



## MEDIA LAW LETTER

Reporting Developments Through September 19, 2003

IN THIS ISSUE		PAGE
<b>MLRC</b>		
<b>Legislative</b>	<b>Legislative Affairs: Rundown</b> <i>Restore FOIA Act; Freedom to Read Protection Act; Protecting the Rights of Individuals Act</i>	31
<b>Ethics</b>	<b>Ethics Corner: "On Advice of Counsel": A Trap for the Unwary Client ... and Lawyer</b>	51
<b>LIBEL &amp; PRIVACY</b>		
<b>2d Cir.</b>	<b>The "Perp Walk" Revisited:</b> <i>Court Rules that Filming Handcuffed Arrestees and Tipping Off Press is Constitutional</i> <i>Caldarola v. County of Westchester</i>	3
<b>Mich. Cir. Ct.</b>	<b>Michigan Court Throws Out Privacy Case by Cops Caught on Tape Censoring Concert</b> <i>Judge dismisses claims of invasion of privacy against rap concert promoter</i> <i>Gregory Bowens, et. al. v. Aftermath Entertainment, et. al.</i>	9
<b>Minn.</b>	<b>Non-Party Reporter Must Disclose Confidential Sources in Libel Case</b> <i>In a setback for the state shield law, journalist forced to name sources</i> <i>Weinberger v. Independent School District No. 622 v. Maplewood Review</i>	11
<b>ACCESS / NEWSGATHERING</b>		
<b>Los Angeles</b>	<b>US Attorney Threatens Criminal Indictment of ABC News Team</b> <i>Angered officials contemplated prosecuting after Uranium report</i>	13
<b>Augusta</b>	<b>FBI Seizes Documents from Newspaper's Office in Augusta, Georgia</b> <i>Documents included reporters' notes, and e-mails with sources</i>	14
<b>DC Cir.</b>	<b>UPDATE: Court Allows Decision on Cheney Task Force to Stand</b> <i>Court denies Bush Administration's motions for rehearing and rehearing en banc</i> <i>In re: Cheney</i>	15

(Continued on page 2)

### PLANNING COMMITTEE FOR THE 2004 NAA/NAB/MLRC CONFERENCE IN VIRGINIA

November 13, 2003 at 12:15 p.m.

New York City

Join us for the kick off meeting of the Planning Committee for next year's Conference in Virginia  
Any MLRC member is welcome to come.

*If you have ideas for the Conference, or wish to volunteer -- whether or not you will be able to participate in the meeting in New York City on November 13th -- let us know.*

Contact:

Peter Canfield, pcanfield@dlalaw.com  
Dan Waggoner, danwaggoner@dwt.com  
Sandy Baron, sbaron@lsrc.com

**CORRECTION: In last month's issue, on an article about *Sprewell v. NYP Holdings*, we erroneously gave a by-line to Slade Metcalf. In fact, the piece was written in-house at MLRC, and Slade was counsel on the matter.**

*(Continued from page 1)*

<b>NJ Dist. Ct.</b>	<b>US Judge Quashes NJ Subpoena for Student Outtakes</b> <i>Invokes federal shield law to quash AG's subpoena to compel turnover</i>	<b>15</b>
<b>Va. Cir. Ct.</b>	<b>Judge in Sniper Case Denies Defense Motion to Close Pretrial Hearing</b> <i>Holds defendant did not meet burden of proof</i> <b><i>Commonwealth v. Muhammad</i></b>	<b>17</b>
<b>NJ Super.</b>	<b>Judge Gags Attorneys in Prudential Case</b> <i>Broad decision seals not only court records, but also the opinion itself</i> <b><i>Lederman v. Prudential Securities Co.</i></b>	<b>19</b>
<b>Colorado</b>	<b>Judge Denies Application to Unseal Records in Kobe Bryant Case</b> <i>Media companies appeal decision, say Judge misapplied Free Enterprise Analysis</i>	<b>20</b>
<b>Houston</b>	<b>Houston Court Closes Pretrial Hearings in Enron Criminal Case</b> <i>Houston Chronicle files 5th Cir. mandamus to open court and unseal transcripts</i>	<b>21</b>
<b>California</b>	<b>Recent Developments in California v. Peterson</b> <i>Courts have afforded media limited access to information about the prosecution</i>	<b>23</b>
<b>NJ Super.</b>	<b>NY Times Wins Access to 9/11 Tapes</b> <i>After legal battle, released documents exceed Times's original request</i>	<b>25</b>
<b>Senate Intelligence</b>	<b>Committee Will Not Press for Release of Classified Report Section</b> <i>Senate Committee on Intelligence will not release classified section of report on 9/11 attacks</i>	<b>27</b>
<b>Survey</b>	<b>Half of FOIA Officials See No Change Under New Policy, But One-Third Do</b> <i>According to a new survey by the General Accounting Office</i>	<b>28</b>
<b>S. Ct.</b>	<b>Supreme Court Considers Scope of FOIA</b> <i>Will soon hear arguments and decide FOIA request for photographs of Vincent Foster</i> <b><i>Office of Independent Counsel v. Favish</i></b>	<b>29</b>
<b>Comments on Proposed Rule</b>	<b>Media Groups Comment on Rules for Critical Infrastructure Information</b> <i>DHS accepts comments and expects to finalize rule by October</i>	<b>33</b>
<b>INTERNET</b>		
<b>9th Cir.</b>	<b>9th Cir. Holds that Communication Decency Act Protects Internet Dating Service</b> <i>Interactive computer service not liable for content provided by third party</i> <b><i>Carafano v. Metroplash.com, Inc.</i></b>	<b>37</b>
<b>Cal.</b>	<b>Injunction Barring Posting of Trade Secrets on 'Net Constitutional</b> <i>Cal. Supreme Court holds posting does not violate 1st Amendment</i> <b><i>DVD Copy Control Ass'n v. Bunner</i></b>	<b>39</b>
<b>Cal. Ct. App.</b>	<b>California Claims Jurisdiction over LL Bean's Online Activities</b> <i>Court adopts "sliding scale" test to determine jurisdictional question</i> <b><i>Gator.com Corp., v. LL Bean, Inc.</i></b>	<b>42</b>
<b>Survey</b>	<b>Survey Seeks to Identify Concerns Over Internet Jurisdiction</b> <i>ABA and ICC distribute survey to companies in over 29 countries</i>	<b>43</b>
<b>Pennsylvania</b>	<b>Pennsylvania Attorney General to Halt Secret Prior Restraint Orders</b> <i>State AG agrees to seek court approval before sending notices to ISPs</i>	<b>45</b>
<b>COPYRIGHT</b>		
<b>9th Cir.</b>	<b>Los Angeles News Service v. Reuters Television International</b> <i>Ninth Circuit addresses US Copyright damages for infringements overseas</i> <b><i>Los Angeles News Service v. Reuters Television International, Ltd.</i></b>	<b>41</b>
<b>N.D.N.Y.</b>	<b>Judge Denies Injunction Sought by Alleged Cult</b> <i>Federal Judge rejected efforts by group to compel critic to remove material from website</i> <b><i>NXIVM Corp. v. Ross Institute</i></b>	<b>45</b>

*(Continued on page 3)*

*(Continued from page 2)*

<b>9th Cir.</b>	<b>UPDATE: Ditto Heads to Trial After Ninth Circuit Revises Decision</b> <i>Indicates that fair use doctrine applies to thumbnail copies of online images, but not originals</i> <b><i>Kelly v. Arriba Soft Corp.</i></b>	<b>46</b>
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**NEWS & UPDATES**

<b>California</b>	<b>UPDATE: Kasky, Nike Settle After Supreme Court Revokes Cert.</b> <i>Nike agreed to donate \$1.5 million to Fair Labor Association</i>	<b>5</b>
<b>California</b>	<b>PETA Claims KFC Lies About Animal Welfare Policies</b> <i>KFC makes concessions to settle false advertising claim brought under California law</i>	<b>5</b>
<b>California</b>	<b>On Behalf of Public, Resident Sues RIAA for Fraudulent Business Practices</b> <i>Claims "Clean Slate Program" amnesty offer is a raw deal</i>	<b>7</b>
<b>Customs Bureau</b>	<b>Bureau of Customs Returns Goods Seized from Embedded Reporter Returning from Iraq</b>	<b>18</b>
<b>National</b>	<b>More Post-9/11 Issues....</b> <i>Ashcroft Defends Patriot Act; Media Scrutinized War Coverage</i>	<b>33</b>
<b>Best Internet Sites</b>	<b>"The Best" Websites for Media Lawyers</b>	<b>47</b>
<b>Maryland Dist. Ct.</b>	<b>Lawsuit Tests Limits of SEC's Power over Publishers</b> <i>SEC claims publisher knowingly published false info</i>	<b>50</b>

## The "Perp Walk" Revisited:

### ***The Second Circuit Rules That Filming Handcuffed Arrestees And Tipping Off The Press Is Constitutional Provided The Walk Is Actual And Unstaged***

By Nicholas S. Goldin

If you dislike publicity — or bad publicity at least — be sure not to get arrested any time soon. That's because the Second Circuit, in a decision strongly endorsing the proud tradition among police agencies of parading their latest collars for news cameras, ruled this month that law enforcement agencies may not only choreograph multiple arrests to facilitate filming, tip off the news media to movements of arrestees and their pending court appearances, but also may themselves videotape arrestees in handcuffs and distribute the tape to the news media.

In *Caldarola v. County of Westchester*, No. 01-7457, 2003 WL 22080012, 2d Cir. Sept. 9, 2003) (Parker, Jacobs, and Sotomayor), a unanimous three judge panel of the

United States Court of Appeals for the Second Circuit rejected a claim by a former county corrections officer that authorities violated his Fourth Amendment rights by

- (i) coordinating his arrest on fraud charges with related arrests,
- (ii) videotaping him as he was escorted in handcuffs for booking,
- (iii) distributing the video to the press, and
- (iv) identifying the court where he was about to be arraigned.

Although the Second Circuit recognized that this type of police conduct constitutes a Fourth Amendment seizure, it ruled that the legitimate government interests in deterring crime outweighed the arrestee's expectation of privacy under the circumstances. The court, however, did stress that it was not addressing the more controversial act of parading arrestees in front of news cameras for the sole purpose of satisfy-

***The decision makes clear that images of so-called perp walks — "when an accused wrongdoer is led away in handcuffs by the police to the courthouse, police station, or jail" — are here to stay.***

*(Continued on page 4)*

## The “Perp Walk” Revisited

*(Continued from page 3)*

ing media curiosity. Nonetheless, the decision makes clear that images of so-called perp walks — “when an accused wrongdoer is led away in handcuffs by the police to the courthouse, police station, or jail” — are here to stay.

### ***The District Court Proceedings***

In July 1999 the plaintiff, Joseph Freeman, and several other officers of the Westchester (New York) County Department of Corrections (“DOC”) were arrested on charges of fraudulently receiving disability benefits.

