LDRC Conference Postponed to September 25-27, 2002

LDRC Annual Dinner Has All-Star Cast on November 7, 2001

DCS Breakfast On November 9th

As most of you know, the horrendous attacks in New York and Washington D.C. forced a postponement of the NAA/ NAB/LDRC Conference, scheduled to run from the afternoon of September 12th through September 14th. In order to avoid conflict with other scheduled media law gatherings during the year, or with NAA and NAB Conventions in the Spring, we have re-scheduled the Conference in Alexandria, Virginia, for September 25-27, 2002.

An e-mail or fax should have been sent by now to all those who had registered for the Conference with this information. We hope that all of you signed up for the Conference will re-register for it for 2002 and that many of you who were unable to attend this September will be able to do so, now that you have a year's notice of the dates. Please put the Conference on your 2002 calendar.

And please come to the LDRC Annual Dinner. We also hope that all of you will make a special effort to come to the LDRC Annual Dinner this year. It is being held on Wednesday, November 7th at the Sheraton New York Hotel & Towers. The Dinner features:

***A Conversation With... Ben Bradlee, Diane Sawyer, and Mike Wallace
Led by Walter Isaacson.***

This is an incredible panel. And while we hope each year that all of you will join us for the Dinner, may I make a special request to you to do so this year. It would be particularly meaningful, in a year in which we have had to cancel the Conference, to have you join us and each other for the LDRC Dinner and the DCS Breakfast. I think you will find it particularly meaningful to yourselves as well, seeing old friends and colleagues in the wake of the worst single disaster this nation has known in our lifetime – and possibly, wartime excluded, any lifetime.

And note that the DCS Breakfast is on Friday morning. The DCS Breakfast has been moved from its normal time on Thursday morning to Friday morning. This was done to allow all of you to stay out and party late after the Dinner and still be rested for the Breakfast. It was done to allow the West Coast members to get a decent night's sleep after the Dinner, even if they didn't stay out late and party.

It was with great regret that we postponed the NAA/NAB/LDRC Conference, although it was inevitable under the circumstances, and with great regret that we could not reschedule before next September. But September is, indeed, NAA/NAB/LDRC Conference month and it shall be so again next year.

Sandy Baron

AP Reporter's Home Telephone Records Secretly Nabbed by Justice Department in Search for Confidential Source

By David A. Schulz and Hilary Lane

In an alarming use of its administrative subpoena power, the Justice Department disclosed in late August that it had secretly compelled Verizon last May to turn over the home telephone records of Associated Press reporter John Solomon in an attempt to identify the confidential source of a news report concerning a criminal investigation of New Jersey Senator Robert Torricelli. The disclosure sent shockwaves through the LDRC community because the action apparently violated the Department's own long-standing guidelines governing such subpoenas, by failing to provide advance notice to the reporter and by compelling the disclosure of a reporter's phone records before exhausting obvious alternative sources for the information. The subpoena raised further concerns because it had been approved by then Acting Deputy Attorney General Robert Mueller, and its issuance last spring was kept secret until days after Mueller was confirmed as the new head of the FBI in August.

Solomon's Vacation Surprise

Upon returning from vacation at the end of August, Solomon found the stunning disclosure waiting in his mail. AP's assistant bureau chief in Washington, and one of its top investigative reporters, Solomon received a terse notice from the United States Attorney for the Southern District of New York, dated August 20, 2001, advising him that the Government had obtained copies on May 14 of his home telephone records showing all incoming and outgoing calls between May 2 and May 7, 2001. This months after the fact notice was the first Solomon or the AP had heard of any subpoena, or any investigation involving the reporter.

The subpoena apparently had been prompted by an article written by Solomon on May 4. The article reported that a phone call between Sen. Torricelli and one of his supporters had unexpectedly been tape recorded in 1996 by FBI agents who were monitoring a Florida pizzeria for possible organized crime activity. While Torricelli is currently under investigation for possible fund-

raising abuses, Solomon's article noted that the intercepted 1996 telephone call had been carefully reviewed by the Justice Department at the time, and again in 1998, and prosecutors had found no basis for further investigation of the call.

The U.S. Attorney's Office, under pressure from Sen. Torricelli to stop leaks from its on-going investigation, apparently acted swiftly to find the source of Solomon's story. The source of the leak obviously was someone involved in the investigation, so many avenues were readily available to the U.S. Attorney — from questioning those investigators involved in the Torricelli matter (possibly using a lie detector), to obtaining the phone records of the Department's own employees. Nonetheless, the Justice Department seems to have elected instead to grab the reporter's phone records as a first resort.

Are the Attorney General's Guidelines Still Meaningful?

The Justice Department has publicly insisted that there has been no change in its policy governing "the issuance of subpoenas pertaining to the news media." However, the facts concerning the Solomon subpoena raise significant concerns about the continuing vitality of the regulations adopted by the Department in 1973 that are designed to protect against the compelled disclosure of a reporter's confidential sources in all but the most extreme circumstances. 28 C.F.R. §50.10 (the "Guidelines"). By obtaining Solomon's phone records without any showing that the records were essential to an ongoing investigation and could not be obtained through alternate sources, Solomon's First Amendment rights may also have been violated.

The Attorney General's Guidelines state that their purpose is to "provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." The Guidelines provide, among other things, that a reporter's telephone records may only be sought when

(Continued on page 5)

AP Reporter's Home Telephone Records Secretly Nabbed by Justice Department

(Continued from page 4)

- a. they are essential to the investigation of a crime,
- b. all reasonable sources of the information have been exhausted, and
- c. advance notice of the subpoena has been given, unless doing so would pose a substantial risk to the integrity of the investigation.

When a reporter's telephone toll records are subpoenaed without such advance notice, the Guidelines require the Government to provide notification to the reporter as soon as "such notification will no longer pose a clear and substantial threat to the integrity of the investigation," which generally must be within 45 days. One 45 day further extension is allowed in extraordinary circumstances. To ensure compliance with these strict requirements, the Guidelines require the personal approval of the Attorney General before any subpoena is issued to a reporter or for a reporter's telephone records. (The Guidelines as written would apparently not apply to a subpoena issued to an ISP for a reporter's email or for other third-party records.)

[T]he facts concerning the Solomon subpoena raise significant concerns about the continuing vitality of the [DOJ] regulations.

Could Not Meet Guidelines

In the case of Solomon's phone records, the subpoena to Verizon was approved in May by Acting Deputy Attorney General Mueller, because Attorney General Ashcroft had recused himself from all matters relating to the Torricelli investigation. The Justice Department has yet to release any documents or specific information about the approval of the subpoena, but it is impossible to understand how the Guidelines could have been satisfied.

First, the government had several reasonable alternative sources of the information it sought, which obviously were not pursued in the short time between publication of Solomon's article on May 4 and the day his phone records were handed over by Verizon on May 14. The Guidelines require the exhaustion of all reasonable investigative steps, and the failure to pursue alternative

avenues here was particularly stark, given that any leak from a Justice Department employee could have been confirmed by obtaining the employees' own phone records. The Guidelines require such reasonable alternatives to be pursued in lieu of a subpoena for a reporter's records.

Further, the Guidelines require "reasonable and timely" advance notice to a reporter, and an opportunity to object to the subpoena, unless doing so would pose "a substantial threat to the integrity of the investigation." Again, it is hard to understand what threat could have been presented in Solomon's situation, where the evidence in possession of the phone company could not be altered or otherwise manipulated if advance notice had been provided. It is equally unclear what "clear and substantial threat" justified the Department's refusal to notify Solomon of the subpoena, even after the fact, for more than 90 days.

Response to the Delayed

Disclosure

The AP promptly responded to the late notice of the subpoena, first by placing urgent inquiries to the U.S. Attorney who declined to provide any information, and then by a direct appeal to Attorney General Ashcroft. On September 5, 2001 AP President Louis D. Boccardi wrote to the Attorney General requesting a "full and public accounting of the facts and circumstances surrounding the decision to issue this subpoena," and asking for the destruction of Solomon's phone records held by the Department. Boccardi acknowledged that this destruction "would be little more than symbolic" given the Department's secret use of the records for three months, but he urged that "symbolism is important in the delicate intersection of press and government in our nation and this is one of the reasons why so many of us find the tone, spirit and fact of the department's actions so reprehensible."

(Continued on page 6)

AP Reporter's Home Telephone Records Secretly Nabbed by Justice Department

(Continued from page 5)

The subpoena provoked a congressional response as well. Senator Charles E. Grassley (R-Iowa), has asked the Attorney General to provide Congress with all information and documents relating to the subpoena, including a timeline of the events leading up to the issuance of the subpoena. Sen. Grassley also posed several questions to the Attorney General, in writing, including requests for an explanation of what crime led to the subpoena, how the subpoenaed phone records were essential to the successful investigation of that crime, why the Department did not negotiate with Solomon or the AP in advance, what steps were taken to find alternative sources for the needed information, and why an administrative subpoena rather than a court ordered subpoena was used to obtain the telephone records. The Attorney General has not yet responded to either letter, or provided any further information about the subpoena.

David A. Schulz and Hilary Lane are members of the media law group of Clifford Chance Rogers & Wells LLP in New York. The Firm represents The Associated Press and John Solomon in connection with this matter.

LDRC'S 21ST ANNUAL DINNER

with

Ben Bradlee

Diane Sawyer

Mike Wallace

Walter Isaacson,

as moderator

Wednesday,

November 7th, 2001

Sheraton New York Hotel & Towers

Texas Writer Still in Jail for Refusal to Reveal Sources to Grand Jury

Vanessa Leggett remains in jail for her refusal to turn over her notes or to testify regarding confidential and unpublished non-confidential information she has gathered in her research of a book on the 1997 murder of Houston resident Doris Angleton. A federal grand jury looking into the murder issued a broad subpoena to Ms. Leggett, an author who has been researching the murder for a potential book, and the district court held her in contempt when she refused to comply. The Fifth Circuit decision was reported last month, in the August *LDRC LibelLetter* at page 7. As of publication this month, her motion seeking rehearing and rehearing en banc is still pending before the Fifth Circuit. She is believed to have now spent more time in jail protecting her notes, information and sources than any other journalism in the United States.

To Be Published In November

LDRC 50-STATE SURVEY 2001-02: MEDIA LIBEL LAW

With updated reports on libel law in the Federal Circuits and outlines of Canadian & English libel law.

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Court Finds That Web Presence Satisfies Nationwide (And Perhaps Worldwide) Jurisdiction Of Newspapers And Their Employees

By Stephanie S. Abrutyn and Robert D. Lystad

Seemingly overreaching beyond the bounds of existing legal doctrine, the United States District Court for the Western District of Virginia has ruled that a newspaper with little or no circulation in the Commonwealth of Virginia, and with reporters and editors who have never set foot in Virginia, can nonetheless be sued in the Commonwealth because the newspapers' website is accessible by Virginia residents. *Stanley Young v. New Haven Advocate, et al.*, United States District Court for the Western District of Virginia, Big Stone Gap Division, Civil No. 2:00CV0086 (Aug. 10, 2001). One of the novel and challenging legal issues created by the Internet is the thorny problem of assessing personal jurisdiction based solely on the operation of a website. Under this court's reasoning, every publisher who has a website opens itself up to being sued in any jurisdiction around the country, and perhaps the world.

The Connecticut Controversy

Beginning in October 1999, the State of Connecticut began shipping prisoners to the Wallens Ridge Correctional Facility in southwestern Virginia. Connecticut had contracted with Virginia to take the prisoners as a cost-saving measure and to reduce overcrowding in Connecticut's prisons. Most of the nearly 500 inmates shipped to the maximum-security facility by January 2000 were minorities, and most of the prison staff were white. Before long, a highly-charged, public controversy emerged about the propriety of sending the prisoners so far away. Accusations began to trickle in from inmates about the excessive use of stun guns by staff, as well as the prevalent use of racial slurs; complaints were received from family members about the difficulty of visiting relatives in a far-off prison; and concerns arose about the treatment of Connecticut's "Level 4" offenders at the "Level 6" maximum security facility.

In January 2000, a delegation of Connecticut legislators visited Wallens Ridge. When they returned to Connecticut, they raised more questions. One legislator questioned the presence of Civil War memorabilia in the

warden's office. Concerns also were raised about the widespread presence of the Confederate flag on car decals and in other public places. An inmate's subsequent suicide by hanging further fueled the debate about Connecticut's practice of exporting prisoners.

Despite the controversy, in February 2000, Governor John Rowland proposed sending an additional 500 inmates to Wallens Ridge. The plan was rejected, and instead the movement to bring back those already in Virginia gained steam. In late March, hundreds attended a public rally at the Connecticut State Capitol calling for the immediate return of the inmates. Local media throughout Connecticut covered the issue extensively, and it was the subject of frequent commentary by both politicians and journalists. Some of the articles mentioned warden Stanley Young by name, and others mentioned the presence of items in his office depicting the Confederate flag.

On May 12, 2000, Warden Young filed a defamation complaint in federal court in Big Stone Gap, Virginia against the *New Haven Advocate*, *The Hartford Courant*, *The Connecticut Post*, the NAACP, numerous employees of each organization, and two Connecticut legislators. The complaint alleges, among other things, that each of the statements or articles identified in the lawsuit imply that Mr. Young is a racist who condones abuse of the prison's inmates. Young voluntarily dismissed *The Post*, the NAACP, and the legislators.

The Defendants

The *New Haven Advocate* is a free, alternative weekly newspaper published in New Haven, Connecticut. It is distributed in New Haven and the surrounding area only; no copies of the newspaper are sent into Virginia. Neither the reporter nor the editor of *The Advocate*, who are named in the lawsuit, had set foot in Virginia for years prior to publication of the articles, nor do either own property or have any other direct contacts with the Commonwealth.

The Courant is a daily newspaper published in Hartford, Connecticut. Its principal circulation base is Hart-

(Continued on page 8)

Ct. Finds That Web Presence Satisfies Nationwide Jurisdiction Of Newspapers And Their Employees

(Continued from page 7)

ford and the surrounding region, although it also has some mail subscriptions. When the articles about the Virginia prison controversy were published, *The Courant* had eight subscribers located in Virginia. Neither the editor nor the columnist who wrote the articles that are the subject of Warden Young's lawsuit visited Virginia in the course of preparing the articles. Neither has any other direct contacts with Virginia, except for the editor, who occasionally visited his sons attending college in Virginia a few years earlier.

Both newspapers, however, have websites allowing anyone with access to the Internet to read the editorial content of the newspapers.

Motion to Dismiss

In lieu of an answer, the *Advocate* and *Courant* defendants filed motions to dismiss for lack of personal jurisdiction. Neither the Virginia long-arm statute nor due process, they argued, permitted two Connecticut newspapers with de minimus circulation in Virginia, and with employees who did not set foot in the Commonwealth, to be haled into court there. In the pre-Internet age, the argument would have been extremely strong. Indeed, both the plaintiff and the court seem to agree that well-established legal principles prohibit the exercise of jurisdiction in this case in the absence of a Web presence. However, because all of the articles also were posted on the newspapers' websites, the Court was called upon to address whether this additional factor was enough to turn the tide and support personal jurisdiction in Virginia.

The newspapers argued that fundamentally passive websites such as theirs simply were not enough. The record was undisputed that neither newspaper solicited business through the Internet or otherwise attempted to direct its Web content to readers in Virginia. Posting material on the Web, they argued, simply does not overcome the vast array of authority unambiguously holding

that out-of-state journalists must have some meaningful contact with the forum state to be sued there. Moreover, the newspapers pointed out that unlike the defendants in *Calder v. Jones*, 465 U.S. 783 (1984), the Connecticut newspapers did not "aim" their actions at Virginia. Instead, they were writing about a Connecticut controversy for a Connecticut audience and posted the material on a website advertised as a "source of news . . . in and about Connecticut." The forum chosen by plaintiff in *Calder v. Jones*, unlike the forum chosen by Warden Young, was the state where the defendant's publication had the largest circulation.

The Connecticut newspapers also encouraged the court to follow the Eastern District of Louisiana's decision in a remarkably similar case. In *Schnapp v. McBride*, 64 F. Supp. 2d 608 (E.D. La. 1998), a New Orleans police officer sued the *Milwaukee Journal Sentinel* in Louisiana, alleging that he was defamed by statements in an article on New Orleans' experience with

"quality of life policing," which recently had been adopted in Milwaukee. Although the newspaper had only a small number of subscribers in Louisiana, plaintiff sought to base personal jurisdiction on the *Sentinel's* website. The Louisiana court rejected the idea that jurisdiction can be based solely on a passive website, especially where the article "was not purposefully targeted at Officer Schnapp nor was it aimed at readers in Louisiana."

On the other hand, Warden Young argued that the maintenance of websites accessible in Virginia constitutes regularly doing or soliciting business in Virginia and that the posting of the articles constitutes a persistent course of conduct. The plaintiff's argument relied heavily on a 1997 Eastern District of Virginia case which found that advertising a toll-free number on a website and maintaining that number for purposes of soliciting business, by

(Continued on page 9)

[R]elying primarily on Telco Communications v. An Apple A Day, Senior Judge Glenn M. Williams held that "information placed on an Internet website should be subjected to multistate jurisdiction."

Ct. Finds That Web Presence Satisfies Nationwide Jurisdiction Of Newspapers And Their Employees

(Continued from page 8)

itself, constituted regularly doing or soliciting business in Virginia. *Telco Communications v. An Apple A Day*, 977 F. Supp. 404 (E.D. Va. 1997). By seeking to extend *Telco* to a passive website which is not alleged to solicit responses from readers, Warden Young effectively asserted that the distribution of information over the Internet that can be accessed in the jurisdiction is all that the due process clause and the state's long-arm statute require.

The Decision

After reviewing the various and differing decisions in this area of law, the court acknowledged that the question of where acts or omissions occur in cyberspace is still "evolving." Then, relying primarily on *Telco Communications v. An Apple A Day*, Senior Judge Glenn M. Williams held that "information placed on an Internet website should be subjected to multistate jurisdiction."

Addressing first the Virginia long-arm statute, Judge Williams found that posting articles on a website that is accessible in Virginia constitutes an act or omission within the Commonwealth (although in this case the physical act of writing and posting occurred elsewhere). On the question of due process, citing *Calder v. Jones*, the Court found that defendants' knowledge that plaintiff lived and worked in Virginia made them sufficiently aware that any damage to Warden Young would occur in Virginia. Plaintiff's residence, combined with Internet publication accessible in the Commonwealth, satisfies due process. Further explaining his conclusion, Judge Williams opined that the product offered by members of the news media is information. "When such information is posted on the Internet, the product is offered to a worldwide audience," and therefore worldwide jurisdiction is appropriate.

The Court also relied heavily on a recent Fourth Circuit case (decided months after oral argument in the

Young case), which held that personal jurisdiction over a foreign Internet publisher was proper in North Carolina largely because the defendant received technical assistance from a resident of North Carolina, who secured the domain name and physically posted information on the website in that forum. See *Christian Science Board of Directors of the First Church of Christ v. Nolan*, 259 F.3d 209, 2001 WL 845179 (4th Cir. July 26, 2001). In *Nolan*, the Fourth Circuit focused on whether or not the defendant had "purposefully availed" himself of the privileges and protections of the forum state. Considering the facts in *Young*, Judge Williams found that the Web publication plus knowledge of plaintiff's residence satisfied that test.

Plaintiff's residence, combined with Internet publication accessible in the Commonwealth, satisfies due process.

Significantly, although not discussed in Judge Williams' opinion, the *Nolan* court specifically declined to address whether or not publication on the Web, without more, would be sufficient to create jurisdiction.

Instead, the Fourth Circuit observed that the issue is "an important question – and one which has garnered considerable attention – [which it] need not resolve it in this [the *Nolan*] case." *Nolan*, 2001 WL 845179 at *5.

Finally, Judge Williams sidestepped the issue of assessing personal jurisdiction over the editors and reporters separately from the newspapers, simply holding that jurisdiction exists over them, too, based on the newspapers' Internet presence.

The Courant and *The Advocate* have filed a motion asking Judge Williams to certify his decision for interlocutory appeal to the Fourth Circuit. That motion is pending.

The newspapers are represented by Bruce W. Sanford and Robert D. Lystad of Baker & Hostetler, LLP (Washington, DC), along with local counsel Wade Massie of Penn, Stuart & Eskridge (Abingdon, VA), and in-house counsel Stephanie S. Abrutyn of Tribune Company.

Prisoner in for Life is Libel Proof

In the gratifying decision category for this month is the opinion of the Court of Appeals of Tennessee, in Nashville, holding that the plaintiff, sentenced to 99 years in prison for aiding and abetting murder, was libel proof. *Davis v. The Tennessean*, No. M1999-01602-COA-R3-CV (Tenn. Ct. App. Aug. 21, 2001).

The Tennessean had published an article that was apparently received from the AP which mistakenly stated that plaintiff had shot a tavern owner during a robbery, when it was his partner in the crime who had done so (and had been sentenced to death for the crime).

Plaintiff in this libel litigation, Ronald Davis, took issue with being accused of the murder, rather than of simply participating in the robbery that resulted in the murder. He alleged that he had suffered humiliation and distress, and that his reputation as a paralegal in prison had been injured.

The court found that under Tennessee law, a plaintiff must possess good standing and reputation to begin with before he can be said to suffer injury to his reputation. The basis for an action for defamation, the court said, is an injury to reputation from the defendant's statements. This is a pretty basic concept, but some of you out there know only too well that your jurisdictions would not demand a plaintiff show injury to reputation.

The court concluded that plaintiff's conviction "resulting in incarceration for 99 years renders any reputation he may have virtually valueless and that he is in the eyes of the law 'libel-proof.'"

UPDATE: *McDonald v. Renford*

Court of Appeals Denies Plaintiff's Leave to Appeal

On September 14, the New York Court of Appeals, the state's highest court, denied the plaintiff's leave to appeal in a libel suit arising from a December 1996 episode of "Geraldo Rivera Show." Thus, the decision by the Appellate Division to dismiss the case stands. *McDonald v. Renford*, CA 01-00201, 2001 N.Y. App. Div. LEXIS 5974 (June 8, 2001). In June, the Appellate Division, Fourth Department, held that the "Geraldo Rivera Show's" failure to investigate a remark made by a guest during the talk show, claiming improper conduct by a Buffalo police officer, cannot establish actual malice, and thus the trial court should have granted summary judgment for the talk show. See *LDRC LibelLetter*, July 2001 at 29.

In June, a unanimous panel for the Appellate Division rejected the argument that failure to investigate claims by Loretta Renford, a guest on the December 1996 program, prior to airing the claims on the program amounted to "purposefully avoiding" the truth. According to the Appellate Division, there was no proof the producers of the show believed the claims were untrue. Under New York law, actual malice can be inferred from evidence of such "purposeful avoidance." See *Sweeney v. Prisoner's Legal Services*, 84 N.Y.2d 786 (1995).

**WANT TO RECEIVE THE
LIBELLETTTER VIA EMAIL?**

contact:

**Kelly Chew
kchew@ldrc.com**

***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
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Cyber-Defamation Case Against Dow Jones to Proceed in Australia

In what appears to be the first case to consider in detail whether in cyber-defamation cases jurisdiction should be based, as a matter of law, on the location of the website as opposed to where the publication is accessed, the Supreme Court in the southeastern Australian state of Victoria rejected what it described as Dow Jones' bold and remarkably ambitious arguments in favor of website-based jurisdiction – in this case New Jersey – and instead upheld jurisdiction and venue in Australia, ruling that “the law in defamation cases has been for centuries that publication takes place where and when the contents of the publication, oral or spoken, are seen and heard (i.e. made manifest to) and comprehended by the reader or hearer.” *Gutnick v. Dow Jones & Co.*, [2001] VSC 305, ¶ 60 (Aug. 28, 2001) (Hedigan, J.) (available on-line at <www.austlii.edu.au/cases/vic/VIC/2001/305.html>) See *LibelLetter*, July 2001, at 41.

The court squarely rejected Dow Jones' argument that exposing online publishers to liability in all the jurisdictions in which their publications are accessed will have a chilling effect on free speech, causing publishers to either censor or embargo publications to avoid liability in foreign jurisdictions. The court instead suggested that Dow Jones' position was motivated by commercial convenience in avoiding suit. The decision itself suggests that since Dow Jones' website is by paid subscription it could simply restrict dissemination of its articles into foreign jurisdictions. *Id.* at ¶ 74.

Barrons Article Explored Plaintiff's Links to Stock Frauds

In October 2000 *Barrons* magazine, owned by Dow Jones, published an article entitled “Unholy Gains – when stock promoters cross paths with religious charities, investors had better be on guard.” The article examined, in part, the links between Australian stock promoter Joseph Gutnick and several stock frauds in the U. S. in which religious charities were misused to manipulate stock prices, boosting the charities' profits at the expense of other investors. Gutnick filed suit against Dow Jones in November 2000, alleging that the article implied he had laundered money through a fictitious charity in Australia. On a technical pleading issue, the

court also sided with the plaintiff, upholding his choice to sue only on these alleged implications and not on the unchallenged gist of the entire article which detailed Gutnick's ties to religious charities involved in the U.S. stock frauds.

Article Accessed in Australia thru Wall Street Journal's Web Site

Gutnick sued for publication of the article only in the state of Victoria and conceded on this jurisdiction and venue motion that he would not sue anywhere else. A minimal number of hard copies of *Barrons* were sold in Victoria – fewer than 10. More important for purposes of jurisdiction was the number of subscribers to the *Wall Street Journal's* web site www.wsj.com which includes an online edition of *Barrons*. The court found that there were approximately 1,700 paying subscribers to [wsj.com](http://www.wsj.com) who used credit cards issued by Australian banks; he also concluded, although no evidence on the point was presented, that 300 of those subscribers were from Victoria. The plaintiff submitted a handful of affidavits from subscribers in Victoria alleging they had accessed the article, but the court found it could infer for purposes of the motion that all 300 subscribers in Victoria had accessed *Barrons Online* and downloaded the specific article.

Court Rejects Jurisdiction Rule Based on Location of Website

In addition to inviting the court to adopt a rule of website-based jurisdiction on free speech grounds, Dow Jones also advanced an argument based on the technical process of web publication. In essence, Dow Jones argued that its publication on the web occurred only in New Jersey where its servers are located and where the *Barrons* article was accessible to subscribers only by their own deliberate action. Publication itself occurred in New Jersey when pursuant to a particular request the article was transferred from storage to a “get message” sent by a subscriber that then “carried” the article back to the subscriber, wherever he or she may be located. Dow Jones analogized the web to a physical library. As

(Continued on page 12)

Cyber-Defamation Case Against Dow Jones to Proceed in Australia

(Continued from page 11)

summarized by the court,

the browser knocked on the library door and having locked in the correct code, the book is sent to him. He reads it when it is downloaded but it has already been published, just like buying a book and reading it later in his contention. *Id.* at ¶ 21.

After a lengthy and discursive exploration of Dow Jones' web technology arguments, much of which ignored the only evidence before the court, which was presented by Dow Jones and un rebutted by the plaintiff, the court dismissed them as "pop science" irrelevant to determining publication for purposes of defamation law. This, according to the court, must remain the "location of comprehension."

Thus both technically and as a matter of policy the court rejected a website-based rule of jurisdiction. According to the court:

To say that the country where the article is written, edited and uploaded and where the publisher does its business, must be the forum is an invitation to entrench the United States, the primary home of much of Internet publishing, as the forum. The applicant's argument that it would be unfair for the publisher to have to litigate in the multitude of jurisdictions in which its statements are downloaded and read, must be balanced against the world-wide inconvenience caused to litigants, from Outer Mongolia to the Outer Barcoo, frequently not of notable means, who would at enormous expense and inconvenience have to embark on the formidable task of suing in the USA with its different fee and costs structures and where the libel laws are, in many respects, tilted in favour of defendants . . . *Id.* at ¶ 73.

Court Rejects Forum Non Conveniens Argument

Not surprising the court also rejected Dow Jones' request for a transfer of venue to the U.S. based on the practical inconvenience of bringing witnesses to Australia

and the juridical unfairness of litigating under Australia's more plaintiff-friendly defamation laws. The court found that Victoria is the appropriate and convenient forum for the case (and that Australian law applies) because plaintiff was a citizen of Victoria with substantial business and social affairs in the state.

Appeal to the Australian High Court

A number of commentators have described the court's decision as a landmark affecting online publishing. Dow Jones has already filed an appeal to the Australian High Court, publicly noting that the decision could have a major impact in the way media companies operate throughout the world.

Dow Jones is represented by barristers Geoffrey Robertson, QC, of Doughty Street Chambers in London and Tim Robertson of Frederick Jordan Chambers in Sydney, solicitors Paul Reidy and Kate Fitzgerald of Gilbert & Tobin in Sydney, and Stuart Karle of Dow Jones. Joseph Gutnick is represented by barristers Jeffrey L. Sher, QC, and Michael Wheelahan, and solicitors Clayton Utz of Melbourne.

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Iowa Libel Award Reversed

Actual Malice Application to Newspaper Ad

By Charles D. Tobin

The actual malice standard did not require a newspaper to investigate claims about the comparative merits of two product lines before running an ad in which a retailer says its rival fails to tell the “truth” and prefers consumers who are “misinformed and confused.”

The Iowa Supreme Court in early September reached this conclusion in a libel case that pitted a newspaper against an advertiser who sued after its competitor took out a responsive ad. *Caveman Adventures UN, LTD d/b/a The Electronics Cave v. Press-Citizen Co., Inc., d/b/a Iowa City Press Citizen*, slip op., No. 115/99-0435 (Sept. 6, 2001).

In a unanimous ruling, the justices reversed a \$240,000 punitive-damages-only jury award against *the Iowa City Press-Citizen* and held the newspaper had no duty to investigate either advertiser’s boasts before publishing their ads.

Caught Between Dueling Merchants

The lawsuit arose out of the fierce competition between two electronics retailers. The Electronics Cave, which sued the newspaper, featured an inventory of 8 mm camcorders. Its rival, Woodburn Electronics, hawked camcorders that used VHS-C technology.

In 1994, Electronics Cave placed an ad in the *Press-Citizen* listing the relative advantages and disadvantages of the two technologies. The ad asserted that 8 mm camcorders are superior to VHS-C products because, among other ostensible reasons, they are lighter, produce better copies with superior sound, and use tapes that record longer.

A few weeks later, Woodburn Electronics purchased its own ad in the *Press-Citizen*. Woodburn’s ad specifically referred to the Electronics Cave advertisement, then asserted that Woodburn wanted consumers “to know the TRUTH, not fiction being cloaked as ‘fact’.” The ad then launched into a feature-by-feature comparison of the two technologies before concluding with the statement: “The more misinformed and confused the consumer is, the more units they sell.”

Electronics Cave asked the *Press-Citizen* for a retraction, asserting that Woodburn’s ad accused it of fraud. The newspaper declined.

Advertiser sues its competitor for libel

Electronics Cave then filed suit – but not against the newspaper. Instead, the retailer sued its rival Woodburn on a theory of defamation. The *Press-Citizen* was not named as a defendant in that action, nor was the newspaper at all involved in the advertisers’ litigation.

The case was tried to a jury after pretrial dismissal motions, including an argument by Woodburn that its advertisement was protected opinion, were denied. Jurors found that Woodburn and its owners defamed Electronics Cave in their ad.

Jurors awarded Electronics Cave \$30,000 in general damages and \$750 in punitive damages. Significantly, jurors marked “\$0” on the special-verdict form when asked for the amount of damages they found for plaintiff’s “reasonable loss of reputation.”

Newspaper Becomes Defendant in Second Suit

Following the victory against its competitor, Electronics Cave sued the *Press-Citizen* for libel. But in an unusual move, the retailer made no claim for compensatory damages. Instead, Electronics Cave sued the newspaper punitive damages only.

The newspaper moved for summary judgment on many grounds. Chief among its arguments was the preclusive effect of the prior jury’s determination that Electronics Cave had suffered no injury to reputation, coupled with Electronics Cave’s failure to produce a single customer who said the ad had caused them to shop elsewhere. This, according to the newspaper, meant the retailer could not meet its burden to establish an injury to reputation. Iowa’s Supreme Court, during the pendency of the litigation, held that all Iowa libel plaintiffs must prove reputational injury as a bedrock element of their case. *Schlegel v. The Ottumwa Courier*, 585 N.W.2d 219 (Iowa 1998). Moreover, the newspaper argued, Iowa law does not permit freestanding punitive damages claims.

The trial court disagreed with the newspaper. It in-

(Continued on page 14)

Iowa Libel Award Reversed

(Continued from page 13)

stead adopted plaintiff's argument that, because the jury had awarded some type of compensatory damages in the prior case, Electronics Cave had met its burden: "[T]he award of damages in the previous case satisfies the actual damages requirement for a possible award of punitive damages in the present case." The trial court also turned aside the *Press-Citizen's* arguments that Electronics Cave had failed to demonstrate the requisite constitutional actual malice on the newspaper's part.

The case proceeded to a jury in January 1999. Jurors, over the newspaper's objections, were told of the \$30,000 "general damages" award in the *Electronics Cave v. Woodburn* litigation. The judge, however, would not subsequently allow the *Press-Citizen* to introduce the prior jury's \$750 punitive-damages verdict.

After a three-day trial, jurors awarded Electronics Cave \$240,000 in punitive damages against the *Press-Citizen*. The newspaper appealed.

Newspaper Prevails on Constitutional Grounds

The newspaper based its appeal on the following grounds:

- Under the doctrine of issue preclusion, plaintiff had no grounds for recovery against the *Press-Citizen*, as the jury in the first trial had determined that Electronics Cave suffered no harm to its reputation.
- Even if the prior jury's finding were not binding in the second trial, the court ignored precedent by letting the case against the newspaper to a jury without plaintiff having produced any witnesses as to reputational injury.
- Plaintiff did not produce clear and convincing of actual malice, as the First Amendment requires for the recovery of punitive damages in a libel lawsuit.
- The punitive damages award was excessive.

In a unanimous 11-page decision written by Justice James H. Carter, Iowa's Supreme Court ruled in favor of the *Press-Citizen* solely on constitutional grounds. The court found it unnecessary to address the newspaper's remaining grounds.

Justice Carter began the legal analysis with a recogni-

tion of the breadth of the United States Supreme Court's decision in *Gertz v. Welch*, 418 U.S. 323 (1974). He noted that in *Gertz*, the Court "did not distinguish between media advertising and ordinary reportage[]" in holding that no libel plaintiff suing the press may recover punitive damages without a showing of actual malice. *Caveman Adventures v. Press Citizen Co.*, slip op. at 7.

The Iowa high court next reviewed plaintiff's arguments that it produced clear and convincing evidence of actual malice because: (1) the newspaper's advertising manager testified at trial that she believed the ad accused plaintiff of trying to defraud the public; (2) the newspaper ran the ad contrary to its "established policy of not printing attack advertisements"; (3) the newspaper "hoped to motivate" Electronics Cave into running a responsive advertisement. *Id.* at 9.

The court then borrowed from Iowa fraud and misrepresentation law in order to analyze the issue of actual malice in the "context in which the challenged statements were published." *Id.* Citing state precedent that sellers do not commit actionable fraud when they merely puff the quality of their wares, the Iowa Supreme Court held, that "a comparable, albeit somewhat less permissive, rule exists with respect to attempts to deflate the puffery resorted to by a competitor."

When attempts are made to counter such puffery through the use of comparative-product advertising, we are not persuaded that a newspaper in which this type of advertisement is run is guilty of reckless conduct if it does not ascertain which of the competing claims is closest to the truth.

Id. at 9-10. Without detailed further discussion plaintiff's evidence, the court held plaintiff had failed to satisfy the "purely subjective" actual malice standard. According to the justices, none of the evidence Electronics Cave relied upon "was sufficient to establish that the *Press-Citizen* acted with knowledge that the claims made in Woodburn's advertisement were false or that the *Press Citizen* acted with a reckless disregard for the truth." *Id.* at 10.