A county employee videotaped Freeman and other handcuffed arrestees as they were escorted from DOC headquarters, where the arrests occurred, to cars that took them to the police station for booking. Later that day, county officials announced these arrests and played the video at a press conference discussing the crackdown on fraud. They also distributed this video to the press and announced where the officers were “pending arraignment right now,” which led to the officers being filmed before and as they walked into court.

In the District Court, Freeman and two other officers sued DOC and county officials under 42 U.S.C. § 1983 for alleged violations of their Fourth Amendment right against unreasonable searches and seizures. Holding that the defendants’ conduct did not constitute an unreasonable seizure, the District Court granted summary judgment dismissing the claims. On September 9, 2003, the Second Circuit unequivocally affirmed the dismissal of Freeman’s claims (apparently only Freeman appealed), although on different grounds.

### ***Gov’t Interests Outweighed That of Privacy***

In a decision written by the late Circuit Judge Parker, the court recounted the storied history of perp walks and acknowledged its suspicion that they “are broadcast by networks and reprinted in newspapers at least in part for their entertainment value.”

But the court quickly pointed out that perp walks have a “more serious” purpose as well: “educating the public about law enforcement efforts” because “the im-

age of the accused being lead away to contend with the justice system powerfully communicates government efforts to thwart the criminal element, and it may deter others from attempting similar crimes.” At the same time, the court recognized they also implicate privacy rights of the accused — which requires a “careful[] balanc[ing]” of these privacy interests and the “legitimate government purposes” behind perp walks.

Turning to the facts, the Second Circuit then held that two types of Fourth Amendment seizures had occurred here: Freeman’s initial arrest and the videotaping of his image. The court ruled that videotaping and distributing the video implicated privacy interests protected by the Fourth Amendment, quoting its only other perp walk decision that “an accused possesses a privacy interest in not being ‘displayed to the world, against his will, in handcuffs, and in a posture connoting guilt.’”

The court added, however, that the Fourth Amendment requires only that a seizure be reasonable, and “the reasonableness of an individual’s expectation of privacy will vary in accordance with the circumstances of a given seizure.” Here, Freeman’s expectation of privacy where the filming occurred — in an outdoor parking lot on DOC grounds — was “minimal” because he could not reasonably have expected that the area would be free of other county employees, nor did he have any dominion over the area.

The court then balanced this “intrusion on privacy” against the government’s purpose in making and distributing the videotape — namely, to publicize its crackdown on disability fraud, deter similar crimes, and “enable[] members of the public who may come forward with additional information.” Concluding that these “legitimate government interests” outweighed Freeman’s “minimal” expectation of privacy, it affirmed the dismissal of his claims. Provided the method chosen is constitutional, the court noted it would not second guess an agency’s choice of how to achieve these goals by assessing whether a less burdensome alternative would have sufficed.

### ***The Bottom Line***

*Caldarola* is the Second Circuit’s second decision addressing the constitutionality of perp walks. In the other, *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000), the court

*(Continued on page 5)*

## UPDATE: Kasky, Nike Settle After Supreme Court Revokes Cert.

Two months after the U.S. Supreme Court dismissed its grant of certiorari in the case as improvidently granted, the parties in *Nike v. Kasky* have reached a settlement of the litigation.

In May 2002, the California Supreme Court held that activist Marc Kasky could proceed with his suit alleging that statements, letters, press releases and other materials produced by Nike, Inc. in response to critics of its employment policies abroad constituted unfair competition and false advertising. See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002); see also *LDRC MediaLawLetter*, May 2002, at 3.

The U.S. Supreme Court agreed to hear the case on the question of whether such a suit was precluded by the First Amendment. *Nike, Inc. v. Kasky*, 537 U.S. 1099 (Jan. 10, 2003) (granting cert.). But after full briefing and oral argument, the court issued a *per curiam* order dismissing the appeal. *Nike, Inc. v. Kasky*, 123 U.S. 2554 (June 26, 2003) (dismissing cert. as improvidently granted); see *MLRC MediaLawLetter*, July 2003, at 7. Justices Breyer, Kennedy and O'Connor dissented.

This would have sent the case back to the California Superior Court for trial. But on Sept. 12 the parties an-

*(Continued on page 6)*

## Kasky v. Nike is Settled, but it is not the end....

**What you see on this page and the following pages are stories about other *Kasky*-like law suits; that is suits brought using the California private attorney general statute and its broad commercial fraud provisions. MLRC members should be alert to *Kasky*-clones and should let us know of any in their jurisdictions. *Kasky* is settled. But the problems it revealed (and created) are alive and well.**

## PETA Claims KFC Lies About Animal Welfare Policies

On Sept. 2, People for the Ethical Treatment of Animals ("PETA") announced it would drop a lawsuit against KFC and its parent company, Yum! Brands, Inc., alleging that KFC's responses to PETA's campaign against alleged inhumane methods by which chickens are raised and processed before use in KFC restaurants constituted unfair competition under Cal. Business & Professions Code Section 17200, *et seq.*, and false advertising under Cal. Business & Professions Code Section 17500, *et seq.*

*(Continued on page 6)*

## The "Perp Walk" Revisited

*(Continued from page 4)*

sustained a § 1983 claim where the perp walk was entirely staged: a detective drove the arrestee around the block and walked him back into the station—two hours after he had been arrested and brought to the police station—solely so a news crew outside the station could film him. While noting that Freeman had at least the same expectation of privacy as the *Lauro* arrestee, the court said the *Lauro* perp walk crossed the line because it was an "inherently fictional dramatization of an [earlier] event" that had no legitimate law enforcement purpose. By contrast, this case involved an "actual, unstaged perp walk" that occurred as Freeman was "being legitimately transported pursuant to a lawful arrest."

Even so, *Caldarola* is significant. It does more than confirm that law enforcement may choreograph arrests to

facilitate filming of handcuffed arrestees and tip off the press to movement of arrestees and their court appearances. Provided the conduct is actual and not staged, it also gives police the green light to themselves videotape handcuffed arrestees for distribution to the media. And that is likely welcome news in both police precincts and newsrooms throughout the Second Circuit.

Robert David Goodstein represented Freeman; Deborah A. Porder and Charlene M. Indelicato (Westchester County Attorney's Office) represented the defendants. The decision, available at 2003 WL 22080012, will be reported in the Federal Reporter.

*Nicholas S. Goldin, an associate at Cahill Gordon & Reindel LLP in New York City, has participated in several litigations involving First Amendment and media issues.*



**Kasky, Nike Settle After Supreme Court Revokes Cert.***(Continued from page 5)*

nounced that they had reached a settlement under which Nike agreed to donate \$1.5 million to the Fair Labor Association, which will use the funds for training to improve workplace monitoring, education and economic development programs for workers, and development of international corporate responsibility standards. The programs will not specifically be targeted to Nike's workers. But Nike also agreed to continue its education and micro-loan programs for its workers.

The case had drawn interest from media and other groups because of its First Amendment implications. A brief from a coalition of 40 newspapers, magazines and media organizations, written by Kelli Sager, Bruce E.H. Johnson, P. Cameron DeVore, Eric M. Stahl, and Jeffrey L. Fisher of Davis Wright Tremaine LLP, was among several submitted to the Supreme Court by *amici* in the case.

Nike vice president and general counsel Jim Carter acknowledged the interest in a press release announcing the settlement, and stated that Nike would not issue its 2002 corporate responsibility report because of the continued threat of litigation under the California statute under which Kasky sued. *See* Cal. Bus. & Prof. Code §§ 17200 *et seq.* The release added that Nike "will continue to limit its participation in public events and media engagement in California."

**PETA Claims KFC Lies About Animal Welfare Policies***(Continued from page 5)*

PETA dropped the suit after approving KFC and Yum's proposed changes to the website, which will involve removing the alleged false claims. In addition, callers to the company's telephone information line will no longer hear that PETA's claims are "untrue," but KFC operators will continue to say "KFC disagrees with PETA's claims. KFC believes that animals should be treated humanely. For this reason, KFC has established animal welfare guidelines for vendors who supply KFC restaurants with chicken." *See* "PETA Says It Drops Lawsuit Against KFC", September 2, 2003, Yahoo News (Reuters).

PETA's legal counsel, Matthew Penzer, claimed victory, saying it "is a successful suit for false representations about the treatment of farmed animals [and] puts corporations on notice that they cannot abuse animals and lie about it with impunity. Penzer said that PETA will "continue [its] fight to stop the company's horrific abuse of chickens."

KFC had little to say regarding the dropped lawsuit. "We have no comment on PETA's ongoing misinformation campaign and efforts to promote vegetarianism," KFC spokeswoman Bonnie Warschauer told Reuters.

The suit, filed in Los Angeles County Superior Court on July 7, 2003, claimed that PETA had standing to sue under California Business and Professions Law section 17204, which permits a resident to sue on behalf of the general public. By e-mail, Penzer noted that PETA "filed the lawsuit so that people who are concerned about animal abuse would not unknowingly contribute to it because of KFC's dishonesty."

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**\$175**

## California Resident Sues RIAA, Alleging Fraudulent Business Practices

### **California Resident Uses California's Business and Professions Code Section 17204 to Challenge "Clean Slate" Program on Behalf of Public**

California resident Eric Parke is using California's Business and Professions Code Section 17204 to sue the Recording Industry Association of America's ("RIAA") over its "Clean Slate" program. Section 17204 permits a resident to sue on behalf of the general public, in which case the "plaintiff need not show he has suffered direct harm from defendant's acts." See *Complaint*, accessible at <http://www.techfirm.com/Parke-RIAA%20Complaint.pdf> (downloaded on September 10, 2003), citing *Massachusetts Mutual Life Insurance Company v. Superior Court*, 97 Cal.App.4<sup>th</sup> 1282, 1290 (2002).

#### **RIAA's Amnesty Offers**

On September 8, 2003, RIAA announced it was filing of hundreds of civil lawsuits against individual users of

P2P networks. In the same press release, RIAA unveiled its new "Clean Slate" program, stating that in return for a voluntary affidavit admitting wrongdoing, RIAA will guarantee that it will not participate in a lawsuit against the individual. See *September 8, 2003 RIAA Press Release*, Exhibit A of *Complaint*, accessible at <http://www.techfirm.com/Parke-RIAA%20Complaint.pdf> (downloaded on September 10, 2003). According to RIAA's "Clean Slate Program Description," an individual is eligible for "amnesty" if he has destroyed previously illegally uploaded material, promises to never again illegally share material, is not the subject of a current RIAA lawsuit or investigation, and has never illegally downloaded or distributed materials for commercial pur-

*(Continued on page 8)*

## MLRC ANNUAL DINNER NOVEMBER 12, 2003

### **IN THE TRENCHES REVISITED: WAR REPORTING AND THE FIRST AMENDMENT – PART II**

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

**Howard H ("Tim") Hays, Jr.,  
former owner and publisher of the Press-Enterprise of Riverside, CA.**

**Presented by Gary B. Pruitt, Esq.,  
Chairman of the Board, President & Chief Executive Officer of The McClatchy Company.**

#### **PANEL**

**Cheryl Diaz Meyer  
The Dallas Morning News**

**Mary Beth Sheridan  
The Washington Post**

**Michael Weisskopf  
TIME Magazine**

#### **MODERATED BY**

**Brian Williams  
NBC News**

**CA Resident Sues RIAA For Fraudulent Business Practices***(Continued from page 7)*

poses. See *Clean Slate Program Description*, Exhibit B of *Complaint* accessible at <http://www.techfirm.com/Parke-RIAA%20Complaint.pdf> (downloaded on September 10, 2003) or [www.riaa.org](http://www.riaa.org).