The case was remanded to the trial court for entry of

(Continued on page 15)

Iowa Libel Award Reversed

(Continued from page 14)

judgment in favor of the newspaper. Electronics Cave has petitioned the Iowa court for reconsideration of the unanimous decision and no ruling on that application had been entered as of press time.

Charles D. Tobin is a partner at Holland & Knight LLP in Washington, D.C. He assisted in the defense of the Gannett Co., Inc. newspaper in this case when he was an in-house attorney with the company. Michael A. Giudicessi and Kasey W. Kincaid of Faegre & Benson LLP, Des Moines, represented the newspaper in the appeal. Randall B. Willman of Leff, Haupt, Traw & Willman, LLP, Iowa City, represented the newspaper at the trial.

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“Official Secrets Act” Dead Again – For Now

At the request of Attorney General John Ashcroft, the Senate Select Committee on Intelligence cancelled a Sept. 5 hearing on an American “official secrets act,” which would have made federal government employees and former government employees who disclosed or attempted to disclose “properly classified” information subject to a fine and/or imprisonment for up to three years. See LDRC LibelLetter, Aug. 2001, at ___.

At the time of the cancellation, committee vice chair Sen. Richard Shelby told the Associated Press that he was confident that the Bush Administration would eventually support the measure.

The Administration has not specifically addressed the legislation after the terrorist attacks on Sept. 11, but there is a sense in Washington that leaks of classified information are a problem. The day after the attacks, Sen. Orrin Hatch revealed information from a confidential briefing that American intelligence had intercepted messages between associates of Osama bin Laden stating that American targets have been struck. Hatch was reported unaware that the information was classified. Without naming Hatch, Defense Secretary Donald Rumsfeld criticized those who leak classified information, saying that they “frustrate our efforts to track down and deal with terrorists.”

“Anybody in the government who is receipt of classified information must at all times obey the law that makes that information classified for a good reason,” White House spokesman Ari Fleischer was quoted as saying, “because it’s to protect the security of the country and individuals around the world.”

According to *U.S. News and World Report*, White House officials are now treating information which had previously been given to reporters – such as the president’s daily schedule – as classified information. Since the attacks, “a leak with regard to the president’s schedule is tantamount to treason,” an unnamed White House aide told the magazine.

The “official secrets act” was included as part of last year’s bill funding government intelligence activities. After an intense lobbying campaign and debate within the Administration, Clinton vetoed the budget bill containing the provision on Nov. 4. See 146 Cong. Rec.

H11852_11853 (daily ed. Nov. 13, 2000) (text of veto message). He later signed a version of the funding bill without the secrecy provision. Intelligence Authorization Act for Fiscal Year 2001, Pub. L. 106_567 (2000). See LDRC LibelLetter, Nov. 2000, at 26.

At the time, a committee press release paraphrased Shelby – then chair of the Intelligence Committee -- criticizing Clinton “for placing media interests above national security equities.”

To be published in January 2002

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Jury Awards \$1 Million to Woman Labeled By Drug Brochure

A New York jury has awarded \$1 million in compensatory damages to a woman who was found to have been libeled by a brochure used to promote the AIDS drug Crixivan. *Doe v. Merck & Co.*, No. 10786-98 (N.Y. Sup. Ct., Suffolk County jury verdict Sept. 25, 2001). The jury also decided that punitive damages were appropriate, and after the compensatory damages verdict the case is proceeding to that second phase.

The jury verdict came after two days of deliberation, and three months after Supreme Court Justice Mary Werner granted summary judgment to the plaintiff against pharmaceutical company Merck & Co. and its advertising agency, Harrison & Star, and ordered a trial on damages. She dismissed claims against modeling agency The Morgan Agency and photographer Skip Hine. *Doe v. Merck & Co.*, No. 10786-98 (N.Y. Sup. Ct., Suffolk County June 13, 2001), available at www.courts.state.ny.us/FCAS_docs/2001JUN/510010786199811SCIV.PDF. See *LDRC LibelLetter*, July 2001, at 25.

Merck and Harrison & Star, a division of Omnicom Group, Inc., will be jointly liable for the damages.

“Jane” and “Maria”

The plaintiff, who used the pseudonym Jane Doe in court papers, is a 30-year suburban mother who contracted HIV, the virus that causes AIDS, from her husband. In 1996 and 1997, she agreed to be photographed for what she was told would be educational material about the virus; the photographs eventually appeared in a flip-chart titled “Getting the Facts” and a brochure titled “Sharing Stories.”

Next to the plaintiff’s picture, the text of the brochure related the story of 19-year-old “Maria,” who “has two young children” and has been taking Crixivan and two other (non-Merck) AIDS drugs ever since she “was enrolled in a clinical trial 2 years ago,” and takes another drug daily “[t]o protect her from a recurring case of herpes.” Elsewhere, the brochure noted that “[m]ore than 50 HIV-positive individuals taking Crixivan contributed ideas to this brochure, even though only four of them are highlighted here. Their names have been changed to protect their privacy. We thank them for sharing their stories and their time.”

In her lawsuit, the plaintiff claimed libel, intentional

and negligent infliction of emotional distress, and violation of New York’s “right of publicity” laws (N.Y. Civil Rts. Law §§ 50, 51), and sought \$12 million in compensatory damages – \$100 for each of the 120,000 brochures published.

Summary Judgment

Ruling on motions from both parties, Justice Werner’s grant of summary judgment on the issue of compensatory damages held that the brochure’s statements were libelous *per se* and that they violated New York’s right of publicity statute. By stating that the plaintiff has herpes, the brochure labeled the plaintiff as having a loathsome disease, Werner wrote. And by stating that she had a second child after she learned that she was HIV positive, the court wrote, the brochure imputed unchastity.

Werner rejected both parties’ motions for summary judgment on punitive damages, holding that the record established actual malice, but there were factual issues remaining on the issue of common law malice, required by New York law in order to award punitive damages.

Damages Trial

The damages trial began in late August in Suffolk County Supreme Court in Riverhead, N.Y., and lasted two weeks. According to press accounts, the jury of six was all male, and mostly middle-aged. Justice Alan D. Orshin presided.

According to *The New York Law Journal*, in his summation plaintiff’s counsel Joseph Tranfo of Tranfo & Tranfo in Jericho, N.Y. and Greenwich, Conn. argued that the plaintiff’s trust had been violated numerous times – by her husband, by Merck, and by Harrison & Star. In an interview with the legal newspaper, Tranfo said that he was hoping that the all-male jury would relate to the plaintiff as a “sister or daughter, a decent person who didn’t deserve to have these terrible things happen to her.”

“These are not mistakes, gentleman,” Tranfo told the jury in his summation, referring to the “Maria” story in the brochure. “These are lies ... They knew the truth.” Pointing to an blow-up of the brochure, he said, “They knew this wasn’t the truth, and they said it anyway.”

(Continued on page 18)

Jury Awards \$1 Million to Woman Libeled By Drug Brochure

(Continued from page 17)

Defense counsel Victor Kovner of DCS member firm Davis Wright Tremaine LLP told the jurors that the defendants had apologized for their “honest mistake,” and that the ad agency had intended to include a note in the brochure indicating that the individuals described were composites, and that the photos were of models. He added that while the plaintiff’s problems were “terrible,” they were not caused by the brochure, which “hardly anyone she knew saw.”

Kovner suggested that \$10,000 “would more than compensate her for any minor injury she might have sustained.”

Punitive Phase

After the jury rendered its verdict awarding compensatory damages, the jurors proceeded to consider punitive damages; a verdict was pending at press time.

Previously, when the jury was considering whether punitives were appropriate, Tranfo argued that they were warranted because Merck continued to distribute the brochure after it claimed that it had stopped doing so.

In addition to Kovner, defendants Merck and advertising agency Harrison & Star are represented by Sara Edelman of Davis & Gilbert in New York.. Besides Tranfo, the plaintiff is represented by Meredith Braxton of the same firm.

Judge Dismisses Sopranos Suit

A Cook County Circuit Judge dismissed a lawsuit on September 19 that accused Time Warner Entertainment Co., the makers of the HBO television series “The Sopranos,” of stereotyping Italian-Americans. *American Italian Defense Association v. Time Warner Entertainment Co.*, In bringing the suit, the American Italian Defense Association claimed the show violated the “individual dignity” clause of the Illinois Constitution by depicting Italian-Americans as mobsters.

In his 11-page ruling, obtained by Reuters, Circuit Court Judge Richard A. Siebel said the “individual dignity” clause was only a “constitutional sermon.” Instead of being meant to be used to bring lawsuits, the clause was included in the state constitution to “serve a teaching purpose, to state an ideal or principle to guide the conduct of government and individual citizens,” according to Siebel.

The clause in question is Art. 1, § 20 of the Illinois Constitution. It states that communications that “portray criminality, depravity or lack of virtue in ... a group of persons by reason of or by reference to religious, racial, ethnic, national or religious affiliations are condemned.”

The AIDA is represented by Ted Grippo, who said they would appeal the dismissal. Time Warner is represented by Tom Yannucci.

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Ohio Expands Independent State Protection For Opinions

By Jill Meyer Vollman

In a decision reaffirming its previous holding that Ohio's Constitution provides broader protection for opinion statements than does the United States Constitution, the Ohio Supreme Court recently expanded the opinion privilege. In *Wampler v. Higgins*, 93 Ohio St. 3d 111 (2001), the court held that the "separate and independent protection for opinions" previously recognized for media defendants extends also to non-media libel defendants.

Letter to Editor Provokes Claim

Wampler filed a libel claim against Higgins, a private individual who had written a biting letter to the editor of their local newspaper sharply criticizing Wampler and his business dealings in town. Higgins, claiming that every statement contained in his letter "was an honest and good faith expression of opinion," filed a motion for summary judgment.

The trial court granted the motion and the court of appeals upheld the dismissal. The Ohio Supreme Court granted a discretionary appeal in response to Wampler's argument that the court of appeals' decision created a conflict with an earlier court of appeals decision holding that the "absolute privilege to express opinions had not yet been extended to all statements of opinion, by anyone, or to the media for the republication of the opinion of others."

Ohio's Opinion Protection

The Ohio Supreme Court walked through the history of Ohio's separate opinion privilege, which it first recognized in *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St. 3d 279 (1995). *Vail* followed the United States Supreme Court's *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) decision, in which seven justices agreed that "we do not think ... *Gertz* ... was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.' *** Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact."

On the heels of *Milkovich*, the Ohio Supreme Court issued its decision in *Vail*, expressly declining to follow *Milkovich* on independent state grounds:

The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press. *** The focus shifts to whether the language under question is to be categorized as fact or opinion. *** When determining whether speech is protected opinion a court must consider the totality of the circumstances. Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared.

[T]he court dismissed [plaintiff's] assertion that any distinction should be made between media and non-media defendants

See Ollman v. Evans, 750 F.2d 970 (D.C. App. 1984), cert. denied, 471 U.S. 1127 (1985) (creating the four-part test adopted by the Ohio Supreme Court).

Refuses to Limit Protections

Plaintiff Wampler challenged the extension of the *Vail* opinion protections to a non-media defendant, urging the court to revisit *Vail* and instead adopt the *Milkovich* standard. Alternatively, Wampler argued that *Vail*'s rule should not be applied to cases where the "defendant is a private citizen unaffiliated with the media."

The court wholeheartedly rejected the notion that *Vail* should be abandoned, reiterating that anyone who abuses the right of free speech still is held accountable for false statements of fact under that test, but only after a *categorical* determination first is made, as a matter of law, as to whether the statement is one of fact or if it truly is protected opinion.

Turning to Wampler's argument that the application of the *Vail* test should be limited to media defendants, the court similarly dismissed his assertion that any distinction should be made between media and nonmedia defendants and denied that its previous decisions made such a distinction:

(Continued on page 20)

Ohio Protection For Opinion

(Continued from page 19)

It guarantees to every citizen the right to publish freely his or her sentiments on all subjects, regardless of that citizen's association or nonassociation with the press. *** It is true ... that ... when this court recognized and reaffirmed the Ohio Constitution's independent protection for opinions, we did so by explicitly referring to the *freedom of the press*. *** In neither case, however did this court suggest that Ohio's categorical protection for opinions would *not* be available to nonmedia defendants such as Higgins who, though personally unaffiliated with the media, utilize a media forum to comment on a matter of public concern.

The court expressly rejected the reasoning of the Oregon and Vermont courts that have made such a distinction, rejecting the premise that "restricting nonmedia defendants' access to constitutional privileges poses no threat to meaningful debate of public issues, and no threat of self-censorship by the press." Instead, the court emphasized:

The shortcomings of this premise are particularly evident in cases such as the one at bar, concerning a suit against the author of a letter to the editor published in a local newspaper. Constitutionally significant debate on matters of public concern is not the sole province of the media. ... The robust exchange of ideas that occurs each day on the editorial pages of our state's newspapers could indeed suffer if the nonmedia authors of letters to the editor published in these forums were denied the same constitutional protections enjoyed by the editors themselves.

The court also relied on the fact that "several members of the United States Supreme Court have agreed that distinguishing between media and nonmedia defendants for purposes of access to constitutional protections would be improper."

Find Letter is Protected

Finally, the court applied the *Vail* test and agreed that the lower courts correctly found, as a matter of law, that Higgins's statements in his letter to the editor were protected opinion. First, quoting from *Ollman*, the court found:

Although the Supreme Court has never directly ad-

ressed this issue, the Court has clearly ruled that questions as to other privileges derived from the First Amendment, such as the qualified privilege as to public officials and public figures, are to be decided as matters of law. Moreover, the predictability of decisions, which is of crucial importance in an area of law touching upon First Amendment values, is enhanced when the determination is made according to announced legal standards and when a body of public case law furnishes published examples of the manner in which these standards are to be applied.

Then, the court performed an exhaustive review of the four *Vail* factors. With regard to the specific language used, the court held: "Though plainly pejorative in tone, with Higgins describing Wampler as a 'ruthless speculator' possessed of 'self-centered greed' charging 'exorbitant rent,' these phrases are all inherently imprecise and subject to myriad subjective interpretations."

As to the verifiability of the statements, "Higgins's description of Wampler's proposed rent as 'exorbitant,' much like his characterization of Wampler as 'ruthless,' and his distaste for Wampler's 'faceless,' 'mindless,' or 'heartless' corporate vendee, are standardless statements not amenable to objective proof or disproof."

The court's review of the third factor, general context, led it to this conclusion:

Considering Higgins's allegedly defamatory statements in the context of the entire letter, we find that the average reader of the Circleville Herald would be unlikely to infer that those statement were factual. The gist of Higgins's letter as a whole is ... *his opinion...*

The court ended with its decision that the broader social context also weighed in favor of the defendant.

We do not suggest here that publication of defamatory statements in a letter to the editor will insulate the author from liability in every case. We merely note that it is commonly known that the authors of letters to the editor are normally not engaged in the business of factual reporting or news dissemination,

(Continued on page 21)

New York Court Addresses Use of Confidential Sources by Libel Defendant

By Slade R. Metcalf

A New York State judge recently resolved an issue that haunts libel practitioners both at the pre-publication stage and during the defense of a libel suit. The issue was simple and direct: what sanctions, if any, could or should a court apply when a newspaper reporter and its employer firmly, but respectfully, decline to disclose the identity of a confidential source. The court concluded to allow evidence of reliance on the source, but not of the source's past reliability.

Miss Universe as CIA Agent

In the case of *Bement v. NYP Holdings, Inc.*, the winner of the 1960 Miss Universe pageant sued the publisher of the *New York Post* for printing an article in its May 13, 1998 issue, which reported on an "unpublished magazine article" that had been circulated among motion picture studios. The alleged

[The court] agreed with the publisher that the identification of the confidential source was "of limited value to the plaintiff in establishing her claim."

magazine article told the story, the *Post* reported, of how the Miss Universe of 1960 (who was Linda Bement, but was given a pseudonym in the unpublished article) had worked for the CIA during her reign and slept with foreign government officials in order to plant electronic eavesdropping devices in their homes.

The magazine article (which in reality turned out to be a motion picture treatment) was written by Laurence Gonzales, a former *Playboy* writer and editor. The *New York Post* reporter, after reviewing the information about the contents of the treatment from a confidential source, undertook some basic research to learn that the pseudonymous 1960 Miss Universe was named Linda Bement. The *Post* reporter had used the confidential source numerous

times in the past and had found the source in each case to be reliable.

After publication of the *New York Post* article, Ms. Bement telephoned the *Post* reporter and denied that she had ever worked for the CIA.

The *Post* reporter then contacted the confidential source again and had the source send him a copy of the "unpublished magazine article." The statements contained in the magazine article/treatment were fully consistent with the information provided by the confidential source.

Protecting a Source

Almost a year later, Ms. Bement sued the *New York Post* for libel and, during discovery, the *Post* reporter respectfully declined to reveal the identity of the confidential source. After the completion of discovery, plaintiff filed an omnibus discovery motion to preclude reliance on certain information and to compel the defendant to provide certain other information. With respect to the confidential source, the *Post* reporter did reveal in his deposition that the source reviewed potential articles and treatments for motion picture exploitation.

During discovery, defendant produced a copy of the magazine article/treatment. The defendant also established through affidavits and deposition testimony that United

Ohio Protection For Opinion

(Continued from page 20)

and that their letters qualify as what the *Ollman* court described as a 'well established genre' of opinionated speech.

Though not so readily apparent on its face, the *Wampler* decision provides media defendants, as well, with an additional defense when sued for libel based upon the publication of others' opinions. Some Ohio appellate courts had been hesitant to apply the opinion protection in such a situation, finding that it had been extended previously only when the media was publishing its own opinion. With *Wampler*, however, the Ohio Supreme Court has made it clear that the "separate and independent" protection rooted in the Ohio Constitution applies to freedom of *speech* for anyone as well as freedom of the *press*.

Jill Meyer Vollman is an attorney at Frost Brown Todd LLC in Cincinnati, Ohio.

(Continued on page 22)

New York Court Addresses Use of Confidential Sources by Libel Defendant

(Continued from page 21)

Talent Agency, the movie agent for Laurence Gonzales, had distributed the treatment to over a dozen motion picture studios.