In the “Our Privacy Policy” section of the Description, RIAA assures signers that “Information will not be made public or given to third parties, including individual copyright owners, except if necessary to enforce a participant’s violation of the pledges set forth in the Affidavit or otherwise required by law.” *Ibid.*

**Plaintiff: “Clean Slate Program” is Deceptive**

On September 9, 2003, one day after RIAA’s announcements, Parke filed his complaint on behalf of the general public. Parke alleges that RIAA’s “Clean Slate Program” is “unlawful, unfair and deceptive” under California’s Business and Professions Code Sections 17200 *et seq.* In essence, Parke contends that RIAA is obtaining “admissions of copyright violations by individuals, without giving individuals any meaningful benefit in return or any binding amnesty from suit.” See *Complaint*, at 2-3. Specifically, Parke points out that in return for an affidavit RIAA will only agree not to “support or assist in copyright infringement suits” but does not guarantee complete amnesty or immunity. *Id.* at 5.

Parke also notes that while the privacy policy promises not to share information from the affidavit with third parties, the inclusion of the phrase “otherwise required by law” creates an exception that, if requested by “subpoena, deposition, court order, or any other legal process,” RIAA will hand over the information. *Id.* at 5-6.

Parke further contends that RIAA has no “ ‘actual’ authority to ‘guarantee not to sue file sharers’ with respect to all its member ‘recording company copyrights.’” *Id.* at 6. As the *Wall Street Journal* reported

on September 10, 2003, RIAA “doesn’t represent all copyright holders, so songwriters and independent musicians could use the affidavits to bring other lawsuits against you.... In response, the RIAA says people don’t need to reveal which songs they swapped nor their Internet names to obtain amnesty.” “Amid Lawsuits, Music Swappers Weigh Options,” *Wall Street Journal*, September 10, 2002, D12.

**Program May Leave Public Open to More Lawsuits**

Parke also expresses concern about the eligibility portion of the affidavit. Parke believes it is “likely that there are members of the general public... who will not know, and can not reasonably know, that they are under investigation by the RIAA, and who therefore will be induced to make potentially damaging confessions and statements against interest without receiving any benefit whatsoever.” *Id.* at 6.

In not destroying the “evidence collected on members of the general public who submit affidavits,” Parke contends that RIAA is “leaving the ‘slate’ anything but ‘clean’ for those Copy-

right owners or Government prosecutors who subpoena such information from the RIAA.” *Id.* at 7.

Parke’s suit requests an injunction and wishes the court to require RIAA to destroy all affidavits obtained and conduct a remedial advertising campaign addressing its attempts to deceive the public. *Id.* at 7.

In its September 8, 2003 press release, RIAA stresses that the current lawsuits and “amnesty” plan come after a year-long public education program in which advertisements have informed the public of the illegality of and harm caused by file-sharing and downloading music – and that because there is no anonymity in the process, those illegally swapping music can be identified. RIAA maintains that musicians, songwriters, the music industry, and creativity in general are all harmed by illegal downloading of music and it must now resort to litigation and other remedies.

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***In essence, Parke contends that RIAA is obtaining “admissions of copyright violations by individuals, without giving individuals any meaningful benefit in return or any binding amnesty from suit.”***

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## Michigan Court Throws Out Privacy Case by Cops Caught on Tape Censoring Concert Performance

By Herschel P. Fink

A Michigan trial judge has dismissed claims of electronic eavesdropping and invasion of privacy against a rap concert promoter and 39 other defendants brought by several Detroit city officials who were caught on tape backstage while censoring a concert performance. (*Gregory J. Bowens, et al v Aftermath Entertainment, et al*, Wayne County Circuit Court No. 02-23325, August 21, 2003). The tape was incorporated into a "bonus track" of the concert DVD, the "Up In Smoke Tour" of 2000, which featured performances by rap impresario Dr. Dre and singers Eminem, Ice Cube and Snoop Dogg.

A related case under the Federal Wiretap Act remains pending in U. S. District Court in Detroit, but may soon follow the state case under *res judicata* principles.

Although the unusual case involves a concert DVD, it has implications for television news and other newsworthy uses of video shot without the consent of the subject.

### ***Factual Background***

The dispute initially arose when a troop of Detroit police officers, led by the press secretary of the mayor of Detroit, arrived backstage shortly before the concert performance in July, 2000, and demanded changes in the show, which had previously played without incident in a dozen U. S. cities.

Dr. Dre (a/k/a Andre Young) and concert promoters subsequently sued the City of Detroit, the mayor's press secretary and several involved police command officers for violation of their First Amendment rights. The lawsuit resulted in a settlement which included a written apology from the mayor at the time, Dennis Archer, a former Michigan Supreme Court justice who is now president of the American Bar Association, and payment of attorney fees. The tape showing the officials demanding that the concert be censored was later incorporated into a documentary called "Detroit Controversy," one of the bonus tracks on the concert DVD, which achieved multiple platinum sales status.

Following settlement of the civil rights suit, the mayor's press secretary, Gregory Bowens, and four other Detroit officials shown on the tape filed suit against Dr. Dre and 39 other concert promoters, DVD producers, retailers, a law firm and even a camera manufacturer in U. S. District Court in Detroit. The suit claimed violation of the Federal Wiretap Act, as well as of the Michigan Eavesdropping Statute, commercial appropriation, false light and invasion of privacy. The state law counts were dismissed by U. S. District Judge Paul V. Gadola, and were refiled in state court. *Bowens, et al v Aftermath Entertainment, et al*, 254 F.Supp.2d 629 (E.D.Mich. 2003).

### ***No Expectation of Privacy***

In granting the defendants' motion for summary disposition in full, Wayne County, Michigan, Circuit Judge John A. Murphy held that the Michigan Eavesdropping Statute, similar to the Federal Wiretap Act, was not violated:

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***The suit claimed violation of the Federal Wiretap Act, as well as of the Michigan Eavesdropping Statute, commercial appropriation, false light and invasion of privacy.***

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"Plaintiffs may be right that the events at issue did not transpire before the arena audience itself, but the events were public enough that no reasonable expectation of privacy existed."

He further explained that,

"Even if the conversation was in a room, the locale was a concert arena filled with people, and the topic was what should be shown to the concert audience, not exactly a matter of private concern."

Judge Murphy observed that the door to the room was "wide open" and in some of the scenes the camera and light can be seen in a backstage mirror.

"It is difficult to find reasonable expectations of privacy where the parties knew that they were being videotaped. Plaintiffs did ask to talk privately, yet, upon getting no response from the defendants present, Plaintiffs proceeded anyway. Thus, Plaintiffs were

*(Continued on page 10)*

## Michigan Court Throws Out Privacy Case by Cops

(Continued from page 9)

apparently aware that the conversation was not private, yet elected to proceed regardless.”

(The plaintiffs claimed in their complaint that their conversations had been secretly taped, but this assertion was belied by the tape itself, showing the camera in a mirror and the camera light reflecting off the eyeglasses of the officials.)

### ***False Light / Misappropriation Fall***

Judge Murphy brushed aside claims of false light, finding that “much of what Plaintiffs point to as casting them in a false light constitutes expressions of opinion that are not susceptible to a true/false analysis.”

Finally, in dismissing the misappropriation/right of publicity claims, the court observed:

In arguing for false light, Plaintiffs emphasize how the DVD of the concert mis-portrays what actually happened to transform the facts into a narrative of police abuse and suppression of legitimate entertainment material. But this argument cuts against Plaintiffs’ right-of-publicity claim, for it illustrates how Defendants did much more here than simply appropriate Plaintiffs’ name or likeness to, say, sell a product; instead, they wove a tale of police heavy-handedness, a creative act. Put another way, the commercial value of Plaintiffs’ likenesses here has little to do with the individual identities of the plaintiffs; instead, it stemmed from their generic identity as law-enforcement officers, through whom Defendants were able to weave a tale of (alleged) police suppression of free speech.

### ***Federal Suit Remains***

Interestingly, while the state court has dismissed the state action after viewing the DVD itself, the federal court declined to dismiss defendants’ similar motion under FRCP 12(b)(6) in a 32 page decision on March 28, 2003. While the federal court performed an extensive analysis of Federal Wiretap Act defenses, it concluded that there were factual issues involving allegations of tortious purpose and expectations of privacy that could not be decided on the pleadings.

The court refused to consider the DVD itself, which was not attached to the complaint, because it was not a “writing” under FRCP 10(c), and not “central” to the plaintiffs’ claim:

“Although the Concert DVD may be important to Plaintiffs’ case insofar as it represents a result of the alleged wiretapping, the Concert DVD is not determinative of Plaintiffs’ claims necessarily. Unlike a suit under a contract or pension plan document, the Concert DVD does not define the rights and obligations of the parties. Thus, as opposed to being a ‘written instrument’ for the purposes of Rule 10(c), the Court concludes that the DVD is the sort of ‘lengthy exhibit containing extraneous or evidentiary material [that] should not be attached to the pleadings.’”

In a classic “Catch 22,” the federal court declined to treat the motion to dismiss as one for summary judgment under Rule 56, because, “This Court generally does not consider motions for summary judgment prior to the close of discovery.” Interestingly, the state court judge commented on the federal court’s rigidity in a footnote:

“Plaintiffs have given the Court a copy of an opinion in a related federal proceeding in which the federal judge refrained from considering the contents of the cassette [DVD] because the motion under consideration was one on the pleadings. Since the instant motion is brought under MCR 2.116(C)(10), we may consider the details of the cassette.”

The state court decision, however, may yet provide the final word. Since the state court found that no tort had been committed, that ruling may be *res judicata* in the federal action. Under the Federal Wiretap Act, dismissal may be required unless “such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.” 18 USC §2511(2)(d).

*Herschel P. Fink is a partner at Honigman Miller Schwartz and Cohn LLP, Detroit, who along with partner Cynthia Thomas represents the defendants.*

## Non-Party Reporter Must Disclose Confidential Sources in Minnesota Libel Case

By John Borger

In a setback for journalists and the state shield law, the Minnesota Supreme Court held that a non-party reporter must disclose which named defendants were his confidential sources for allegedly defamatory statements about a high school football coach. (*Weinberger v. Independent School District No. 622 v. Maplewood Review*, No. C7-01-2021, September 11, 2003, available at <http://www.courts.state.mn.us/opinions/sc/current/opco012021-0911.html>.)