Plaintiff contended in her motion that she needed to know the identity of the confidential source in order to determine whether in fact the source provided accurate information and whether the *Post* reporter had reason to rely on the source. Defendant contended that the identity of the source was not important since the information provided by the source was clearly confirmed in the movie treatment (which plaintiff now had a copy of). Further, defendant argued that disclosure of the source's identity was not germane since Gonzales's agent and one motion picture studio confirmed that the treatment was being distributed in Hollywood as a true story.

Sanctions Rejected

The court initially recognized that New York State Shield Law (N.Y. Civil Rights Law §79-h) provided absolute protection for the reporter (and the newspaper) from being held in contempt of court and from being incarcerated. However, the court did recognize its discretion in imposing sanctions against the defendant for its reporter's refusal to disclose the source's identity.

Justice Marylin Diamond of the Supreme Court of the State of New York, County of New York, wrestled with whether a sanction would be appropriate under the circumstances. She agreed with the publisher that the identification of the confidential source was "of limited value to the plaintiff in establishing her claim."

The court also rejected the plaintiff's argument that it was necessary for the plaintiff to determine the identity of the source in order to verify that the information provided by the source was accurate. The court stated that it was clear that Mr. Gonzales actually wrote an article in which the 1960 Ms. Universe was portrayed as a CIA agent who seduced foreign officials for surveillance purposes. The court also found that Mr. Gonzales had sought to interest

movie studios in the story and that his agents were promoting the article as a true story. As the court recognized, no movie studio agreed to turn the story into a motion picture, and the treatment was ultimately turned down because at least one studio was concerned about obtaining the life story rights from the plaintiff.

Limited Order of Preclusion

Although the court largely denied the plaintiff's motion to preclude defendant's reliance upon the confidential source, it did grant a "limited order of preclusion." The court precluded the newspaper reporter and the publisher from presenting evidence that the confidential source had

in the past proven to be reliable. However, the statements contained in Gonzales' treatment were accurately reflected in the article appearing in the *New York Post*. In addition, the newspaper will be

able to introduce evidence that the source said that the magazine article was being promoted as a true story, which information has been confirmed independently by at least one motion picture studio.

Libel Seminar is Privileged

The court also denied the following arguments raised by the plaintiff. The court found that an affidavit submitted by the *New York Post* publisher adequately answered questions pertaining to the *New York Post*'s website and the policies and procedures as they related to the editing and publishing of the article. In addition, at his deposition, the *Post* reporter declined, upon advice of counsel, to discuss the precise discussions which were held at a regular seminar given to the *Post* employees by outside counsel on the issues of avoidance of and response to defamation claims. The court agreed that those discussions were covered by the attorney-client privilege and, thus, were not open to discovery.

(Continued on page 23)

[T]he court also declined to require the New York Post to produce documents relating to all defamation lawsuits which had been brought against the Post in the last ten years.

New York Court Addresses Use of Confidential Sources by Libel Defendant

(Continued from page 22)

The court also declined to require the *Post* reporter to answer questions, in the form of a legal conclusion, whether he believed that he complied with professional journalistic standards in researching and writing the *Post* article. In addition, the court also declined to require the *New York Post* to produce documents relating to all defamation lawsuits which had been brought against the *Post* in the last ten years. The court found that there was an insufficient showing by the plaintiff that the information requested was sufficiently relevant to this case and, further, found that an affidavit from the *Post* reporter stating that he had not been involved in any defamation suits since January 1990 was adequate.

Libel practitioners often confront some of the foregoing issues without the benefit of precedential support in advising their clients. This opinion gives helpful guidance to libel lawyers for pre-publication review and in assisting clients to establish policies for their news organizations.

The attorneys for plaintiff Linda Bement were Peter Jakab, Esq., of Fein & Jakab in New York and Peter Neufeld, Esq., of Cochran Neufeld & Scheck, LLP in New York.

Slade R. Metcalf is a partner at Squadron Ellenoff Pleasant & Sheinfeld, LLP in New York. Along with Trina R. Hunn & Katherine M. Bolger, he represents NYP Holdings, Inc.

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Friday, November 9th, 2001

Sheraton New York Hotel & Towers

Discovery Regarding Editorial Process Limited in Massachusetts Case

By **Kenneth W. Salinger**

A single justice of the Massachusetts Appeals Court recently held that civil litigants are not entitled to pursue discovery regarding the editorial process followed by journalists and publications without at least a showing that such inquiry would have concrete relevance to an identifiable issue in the case. *Astra USA, Inc. v. Bildman*, No. 01-J-412 (Mass. App. Ct., July 27, 2001). This opinion was issued on an interlocutory appeal regarding a subpoena to a third-party journalist, and does not constitute binding appellate precedent.

Story on Harassment Claims

Journalist Mark Maremont is a reporter, formerly for *BusinessWeek* magazine and now for the *Wall Street Journal*. In 1996 he broke the story of pervasive sexual harassment of female employees by the then-CEO and other managers at Astra USA. Among other things, Maremont's investigative reporting was followed by a sexual harassment lawsuit filed by the United States Equal Employment Opportunity Commission ("EEOC") on behalf of those employees.

In 1998 Astra USA entered into a Consent Decree and agreed to pay \$9,850,000 into a fund to compensate individual claimants. The EEOC characterized this as "the largest settlement of a sexual harassment lawsuit in the agency's history." According to the agency,

[t]he EEOC's investigation revealed that at least since January 1993, Astra's management officials, including former President Lars Bildman, subjected the charging parties and other similarly situated female employees to a hostile work environment and[,] in some instances, quid pro quo harassment.

Third Party Subpoena

Astra sued Bildman at the same time that this Consent Decree was announced. Astra alleges that Bildman de-

(Continued on page 24)

Discovery Regarding Editorial Process Limited in Massachusetts Case

(Continued from page 23)

frauded the company of millions of dollars and that he repeatedly breached his fiduciary obligations by engaging in various forms of misconduct, including sexual harassment. Bildman asserted counterclaims alleging that Astra breached his employment contract by “terminating him without cause” and that Astra libelled him.

Neither Maremont nor *BusinessWeek* have been sued, for libel or on any other grounds. Nonetheless, three years into this litigation Bildman subpoenaed Maremont, seeking access to any unpublished information that Maremont may have gathered in the course of his investigative reporting, including any such information obtained from confidential sources, as well as access to information regarding the editorial process that led to the decision to publish this article.

Motion to Quash

Maremont moved to quash the subpoena. This motion is being litigated in the context of Massachusetts precedent holding that journalists have no absolute constitutional privilege to refuse to provide discovery to others, but over time recognizing a qualified common law privilege under which the interest of civil litigants in obtaining information gathered by a journalist must be weighed against the public’s First Amendment interest in the free flow of information and Freedom of the Press.

The trial judge, Massachusetts Superior Court Justice Margaret Hinkle, expressed serious concerns about the propriety of the subpoena to Maremont, but rather than quash the subpoena she decided that the deposition could go forward so that she could subsequently adjudicate any remaining claims of privilege in the context of specific deposition questions. The trial judge did rule, however, that Maremont is not required to turn over his investigative reporting notes.

Appeals Judge Review

Maremont sought interlocutory review from a single justice of the Massachusetts Appeals Court. Justice James F.

McHugh III held that for the most part it was appropriate for the trial judge to permit the deposition to go forward and then adjudicate “if necessary on a question-by-question basis” how to balance Bildman’s desire to obtain information against the First Amendment interests “of the reporter and his employer.”

However, Justice McHugh vacated the order below with respect to any inquiry into the decision to publish Maremont’s story in *BusinessWeek* magazine. He explained that – under *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) and prior cases – editorial decisions regarding what to publish are “laced with First Amendment values,” and that the First Amendment requires “heightened showings of relevance

and need” when a party to litigation seeks “to compel disclosure of information that implicate[s] First Amendment values.”

In this case, the trial judge found that Bildman failed to show that “the decision to publish the article or the timing of its pub-

lication has any relevance” to any claims or defenses asserted by Astra or Bildman. The appellate judge held that “[i]f that is so, it ends the matter, and there should be no inquiry into the editorial process until, at the very least, relevance is concretely shown.” The matter was remanded to the trial court, and to date no deposition of Maremont has taken place.

Ken Salinger is a Partner at Palmer & Dodge LLP in Boston. He represents journalist Mark Maremont and McGraw-Hill, publisher of BusinessWeek magazine, in this case. Lars Bildman is represented by Peter F. Carr, II, of Eckert, Seamans, Cherin & Mellot, LLC, in Boston. Astra USA is represented by Jeffrey Robbins of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC, in Boston. As a private attorney, Justice McHugh, represented the Boston Globe in First Amendment matters.

[T]hree years into this litigation Bildman subpoenaed Maremont, seeking access to any unpublished information that Maremont may have gathered in the course of his investigative reporting.

Ninth Circuit Allows Discovery in Suit Challenged Under California Anti-SLAPP Statute

In reversing the dismissal of a lawsuit against media defendants pursuant to the California anti-SLAPP statute (California Code of Civil Procedure section 425.16), the Ninth Circuit has ruled that the availability of discovery in the district court is governed by federal procedure, not limitations contained in the anti-SLAPP statute. *Metabolife International, Inc. v. Wornick, Blackburn, and Hearst-Argyle Television, Inc., dba WCVB-TV*, No. 99-56814, (9th Cir. aff'g in part & rev'g in part, Sept. 5, 2001), 72 F.Supp.2d 1160 (S.D. Cal. 1999). The Ninth Circuit previously held state anti-SLAPP statutes applicable to diversity lawsuits. See *United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73 (9th Cir., 1999).

The Ninth Circuit affirmed the dismissal of one of the defendants, Dr. George Blackburn, who was interviewed in the news broadcasts that led up to the case. The Appeals Court then returned the case to the district court for reassessment of the anti-SLAPP motion after the plaintiff conducts certain discovery and after the district court reconsiders its ruling excluding evidence offered by the plaintiff in opposition to the motion.

Report on Metabolic Life Safety

In May 1999, WCVB-TV in Boston aired various broadcasts concerning the safety of Metabolife 356, a dietary product sold by San Diego-based Metabolife International. Metabolife filed suit asserting various claims related to alleged falsity in the broadcasts. Among the statements claimed to be false were the words, "but I mean, you can die from taking this product," excerpted from an interview of Dr. George Blackburn concerning products containing ephedrine. Dr. Blackburn is a nutrition expert from Harvard Medical School and Beth Israel Deaconess Medical Center in Boston.

Omitted from the broadcast was Dr. Blackburn's immediately preceding comment:

The documents from the FDA hearings remained on the Internet in 1999, when we did this work years ago, and they know, even today as I know, there are

people who are taking similar types of these products who are getting heart attacks, and of course the abuse can lead to death.

At the time of the broadcast, the Massachusetts Legislature was considering a bill requiring the Massachusetts Department of Public Health to study the need for regulation of over-the-counter diet supplements and Dr. Blackburn was about to testify in that proceeding. In 1997, the FDA proposed a rule addressing dosage and labeling requirements for dietary supplements containing ephedrine alkaloids such as Ma Huang, a substance contained in Metabolife 356. Other state governments also have considered the regulation of such products.

The district court dismissed Metabolife's claims as to all defendants after denying a request by Metabolife for discovery

and excluding much of Metabolife's proffered evidence in opposition to the motion. The district court found the evidence lacked sufficient scientific reliability under *Daubert* standards. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587-89 (1993);

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir.1995).

Remanded for Discovery

The Ninth Circuit's majority opinion concluded that discovery limiting provisions in the anti-SLAPP statute conflicted with the liberal discovery contemplated by the Federal Rules of Civil Procedure. Consequently, the district court should have permitted certain discovery before dismissing the action as to the media defendants. The Ninth Circuit majority also directed the district court to reconsider admissibility of some of the excluded evidence. The Ninth Circuit majority did not direct denial of the motion but remanded for reassessment of the motion after the discovery was completed and admissibility of the scientific evidence reconsidered.

However, the Ninth Circuit unanimously affirmed the

(Continued on page 26)

The Ninth Circuit's majority opinion concluded that discovery limiting provisions in the anti-SLAPP statute conflicted with the liberal discovery contemplated by the Federal Rules of Civil Procedure.

Ninth Circuit Allows Discovery in Suit Challenged Under California Anti-SLAPP Statute

(Continued from page 25)

dismissal as to Dr. Blackburn. In response to inquiry from the district court judge, Metabolife had recognized that the “you can die” statement could only be proved false if words to the effect of “when taking the product as directed” were implied into the statement. The Ninth Circuit found that Dr. Blackburn’s complete statement, before editing, was not actionable since it referred to “abuse” situations.

A Dissent

Circuit Judge Rymer would have affirmed the dismissal as to all defendants. While she found no fault concerning the district court’s rulings on discovery and the exclusion of evidence, she found the analysis unnecessary. She would have affirmed as a matter of law because the four statements at issue on the appeal were literally or substantially true and various implications asserted by Metabolife were unreasonable.

As to the “you can die” statement, Judge Rymer found that it was “admittedly true that you can die from taking the product.” She also found that Metabolife’s contention that the statement implied when taken as directed was unreasonable.

Judge Rymer also found that the broadcast statement “every expert we asked said that Metabolife is not safe because of its main ingredient, Ma Huang” could not be reasonably expanded by implication to convey that “there is a consensus in the medical community that taking Metabolife 356 is deadly” as contended by Metabolife. The majority directed discovery as to the identity of the experts referred to in the broadcasts and also found the statement to be reasonably susceptible to the alleged implication.

Judge Rymer noted that the broadcasts had reported that “Metabolife’s founder and president, Michael Ellis, had previously pleaded guilty in federal court to felony charges related to the sale of methamphetamine and that his conviction had not been disclosed to regulatory authorities he and the company were lobbying not to regulate Metabolife 356.” As to Metabolife’s claim that the broadcasts falsely stated that Metabolife 356 and methamphetamine share the same main ingredient, Judge Rymer would have held the statements to be substantially true.

The judge observed that Metabolife did not dispute that

the main ingredient of methamphetamine is ephedrine or that Ma Huang is a naturally occurring ephedrine. That the Metabolife source may be natural instead of synthetic, and that the naturally occurring variety may be less potent than ephedrine produced in a laboratory, was seen by the judge as immaterial. The majority had noted that it could not determine from the record whether potency and absorption differences between synthetic and natural ephedrine resulted from differences in concentration or chemical structure.

Finally, Judge Rymer considered Metabolife’s claim that the broadcasts implied that Metabolife 356 had not been tested for safety. The judge noted that the broadcasts had accurately reported that a two week test at Vanderbilt University was not for safety and there was no dispute that Vanderbilt told Metabolife to stop citing its study as a safety study. Judge Rymer did not believe that the broadcast reasonably implied that no other tests had been conducted as contended by Metabolife. But if it did, Judge Rymer did not believe that the Chinese studies which had been conducted at that time were adequate to render the broadcasts substantially false. Judge Rymer observed that the Chinese studies were on mice, rats and beagles. She also observed that the studies lasted just fourteen days, were conducted outside United States protocols, were paid for by Metabolife, and were not peer reviewed in the several years since completion. She also observed that at a dosage of 3270 mg/kg/day “all four beagles had convulsions and two died.”

She agreed with the district court that even if the alleged implication were reasonable that the Vanderbilt study was the only one, the Chinese studies were “so insubstantial as to be ‘no studies’ for purposes of establishing the gist of WCVB’s speech and its substantial truth.” The majority concluded that the admissibility of the Chinese studies should be reconsidered but, if again excluded, the district court’s previous analysis would be correct.

Dr. Blackburn is represented by Gregory D. Roper of Luce, Forward, Hamilton & Scripps in San Diego, and Robert J. O’Regan and Jeffrey R Martin of Burns & Levinson in Boston. Metabolife is represented by Stephen A. Mansfield of Akin, Gump, Strauss, Hauer & Feld. The media defendants are represented by Steven J. Comen of Goodwin, Proctor & Hoar in Boston and Michael J. Weaver of Latham & Watkins in San Diego.

Miracle Whipped in Hawaii

By David Wienir

Nancy Miracle, a Hawaii resident who contends that she is the secret daughter of Marilyn Monroe, is no stranger when it comes to suing the media. In the past she has unsuccessfully pursued *The New York Post*, *The Daily News*, and a number of other entities. Her most recent complaint arose out of an article entitled *Fakes: Who Forged the J.F.K.-Marilyn Monroe Papers?*, (“the Article”), written by David Samuels and published in the November 3, 1997 issue of *The New Yorker*.

On July 9, 2001, The United States District Court for the District of Hawaii granted *The New Yorker's* motion for judgment on the pleadings, and for summary judgment. *Miracle v. The New Yorker Magazine*, No. 99-00689 (D. Haw. July 9, 2001).

Marilyn Monroe Letters

The court resisted the urgings of the plaintiff to find that she was libeled by her inclusion in an article addressing the fraud of others.

The Article concerned Lawrence (“Lex”) Cusack III, who was selling a number of documents which he said substantiated an extramarital affair between President John F. Kennedy and Marilyn Monroe. Cusack said that he found these original documents in the files of his father, Lawrence Cusack, who represented Marilyn Monroe’s mother. It turned out that these documents were fakes. Cusack has since been convicted and sent to prison for mail and wire fraud.

The Article began by briefly describing a 1986 meeting between the plaintiff and Lex Cusack, in which the plaintiff professed to be the illegitimate daughter of Marilyn Monroe. She had come to demand a share in Marilyn Monroe’s estate. It was only after this meeting that Lex Cusack says he first went to his father’s old office and looked at files concerning the Monroe estate. The Article recounts how, in early 1986, “a disheveled woman in her early forties” appeared in the offices of Cusack & Stiles, who “laid out a tangled claim to the Monroe estate, and Lex Cusack quickly concluded that she was nuts.” Plaintiff’s action was based primarily on these allegedly defamatory statements.