### *Court Uses Relevancy as Threshold Test*

The court limited its analysis to the terms of the statute's exception for "any defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice." Justice Alan Page's opinion for the court stressed that the test of relevance is whether evidence has "any tendency" to make a consequential fact more or less probable. Therefore, in

cases ... in which the plaintiff has alleged that the defendant is the source of the allegedly defamatory statements, relevant evidence constitutes not only evidence on the source's knowledge, but also the source's identity. ... [W]hen the identity of the speaker is hidden under the cloak of anonymity because the speaker has published his or her allegedly defamatory statements through a newspaper that has not attributed the statements directly to the speaker, it is self-evident that the identity of the speaker will lead to relevant evidence on the issue of actual malice.

The shield law requires, even in defamation cases, that certain thresholds be met before disclosure can be compelled, but the court had little trouble finding those standards were satisfied:

[T]he probable cause requirement ... is satisfied because the narrowness of the district court's order insures that the unnamed sources will have information relevant to the defamation claim. ... [T]he order only requires disclosure of the identity of sources who are named ... defendants and then only with respect to any of the 13 allegedly defamatory statements they made. Because the source of a statement will have information clearly relevant to whether the statement is defamatory, if any of the ... defendants are the source of any of the allegedly defamatory statements, there is probable cause to believe that they have information clearly relevant to defamation.

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***The court pointedly stated that it was not addressing any issue of a constitutional reporter's privilege against compelled disclosure "because neither party has properly put that issue before the court," thereby at least technically preserving the issue for later cases.***

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Because none of the named defendants had "owned up to any of the statements in question or provided information as to the source," the court held that the plaintiff lacked alternative means for obtaining the information.

### ***Constitutional Privilege Not Addressed***

The court pointedly stated that it was not addressing any issue of a constitutional reporter's privilege against compelled disclosure "because neither party has properly put that issue before the court," thereby at least technically preserving the issue for later cases.

The reporter's tactical decision not to invoke a constitutional privilege may have been influenced by the court's skeptical observation in *State v. Turner*, 550 N.W.2d 622, 627 (Minn. 1996), that other courts that had recognized a First Amendment privilege had engaged in "strained interpretations" of Justice Powell's concurring opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Although *Turner* acknowledged that Minnesota's 1973 shield law "was a reaction to the *Branzburg* decision, and was intended to provide additional protection to reporters and their employers against subpoenas from litigating parties," 550 N.W.2d at 631, it held that the statute's language extended only to unpublished information that would identify a

(Continued on page 12)

### Non-Party Reporter Must Disclose Confidential Sources

(Continued from page 11)

confidential source and not to other unpublished information. The legislature reacted to *Turner* by expressly protecting all unpublished information, but that 1998 amendment left the language of the defamation exception unchanged.

Citing that legislative history, media amici in *Weinberger* urged the court to interpret the statutory language consistently with First Amendment principles, as the Court of Appeals had done in *Weinberger v. Maplewood Review*, 648 N.W.2d 249 (Minn.App. 2002), and in *Bauer v. Gannett Co. (KARE 11)*, 557 N.W.2d 608 (Minn.App. 1997). Instead, in a footnote, the court overruled the *Bauer* analysis “to the extent [it] is inconsistent with this opinion.”

### A Caustic Dissent

The majority’s approach prompted a caustic dissent from Justices Helen Meyer and Paul Anderson: “Although clearly intended to expand the reporter’s constitutional privilege after *Branzburg*, the majority applies the Free Flow of Information Act to give [the reporter] less protection than he deserves under the Constitution.”

The dissent stressed that

it is not clear that identifying the sources of the statements in the article would be material to Weinberger’s case because he has presented scant evidence of the statements’ falsity, which is the first element in a prima facie case of defamation,

and that Weinberger did not need to know the identity of the unnamed sources

to prove any element of his case because his defamation suit is not based solely on the statements made in the newspaper ... [and, indeed] ... focuses more on the defendants’ allegedly defamatory statements to coaches, administrators, students, and parents

than on the newspaper statements.

The dissent protested that

A defamation plaintiff cannot transform a reporter from a neutral observer into an informant for the plaintiff when the information sought is not necessary to maintain the plaintiff’s case.

In her first opinion on media issues since taking the bench last year, Justice Meyer also wrote:

The public has a legitimate interest in issues surrounding public education and the conduct of public officials in the exercise of their duties. Requiring the disclosure of a reporter’s sources in this context will have the effect of chilling other stories of public interest. Courts should not discourage confidential sources from adding to the public debate by compelling reporters to disclose the sources’ identities, but instead should assist reporters’ efforts to maintain confidential sources, especially in a case ... where there has been little showing that the sources are material or necessary to the plaintiff’s case.

### Factual Background

*Weinberger* arises from a January 1997 article about Richard Weinberger’s termination as head football coach at a suburban high school near St. Paul. Reporter Wally Wakefield quoted confidential sources as well as named sources discussing why Weinberger was terminated. Because the termination came as a nonrenewal of Weinberger’s coaching contract, it was not “disciplinary action” under state data practices law and the school did not give an official reason for the action. Searching for explanations for the popular coach’s departure, the local newspaper reported that unnamed school officials had

had enough of Weinberger and his behavior ... [including] his temper, inappropriate comments and foul language, which people claim he uses to intimidate players.

Weinberger sued the school and school employees who he suspected had made the critical comments. In July 2000, the coach subpoenaed Wakefield for all documents concerning or related to him and demanded that he identify the unnamed sources. Wakefield fought the subpoena through numerous proceedings in the district court and court of appeals, during the course of which Weinberger defeated a motion for summary judgment. The district court eventually ordered Weinberger to identify by written interrogatory “which defendant, if any, is the original source for each” of 11 specified statements in the article, prompting Wakefield’s current appeal.

*John Borger practices media law at MLRC member Faegre & Benson LLP in Minneapolis. With Eric Jorstad and Patricia Stenbridge, he submitted a brief on behalf of media amici to the Minnesota Supreme Court in Weinberger.*

## Federal Attacks on Free Speech

Last month the MLRC reported on not one, but two separate aggressive actions taken by the US Secret Service against journalists.

In the first story, Pulitzer Prize-winning editorial cartoonist Michael Ramirez was paid a surprise visit at his *L.A. Times* office by federal agents concerned over an earlier published cartoon that depicts President George W. Bush facing political assassination for relying on faulty intelligence reports regarding Iraq and weapons of mass destruction. See *MLRC MediaLawLetter*, August 2003, at 43. The agents apparently missed the abstract meaning behind the cartoon, which supported the President.

In the second story, Secret Service agents confiscated notes taken by a journalism graduate student at American University who was on assignment at the British Embassy in Washington, DC even after the student identified herself as a reporter. See *MLRC MediaLawLetter* August 2003, at 43, citing <http://www.soc.american.edu>.

In this month's volume, we note that an ABC News team and the associated freelance cameraman who helped them have been threatened with the possibility of criminal charges by the Department of Justice for the journalists' respective roles in an investigative report that exposed weaknesses with homeland security at national ports. It is currently unknown whether the US Attorney's Office is still considering initiating legal action.

Additionally in this month's issue, we report that the FBI seized numerous documents from a small Georgia newspaper including advertising orders, accounting documents and reporters' notes and emails with sources.

It is too early to say whether restrictions on free speech by the threat or use of force and litigation is a trend; but, the MLRC takes this opportunity to bring these recent events to light. We hope our membership remains wary of the growing number of incidents involving federal authorities. Media outlets should consider having procedures in place to handle inquiries and more aggressive approaches from federal authorities. Note that the media involved in the reported incidents were both large and small.

## US Attorney Threatens Criminal Charges for ABC News Team for Uranium Story

At least as of September 12th, federal authorities were considering criminal charges against ABC News journalists for an investigation of homeland security at American ports. The US Attorney in Los Angeles is reportedly debating whether to prosecute the ABC News team for failing to accurately disclose the contents of a package when the investigative reporters brought 15 pounds of depleted uranium into the country.

There has been speculation that US Attorney General John Ashcroft will play an instrumental role in helping make the final decision. However, tension over what the appropriate response should be has cut across political lines. Sen. Charles E. Grassley, R.-Iowa, supported ABC News in a letter he sent to both Ashcroft and Homeland Security Secretary Tom Ridge, urging that they make certain "that legitimate reporting is not chilled."

Just two months before the second anniversary of the 9/11 attacks, ABC News shipped a container of undeclared depleted uranium to Jakarta, Indonesia and then shipped

the cargo back into the United States through the Los Angeles port on August 23. US Customs officials failed to detect the lawful substance, which was concealed in a lead pipe placed inside a teak trunk. The chest containing the harmless material passed through an X-ray safety check but authorities never opened or inspected the contents.

According to a report on ABCNews.com, the truck driver hired by ABC journalists to deliver the trunk from the port to ABC became concerned that Homeland security had bungled their duties only after ABC personnel identified themselves and told him the nature of their shipment (<http://abcnews.go.com/sections/wnt/primetime/sept11-uranium030910.html>). Subsequently, the trucking company contacted officials at Maersk, the Danish-owned shipping company that unwittingly helped transport the uranium into the country, who then called the FBI.

Federal agents, however, didn't begin their investigation until nine days after the uranium had entered the country. ABCNews.com reported that federal agents raided the

*(Continued on page 14)*



## US Attorney Threatens Criminal Charges for Uranium Story

*(Continued from page 13)*

ABC News bureau in Los Angeles at midnight on September 2. The agents questioned ABC personnel and wanted to seize the uranium, but it had already been sent to New York. US agents also showed up at nighttime at the home of a freelance cameraman who worked on the project, in an attempt to obtain ABC News field tapes without a warrant or subpoena. The tapes had also been sent to New York at this point.

A few days later, two US Customs agents in Washington, DC showed up at the home of nuclear physicist, Dr. Thomas Cochran, who worked at the Natural Resources Defense Council (NRDC) and worked with ABC on their report. The agents allegedly blocked Cochran's driveway with their car as he began to pull out to go shopping with his wife.

The federal authorities, while critical of ABC's actions, have yet to declare publicly what, if anything, they will do on the matter.

## FBI Seizes Documents from Newspaper's Office in Augusta, Georgia

### *Search Part of Investigation of Newspaper Owner*

On August 18, 2003, the FBI seized numerous documents from the offices of the *Augusta Focus* newspaper in Georgia. The paper came under scrutiny because of an ongoing investigation into alleged financial improprieties of former Georgia state senator and *Augusta Focus* owner Charles Walker, Jr.

According to an August 26, 2003 telephone conversation with *Augusta Focus* editor, Theresa Minor, the paper's primary concern was that in addition to seizing financial documents regarding the operation of the paper (such as advertising orders, contracts with businesses and advertisers, and accounting documents), the FBI also downloaded information off a shared server, which Ms. Minor said included personnel information, reporters' notes, e-mails with sources, and attorney-client information.

Ms. Minor said that the paper had no problem with the initial search and seizure of operational documents, provided that the paper be allowed to retain copies or originals to continue to operate. It was the additional search and seizure of information she claimed as "privileged" which she insisted was not covered by the initial warrant. According to Ms. Minor, the FBI noticed the shared network server (which also serves two other companies in the building) halfway through their initial seizure. The FBI then acquired a second warrant from a different judge, according to Ms. Minor.