Choice of Law

Despite a growing trend among courts to apply the law of the state of publication when an alleged libelous article is distributed in numerous states, Senior District Judge Samuel P. King opted to apply Hawaii law. Applying the most significant relationship test from the Restatement (Second) of Conflict of Laws, the Court found that when defamatory statements are published in multiple states, the law of the state where the plaintiff resides normally applies. As the Court explained “It is there that the plaintiff can be said to enjoy a reputation, and that the reputation would suffer by the accused writing.” The application of plaintiff’s own Hawaiian state law, rather than the more favorable law of New York, was not enough to save her defective claims from summary judgment.

The General Tenor of the Article

Plaintiff’s libel claims were both general and specific. She complained both that a number of specific statements were defamatory, and that the general tenor of the Article associates her with forgers, liars, and other unscrupulous types. Plaintiff insisted that, by naming her as the person who triggered Lex Cusack’s interest in his father’s business, the Article implicitly accused her of criminal conduct. Finally, she complained that the Article’s title “Fakes” added to the overall defamatory meaning.

While recognizing that the law does not dwell on isolated passages but judges a publication as a whole, the court determined that the “article is not about her at all. . . [it] assigns no culpability whatsoever to Miracle. No reasonable fact-finder applying all due effort could strain from the article the guilt by association that Miracle perceives.” The word “Fakes” in the title of the Article was not enough to insinuate that plaintiff was in any way linked to the transgressions of Lex Cusack. The theory of defamation by implication having failed to sustain plaintiff’s cause of action, the Court directed its scrutiny to the individual statements in the Article.

(Continued on page 28)

Miracle Whipped in Hawaii

(Continued from page 27)

The “Disheveled Woman in her Early Forties” Statement

No woman averring to be the offspring of Marilyn Monroe would ever want to come across as old and sloppy, and plaintiff was no exception. In her complaint, she sought relief for being called “disheveled” and “in her early forties,” insisting that she was both thirty-nine years old and chic. The court summarily dismissed both of her claims, but on slightly different grounds.

As for the “disheveled” comment, the court concluded that it constituted non-actionable opinion, incapable of being proven true or false. The court made special efforts to explain that “one’s definition of disheveled may be another’s definition of tidy.”

On the other hand, the reference that Ms. Miracle was in her “early forties” was found to be an assertion of objective fact, and a potentially erroneous one at that. The court nevertheless dismissed the claim. It was devoid of defamatory meaning and therefore non-actionable. The court explained that “no reasonable person could conclude that a minor misrepresentation regarding Miracle’s age would damage her reputation.” Despite the trauma many of us have felt upon turning forty, calling the plaintiff a forty-year-old in the context of the Article was determined to be non-defamatory.

A Tangled Holding on the “Tangled Claim” Statement

Next, the court addressed the issue of whether the statement “Nancy Greene laid out a tangled claim to the Monroe estate” was an opinion or an assertion of objective fact. Departing from standard English, the court found that “the adjective tangled, taken in context of the article, is similar to the meaning of false, which is to say that the statement makes a representation about the legitimacy of Miracle’s claim to be the daughter of Monroe.” Even this ruling did not save plaintiff’s case.

The court proceeded to declare that because the statement did not purport to represent the author’s thoughts, but rather described Lex Cusack’s state of

mind, the statement was non-actionable opinion. The court explained “The article does not assert that Miracle had a tangled claim; rather, it asserts that Lex thought that Miracle had a tangled claim — a subtle difference in meaning, but enough to disarm Miracle’s contention that the statement makes a false assertion of fact regarding her.”

Had the statement represented the author’s thoughts on the legitimacy of Ms. Miracle’s claim to the Monroe estate, raising a question of fact, the merits of plaintiff’s claim of parentage might have been scrutinized by the Court. Today, the question of Ms. Miracle’s true genealogy remains unanswered. However certified court records, which show that Marilyn Monroe appeared in a court proceeding in Las Vegas, just 10 hours and 16 minutes before plaintiff was born in New York in September 1946, cast considerable doubt on plaintiff’s claims.

The “Nuts” Statement

No statement in the Article angered Ms. Miracle more than the statement that “Lex Cusack quickly concluded that she was nuts.” In her complaint, plaintiff alleged that she “is not now and at all relevant times has never been nuts.” Explaining that the term “nuts” was used in its “popular, not clinical, sense,” the court held that “the statement is an expression of pure opinion couched in figurative or hyperbolic language.” Furthermore, similar to its reasoning regarding the “tangled claim” phrase, the court held that the nuts statement does not reflect the author’s state of mind, but rather only relays Cusack’s subjective evaluations.

Plaintiff’s Additional Claims Dismissed

Finally, the court dismissed an assemblage of statements in the Article which were not “of and concerning” the plaintiff. In addition to grumbling about several innocuous sentences woven into the text, plaintiff took issue with an advertisement for the Washington Week in Review, which appeared at the end of the Article. The

(Continued on page 29)

Atlanta Television Station Seeks Georgia Supreme Court Review in Newsgathering Trespass Case

By Sean Smith

Atlanta television station WSB-TV is petitioning the Georgia Supreme Court for certiorari of a Georgia Court of Appeals decision reversing entry of summary judgment for the station in a trespass case brought by a couple whose chicken farm was searched pursuant to a federal drug trafficking warrant. *Nichols v. Georgia Television Co.*, Case No. A01A0232 (Ga. App., July 16, 2001) (J.D. Smith, J., with Anne Elizabeth Barnes and Herbert Phipps, JJ.).

In 1997, a drug task force obtained a warrant authorizing the search of Randall and Kathy Nichols' chicken farm for a suspected illegal drug laboratory.

After beginning the search, law enforcement authorities notified various media of the raid and invited their presence at the search. The Nichols had been arrested

and removed from the premises by the time WSB arrived on scene. Once on the scene, WSB photographed exterior scenes of the property and conducted interviews with law enforcement officials and Randall Nichols' father. WSB later aired stories focusing primarily on the fact that law enforcement agents had not found any drug lab.

Nonetheless, the Nichols sued various media for airing reports of the search. The federal § 1983 action was dismissed in 1999 by Judge William C. O'Kelley of the United States District Court for the Northern District of Georgia, *Nichols v. Hendrix*, No. 2:98-CV-161-WCO (N.D. Ga. Feb. 1, 1999) (see *LDRC LibelLetter*, Feb 1999, at 19), and the trespass claim was refiled in state court after the federal court refused to exercise supplemental jurisdiction. The state court then granted summary judgment in favor of WSB, finding that Georgia's innocent trespass doctrine and the interests of protecting First Amendment activity warranted judgment for WSB on the facts alleged by the Nichols. *Nichols v. Georgia Television Co.*, No. 99-A-6323-4 (Ga. Super. Ct., Gwinnett County, Aug. 15, 2000) (Michael C. Clark, J.) (see *LDRC LibelLetter*, Sept. 2000, at 31).

The Court of Appeals reversed this decision, finding that whether a trespass is innocent is always a jury question. The Court further held that the cases dismissing trespass cases because they in essence are recast defamation cases "are not binding on this court" and thus would not even be discussed. The Court also held that the Nichols could pursue emotional damages, even though their injuries appear to stem only from the broadcasts, about which they purport not to complain (and which were undeniably truthful).

WSB-TV's petition for certiorari was filed in August and is not expected to be considered until late this year.

WSB-TV is represented by Peter Canfield and Sean Smith of Dow, Lohnes & Albertson. The Nichols are represented by Clifford Hardwick.

Miracle Whipped in Hawaii

(Continued from page 28)

advertisement depicted a picture of \$100 bills hanging on a clothesline. Below the picture was the slogan "If you launder it, is it still dirty?" The court held that "since the advertisement is not part of the article, it cannot be interpreted within the context of the article, which means that its connection with Miracle and her reputation is non-existent."

Ms. Miracle also alleged claims for emotional distress, tortious interference with contractual relations and business, unjust enrichment, and punitive damages. The court briefly analyzed and rejected each of these claims as insufficient under the facts alleged by Ms. Miracle or vitiated by the same precedent as the libel claim. Ms. Miracle has apparently decided not to appeal.

Kevin Goering and David Wienir of Coudert Brothers and Edward Klaris represented The New Yorker in this case. Local counsel was James Bickerton of Honolulu. Gary Dubin of Honolulu represented Nancy Miracle.

UPDATES

Bill to Ban Secret Settlements Goes Down Without a Vote

In the final hours of its most recent session, the California Assembly declined to vote on a bill that would have put an end to secret settlements. The proposed ban on secret settlements was introduced in December 2000, in the wake of revelations that Bridgestone/Firestone hid information about defective tires through confidential settlements of prior lawsuits. See *LDRC LibelLetter*, January 2001, at 19.

The bill, SB 11, was intended to protect consumers by making information about defective products more readily available. Opponents to the bill were concerned that the bill would expose trade secrets.

TechNet, a political action committee composed of many of the nation's leading high-tech businesses, led the opposition to the bill, which was introduced by Senator Martha Escutia. TechNet was strongly opposed to the bill because it felt the bill was too broad and would make trade secrets and intellectual property freely available to the public. The opposition remained strong despite major changes to the bill.

An identical bill out of the Assembly, AB 36, which had been introduced by Assemblyman Darrell Steinberg, did not make it out of the Senate Rules Committee.

This is not the first failed attempt to put an end to secret settlements. California Attorney General Bill Lockyer, previously a state senator, has been pushing to end the practice since 1992. Former California Governor Pete Wilson vetoed an earlier version of this bill. Finally, in 2000, another bill on the subject was tabled at the request of Governor Gray Davis.

9th Circuit Dismisses Mattel's Effort to Block Barbie Artwork

On August 13, the Ninth Circuit threw out toymaker Mattel's attempt to prevent Utah-based artist Tom Forsythe from using Barbie's image in his photographs. After previously rejecting Mattel's request for a preliminary injunction on February 12, see *LDRC LibelLetter*, March 2001 at 25, U.S. District Judge Ronald Lew had dismissed the claim in its entirety, finding that because the photographs were a parody they did not hurt Mattel's marketing of the doll. Judge Lew ruled that Mattel did not show that it would suffer economically as a result of any consumer confusion. *Mattel, Inc. v. Walking Mountain Productions, et al.*, No. 00-56733 (9th Cir. Aug. 13, 2001).

Mattel, a company known for its aggressive litigation against over 65 artists in the past five years to control the use of Barbie's image, accused Forsythe of copyright and trademark infringement based upon his Barbie artwork. Forsythe argued that his was a fair use based on artistic expression and free speech rights.

Forsythe photographed the doll in a series of poses that he says were a portrayal of the materialism and sexist values he believes Barbie embodies. His works, which have appeared in galleries across the country and garnered critical acclaim, include depictions of the doll wrapped in tortillas, doing household chores, naked inside blenders and martini glasses, and posed in sexual positions.

Mattel has said it plans to appeal the decision.

Forsythe was represented by the American Civil Liberties Union of Southern California, and by the San Francisco firm of Howard, Rice, Nemerovski, Canady, Falk & Rabkin. Mattel was represented by Michael T. Zeller, Adrian M. Pruetz, Jody M. Borelli of Quinn Emanuel Urquhart Oliver & Hedges, LLP in Los Angeles, California.

Federal Courts to Monitor Surfing

Federal courts will be required to restrict and monitor the web surfing activities of judges and other court employees under a new policy adopted in September by the Judicial Conference of the United States. The policy does not provide for the monitoring of e-mail.

The monitoring, which will focus on web site visits and downloads from the Internet, will look at overall Internet usage by court employees, not use by a specific employee or from a particular computer.

Individual Court Policies

Each federal District and Circuit court will be required to adopt an Internet policy which is at least as restrictive as a model Internet use policy for federal executive agencies created by the General Services Administration in 1999. The model policy has been adopted by about two-thirds of executive branch agencies and has been approved by Congressional leadership for use in the legislative branch. Most of the other executive agencies have adopted even stricter policies.

The Conference also adopted a policy to serve as an interim, national standard until the individual courts can act, and as a minimum standard afterwards. The minimum policy allows "limited personal use" of the Internet, but not to download pornography, files relating to gambling or illegal weapons, and large files such as music. The policy also bans certain specific sites, including music-sharing services Gnutella and Napster and the gaming site Quake.

But the conference deferred making a decision about how court employees would be notified of the monitoring, rejecting a staff recommendation that users be notified while logging on to the computer system.

Monitoring will initially be done centrally by the Administrative Office of the U.S. Courts, although the agency will study the possibility of moving monitoring and control responsibilities to individual courts.

The policy was adopted by a unanimous mail ballot of the 27 Judicial Conference members after their Sept. 11 meeting to discuss the issue disbursed after the Pentagon and World Trade Center attacks.

Debate Before Decision

The monitoring policy was the subject of robust debate

among federal judges for several weeks. Certain judges argued that monitoring would invade their privacy, and would be a violation of federal wiretapping laws.

In May, the Ninth Circuit Judicial Council instructed its staff to remove monitoring software which had been installed on its Internet gateway, which served the Court of Appeals and trial courts within that circuit as well as the Eighth and Tenth circuits. Ninth Circuit Judge Alex Kozinski was particularly vocal on the issue, writing an "open letter" to his fellow federal judges that was published in *The Wall Street Journal*. One week later, the Council and the Judicial Conference reached a compromise which allowed the software to be re-installed until the Sept. 11 Judicial

9th Circuit Withdraws Wiretap Decision

At the same time that the debate over internal court monitoring was raging, the Ninth Circuit withdrew a January decision in which the court held that an employer's use of employees' personal passwords to access a message board on a third employee's personal web site to read messages critical of the company may be a violation of the federal Electronic Communications Privacy Act. *Konop v. Hawaiian Airlines, Inc.*, 2001 U.S. App. LEXIS 191 (9th Cir. Aug. 28, 2001) (withdrawing earlier opinion reported at 236 F.3d 1035). See LDRC LibelLetter, Feb. 2001, at 29.

The initial ruling was the first to hold that the federal Wiretap Act, 18 U.S.C. §§ 2510-22, applies to information stored on an Internet web site, and created a direct conflict with every other court that has considered the question. The other courts have held that the Act applies only to information which is "in transit" between computers.

In light of the severe civil and criminal penalties for Wiretap Act violations, the initial ruling posed grave risks for reporters, law enforcement personnel, and others who gather information on the Internet. The initial ruling was criticized by the U.S. Justice Department and local prosecutors.

Although the order withdrawing the earlier opinion was issued after defendants moved for reconsideration with a suggestion for rehearing en banc, the order rejected this motion as moot in light of the withdrawal. The order also announced that "[a] subsequent opinion will be filed at a later date."

Judicial Conference Adopts Guidelines for Remote Access to Case Files

Guidelines Limit the Amount of Information Available in Civil Cases, Prohibit Access to Criminal Case Files via Remote Electronic Access.

The Judicial Conference of the United States, the principal policy-making body for the federal court system, unanimously approved a set of guidelines for remote electronic access to federal-court case files. This comes a month after the 14-judge Committee on Court Administration and Case Management unanimously endorsed the guidelines, which do not allow for remote electronic access to criminal case files and provide some limitations on the type of information available through civil case files.

The guidelines are an effort to set a nationwide policy for online access to case files. Without a nationwide policy, the federal courts throughout the country have been using different policies regarding Internet access of case files.

Civil Suit Limits

Under these guidelines, civil case files will be available subject to two restrictions. First, Social Security cases are to be excluded from remote electronic access. The committee found the information available through Social Security cases to be “of little or no legitimate use to anyone not a party to the case.” The committee concluded that “making such information available on the Internet would be of little public benefit and would present a substantial intrusion into the privacy of the claimant” despite the fact that Social Security cases would still be available in their entirety at the courthouses.

The second restriction on civil case files applies to “personal data identifiers,” such as Social Security numbers, dates of birth, financial account numbers and names of minor children. According to the guidelines, these “personal data identifiers” are to be “modified or partially redacted by the litigants.” Documents in bankruptcy case files will also be subject to the “personal data identifiers” policy change.

The policy change on “personal data identifiers” applies not only to the files available via the Internet, but also to the files available at the courthouses. According to the committee report, because the modification of the “personal data identifiers” is to be done by the litigants,

this guideline “contemplates that certain personal, identifying information will not be included in its full and complete form in case documents, whether electronic or hard copy.”

No Access to Criminal Files

In addition to the restrictions placed on civil case files, the guidelines completely prohibit the remote electronic access to documents in criminal cases. According to the committee report released in August, the committee “determined that any benefits of public remote electronic access to criminal files were outweighed by the safety and law enforcement risks such access would create.” As an example, the committee suggested that “an individual could access documents filed in conjunction with a motion by the government for downward departure for substantial assistance and learn details of a defendant’s involvement in the government’s case. Such information could then be very easily used to intimidate, harass and possibly harm victims, defendants and their families.” This policy is to be reexamined within two years.

The guidelines treat appellate case files in the same manner that the case files are treated at the lower level.

Electronic access to court docket sheets through PACER and court opinions through the respective court web sites will not be affected by the guidelines. The guidelines, however, are intended to make case files available only via PACER, which requires a user account and charges a fee per page.

Originally, the Judicial Conference was to vote on this issue on September 11. Shortly after the meeting got underway, there was an evacuation of the Supreme Court – where the meeting was being held. The next day, the Judicial Conference was cancelled. The vote on this and two other issues was conducted via mail.

A copy of the committee’s report can be located at http://www.uscourts.gov/Press_Releases/att81501.pdf.

Tennessee Recognizes the Tort of False Light Invasion of Privacy, and Defines the Parameters and Elements of the Tort

By Donald L. Zachary and Rebecca S. Kell

On August 23, 2001, the Supreme Court of Tennessee held that Tennessee recognizes the tort of false light invasion of privacy and that Section 652E of the *Restatement (Second) of Torts*, as modified by the Court, is an accurate statement of the elements of the tort in Tennessee. *Charmaine West, et al. v. Media General Operations, Inc.*, No. M2001-00141-SC-R23-CQ (Tenn. Aug. 23, 2001). The Court further concluded that the parameters of the doctrine are illustrated by the Comments to Sections 652A and 652E-I of the *Restatement* and by the Tennessee Supreme Court's decision in *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978).