On August 20, 2003, *Augusta Focus* attorney Don Samuel of Atlanta faxed what he termed a "fairly caustic letter" to the U.S. Attorney demanding a return of the materials

seized "in order to maintain operations and in order to continue to provide news to the audience it serves." The letter charges that since the search warrant obtained is still under seal, "neither the need for the search warrant (as opposed to a subpoena), nor any evidentiary support for this type of search is apparent on the face of the document that is available". Mr. Samuel addressed the First Amendment concerns, stating that

***[Mr. Samuel] noted that failure to return the current advertising, circulation and sales information "will operate as a prior restraint on the operation of the business."***

[w]hether the government seizes reporter's notes or advertising information is inconsequential. The result is a significant disruption of the newspaper's business,

and noted that failure to return the current advertising, circulation and sales information "will operate as a prior restraint on the operation of the

business." Mr. Samuel's letter also charged the FBI with going beyond the scope of the initial warrant by seizing all computer files, and took issue with the proposed procedure which would permit an "independent" agent to review the files and hand over to the FBI only those documents pertaining to financial operations. Within 24 hours of receipt of Mr. Samuel's letter, the FBI returned copies of the operations documents. (Mr. Samuel said in an e-mail on August 27, 2003, that they returned "virtually everything that was seized").

Mr. Samuel noted that it was not apparent at that time that anything beyond operations information was seized, despite Ms. Minor's contention otherwise. After a follow-up ques-

*(Continued on page 15)*

## FBI Seizes Documents from Newspaper's Office

(Continued from page 14)

tion regarding possible newspaper content being seized, Mr. Samuel did acknowledge that other materials could have been included when the mirror image of the hard drive was taken. At this point, the legal issues and potential arguments were yet to be fully developed and were being investigated further.

The *Atlanta Journal-Constitution* has highlighted Charles Walker, Jr.'s alleged financial improprieties, for which he is under investigation. Since 1990, more than \$82,600 for Walker's state senate campaigns have allegedly gone to his businesses or family members. See "Senate Leader's Economic Web: Campaign funds find way to Walker kin, businesses", *Atlanta Journal-Constitution*, April 14, 2002, page A15. Walker also allegedly paid his paper, the *Augusta Focus*, more than \$42,000 to advertise his campaign, including a single payment of \$38,000 for the 2000 campaign. However, the *Augusta Focus* allegedly printed only \$6,000 worth of advertising. *Ibid.* The *Augusta Focus* offices are in a building owned by Charles Walker, Jr., in an area of town he helped renovate, in part because some of the state aid he helped obtain as senator was given to a neighborhood improvement corporation of which he is vice chairman. *Ibid.*

As of September 9, 2003, Ms. Minor reported via e-mail that the case was "at a stand still at the moment, legally." However, she did indicate that the story has received national attention "with reporters from syndicated radio talk shows and weekly newspapers picking up on the issue of the FBI seizure of privileged documents in what appears to be an area of interest with talks of the Patriots [sic] Act to launch it."

Needless to say, this case is continuing to develop and will receive further attention.

## UPDATE:

### D.C. Circuit Allows Decision on Cheney Task Force to Stand

One Sept. 10 the U.S. Court of Appeals for the D.C. Circuit denied the Bush Administration's motions for rehearing and for rehearing *en banc* of the court's previous decision allowing discovery to proceed in a lawsuit seeking documents related to a energy policy taskforce led by Vice President Dick Cheney. *In re: Cheney*, No. 02-5354 (D.C. Cir. orders Sept. 10, 2003).

The lawsuit was filed in July 2001 by Judicial Watch, Inc., who was later joined by the Sierra Club. The suit, filed under the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix 2, seeks documents from the task force in order to determine the role that energy industry executives played in formulating the administration's energy policy. FACA requires that documents from federal advisory committees be made public, unless exempt from disclosure under the provisions of the Freedom of Information Act, 5 U.S.C. §§ 552, *et seq.*

On July 8, a two-to-one majority of a D.C. Circuit panel refused to vacate a district court decision ordering the administration to release the documents, or else justify its failure to do so. See *In re Cheney*, 334 F.3d 1096 (D.C. Cir. July 8, 2003); see also *MLRC MediaLawLetter*, July 2003, at 33. The majority noted that the district court planned to review the contested documents *in camera*, and that the administration could appeal any adverse judgment after trial.

With the appeals court's latest action, the prior decision stands and the case may now proceed to discovery before the D.C. District Court.

## U.S. Judge Quashes NJ Subpoena for Student Outtakes

By Bruce S. Rosen and Matthew Leish

Invoking the federal reporter's privilege, a U.S. District Court Judge in New Jersey has quashed a subpoena from the New Jersey Attorney General that sought to compel a student documentary filmmaker to turn over video outtakes and other materials relating to a documentary about New Jersey death row inmate Robert Marshall. *Marshall v. Hendricks*, No. 97-CV-5618 (D.N.J. order issued Sept. 3, 2003).

The September 3, 2003 ruling by Judge Joseph Irenas of the U.S. District Court in Camden declared that the student, recent Rowan University graduate Jason Kitchen, was a journalist under Third Circuit law; that his documentary outtakes were within the First Amendment reporter's privilege; and that the attorney general's office was "fishing" when it subpoenaed the materials for use in Marshall's ongoing *habeas corpus* proceedings.

(Continued on page 16)

**U.S. Judge Quashes NJ Subpoena for Student Outtakes***(Continued from page 15)*

In July, the state served subpoenas on the University and then on Kitchen. The subpoenas sought "all videotapes, notes and documents pertaining to interviews" that Kitchen conducted of Marshall, his son, his trial attorney, the trial prosecutor and the chief investigator. On August 1, after Kitchen's attorneys filed a motion to quash, the state narrowed its subpoena to seek only the Marshall interview materials. In addition, realizing that the law requires the state to seek alternative sources for the information, the state made a belated motion to take Marshall's deposition, which is permitted under the federal *habeas* rules.

The state's motion to take Marshall's deposition was granted before the motion to quash was heard. From the bench at the hearing on the motion to quash, Judge Irenas ruled that the state could not make the requisite strong showing as to any of the three criteria needed to overcome the reporter's privilege, and had not even made a showing sufficient to have the Court examine the materials *in camera*.

Under *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), the Third Circuit's qualified privilege requires those seeking to subpoena such information from a journalist to satisfy a three-part test before compelled disclosure will be allowed. In order to overcome the privilege, the party seeking disclosure must make a "strong showing" that 1) the information sought is relevant; 2) the information is "necessary" and "crucial" to the claim; and 3) there is "no other source for the information requested."

In *Cuthbertson*, the Third Circuit held that even *in camera* review of newsgathering materials is not permissible unless the movant makes a threshold showing that the information consists of "relevant evidentiary material" and that he is unable to acquire the information from another source.

The state made no showing of relevance, and its position as to alternative sources was made problematic when it was granted to right to depose Marshall. Judge Irenas also rejected the state's contention that it needed to review the outtakes in order to see whether Marshall had contradicted any of the claims in his *habeas* petition.

The University attempted to argue that a scholar's or academic privilege also protected the tapes, but Judge Irenas declined to address the issue. Although the physical

tapes were in the school's custody, under the university's policies, student documentaries remain the property of the students.

Marshall was convicted in 1986 of hiring a hit man to murder his wife and was sentenced to death. Marshall's case attracted widespread media coverage and was the subject of the book "Blind Faith." Kitchen's interview, conducted in April 2003, was the first filmed interview granted by Marshall since his conviction in 1986.

*Kitchen was represented by ACLU-NJ cooperating attorneys Bruce S. Rosen of McCusker, Anselmi, Rosen, Carvelli & Walsh in Chatham, New Jersey, and Robert Balin and Matthew Leish of Davis Wright Tremaine LLP in New York City. The state was represented by Robert Leaman, supervising deputy attorney general, and Rowan University was represented by Clark Hodgson and Stephen Nolan of Stradley Ronan in Philadelphia.*

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CONFERENCE IN VIRGINIA**

**November 13, 2003 at 12:15 p.m.**

**New York City**

**Join us for the kick off meeting of the  
Planning Committee for next year's  
Conference in Virginia Any MLRC  
member is welcome to come.**

***If you have ideas for the Conference, or wish  
to volunteer -- whether or not you will be able  
to participate in the meeting in New York City  
on November 13th -- let us know.***

**Contact:**

**Peter Canfield, pcanfield@dlalaw.com**

**Dan Waggoner, danwaggoner@dwt.com**

**Sandy Baron, sbaron@ldrc.com**

## Judge in Sniper Case Denies Defense Motion to Close Pretrial Hearing

By Adam L. Perlman

The judge presiding over the case of John Allen Muhammad, accused of being one of the Washington, D.C.-area snipers, has denied a motion by the defense to close a pretrial hearing at which a defense motion in limine will be heard. In an oral ruling on September 10, 2003, Judge LeRoy F. Millette, Jr. of the Circuit Court of Prince William County, Virginia ruled that the defense had not met its burden of showing that there was a substantial probability that the defendant's right to fair trial would be prejudiced by keeping the hearing open and that there were alternatives to closure already in place that would ensure a fair trial. *Commonwealth v. Muhammad*, Case Nos. CR54362, CR54363, CR54364, CR54365.

Muhammad is charged in Prince William County with capital murder, conspiracy, and use and display of a firearm in the commission of a felony. He has also been charged with crimes in several other jurisdictions.

With his motion, Muhammad sought to close to the public the pretrial hearing at which a motion in limine which he has filed will be argued. Although the motion itself was filed under seal, at the hearing on his motion to close, Muhammad's counsel revealed that the motion seeks to exclude evidence of other alleged bad acts by Muhammad which may be introduced by the government in the sentencing phase of this death penalty case.

Muhammad argued that because of the extensive publicity that this case has received, and will continue to receive, his right to a fair trial would be prejudiced if these additional alleged acts became known to the public in the weeks leading up to his mid-October trial. Muhammad contended that given the amount of publicity that the case has received, it would already be difficult to pick a fair and impartial jury and that allowing public access to the hearing on his motion in limine would make it even more difficult. He also offered what he termed an alternative to permanent closure of the hearing, suggesting that a redacted transcript of the hearing could be released after the jury was selected.

### *Press Enterprise Analysis Urged*

Several newspapers – *The Washington Post*, *The Baltimore Sun*, *The New York Times*, and *the Richmond Times-Dispatch* – moved to intervene in order to oppose the defense motion to close. Citing the U.S. Supreme Court's decision in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), the newspapers argued that the pretrial hearing could only be closed upon specific findings that “first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.” The newspapers argued that neither portion of the *Press-Enterprise* test was met in this case.

First, according to the newspapers, there was not a substantial probability that the defendant's right to a fair trial would be prejudiced if the hearing on his motion in limine remained open to the public. They argued that Muhammad had not shown any basis to conclude that his right to a fair trial would be prejudiced if the particular information in his motion in limine were discussed in an open hearing, and certainly had not met his burden of proving a substantial probability of prejudice to his fair trial right if this additional information were revealed.