The issue was presented to the Court by a Certification Order from the United States District Court for the Eastern District of Tennessee. As described in that Order, the case:

arises out of a multi-part investigative news report aired by WDEF-TV 12 [owned by Media General] in Chattanooga about the relationship between the plaintiffs [Charmaine West and First Alternative Probation and Counseling, Inc.] and the Hamilton County General Sessions Court, and in particular, one of the general sessions court judges. Plaintiffs operated a private probation services business, and were referred this business by the general sessions courts. Plaintiffs claim that WDEF-TV defamed them by broadcasting false statements that the plaintiffs' business is illegal. Plaintiff West, in particular, claims the defendant invaded her privacy by implying that she had a sexual relationship with one of the general sessions judges; and that the general sessions judges and the plaintiffs otherwise had a "cozy," and hence improper, relationship.

Media General filed a motion to dismiss plaintiffs' false light invasion of privacy claim. Thereafter, the District Court certified to the Tennessee Supreme Court the following question of law: "Do the courts of Tennessee recognize the tort of false light invasion of privacy, and if so, what are

the parameters and elements of that tort?"

The Court opened its analysis by referring to the seminal article written by Warren and Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1891). The Court then noted that the protection of privacy rights appear in current law primarily because of the efforts of Dean William L. Prosser, whose analysis of invasion of privacy resulted in the classification of the tort into four separate causes of action. See William L. Prosser, *Privacy*, 48 Calif.L.Rev. 383 (1960). Section 652A of the *Restatement (Second) of Torts* (1977) incorporated Dean Prosser's four categories of invasion of privacy. The Court reviewed the various Tennessee cases dealing with the general subject of the right of privacy, and acknowledged that no court in Tennessee had recognized specifically the false light branch of the tort.

The Court calculated that a majority of jurisdictions have chosen to recognize false light as a separate actionable tort.

Restatement Accepted

The Court accepted the definition of false light set forth in Section 652E of the *Restatement*: "One

who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

The Court calculated that a majority of jurisdictions have chosen to recognize false light as a separate actionable tort, and adopted either the analysis of the tort given by Dean Prosser or the definition provided by the *Restatement*. The Court acknowledged, however, that a minority of jurisdictions have refused to recognize false light invasion of privacy. "Perhaps the most significant case upholding the minority view is *Renwick v. News and Observer Publishing Co.*, 312 S.E.2d 405 (N.C. 1984)," said the Court. In *Renwick*, asserted the Court, the Supreme Court of North Carolina expressed two main arguments for not recognizing false light. First, the protection provided by false light either du-

(Continued on page 34)

Tennessee Recognizes the Tort of False Light Invasion of Privacy

(Continued from page 33)

plicates or overlaps the interest already protected by the defamation torts of libel and slander. Second, to the extent false light would allow recovery beyond that permitted in actions for libel or slander, recognition of the tort would add to the tension already existing between the First Amendment and the law of torts.

Distinguishing False Light and Defamation

The Tennessee Supreme Court rejected these arguments. “After considering the relevant authorities, we agree with the majority of jurisdictions that false light should be recognized as a distinct, actionable tort. While the law of defamation and false light invasion of privacy conceivably overlap in some ways, we conclude that the differences between the two torts warrant their separate recognition.”

The Court identified those distinctions: “In defamation law only statements that are false are actionable, truth is, almost universally, a defense. The facts may be true in a false light claim. However, the angle from which the facts are presented, or the omission of certain material facts, result in placing the plaintiff in a false light.” (Quoting *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1983)). Quoting from the Pennsylvania Superior Court decision in *Santillo v. Reedel*, 634 A.2d 264, 267 (Pa. Super. Ct. 1993), the Tennessee Supreme Court asserted that: “[l]iteral accuracy of separate statements will not render a communication ‘true’ where the implication of the communication as a whole was false. . . . The question is whether [the defendant] made discrete presentations of information in a fashion which rendered the publication susceptible to inferences casting [the plaintiff] in a false light.” (Emphasis added) (internal quotation marks and citations omitted). The Tennessee Supreme Court never explains how this formulation varies in any way from the traditional law of defamation, which recognizes that statements that literally are true may nonetheless be libelous if they imply a false statement of fact about a person that damages their reputation.

The second justification for maintaining a distinction between defamation and false light said the Court, still quoting from *Crump*, is that, in defamation cases, the interest sought to be protected is “the objective one of reputation, either economic, political or personal, in the outside world. In privacy cases the interest affected is the subjective one of injury to [the] inner person.” (Emphasis added) (alteration in original). Despite the attempt by counsel for Media General to focus the Court’s attention on the fact that none of the cases that have accepted false light as a separate tort have been able to define, in any meaningful way, the interest protected by the tort, the Tennessee Supreme Court declined to enter the fray. In fact, the foregoing quotation from *Crump* represents the Tennessee Su-

preme Court’s only (glancing) reference to the issue. The Court never explains how a “subjective injury” to the so-called “inner person” can occur.

“After considering the relevant authorities, we agree with the majority of jurisdictions that false light should be recognized as a distinct, actionable tort.”

“Marketplace of Ideas”

Finally, said the Tennessee Supreme Court, false light is distinguished from defamation because, where the issue is truth or falsity, the marketplace of ideas provides “a forum in which the battle can be fought,” whereas, in privacy cases, “resort to the marketplace simply accentuates the injury.” (Quoting *Crump*, 320 S.W.2d at 83). Once again, the Tennessee Supreme Court failed to note that the language in *Crump* refers generally to privacy cases, and does not deal with false light. Moreover, the Court never explains why the “marketplace of ideas” is sufficient to deal with truth or falsity in the defamation context, but not in the false light context.

Addressing the interest in judicial economy expressed by the North Carolina Supreme Court in *Renwick*, the Tennessee Supreme Court found “that such concerns are outweighed in this instance by the need to maintain the integrity of the right to privacy in this State.” (Emphasis added). The Court did not explain why that need was important in the case before it, where plaintiffs also have

(Continued on page 35)

Tennessee Recognizes the Tort of False Light Invasion of Privacy

(Continued from page 34)

sued for defamation on exactly the same facts underlying their false light claim.

The Tennessee Supreme Court noted, "Certainly situations may exist in which persons have had attributed to them certain qualities, characteristics, or beliefs that, while not injurious to their reputation, place those persons in an undesirable false light." (Emphasis added). Interestingly, the Court did not cite to the facts alleged in plaintiffs' Complaint. Rather, in a footnote the Court cited Comment b, Illustration 4 to Section 652E on the *Restatement* which, said the Court, provided "such an example." In that illustration, A is a Democrat, and B induces him to sign a petition nominating C for office. A discovers that C is a Republican and demands that B remove his name from the petition. B refuses to do so and continues public circulation of the petition, bearing A's name. According to the *Restatement*, B is subject to liability to A for invasion of privacy. Despite this pronouncement by the *Restatement*, the example really demonstrates how trivial the false light tort can become. It seems highly unlikely that B's conduct would be found to be "highly offensive to a reasonable person," as required by the *Restatement's* definition of false light. On the other hand, if other facts were present that indicated that the statement in fact harmed A's reputation, then a defamation action could be sustained. (Interestingly, the *Restatement (Second)* illustration is drawn from *Schwartz v. Edrington*, 62 So. 660 (La. 1913), a case in which false light was neither alleged nor discussed.)

Rejecting the Minority View

The Tennessee Supreme Court then turned to the argument made by Media General, and accepted by those states that reject the false light tort, that its recognition will result in unnecessary litigation, even in situations where positive or laudatory characteristics are attributed to individuals. In rejecting this prediction, the Tennessee Court seemed to say that such cases cannot be brought in Tennessee:

[T]he Court affirmed that all privileges previously recognized in Tennessee applied to false light claims.

Such needless litigation is foreclosed by Section 652E(a) of the *Restatement (Second) of Torts* which imposes liability for false light only if the publicity is highly offensive to a reasonable person. Comment c to Section 652E notes that the hypersensitive plaintiff cannot recover under a false light claim where the publicized matter attributed to the plaintiff was, even if intentionally falsified, not a seriously offensive misstatement. . . . Thus, the 'highly offensive to a reasonable person' prong of Section 652E deters needless litigation."

In a footnote, the Court refers to Illustration 9 of the Comments to the *Restatement*, in which A is the pilot of an airplane that develops motor trouble. B Company broadcasts over television a dramatization of the flight, which enacts it in most respects in an accurate manner, but which shows scenes, known to be false, in which the actor portraying A is shown as

praying, reassuring passengers and otherwise conducting himself in a fictitious manner "that does not defame him or in any way reflect upon him." *Restatement (Second) of Torts*, § 652E cmt. c, illus. 9 (1977). According to the Comment, apparently accepted with approval by the Tennessee Supreme Court, "[w]hether this is an invasion of A's privacy depends on whether it is found by the jury that the scenes would be highly objectionable to a reasonable man in A's position." *Id.* (Emphasis added.) Unfortunately, leaving the question of whether the statement is "highly objectionable to a reasonable person" to the jury permits the sort of runaway verdicts that often accompany cases in which a person is accused of being portrayed "falsely," particularly in the context of motion pictures or television movies.

Finally, the Court cited with approval Comment b to Section 652E of the *Restatement* that, while a plaintiff may proceed under alternative theories of defamation and false light, he or she can only have one recovery for a single instance of publicity.

(Continued on page 36)

Tennessee Recognizes the Tort of False Light Invasion of Privacy

(Continued from page 35)

Fault Standard: Negligence for Private Matters

The Court turned next to the parameters and elements of the tort in Tennessee. Distinguishing Tennessee from the *Restatement* and other states, the Court declared: “We hold that actual malice is the appropriate standard for false light claims when the plaintiff is a public official or a public figure, or when the claim is asserted by a private individual about a matter of public concern. We do not, however, adopt the actual malice standard for false light claims about private plaintiffs about matters of private concern.” Further, the Court adopted negligence as the standard for false light claims brought by private plaintiffs about private concerns. “For all other false light claims, we believe that the actual malice standard achieves the appropriate balance between the First Amendment guarantees and privacy interest.”

The Court also adopted Section 652I of the Restatement, which recognizes that the right to privacy is personal, and cannot attach to corporations or other business entities, may not be assigned to another, and may not be brought by a member of a person’s family or brought after the death of the individual.

All Libel Privileges Apply and Statute of Limitations

With respect to other parameters of the false light tort, the Court concluded that Sections 652F-I of the *Restatement* adequately address its limits. Citing Sections 652F and 652G, the Court affirmed that all privileges previously recognized in Tennessee applied to false light claims. With regard to damages, the Court cited with approval Section 652H, which provides that one “who has established a cause of action for invasion of privacy is entitled to recover damages for (a) the harm to [his or her] interest in privacy resulting from the invasion; (b) [any] mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and (c) special damage of which the invasion is a legal cause.” *Restatement (Second) of Torts*, § 652H (1977). Consistent with its holdings with respect to defamation, the Court emphasized that plaintiffs seeking to

recover on false light claims “must specifically plead and prove damages allegedly suffered from the invasion of their privacy.” As with defamation, there must be proof of actual damages, emphasized the Court. The plaintiff need not prove special damages or out of pocket losses, however, because evidence of injury to standing in the community, humiliation or emotional distress is sufficient.

The Court also adopted Section 652I of the *Restatement*, which recognizes that the right to privacy is personal, and cannot attach to corporations or other business entities, may not be assigned to another, and may not be brought by a member of a person’s family or brought after the death of the individual.

Finally, the Court held that false light claims are subject to the statutes of limitations that apply to libel and slander, that is, one year for written false light and six months for spoken

false light.

Unfortunately, the decision of the Tennessee Supreme Court does nothing to clarify the intellectual underpinnings of the false light tort, which remains in virtually every instance, simply “defamation lite.” The current case is no exception. Having alleged a claim for defamation based on exactly the same facts, plaintiffs simply threw in an additional cause of action for false light invasion of privacy, one which does nothing more than give plaintiffs an alternative theory upon which to reach the jury. Nonetheless, because the Tennessee Supreme Court took the time to address the parameters of the tort in some detail, the decision should help media defendants weed out false light claims.

The authors are with Bass, Berry & Sims PLC in Nashville, and represent Media General Operations, Inc., the owner of WDEF in Chattanooga, in connection with the suit brought by Charmaine West and First Alternative Probation and Counseling, Inc. Discovery in the case is ongoing. Trial is scheduled for November 13, 2001.

Court Seals Support for Criminal Charges Against Public Official

By Stephanie S. Abrutyn

In a carefully crafted opinion that precisely tracks the legal test, District Court Judge Alan Nevas sealed the criminal complaint and supporting affidavit against the Mayor of Waterbury, Connecticut, and closed the bail hearing because “the nature of the information that would be the subject of pervasive publicity . . . has a capacity to inflame and prejudice the entire community.” *United States of America v. Giordano*, United States District Court for the District of Connecticut, Crim. No. 3:01MC200 (AHN) (Aug. 7, 2001). The court also strongly suggested that the presence of communications obtained from a wiretap in court records somehow reduces the burden on a party seeking to keep those records secret.

Mayor Arrested

On July 26, 2001, the sitting mayor of Waterbury, Philip A. Giordano, was arrested by federal authorities and charged with using interstate facilities to transmit information about a minor. The affidavit on which the charges were based consisted almost entirely of communications and conversations that were recorded pursuant to a court-authorized wiretap. It was sealed immediately.

Journalists quickly learned and reported that the federal charges stemmed from allegations that included sexual activity with minors, some of which allegedly were arranged from the Mayor’s office. Waterbury already had been a regular fixture in Connecticut newspapers as a result of serious fiscal problems that arose during Mayor Giordano’s administration, and his arrest received widespread local and some national attention.

The Hartford Courant and other local news media filed motions to unseal the arrest affidavit. Mayor Giordano then moved to close the courtroom during his bail hearing, which the media also opposed. After oral argument, Judge Nevas denied *The Courant’s* motion to unseal the affidavit and granted the defendant’s motion to close the bail hearing. The Court issued a written ruling containing his legal reasoning, and also made specific factual determinations,

which he filed under seal, “demonstrating that the . . . material is of such a prejudicial nature that closure is essential to preserve the defendant’s rights.”

Wiretaps Were Significant to Ruling

In his opinion, Judge Nevas acknowledged the existence of qualified common law and First Amendment rights of access to the affidavit and hearing. As a result, he determined, the sealing order only can be continued if the court finds a “substantial probability” of prejudice to a defendant’s fair trial rights and an absence of reasonable alternatives. See *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). He began his application of the law to this particular case by noting that “[p]rotection of individual

privacy rights are of paramount importance and concern when there is a Title III wiretap,” and citing the presence of such communications in the records as a “significant factor” in application of the balancing test.

The court spent several pages discussing privacy rights and the importance of the elements of Title III which ensure that a defendant has an adequate opportunity to challenge wiretap evidence before it is admitted against him in any court proceeding. As a result of these concerns, Judge Nevas concluded that “Until the defendant has had this opportunity [to challenge the wiretap], the fruits of an electronic surveillance should not be publicly disseminated.” Noting that the defendant’s counsel had not even received the Title III material, the court then held that, “[T]he defendant’s rights cannot be adequately protected unless the affidavit remains under seal and the bail hearing is closed.”

In explaining his conclusion, Judge Nevas acknowledged that pervasive publicity alone is not sufficient to support closure. However, he said, “the court has assessed the nature of the information that would be the subject of pervasive publicity in this case and finds that it has a capacity to inflame and prejudice the entire community.” He did not directly rely on the fact that the information came

[T]he presence of [Title III Wiretap] communications in the records as a “significant factor” in application of the balancing test.

(Continued on page 38)

Third Circuit Reverses Curbs on Ex-lawyer's Comments

By Bruce S. Rosen

A New Jersey federal district court's gag order prohibiting the former lawyer of a reputed Philadelphia mob boss from discussing a potential motion in the case was reversed by the Third Circuit U.S. Court of Appeals on Aug. 27, 2001. *United States v. Scarfo*, No. 00-4313 (3rd Cir. Aug. 27, 2001).

Court Seals Support for Criminal Charges Against Public Official

(Continued from page 37)

from a wiretap in concluding that public release of the information would be prejudicial.

Alternatives Rejected

Next, the court applied the second prong of the *Press Enterprise* test by considering alternatives to closure, ultimately concluding that none of them "present a viable option." Redaction is not reasonable, the court found, because the entire affidavit consists of wiretap information likely to cause prejudice. Partial closure of the bail hearing is "unworkable and would not permit the parties and the court to engage in the full and fair exchange that is needed." Change of venue is not viable because publicity is equally intense in the only other locations within the District of Connecticut. And, Judge Nevas found, additional preemptory challenges, extensive voir dire, and curative jury instructions would not be adequate to eliminate the prejudice. The court did not specifically explain what distinguished this case from that of Timothy McVeigh or OJ Simpson, where juries were successfully empanelled.

On September 10, 2001, based on the results of an investigation that did not include the federal wiretap evidence, the State of Connecticut charged Mayor Giordano with six counts each of sexual assault and risk of injury to a minor. None of the media has appealed Judge Nevas' decision.

Ralph G. Elliot of Tyler, Cooper and Alcorn in Hartford represented The Courant, along with in-house counsel Stephanie S. Abrutyn of Tribune Company.

Judge Nicholas H. Politan had become upset with defense attorney Donald F. Manno after Manno, who had just been disqualified from representing Nicodemo Scarfo, commented to the *Philadelphia Inquirer* about a potential motion that would be brought by his former client challenging the government's use of "keystroke" eavesdropping technology that had been installed on Scarfo's home computer. Politan was critical of Manno because he discussed the potential motion in the press before it was presented to the court.

At first Judge Politan issued an oral order barring "anybody from talking to the press about a motion that I haven't seen and that I don't know anything about," specifically including Manno, who appeared for the substitution of counsel that day, one day after the *Inquirer* article appeared. A later-written order drafted by the government and signed by Judge Politan, said that Manno's comments would lead the public to believe he still represented Scarfo and would materially prejudice the court's ability to fairly and efficiently determine pre-trial motions.