The newspapers also noted that there were reasonable alternatives to closing the hearing that would preserve the defendant's ability to obtain a fair and impartial jury, including searching voir dire, the use of jury questionnaires to screen potential jurors, and empanelling a large venire from which to choose potential jurors. The newspapers argued that these procedures, which the court would be undertaking anyway given the publicity that the case has received, would not be rendered ineffective if the defendant's motion in limine were heard in open court. Finally, the newspapers contended that the defense proposal to release a redacted transcript after the jury was selected was inconsistent with the First Amendment, which mandates contemporaneous access to pretrial proceedings in criminal cases.

The Commonwealth also objected to the defense motion to close.



## Motion to Close Pretrial Hearing Denied in Sniper Case

(Continued from page 17)

### **The Court's Ruling**

In denying the defense motion to close, the court held that Muhammad had not met his burden of showing that there was a substantial probability that his right to a fair trial would be prejudiced if his motion in limine were heard in an open hearing. The court also held that there were alternatives already in place to ensure that Muhammad receives a fair trial, noting that it intends to conduct extensive voir dire of potential jurors, either individually or in small groups. The court also noted that the defense motion in limine was filed under seal pursuant to an earlier court order, and that the parties and the court could discuss the matters raised in the mo-

tion in open court without any extremely sensitive details being revealed.

Jonathan Shapiro, Law Offices of Jonathan Shapiro, P.C., and Peter D. Greenspun, Greenspun & Mann, P.C., represented John Allen Muhammad.

Paul B. Ebert, Commonwealth's Attorney, represented the Commonwealth of Virginia.

Craig T. Merritt, Christian & Barton, L.L.P., represented Media General Operations, Inc. t/a *Richmond Times-Dispatch*.

*Dane H. Butswinkas, Lisa M. Duggan, and Adam L. Perlman, Williams & Connolly LLP, represented The Washington Post Company, The Baltimore Sun Company, and The New York Times Company.*

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## Bureau of Customs and Border Protection Returns Goods Seized from Embedded Reporter Returning from Iraq

By Jeffrey P. Hermes

On April 19, 2003, Jules Crittenden, a reporter for the *Boston Herald* newspaper, returned from Kuwait to Boston after a month-long tour as an embedded reporter with the United States Army's Third Infantry Division in Iraq. Upon his arrival at Boston's Logan International Airport, the Bureau of Customs and Border Protection ("Customs") seized a wide variety of goods that Crittenden had in his possession, including protective gear and journalistic equipment that Crittenden had brought with him from Boston, as well as various mementos that Crittenden had obtained in Iraq or purchased in Kuwait.

According to a notice dated May 20, 2003, these items were seized for violation of 31 C.F.R. § 575.204, a Gulf War-era regulation issued by the Office of Foreign Assets Control of the United States Treasury Department ("OFAC") under a delegation of presidential authority pursuant to 3 U.S.C. § 301 and 22 U.S.C. § 287c. Section 575.204 provides that "no goods or services of Iraqi origin may be imported into the United States, nor may any U.S. person engage in any activity that promotes or is intended to promote such importation."

Upon examination of the seized items, Customs divided them into three categories: (1) items that appeared

to be of Iraqi origin; (2) items that appeared to be of United States origin; and (3) items of indeterminate status, including material that appeared to originate with the U.S. military. Customs offered to return the items in category (2), but indicated its intent to begin forfeiture proceedings regarding the remaining items.

In fact, Customs had grouped into categories (1) and (3) various United States-origin items that belonged either to Crittenden or the *Herald*, as well as various souvenirs purchased by Crittenden in Kuwait. Those items that were of Iraqi origin included traditional "battlefield souvenirs" such as abandoned Iraqi helmets and spent ammunition shells of little to no value; Crittenden had not purchased any items within Iraq.

### **Reporter Argues Misapplication of Regs**

Believing that the regulation in question was not intended to apply to such items, Crittenden filed an administrative petition with Customs, pursuant to 19 C.F.R. § 171.11 and 19 U.S.C. § 1618, seeking relief from the seizure. Crittenden submitted an affidavit to Customs identifying the true origin of each item he sought to have returned, as well as the circumstances under which he obtained each item from Iraq.

(Continued on page 19)

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## Bureau of Customs & Border Protection Returns Goods

(Continued from page 18)

Furthermore, with regard to the Iraqi items, Crittenden argued that the purpose of the regulation (which was to cut Iraq off from the benefits of international commerce following the Gulf War) was no longer valid after the fall of Saddam Hussein's regime and the Bush administration's recent successful efforts to have the United Nations drop economic sanctions against Iraq. Crittenden also argued that the particular items in question were not purchased in Iraq and had no economic value; therefore, even if circumstances in Iraq had not changed, restricting the importation of such items would not serve the purpose behind the regulation.

### *Customs Acquiesces in Part*

On July 17, 2003, Customs granted Crittenden the majority of the relief he sought. In its letter of decision, Customs noted that, effective May 23, 2003, OFAC had amended its regulations to allow for greater freedom in commerce between the United States and Iraq. While Customs indicated that the new regulations did not, on their face, apply to Crittenden, because he had imported items prior to their effective date, Customs went on to state that "on June 9, 2003, [OFAC] advised U.S. Customs that certain Iraqi items seized prior to May 23, 2003, may be released from seizure." Under this grant of permission from OFAC, Customs released all but one of the items whose return Crittenden sought.

Crittenden recovered his property and that of the *Herald* on July 24, 2003. The only item sought but not returned was a canvas painting of Saddam Hussein, which Crittenden had found abandoned in Baghdad during a period when such paintings were being publicly destroyed by Iraqis. Customs found that, notwithstanding the recent changes to the regulations, the painting did not meet its conditions for importation without OFAC approval. In response to this determination, Crittenden has recently sought a license from OFAC to import the painting for the purpose of donating it to a charitable veterans' organization; he has also filed a supplemental petition with Customs to prevent the forfeiture of the painting pending a response from OFAC. A decision regarding Crittenden's request for a license has yet to be issued.

*Jeffrey P. Hermes is an associate with the Boston office of Brown Rudnick Berlack Israels LLP. Mr. Hermes and Brown Rudnick Berlack Israels LLP represent Jules Crittenden in this matter.*

## New Jersey Judge Gags Attorneys in Employment Case

In an extraordinarily extensive court order, a New Jersey judge has sealed an opinion that denies a request made by ABC, Bloomberg News and *The Record* of Hackensack, NJ for access to documents and proceedings in a controversial case against Prudential Insurance Co. Although no formal seal was entered during the proceeding, the law clerk for Essex County Superior Court Judge Theodore Winard said in a published report that the judge's two rulings against opening hearings and the court file also barred lawyers involved in the case from commenting on those proceedings.

According to a report by the New Jersey Law Journal, the Appellate Division denied ABC's motion for leave to appeal on an emergent basis; now, ABC and the other media companies must endure the conventional appeals process and its accompanying timetable. See *New Jersey Law Journal*, Sept. 1, 2003, at 1.

Lawrence Lederman, the plaintiff in the underlying case, *Lederman v. Prudential Securities Co.*, is a former sales agent for Prudential. He claims the insurance giant duped him and more than 300 other former and current Prudential employees into entering a rigged alternate dispute resolution program. The lawsuit alleges that Prudential engaged in collusion with the law firm Leeds, Morelli & Brown, which was supposed to represent the employees in the ADR program. According to the lawsuit, the law firm agreed with Prudential to limit Prudential's payout in settlements with employees while receiving a \$5 million retainer to handle the ADR process.

The ADR program was allegedly adopted by Prudential to silence whistleblowers, like Lederman, from publicizing their claims that the company engaged in a policy of "redlining," or encouraging sales agents to abandon offices in urban, minority neighborhoods and relocate to wealthier suburban areas.

Prudential claimed that the court records must remain secret because Lederman signed a confidentiality agreement regarding the ADR process. The court apparently has accepted that argument. However, the media companies are expected to argue that the broad sealing of all documents relating to this case violates the First Amendment.

For the media: Nathan Siegel, ABC, Inc., Washington, D.C.; Bruce Rosen, McCusker, Anselmi, Rosen, Chatham, NJ.

## Arrest and Search Warrants Sealed in Kobe Bryant Case

Upon returning from summer vacation, the Honorable Frederick Gannett wasted little time in rejecting an application to unseal the arrest warrant and search warrant affidavits in the Kobe Bryant proceedings. On August 21, the Eagle County judge issued a 15-page decision outlining his reasoning for why the documents should remain hidden from public and media view. Shortly thereafter, attorneys for the five media companies involved in the application (The Denver Post, The Los Angeles Times, The Orange County Register, NBC, KNBC-TV and CNN) filed a Notice of Appeal.

Judge Gannett applied a two-step First Amendment analysis that was originally set forth in *Press Enterprise v. Superior Court*, 499 US 1 (1986) (Press Enterprise II). The first step of the test requires a judge to determine whether the “place and process” in question have historically been open to the press and general public; and whether public access helps facilitate the “process” in question. If the answer is yes on both accounts, then a First Amendment right of access attaches.

However, Judge Gannett found that historically warrants issued in ex parte proceedings and the process in which those warrants are executed have not been open to the public. Thus, no First Amendment right should attach. The media’s attorneys dispute this supposition and have asked the appellate court to review. This first finding seemingly would have been sufficient to deny the application without further consideration, yet Judge Gannett addressed each part of the Press-Enterprise II analysis exposing himself to greater scrutiny on appeal.

The second step of the test is to balance a defendant’s rights against countervailing First Amendment interests. Here, the court must compare Bryant’s right to a fair trial with free speech by the press. According to the Press Enterprise II court, a preliminary hearing in a criminal case could be closed if there is a substantial probability that the defendant’s right will be prejudiced and there are no reasonable alternatives that could adequately protect those rights. Attorneys for the applicants disagree with the use of this standard; they argue that the standard set forth in *Star Journal Publ’g Corp. v. County Court*, 591 P.2d 1028 (Colo.

1979) controls. Under the *Star Journal* framework, a court should not close a preliminary hearing unless there is a “clear and present danger” to the defendant’s fair trial rights and no reasonable alternatives to protect that right.”

Judge Gannett rejected the media’s request to use a clear and present danger standard and in so doing, he arguably declined to apply the doctrine of stare decisis. Instead, Judge Gannett borrowed the current Standard 8-3.2, ABA Stands for Criminal Justice, Fair Trial and Free Press, and implemented a less stringent “substantial likelihood” test. Attorneys for the media have asked the district court to review this issue.

Judge Gannett observed that much of the information contained in the warrant affidavits did not relate to a showing of probable cause, and thus was not likely to be introduced at the preliminary hearing, yet was extremely prejudicial to Bryant. Additionally, the court found that “no reasonable alternative exists which will ameliorate the possible prejudice of disclosure of the search warrant materials and the arrest warrant.” Judge Gannett decided that neither the redaction of prejudicial information in the affidavits nor a change of venue and voir dire would be an effective alternative means to protect Bryant’s fair trial rights.