The appeals court was unimpressed by the court's reasoning. Using the "substantial likelihood of material prejudice" standard enunciated in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1990), which involved a lawyer's right to free speech during an ongoing criminal case, the Third Circuit, in an opinion written by Judge Max Rosen, and joined by Judges Anthony J. Scirica and Marjorie O. Rendell, found Judge Politan's rationale unavailing. "The District Judge appears to have been upset about reading of a matter pertaining to a case before him in the newspaper before hearing about it in his courtroom," the panel said. "His concern does not rise to any measurable level of prejudice. A perturbed judge is not necessarily a prejudiced judge especially when, as in this case, he is an experienced judge."

Ironically, as part of the decision the Third Circuit cited *United States v. Antar*, 38 F. d 1348 (3d Cir. 1994), in which the appeals court ruled that Politan improperly sealed the transcript of the jury voir dire and then upon unsealing it, placed certain improper restrictions on the use of the juror-identifying information. The court, in granting relief sought by several media outlets, found that the sealing of the transcript was accomplished without adequate

(Continued on page 39)

Pennsylvanians Shouldn't Expect Privacy on the Telephone

State Supreme Court Says Government Can Tape Without Neutral Tribunal's OK

By Hollee Schwartz Temple

Finding that citizens do not have a reasonable expectation of privacy in their home telephone conversations, Pennsylvania's Supreme Court recently cleared the way for law enforcement officials to intercept phone calls without first seeking a probable cause determination. While many have criticized the court for asserting that the public would not expect the contents of home telephone conversations to remain private, the decision in *Commonwealth v. Rekasie*, PICS Case No. 01-1717 (Pa. Aug. 20, 2001), holds that so long as one party consents, police officers will no longer be required to obtain permission from a neutral tribunal before recording telephone conversations.

Drug Informant Case Raises Constitutional Issue

In connection with a drug investigation by the Pennsylvania Attorney General's Office and a suburban police department, a "cooperative" drug informant permitted authorities to tape his conversations with a drug supplier and his courier.

In accordance with Pennsylvania's Wiretapping and Electronics Surveillance Control Act (the "Wiretap Act"), law enforcement officials sought approval from the Attor-

ney General to set up a voluntary intercept. The office approved the request, and agents intercepted six conversations between June 1992 and June 1993. Authorities recorded four telephone calls made to the defendants' homes, one telephone call to the supplier's brother's home, and one conversation through a body wire that the informant wore to his workplace.

As a result of the intercepts, authorities obtained a warrant to search the courier's luggage as he was getting off a flight from Florida to Pittsburgh. Officers found cocaine, and both the supplier and courier were arrested and charged with multiple drug-related offenses. Claiming that their privacy rights under Article I, Section 8 of the Pennsylvania Constitution had been violated by the tapings, both defendants filed motions to suppress.

The trial court initially denied the motions, but later reversed on the basis of the state Supreme Court's decision in *Commonwealth v. Brion*, 652 A. 2d 287 (Pa. 1994). In *Brion*, the court held that Pennsylvania's constitution mandated a probable cause determination before the Commonwealth could intercept a face-to-face conversation through a body wire worn in a person's home.

The Superior Court reversed, holding that *Brion* controlled body wires but not telephone conversations. In addition, the Superior Court concluded that *Brion* did not apply because the wire was not worn in the defendant's home.

Supreme Court Analysis

While the Wiretap Act required the Commonwealth to obtain approval for a voluntary interception by an individual designated by the Attorney General or District Attorney, a probable cause determination was not specifically required. In certain instances, however, the Pennsylvania courts have held that the state constitution provides privacy protections beyond the scope of the Wiretap Act. In those cases, the Commonwealth must obtain a probable cause determination from a neutral tribunal before intercepting a conversation. Thus, the court narrowed its analysis to consider whether under these circumstances the Pennsylvania Constitution required approval from a neu-

Third Circuit Reverses Curbs on Ex-lawyer's Comments

(Continued from page 38)

notice, without a hearing, and without factual findings being placed on the record. That case involved a fraud prosecution against Edward "Crazy Eddie" Antar, a well-known electronics store magnate who had fled to Israel.

Donald F. Manno appeared as counsel *pro se* for appellant and Assistant U.S. Attorney George S. Leone, chief of the Appeals Division in Newark for the District Court as appellee.

Bruce S. Rosen is a partner with DCS member firm McCusker, Anselmi, Rosen, Carvelli & Walsh, P.A. in Chatham, N.J.

(Continued on page 40)

Pennsylvanians Shouldn't Expect Privacy on the Telephone

(Continued from page 39)

tral tribunal before law enforcement officials could tape the defendants' conversations.

First, the majority considered whether the courier had a reasonable expectation of privacy in telephone conversations with the informant. The Commonwealth had argued that once the defendant began conversing with the informant, he lost any expectation that the information would remain private, and therefore the government was not required to obtain a probable cause determination before intercepting the call.

Noting that Pennsylvania courts have consistently utilized the standard established by the U.S. Supreme Court in *United States v. Katz*, 389 U.S. 347 (1967), the court looked to *Katz* to assess the Commonwealth's argument. Under the *Katz* test, in determining whether a person has a reasonable expectation of privacy, a court should consider whether the person has exhibited an actual expectation of privacy and if that expectation is "one that society is prepared to recognize as reasonable."

The court concluded that while the courier may have had an actual expectation of privacy in his conversations with the informant, society would not consider that expectation to be reasonable. As such, the court found that the Commonwealth was not required to obtain a probable cause determination before intercepting the conversations.

Questionable Rationale

The court reasoned that extension telephones and speakerphones had altered the public's expectations of privacy. "A telephone call received by or placed to another is readily subject to numerous means of intrusion at the other end of the call, all without the knowledge of the individual on the call," the majority held.

Extension telephones and speakerphones render it impossible for one to objectively and reasonably expect that he or she will be free from intrusion. The individual cannot take steps to ensure that others are excluded from the call.

In dismissing the defendants' arguments, the court held that the instant case could be distinguished from *Brion* on

the basis that face-to-face interchanges occurring in one's home differed from telephone calls that could be intercepted by the "uninvited ear." The court also rejected the argument that the state Supreme Court's decision in *Commonwealth v. Melilli*, 555 A.2d 1254 (Pa. 1989), required a different result. In *Melilli*, the court recognized a privacy interest in telephone numbers that had been revealed to a telephone company. The court attempted to reconcile its holding by asserting that *Melilli* did not suggest a privacy interest in *all* telephone activities.

Interestingly, the court did not dwell on the language of the Wiretap Tap, which in Pennsylvania generally requires a party recording a conversation to obtain the consent of *all* parties prior to recording. See 18 Pa. C.S. §5704(4). While Pennsylvania's Wiretap Act exacts a stricter standard than the "one-party" consent exception provided under the federal wiretap law and the wiretap laws in many states, the majority's conclusion that the public does not have a reasonable expectation of privacy in telephone calls seems to obliterate the extra layer of protection that the statute was seemingly intended to provide.

Vigorous Dissent

The decision drew two impassioned dissents, both of which criticized the majority's strained rationale. The dissenters expressed concern that the majority's decision means that the Pennsylvania Constitution affords no protection against the government listening to private telephone conversations. "By holding that we have no expectation of privacy in the confidential messages and conversations transmitted from our telephones, it has placed the freedom of every citizen into the hands of enforcement authorities," one dissenter wrote.

The dissenting justices also argued that the majority had misinterpreted *Brion*. They asserted that the key factor in *Brion* was that the conversation was recorded in a person's private residence, rather than that it was intercepted by a body wire. The dissenters also asserted that the decision could not be reconciled with *Melilli*, as it is difficult to

The Court reasoned that extension telephones and speakerphones had altered the public's expectations of privacy.

(Continued on page 41)

Second Circuit Holds NY County May Assert Copyright in Official Public Documents Rejects Guarantees of New York's Freedom of Information Law

Court Declines to Certify a Novel Issue of New York Law to New York Court of Appeals

By Andrew L. Deutsch

New York's Freedom of Information Law, N.Y. Pub. Off. Law § 84 *et seq.* (FOIL), guarantees the public and press the right to access and copy most documents generated by New York's state and local governments. The United States Court of Appeals for the Second Circuit has now ruled that despite this guarantee, FOIL does not permit publishers to freely circulate copies of copyrighted government documents.

Circuit Judges Chester Straub, Dennis Jacobs, and Rosemary Pooler held, in *County of Suffolk, New York v. First American Real Estate Solutions, LLC*, Nos. 00-9011, 00-9169, ___ F.3d ___, 59 U.S.P.Q.2d 1639 (2d Cir., July 25, 2001), that Suffolk County, New York can maintain copyright infringement claims against First American Real Estate Solutions, LLC, a commercial publisher that reproduced the county's official tax maps.

The decision is noteworthy for a number of reasons:

- the Second Circuit rejected the views of the New York State agency empowered to interpret FOIL;
- it gave no weight to the legislative declaration preceding FOIL that the New York Court of Appeals had found persuasive evidence of an intent to give the public and press "maximum access" to government documents; and
- it declined to permit the Court of Appeals to decide this novel issue of New York law.

The decision is likely to encourage state and local governments throughout the country to use copyright as a means of restricting republication of the core documents of government.

The Background

First American is a publisher of real estate data and information used by lenders and appraisers throughout the United States. It provides subscribers with copies of official property tax maps, which allows them to assess the tax status of properties before undertaking purchase or loan transactions. In New York, official property tax maps are created by counties, under supervision of a New York state agency, and are public records under law. Their content and format are dictated by regulations of the state agency. The tax maps are used by the counties in their annual property tax assessments, and access to the maps are needed for taxpayers to challenge such assessments.

In 1999, Suffolk County, which had copyrighted its official tax maps, sued First American for copyright in-

(Continued on page 42)

Pennsylvanians Shouldn't Expect Privacy on the Telephone

(Continued from page 40)

imagine how people can expect privacy in the numbers that they dial, but not in the content of their conversations.

Implications for the Press

While the *Rekasie* decision does not directly affect the newsgathering process, it raises a host of interesting issues surrounding expectations of privacy in the age of wireless technology. While most people indeed expect privacy when holding a telephone conversation within the sanctity of their own homes, the same cannot be said for conversations conducted on cellular and portable phones in public places. Both physics and nosy third parties seem to justify a lower expectation of privacy in such instances, and perhaps the law's previous efforts to prevent eavesdropping when there is no rational reason to expect privacy is unwarranted and ripe for change. On the flip side, because the media relies on the state constitution to protect the newsgathering and writing processes, it is troubling to note that the court was willing to disregard seemingly unassailable privacy provisions. Though the ends can seem to justify the means in this case, this same sort of logic could lead to a slippery slope of unconstitutional actions.

Hollee Schwartz Temple is a litigation associate at Kirkpatrick & Lockhart LLP in Pittsburgh, Pennsylvania.

Second Circuit Holds New York County May Assert Copyright in Official Public Documents

(Continued from page 41)

fringement. First American sought dismissal on three grounds: copying of the maps was permitted under FOIL; the maps lacked sufficient originality for copyright; and the maps, like statutes and judicial opinions, were in the public domain from inception. The district court originally denied the motion. However, First American presented the court with an advisory opinion of the Committee on Open Government, a New York state agency established to administer FOIL and issue opinions on its application. The Committee had opined that FOIL barred a New York state agency from asserting a copyright in mapping data. The district court granted reconsideration, gave deference to the Committee's opinion, and dismissed the County's complaint on grounds that FOIL permitted First American to freely copy the County's tax maps.

The County appealed. It was joined by *amici curiae* the State of New York (which challenged the interpretation of the Committee, one of the State's own agencies) and the City of New York. At oral argument, the panel raised the possibility of certifying the FOIL issue to the New York Court of Appeals, the state's highest court, and both sides said that they would not oppose certification.

The Panel Decision

The panel decision held that whether Suffolk County's maps were in the public domain from inception and whether they were sufficiently original would have to be developed through discovery. Most of the decision was devoted to the FOIL question, which the court chose to reach rather than certify to the court of appeals (in fact, the panel did not even discuss if certification was appropriate).

The court phrased the FOIL issue as whether "the New York Legislature, by enacting FOIL, abrogate[d] Suffolk County's copyright" in its maps. It found no

indication in the statutory language that the Legislature intended such "abrogation." Pre-FOIL state law had recognized that the state could hold copyright in the headnotes and summaries of judicial opinions. Because FOIL did not expressly state what effect the public's right to inspect and copy records had on the state's copyrights in those records, nor what the public could do with copies of records received from government under FOIL, the panel found this "silence" as to copyright to be "deafening." It inferred from the absence of an express reference to copyright in FOIL that the Legislature had not intended to generally limit the ability of state and local government to claim copyright in public records, and held that a private entity had no right to commercially distribute copyrighted government documents.

Interpreting State Law...Or Not

The panel briskly discounted the evidence showing that FOIL did give publishers a right to distribute copies of government records to the public. The legislative declaration preceding FOIL that stated that "the public, individually, and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article," N.Y. Pub. Off. L. § 84, was dismissed as a mere "preamble," not capable of expanding the limited right of "public inspection" of records given by FOIL. The panel ruled that no deference was due to the Committee's opinion that FOIL overcomes claims of copyright in government documents, relying on dictum in a 1981 Court of Appeals decision.

It ignored a number of New York Appellate Division decisions (one as recent as 1999) holding that state courts should give the Committee's interpretations of FOIL great weight. And it gave short shrift to bills

The decision is likely to encourage state and local governments throughout the country to use copyright as a means of restricting republication of the core documents of government.

(Continued on page 43)

Second Circuit Holds New York County May Assert Copyright in Official Public Documents

(Continued from page 42)

pending in the New York Legislature that would amend FOIL to allow state and local governments to assert copyrights in mapping data, on the ground that acts of a subsequent legislature do not illuminate what was intended by the legislative body that enacted FOIL.

The panel did recognize that FOIL's guarantees of access could be read "to permit commercial publishers to disseminate agency records as widely as possible. It also agreed that tax maps "go to the heart of the purposes of FOIL: providing the public access to the operation or decision-making functions of government," and that commercial publishers may be the most effective means of distributing core government records to the public.

However, the panel found that FOIL provided no basis for distinguishing between records created by government in its public role and in its proprietary role. It also held that the county's policy reason for asserting copyright in its maps – to prevent inaccurate portrayal of its records—outweighed the policy interest of giving the public access to the records of government. The panel stated that fears that government could use copyright to restrict the dissemination of documents were unfounded, and that fair use would be available as a defense in such cases. Ultimately, the panel weighed the policy interests cited by both sides and held that the County could maintain copyright protection for its maps while complying with FOIL.

Petition for Rehearing or En Banc

First American has petitioned for panel rehearing or rehearing en banc. It argues that under the established precedents of the Second Circuit, the FOIL question should be certified to the New York Court of Appeals: the question has never been addressed by a New York state court and is not resolved by the statute's plain language, and the panel's decision is contrary to the only existing New York authority (the Committee's opinion). First American contends that

(Continued on page 44)

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(Continued from page 43)

the court of appeals, rather than a federal court, should be permitted to make the policy choices between competing readings of state law. Indeed, because the FOIL issue can only arise as a defense to a federal copyright infringement claim, unless the issue is certified, the court of appeals may never have the opportunity to pass on this important issue of New York law.

Analysis and Impact

The panel decision in *Suffolk County* reflects a deeply copyright (and federal)-centered view of the issues. While zealously protecting copyright values, the panel gave minimal weight to a state interest of at least equal importance: enforcement of open government and public records laws that permit the public to monitor state and local governments through broad access to their documents. The consequence of its ruling is that public records which an agency is required by law to create are given the same level of protection against copying and dissemination as creative works voluntarily produced by private writers and artists. The panel's unbalanced view of the policy interests at issue raises serious federalism concerns, which are heightened by its decision not to refer the underlying FOIL issue to the New York Court of Appeals.

There is good reason to believe that the New York Court of Appeals would resolve the FOIL issue differently. That court has consistently held that FOIL guarantees "maximum access" to government documents, to the press as well as the public, and has not permitted agencies to impose practical impediments to such access. Unlike the Second Circuit, that court has taken seriously the New York Legislature's declaration that FOIL protects the rights of access of the public "collectively and represented by a free press." Because the general public can only obtain access to most government documents through republication by the press, the Court of Appeals,

if given the opportunity, would likely conclude that FOIL does "abrogate" government's right to claim copyrights in those documents. Whether the Court of Appeals will be allowed to pass on the issue, however, is up to the panel now reviewing First American's petition for rehearing.

Media lawyers have always assumed that public records, originating at any level of government, are in the public domain. The panel decision destroys this assumption. Publishers may now have to be more cautious about the use they make of government documents received from government or third-party sources.

While the panel believed that the fair use defense would be a safeguard against abusive copyright claims

The panel stated that fears that government could use copyright to restrict the dissemination of documents were unfounded, and that fair use would be available as a defense in such cases.

by government, the fact is that fair use is a *defense*. Fair use presupposes that infringement has occurred, but is excusable. If the defense fails, the publisher is at risk of substantial statutory damages and attorney's fees awards.

Moreover, the federal courts (including the Second Circuit) have given an increasingly restrictive reading to the fair use provisions of the Copyright Act. It will be impossible for any lawyer to predict in advance whether any particular use of a copyrighted government document will be excused by a federal court. Thus, one unfortunate consequence of the panel decision may be self-censorship by the press. Where the media is traditionally most vigilant – exposure of government abuse and waste – the public will be denied the best evidence, the government's own documents.

Andrew L. Deutsch is a partner in the New York City office of Piper Marbury Rudnick & Wolfe LLP. He was counsel of record to First American Real Estate Solutions LLC in this litigation. Suffolk County was represented by Assistant County Attorney Jeltje de Jong.