Ultimately, the court determined that the release of the sought-after warrant materials which “contain unnecessarily prejudicial and inflammatory material” would result in a barrage of around-the-clock analysis by legal experts and lead to more extensive televised speculation about legal strategies from both camps. Judge Gannett found that such ubiquitous media coverage would make it extremely difficult to conduct a fair trial and could lead to further harassment of the accuser. Therefore, the court concluded, there is a substantial probability that Kobe’s right to a fair trial would be prejudiced by disclosure of the affidavits and search warrant materials.

Steven Zansberg, Tom Kelley, and Chris Baell of Faegre & Benson’s Denver office represent the news media entities in appealing the denial of the media’s application to unseal court records in the Kobe Bryant case.

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***Judge Gannett rejected the media’s request to use a clear and present danger standard and in so doing, he arguably declined to apply the doctrine of stare decisis.***

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## Houston Court Closes Pretrial Hearings in Enron Criminal Case

### *Houston Chronicle files Fifth Circuit Mandamus to Open Court and Unseal Transcripts*

By Bill Ogden

A district judge in Houston unilaterally closed three pretrial hearings in the criminal trial of three former Enron executives. The case involves wire fraud and money laundering charges against former Enron Chief Financial Officer Andrew Fastow, former Enron treasurer Ben Glisan, Jr., and former Enron executive Dan Boyle.

Closure of the hearing has been challenged by the *Houston Chronicle*, which filed a Petition for Writ of Mandamus in the Fifth Circuit on September 3, 2003. The Fifth Circuit appointed a panel and called for responses from the parties in the case, which were filed September 8.

The controversy began with a routine pretrial hearing in *U.S. v. Fastow* scheduled for July 28, 2003. Lawyers for the parties appeared in the courtroom of the Honorable Kenneth M. Hoyt at 2:30 p.m. in the afternoon, joined by a number of observers and reporters, including *Houston Chronicle* reporter Mary Flood. Without notice, and without any apparent request by any party, counsel for all parties were called from open court to conduct the pretrial hearing in chambers. Judge Hoyt's court coordinator announced to the courtroom that the proceedings were closed. Reporters attempted to ask the lawyers about developments in the case after the hearing had concluded, but all of the lawyers declined to comment. The *Chronicle* reporter asked for a transcript of the July 28 hearing, but the transcript was sealed.

#### ***Chronicles Motion to Unseal***

The *Chronicle* promptly filed a motion to unseal the transcripts, and for access to future pretrial proceedings, requesting an expedited hearing. After a week, Judge Hoyt set a hearing on the access motion for August 26. On that morning, Ms. Flood observed counsel for the parties in the case gathering for what appeared to be addi-

tional hearings. The prosecutors met in Judge Hoyt's chambers with Defendant Glisan's counsel at approximately 11:30 a.m. Ms. Flood appeared with counsel and requested permission to attend, which was denied. Again at 1:30 p.m. on August 26, counsel for all parties gathered in open court, and were again called back for a hearing in a private conference room. Ms. Flood and counsel for the *Houston Chronicle* objected and requested leave to attend, but were instructed that the hearing was closed. When the reporter and lawyer waited outside the hallway for approximately 15 minutes, three court security officers appeared and told them they must vacate the hallway or risk incarceration.

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**As *Houston Chronicle* editor Jeff Cohen remarked, "There is no embarrassment exception to the First Amendment."**

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The hearing on the *Chronicle's* original access motion finally began at 3:00 p.m. on August 26. The *Chronicle* verbally amended the motion to object to closure of the two other hearings on August 26, and requested that transcripts of those hearings be unsealed as well.

No evidence was offered by any party at the access hearing. No argument was offered by anyone other than counsel for the *Houston Chronicle*. No party requested closure in open court, although the defense counsel either agreed with the court's procedure or deferred to the court's discretion. The prosecutors did not oppose the *Chronicle's* motion.

#### ***Court Rationale Ignores First Amendment***

In defending his action, Judge Hoyt merely announced that the closed proceedings involved routine administrative matters in which the public had no interest:

"[T]hese are pretrial matters or pre-discussion matters concerning how we get our arms around a case of this significance in terms of its magnitude of discovery — are matters that do not need to be discussed and talked about in public in a way that embarrasses or humiliates the government or the defense, and particularly the Court."

*(Continued on page 22)*

### Court Closes Pretrial Hearings in Enron Criminal Case

(Continued from page 21)

As *Houston Chronicle* editor Jeff Cohen remarked, “There is no embarrassment exception to the First Amendment.” In its Orwellian ruling, the Court admonished the *Chronicle* not to be concerned “about matters that the public doesn’t have an interest in until that interest materializes. There has been no materialization of any matter, and therefore, there is nothing that needs to be reported.” Although the Court refused to unseal the transcripts of the closed hearings, the Court *denied* that it was denying the *Chronicle’s* access motion. Instead, the Court indicated that at sometime in the indefinite near future, probably 15 to 30 days, the matters in the access motion would “become moot.” With no further explanation, the Court adjourned the access hearing.

### Appeal to Fifth Circuit

The *Chronicle* filed a Petition for Writ of Mandamus in the Fifth Circuit, seeking to set aside the sealing orders and restore access. The *Chronicle* argued that the First Amendment subjects sealing orders to strict scrutiny, and accordingly, the District Court was required to establish, in findings clearly articulated on the record, (1) that closure was essential to serve a compelling government interest, and (2) that there was no less restrictive alternative. Since no party requested closure, no party articulated a compelling interest, and there was no consideration of less restrictive alternatives, the *Chronicle* argued that the constitutional safeguards were simply ignored.

The Fifth Circuit assigned the *Chronicle’s* petition to a three judge panel consisting of Judge Jerry Smith, Judge Harold DeMoss, and Judge Carl Stewart. The defendants filed responses to the mandamus, arguing essentially that the closed hearings concerned routine administrative matters to which the presumptive right of access did not apply. The United States filed a response in which it again did not oppose access, but argued that the correct procedure for review in the Fifth Circuit was by appeal, rather than by mandamus. An amicus brief in support of the *Chronicle’s* mandamus was filed on behalf of the *New York Times*, the *Washington Post*, the *Wall Street Journal*, the Associated Press, *Forbes*, and *USA Today*. The matter remains pending in the Fifth Circuit.

The *Houston Chronicle* is represented by Bill Ogden of Ogden, Gibson, White, Broocks & Longoria, L.L.P. in Houston, Texas. The Amici are being represented by David Donaldson and Pete Kennedy with George & Donaldson, L.L.P. in Austin, Texas.

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## Access Developments in Peterson Murder Case

By Alonzo Wickers IV and Rochelle L. Wilcox

The California courts have afforded the media and the public limited access to information about the prosecution of Scott Peterson for the murders of his wife Laci and their unborn child.

### *Access to Search Warrants*

The most active issue has involved access to search warrants and related information. In two unpublished decisions, the California Court of Appeal has refused to give the media and public access to these documents. Although the court's primary concern has been pretrial publicity, and the possibility of tainting the jury pool in a relatively small county, it also has expressed concern about any ongoing investigation and the adverse effect disclosure might have if the crimes in fact were committed by someone other than Peterson.

The pre-arrest search warrants originally were ordered sealed by Judge Roger Beauchesne on April 10, 2003 – several days before the victims' bodies were found and Peterson was arrested – to protect the government's ongoing investigation. Although the trial court ordered the warrants to be unsealed on July 9, 2003 or when a criminal complaint was filed, whichever occurred first, they were not released on April 21, when Peterson was arrested.

On May 5, the Court of Appeal issued its decision affirming Judge Beauchesne's order to the extent that it sealed the search warrants, but reversing that part of the order that permitted their future release. The reviewing court found that the order was "so fundamentally inconsistent with the Findings as to constitute a manifest abuse of discretion." It explained:

A criminal investigation does not automatically cease upon the filing of a complaint or upon the passage of an arbitrary period of time. The Findings themselves implicitly recognize that the investigation would likely continue for a substantial period of time, certainly more than the 11 days which elapsed before the complaint was filed.

The court went on to state that the enunciated harm to the investigation "would conceivably disappear only if the complaint was filed against the actual perpetrator or perpetrators," but that there could be no guarantee that it was.

In an *in camera* hearing on June 12, Judge Beauchesne reconsidered the sealing order. After receiving evidence, the court concluded that "[t]he People have not produced any evidence since Mr. Peterson's arrest to indicate they are investigating other suspects." He found that "[t]here has been a showing of a change in circumstances which justifies unsealing," and he ordered the search warrants, affidavits and returns unsealed. However, he stayed his ruling pending possible review by the Court of Appeal.

The Court of Appeal issued its decision on July 30, reversing Judge Beauchesne's June 12 order. It held that Peterson's arrest was "irrelevant to the concerns addressed by

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***Enunciating its concern about media coverage – and speculating that the media "frenzy" could render it impossible to find an untainted jury – the court ordered that the warrants remain sealed.***

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the Findings" because it was still early in the proceedings and a determination regarding Peterson's guilt will not be made for many months. Enunciating its concern about media coverage – and speculating that the media "frenzy" could render it impossible to find an untainted jury –

the court ordered that the warrants remain sealed. The media did not seek review of this decision by the California Supreme Court.

Issues regarding access to the autopsy reports and the remaining warrants – including the arrest warrant for defendant – were assigned to Judge Al Girolami, who is presiding over the case. Judge Girolami has been less willing than Judge Beauchesne to permit release of the warrants. In a May 30 order, Judge Girolami expressed his concern regarding the potential effects on the investigation if the warrants were released. He also stated that the pretrial publicity might prejudice public opinion. Judge Girolami found that "[t]hese two related interests are identified as overriding interests," and ordered that all of the documents remain sealed in their entirety. On June 27, he granted a motion to seal a newly-filed search warrant, based on the same considerations. He has not been presented with another request to seal or to release the warrants or related information.

*(Continued on page 24)*



## Recent Developments in California v. Peterson

*(Continued from page 23)*

### ***Access to the Preliminary Hearing***

The media had mixed success in its bid for access to the preliminary hearing, at which the court will determine whether there is adequate evidence against the defendant to warrant a trial. The prosecution will present its evidence of defendant's guilt and the defendant will be permitted to challenge that evidence. The defendant asked Judge Girolami to close the preliminary hearing, arguing that the same considerations that the court relied on to seal the search warrants also supported his closure request. The media responded that the defendant's arguments for closure were speculative and similar to concerns enunciated in most other high-profile cases, although courts rarely find that they justify closure. Judge Girolami agreed with the media and found that defendant had not met his burden for closing the hearing. The court pointed out, however, that he might close specific portions of the hearing if defendant makes the necessary showing.

But the court denied the media's request to televise the preliminary hearing. Judge Girolami acknowledged that he had permitted television coverage of other hearings in the case, which primarily involved procedural issues. He explained that the preliminary hearing "is an entirely different proceeding" because of witnesses' privacy rights. In addition – a factor which evidently was very compelling to him – the preliminary hearing "involves the victims' families who will be forced to relive their worst nightmare in a very public way, which unfortunately is necessary to the process." The court gave significant deference to the family's wish that the preliminary hearing not be televised. Finally, the small size of Stanislaus County – where the trial is pending – also contributed to the court's decision to deny camera access. Judge Girolami expressed his belief that having an open but untelevised hearing would sufficiently protect the public's interest in an open hearing without compromising these and other countervailing interests.