Federal Court Denies Motion for Preliminary Injunction To Enjoin NAACP Civil Rights Protest and Nationwide Boycott of Adam's Mark Hotel Chain

By Amy Ledoux

Recognizing that prior restraints on speech are “extraordinary” and “presumptively invalid,” the United States District Court for the District of Maryland recently denied a motion for a preliminary injunction that would have prohibited the National Association for the Advancement of Colored People (NAACP) from boycotting the Adam's Mark hotel chain and placed limits on picketing at the hotels. Two hours after the Court heard oral argument, Senior Judge Alexander Harvey II issued a detailed ruling from the bench, holding — in strong language that would be equally applicable to cases in which prior restraints are sought against media defendants — that the plaintiff had not met its burden of showing that it was entitled to the preliminary relief requested. *HBE Corp. v. National Association for the Advancement of Colored People, et al.*, No. H-01-2223 (D. Md. Aug. 3, 2001) (to be published in the October 2, 2001 issue of the *Media Law Reporter* at 29 Media L. Rep. 2249).

The Call for a Boycott

In July 2001, the NAACP called for a boycott of the Adam's Mark hotels, owned by HBE Corporation. The call for the protest arose out of allegations that the Adam's Mark hotel in Daytona Beach, Florida had engaged in blatant racial discrimination against African American guests who stayed there while attending an annual event known as the “Black College Reunion” in 1999, and that the hotel chain failed to publicly acknowledge this misconduct or to settle in good faith lawsuits arising out of the Black College Reunion. Specifically, the NAACP contended that after a joint settlement of civil rights lawsuits filed by a class of guests, the state of Florida, and the United States was rejected in part by the United States District Court for the Middle District of Florida, HBE did not support the settlement on appeal, as it had agreed to do, and failed to reach a new settlement after four days of mediation before a federal magistrate.

On July 11, 2001, following a determination by the Florida Commission on Human Relations that there was reasonable cause to believe that the Adam's Mark had in fact discriminated against African-American guests during the 1999 Black College Reunion, the NAACP announced in a press release that it was renewing its civil rights boycott and protest, which originally had begun in February 2000, against the Adam's Mark hotels. In addition to encouraging its members and others to boycott Adam's Mark hotels, the NAACP planned to picket and distribute leaflets at the properties as well.

The Hotel Chain's Lawsuit and Motion for Preliminary Injunction

HBE filed suit on July 27, 2001 against the NAACP; its president and chief executive officer, Kweisi Mfume; and its chairman, Julian Bond. The complaint asserted causes of action for tortious interference with existing and prospective contractual relations, based on the NAACP's boycott, and defamation, based on certain statements in the NAACP's July 11 press release that HBE contended were false and defamatory. Specifically, HBE complained about statements: (a) that the Adam's Mark hotel chain discriminates against African American guests and employees; (b) that HBE had refused to negotiate in good faith to settle the litigation arising out of the Black College Reunion; and (c) that the Florida Commission on Human Relations had determined that the hotel had discriminated against African American guests during that event.

The next business day, the plaintiff filed a motion for a preliminary injunction, seeking an order (a) enjoining the NAACP's boycott; (b) restraining the NAACP's speech (including that the NAACP would remove from its web site the press release calling for a boycott, that the NAACP would not make any statements about the Black College Reunion litigation that were “not completely accurate,” and that all public statements by the NAACP about the hotels must be submitted to HBE for review 24 hours in advance); (c) requiring the NAACP

(Continued on page 46)

Federal Court Denies Motion for Preliminary Injunction To Enjoin NAACP Civil Rights Protest

(Continued from page 45)

to make affirmative statements withdrawing its prior criticism of HBE; and (d) imposing severe limitations on the NAACP's planned picketing activities. Finding it curious that HBE had not moved for a temporary restraining order before seeking a preliminary injunction, which would have allowed more time for the development of a factual record, and that HBE had waited more than two weeks after the issuance of the press release to seek an injunction, the Court nonetheless agreed to hear the preliminary injunction motion four days after it was filed based on a factual record submitted to the Court by affidavit.

HBE Was Not Entitled to the "Extreme" and "Overly Broad" Relief It Sought

In its ruling, the Court characterized the relief requested by the plaintiff as "extreme" and "overly broad," noting that "[n]ot only has plaintiff asked the Court to order defendants to take mandatory action which would restrain speech, but plaintiff has also asked the Court to mandatorily require defendants to make certain statements." Tr. 8, 10. The Court then went on to balance the well-established factors typically applied by courts in determining whether a preliminary injunction should issue and easily found that an injunction was not warranted.

Because Any Harm Suffered by the Hotel Chain Could Be Compensated by Money Damages, It Did Not Face Irreparable Injury

First, the Court recognized that one of the purposes of a preliminary injunction is to maintain the status quo. In this case, the status quo involved "the presence of statements critical of HBE which are now contained on the NAACP website." Tr. 10. Notwithstanding HBE's claim that a successful boycott could put the hotel chain out of business, the Court found that the plaintiff had failed to demonstrate that it would suffer irreparable harm if the injunction were denied. Tr. 10. Even if

HBE ultimately prevailed in the case, the Court held, any harm it suffered could "be compensated by an award of money damages." Tr. 10.

The NAACP's Loss of First Amendment Rights Could Never Be Restored

In contrast, the issuance of the injunction would irreparably harm the NAACP because there would be "no way to restore defendants' First Amendment right to criticize HBE's racial practices during the pendency of this action and to call for a boycott of HBE during that time." Tr. 15. In so finding, the court relied on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in which the Supreme Court, in a unanimous ruling, dissolved an injunction that had been issued against an NAACP economic boycott and reversed an award of monetary damages, holding that boycotts are protected expression under the First Amendment.

Quoting from *Claiborne Hardware*, Judge Harvey emphasized that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process" and that "offensive" and even "coercive" speech intended to influence the conduct of private actors is "nevertheless protected by the First Amendment." Tr. 11 (quoting *NAACP v. Claiborne Hardware*, 458 U.S. at 907-911). Judge Harvey relied upon the fact that the Supreme Court recognized in *Claiborne Hardware* that the NAACP and its members "certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign," but nevertheless concluded that the "right of States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." Tr. 11-12 (quoting *NAACP v. Claiborne Hardware*, 458 U.S. at 914).

In applying *Claiborne Hardware*, the Court flatly rejected HBE's argument that *Jews for Jesus, Inc. v.*

(Continued on page 47)

Federal Court Denies Motion for Preliminary Injunction To Enjoin NAACP Civil Rights Protest

(Continued from page 46)

Jewish Community Relations Council of New York, Inc., 986 F.2d 286 (2d Cir. 1992), supported its contention that the NAACP's boycott constituted tortious interference with business and that an injunction was warranted. In *Jews for Jesus*, the Second Circuit held that a claim for tortious interference with contract was not barred by the First Amendment where the defendant had threatened to stop doing business with a resort and persuaded other groups to threaten to stop doing business with it as well, unless the resort cancelled its contract with Jews for Jesus for a planned convention there. Tr. 12. The Maryland Court distinguished *Jews for Jesus*, primarily on the ground that in that case, the threatened boycott was "designed to achieve an objective prohibited by valid state law and federal statutes" in that the protest at issue was itself a form of unlawful religious discrimination, Tr. 12 (quoting *Jews for Jesus*, 986 F.2d at 297-98), while the NAACP's boycott of the Adam's Mark chain was designed to achieve an objective sought by federal law—"to induce a private party to abandon racially discriminatory practices and comply with civil rights laws," *id.*

Similarly, the Court rejected HBE's argument that the preliminary injunction it sought would restrain conduct rather than speech; rather, an injunction would constitute a prior restraint on protected expression, an "extraordinary" and "presumptively invalid" remedy. Tr. 13. Indeed, as the Court emphasized, "the distinction between prior restraint and subsequent punishment is based upon a theory deeply etched in the law that 'a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them beforehand.'" Tr. 13 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)). Thus, the Court held, "defendants have the right under the Constitution to express their views, particularly in an area where the party being criticized has been charged with violating important civil rights laws." Tr. 14.

HBE Failed to Demonstrate a Likelihood of Success on the Merits

In addition to its skepticism that a civil rights boycott could ever be subject to tortious interference claims in light of *NAACP v. Claiborne Hardware*, the Court similarly expressed doubt that HBE would be able to succeed on its defamation claim. While acknowledging that "[t]here is evidence in the record to support the position of each side," such that this "factor is therefore neutral," the Court nonetheless found that "[t]here is substantial evidence in the record here indicating that HBE engaged in discriminatory practices against African-Americans on the weekend in question." Tr. 15, 17-18.

The Public Interest Weighed Against Granting the Injunction

Finally, the Court found that the public interest weighed heavily against the preliminary injunction. Where there was "substantial evidence" that HBE had engaged in discriminatory practices, the "public interest lies in permitting the NAACP to disseminate its views," even if that evidence is ultimately not "accepted by the trier of fact" in the Florida Black College Reunion litigation. Tr. 17-18. More generally, the Court emphasized, "[t]he public interest favors the assertion rather than the suppression of First Amendment rights." Tr. 18.

Two business days after the court's ruling, HBE dismissed its lawsuit, albeit without prejudice. As of this writing, the NAACP boycott continues and it has picketed regularly at Adam's Mark locations throughout the country.

The NAACP defendants were represented by Seth D. Berlin, Jay Ward Brown and Amy Ledoux of Levine Sullivan and Koch, L.L.P., of Washington, D.C. HBE was represented by Michael M. Baylson of Duane, Morris & Heckscher, LLP of Philadelphia and Andrew Jay Graham of Kramon & Graham, P.A., of Baltimore.

High Chill Factor

Cold Hard Cash - Freedom of Speech Catches a Chill With Defamation Suits Down Under

By Gina Baylin

Harmonization of UK law with the principles of the European Convention on Human Rights ("ECHR"), has given freedom of expression center stage. Section 12 of the Human Rights Act 1998 ("HRA") (which echoes Article 10 of the European Convention on Human Rights) came into force in the UK on October 2, 2000, but its effects were felt well before the actual incorporation date as courts in the UK began to look to its terms as guides to principles and approach. UK courts demanded a harder look at the escalating damage awards in UK libel actions, with the consequence that awards for libel plaintiffs in the UK have lost their claim to premiere Commonwealth, if not worldwide, status. As the UK recedes from that dubious distinction, however, other countries in the Commonwealth seem poised to take the UK's place.

Record Damages in Australia

Good news for all libel forum shoppers: for a chilling effect on freedom of expression there is a substantial mark up on defamation damages Down Under. In Melbourne, Australia the Australian Broadcasting Corporation was hit this July for \$A1.1million in damages. This award is the highest ever jury award in a defamation case in Victoria. *Clarke and Runaway Bay Property Limited v. ABC & Robert Morris* (Supreme Court of Victoria, July 2001).

Ron Clarke, a champion middle distance runner who carried the Olympic Torch into the Melbourne Stadium at the 1956 Olympic Games, sued over a story on the ABC's "7.30 Report" broadcast on November 3, 1999 that claimed he and his development company were building a sports center on a toxic waste dump. The jury found that a "7.30 Report" about the development of a "Sports Super Centre" being built on a former garbage dump was false and that it defamed the former runner and his development company. The report described the center as "an environmental time bomb" and "one of the worst development scandals in Queensland history." The jury found that the primary

on air source for the allegations, Dr. Robert Morris, a marine biochemist who had concerns about the adverse environmental impact of developing the site, was also liable and personally responsible for one-third of the damages. The jury found that the report did not amount to a discussion of governmental or political matters, and they ordered the defendants to pay \$A1,065,000 damages (\$A690,000 to Clarke, and \$A375,000 to Runaway Bay Property Limited).

Could Canada Be Far Behind?

While not yet the venue of choice for non-Canadians, it is worth noting that while UK damages are being contained, Canadian damage awards in libel cases, like in Australia, have been on the rise. As LDRC reported in its Trial and Damages Bulletin in 1999, Canadian damage awards in defamation cases have soared since the landmark judgment of the Supreme Court of Canada in *Hill v. Church of Scientology*, [1995] 2 SCR 1130 (affirming \$1.6 million (Cdn) damage award). See Roger D. McConchie, "Canadian Media Defamation Damage Awards: July 1995 - December 1998," LDRC Bulletin 1999 No. 1. This trend was just reconfirmed in June 2001 when the Ontario Court of Appeal upheld million dollar damage awards against the Canadian Broadcasting Corporation. *Leenen v. Canadian Broadcasting Corp.* [2001] O.J. No. 2229 (\$1.3 million Cdn); *Myers v. Canadian Broadcasting Corp.* [2001] O.J. No. 2228 (\$1 million Cdn). See LDRC *LibelLetter* July 2001 at 44.

UK Damages on a Downward Trend

That the UK has found principles in free speech that limits libel damages is of relatively recent vintage, starting the mid 1990's with *Rantzen v. MGN* [1994] QB 670 and *Elton John v. MGN* (1996) 2 ALL ER 35. Prior to these cases, UK damages awards were only challenged in circumstances where the award was "out of all proportion to the facts or such that twelve reasonable men could not have made such an award." *Lewis v. Daily*

(Continued on page 49)

High Chill Factor

(Continued from page 48)

Telegraph Ltd (1962) 2 ALL ER 698, at 717. As a result, reviews of defamation damage awards were rare. Thus before the guidance of these cases the amount of damages awarded to defamation claimants in the UK had been out of all proportion to any harm caused by the publications under complaint. Defamation damages were awarded by sympathetic juries and those awards were soaring way above those given to victims in personal injury cases. Indeed, London was becoming a magnet for claims from non-UK citizens seeking to obtain remedies they could not obtain elsewhere, or to obtain the credibility and enforceability that judgments in their home countries did not afford.

In the mid-1990's, the UK courts, in the spirit of the European Convention on Human Rights that was due to become part of the legal fabric of the UK, provided for genuine appellate review of damages and placed limits on such damages in a hierarchy with loss of limbs and other severe physical injuries. Section 8 of the Courts and Legal Services Act 1990 was introduced to allow the Court of Appeal to order a new trial, or substitute for an award by a jury which is excessive or inadequate, a new award of such sum as appears to the court to be proper. In the past, this power was only exercised in a small minority of cases, where the awards have been so excessive as to be "divorced from reality." *McCarey v. Associated Newspapers Ltd (1964) 3 ALL ER 947, at 961.*

Rantzen v. MGN

In the *Rantzen* case, the Court of Appeal decided that the time was ripe to subject large awards of damages to greater scrutiny than had been done in the past. Esther Rantzen, a famous television presenter, had founded a charity for sexually abused children. The defendant newspaper published articles alleging that she had protected a teacher she knew to be a child abuser, making her appear to be a fake and a hypocrite. The jury found for Rantzen and awarded her £250,000.

The question on appeal was: "Could a reasonable jury have thought this award was necessary to compensate the Plaintiff and to re-establish [her] reputa-

tion?" The appellate court reduced the award to £110,000, taking the ECHR view that freedom of expression is only to be limited to the extent necessary in a democratic society.

Elton John v. MGN

In the Elton John case, *The Sunday Mirror* printed an entirely fictional story of the musician's bizarre dietary regime, to the effect that he ate his food by chewing and spitting it into a napkin without swallowing his mouthfuls. The Court held that it was offensive to public opinion that a celebrity claimant could recover damages to his reputation greater than if the same claimant had been rendered immobile or in a persistent vegetative state. Article 10 of the European Convention on Human Rights was regarded as "reinforcing and buttressing" the decision to reduce that award from £75,000 and £250,000 (exemplary damages for the fictional nature of the story) to £25,000 and £50,000 only.

The Court of Appeal in the Elton John case did stress that precise comparisons to personal injury awards could not be made. However, defamation cases do carry with them a certain element of vindication and compensation for loss of income and professional reputation which may justify higher awards. In delivering his judgment, Sir Thomas Bingham, MR (Master of the Rolls), said that compensatory damages should amount to "such sum as will compensate him [the claimant] for the damage to his reputation; vindicate his good name; take account of the distress, hurt and humiliation caused by the defamatory publication. The more clearly the defamation touches the Plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be." *John v. MGN Ltd (1996) 2 ALL ER 35, at 47-48*

Personal Injury Awards As Guidelines

The personal injury award guidelines suggest that a claimant in a severe vegetative state may be awarded sums in the region of £140,000 - £200,000. Lord Jus-

(Continued on page 50)

High Chill Factor

(Continued from page 49)

Justice Hirst in *Jones v. Pollard*, (1997) EMLR 233 stated: "I find it difficult to imagine any defamation action where even the most severe damage to reputation, accompanied by maximum aggravation, would be comparable with such appalling physical injuries."

General guidance was allowed in cases which led to some rather interesting confusion with the Judge telling the jury not to give "Mickey Mouse" awards, the jury interpreting that to mean "this claimant needs a lot of money to compensate for the damage to his reputation," and the Judge having actually meant for them to be careful not to award too much money to any given claimant. These small blips aside, since the Elton John case, the courts have attempted to maintain damages awards at a level suitably complimentary to those awarded in personal injury cases.

Awards of damages, whilst still high, have been cropped to the extent that the UK may no longer be seen as the forum where a defamation claimant would achieve the highest level of damages. It can be safely assumed that, with the exception of cases involving financial loss as a result of the particular publication complained of, £200,000 is the approximate maximum award of compensatory damages that the Court of Appeal will allow.

UK Principles Influence Malaysia

Elsewhere in the Commonwealth, in Malaysia, Chief Justice Mohamed Dzaiddin Abdullah has observed that an increase in damages there began a number of years ago "with the country's highest defamation awards granted in the Vincent Tan libel suit." See *Asia Features*, "Mega Defamation Suits a Blot on Malaysia's Judiciary", March 24th 2001. Drawing a similar conclusion to the English judges, outgoing council president, Sulaiman Abdullah, has commented that the difference between the damages awards in defamation and personal injury cases is "obscene." *Id.*

So, whilst the courts in Malaysia have recently attempted to draw limits on the excessive damages awards there (averaging \$US1million per libel) and courts in Jamaica are poised to reflect upon their own principles of awarding damages in such cases, the

Australian Courts apparently have yet to feel the chilling strain that such level of damages can cause to the fundamental freedom of expression.

Gina Baylin is a Solicitor in the Media Department of Finers Stephens Innocent, London.

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LIBEL DEFENSE RESOURCE CENTER, INC.
80 Eighth Avenue, Suite 200
New York, NY 10011
(212) 337-0200
www.ldrc.com

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