### ***Protective Order***

On June 12, Judge Girolami issued a broad protective order, prohibiting the parties and their agents, along with "any persons subpoenaed or expected to testify in this matter," from releasing information to the press. The court discussed the extensive publicity the case has received,

which it found to be "especially troubling as it often involves leaks of information that could be considered favorable for one side or the other." The court issued the order, notwithstanding the defense's opposition to it, citing *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966). The court found that "there is a clear and present danger because of the modern media's capability easily to store and recall bits of information in order to relate them at any time including during jury selection." The court acknowledged the public's right of access to the proceedings and the participants' right of free speech, but found that the balance weighed in favor of the protective order.

### ***Access to Intercepted Communications***

In May, members of the media received notices that their communications with Peterson had been intercepted by government wiretaps. California law limits the government's right to intercept privileged communications. The media, relying on the First Amendment qualified privilege and California's Shield Law, requested access to their communications in anticipation of arguing that the communications were privileged and should not have been intercepted. Judge Girolami rejected the media's request, finding that the communications were not privileged and consequently that the government was entitled to intercept them. He ordered the communications released to the prosecution and the defense. The California Court of Appeal and Supreme Court both refused to review Judge Girolami's decision. However, Judge Girolami ultimately granted the media access to their communications, after they had been reviewed by the prosecution and the defense.

Defendant is represented by Mark Geragos, Los Angeles, California, and Kirk McAllister, Modesto, California.

The media are represented by Kelli Sager, Alonzo Wickers, Duffy Carolan and Rochelle Wilcox, Davis Wright Tremaine, Los Angeles, San Francisco and Sacramento, California, and by Charity Kenyon, Riegels Campos & Kenyon LLP, Sacramento, California.

*Mr. Wickers (partner) and Ms. Wilcox, (associate), Davis Wright Tremaine LLP, Los Angeles, California, along with their colleagues Kelli Sager and Duffy Carolan, have represented a group of media entities, including NBC, CBS, ABC, CNN, Court TV, and the McClatchy Company, in most of the proceedings reported in this article.*

## NY Times Wins Access to 9/11 Tapes

By David McCraw

The New York Times' long dispute with the Port Authority of New York and New Jersey over access to 9/11 materials – a dispute that wended its way through two federal courts and a state court – came to an end in late August when the Port Authority released radio transcripts and other documents chronicling emergency operations at the World Trade Center the morning of the terrorist attack.

The Port Authority, a bi-state agency created by the New York and New Jersey legislatures, has long contended that it is subject to neither the Freedom of Information Law in New York nor the Open Public Records Act in New Jersey. Whether that is so still remains an open question, but the issue played a pivotal role in the dispute with The Times. The case also involved the unusual question of whether a public agency that enters into an agreement to settle a freedom-of-information suit can later back out of the deal.

### ***Port Authority Stalls on FOI***

The strange and twisting path of this litigation began simply enough in March of 2002, when Times reporter Jim Dwyer filed a request for 9/11 materials with the Port Authority, which owned the World Trade Center. The Port Authority has an internal freedom-of-information policy modeled roughly on the New York Freedom of Information Law. While the Port Authority asserts an exemption to both states' freedom-of information statutes – based on its claim that, as a bi-state agency, it is not an agency of either state – it purports to honor its own FOI policy.

The Port Authority initially declined to produce any documents, saying that copies of all of its 9/11 materials had been turned over to the prosecutors in the Zacarias Moussaoui case and were therefore confidential under an order issued in the Eastern District of Virginia, where Moussaoui is being prosecuted.

In September of 2002, The Times filed a motion in *United States v. Moussaoui* asking the court to clarify whether its confidentiality order bound the Port Authority. The Times argued in its papers that the order, on its face, applied only to the parties before the court.

Before the motion could be heard, the U.S. Attorney's Office entered into a settlement with The Times. Prosecutors told The Times that, after reviewing the Port Authority materials, they had decided only a few documents were likely to be used in the prosecution. Under the settlement agreement, The Times agreed not to seek those documents (ultimately, three police reports) from the Port Authority, and the prosecutors agreed to inform the Port Authority that they had no objection to the release of all other materials.

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***While the Port Authority asserts an exemption to both states' freedom of information statutes – based on its claim that, as a bi-state agency, it is not an agency of either state – it purports to honor its own FOI policy.***

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In response to that settlement and in the midst of a public dispute over whether the Port Authority's radio transmission system in the WTC failed New York City firefighters, the Port Authority immediately released to The Times the audiotape (and a transcript) of radio transmissions of the New York City Fire Department that were recorded on the Port Authority system. On the recording, listeners could hear reports from firefighters who had made their way high up into the World Trade Center and were conducting rescue operations in the final minutes before the buildings collapsed. The tape provided important insights for Times' stories on conditions inside the buildings after the attacks and the conduct of rescue operations.

As for the other 9/11 materials, the Port Authority stalled, repeatedly telling The Times that it was reviewing the requested tapes and documents and would later render a decision under its internal FOI policy. Ignoring the policy's requirement of a "prompt" determination, Port Authority officials told The Times that the transcription of the radio calls was slow work because listening to the tapes was emotionally provocative for the authority's staff.

*(Continued on page 26)*

## NY Times Access to 9/11 Tapes

*(Continued from page 25)*

### ***New Strategy Brings Settlement***

In March, The Times decided to switch its legal strategy. Research suggested that, under New Jersey state cases and the definition of “agency” contained in the recently amended New Jersey OPRA, the Port Authority would be deemed a New Jersey state agency subject to OPRA’s disclosure requirements. The Times submitted a new document request to the Port Authority, this time framing it as an OPRA request.

The Port Authority predictably responded that it was not a New Jersey agency and therefore not subject to OPRA. In June, The Times filed suit in Superior Court, Bergen County, seeking the materials under OPRA and the New Jersey common-law right of access.

Almost immediately, the general counsel of the Port Authority entered into settlement discussions with David McCraw of The Times’s legal department. In July, following weeks of discussions, they reached an agreement under which the Port Authority would release to The Times by August 18 the transcripts – but not audiotapes – of the radio calls made by Port Authority employees. The Port Authority also agreed to issue a decision on The Times’ request for other 9/11 documents. Under the agreement, The Times reserved the right to return to court to seek any materials withheld. The Port Authority also built into the agreement several weeks of time so that it could contact employees and survivors of employees and allow them a chance to read the transcripts prior to release.

That appeared to be end of things – until the Port Authority suddenly decided to repudiate the agreement on July 30. The general counsel of the Port Authority said that he had been overruled by senior executives who believed release of the materials would violate the privacy interest of employees and the family members of those who died in the World Trade Center.

The Times quickly went back to Judge Sybil Moses in Superior Court with an emergency motion asking her to enforce the parties’ settlement agreement. Judge Moses set an abbreviated briefing schedule and ordered

oral argument on August 20. In a particularly strange and desperate maneuver, the Port Authority removed the case to the U.S. District Court on the theory that enforcement of the settlement agreement was a “federal question” arising under the First Amendment.

Simultaneously, the Port Authority launched a PR campaign criticizing The Times for its “insensitive” document request. The agency claimed The Times wanted to print the dying words of Port Authority employees.

### ***Port Authority Bound By Agreement***

U.S. District Court Judge Joel Pisano agreed to hear The Times’ motion to remand on two days’ notice and, in a ruling from the bench, returned the matter to Judge Moses. The Times continued to press for a quick oral argument and – despite the time constraints and the blackout of August 14 – Judge Moses heard the case on August 21.

The Port Authority’s brief presented an astonishing array of legal theories: that the agreement made by its general counsel violated public policy, that family members of victims had a due process right to be heard before documents could be released, that the family members had a “proprietary interest” in the Port Authority’s materials, and that release of the materials would violate the constitutional right of privacy of employees and surviving relatives.

In the end, Judge Moses declined to consider those claims and instead focused on whether there was a valid agreement. Because the Port Authority had introduced no evidence to controvert The Times’s showing that an agreement had been reached after much negotiation – negotiation involving the Port Authority’s senior-most legal officer – she ruled the day after the hearing that the agreement was binding and should be enforced. She also found that the settlement agreement had been incorporated by reference into the court’s order of dismissal and therefore could be enforced through a summary proceeding.

*(Continued on page 27)*

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***The Port Authority launched a PR campaign criticizing The Times for its “insensitive” document request.***

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### NY Times Access to 9/11 Tapes

(Continued from page 26)

The Port Authority decided not to appeal and the materials were released on August 28 – after one last round of threatened legal action, this one from a Port Authority union that was upset that the Port Authority had failed to notify all employees and surviving relatives, as it had promised to do. In the end, the union decided not to seek a delay in the release of the materials.

### Times Gets More Than it Requested

The released documents actually exceeded The Times' request and included transcripts of phone calls and handwritten statements made by Port Authority employees in the aftermath of 9/11. In addition, the Port Authority agreed to release transcripts for 160 additional hours of tape recently found by the Port Authority at La Guardia Airport by December 31, 2003.

Despite the Port Authority's dire warnings of the harm that would be inflicted on 9/11 survivors, the stories that were published and broadcast after the release repeatedly reported on families who were pleased that the materials had been made public. Stories and editorials based on the released materials praised the bravery and compassion of Port Authority employees.

### Exclusivity Period for New York Times Controversial

The case also raised, but did not resolve, an interesting secondary issue: whether an agency can agree to give an exclusivity period as part of a settlement of freedom-of-information litigation. Under the agreement entered into by the Port Authority, The Times was to have exclusive access to the materials for either two weeks or until The Times published any part of the materials, whichever came first.

The Times believed that such an arrangement was necessary to put the paper into the position it would have been had the Port Authority done what it was supposed to do in the first place: release the materials so The Times could publish its stories, at which points others would know about the materials and file their own requests. The exclusivity agreement also addressed the often-troubling fact that many news organizations free-ride off their competitors that are willing to devote time and resources to litigating access matters.

When other media organizations complained about the arrangement, The Times agreed to remove the provision in

the final order of Superior Court, and the materials were released generally to the public and the press on August 28.

The Port Authority was represented by Christopher Hartwyck of its in-house legal staff.

*David McCraw, in-house counsel for The Times, represented The Times, with Jay Ward Brown of Levine Sullivan Koch & Schulz of Washington, D.C. (in the Moussaoui motion in the Eastern District of Virginia) and Bruce Rosen of McCusker, Anselmi, Rosen, Carvelli & Walsh of Chatham, N.J. (in the New Jersey state and federal litigation).*

### Committee Will Not Press For Release of Classified Report Section

While the gist of the section has been widely reported, the Senate Select Committee on Intelligence has affirmed the decision not to release a classified 27-page section of its report on the causes of the 9/11 terrorist attacks. Although the section was classified at the request of the Bush Administration, the committee is empowered to release the information after determining "that the public interest would be served by such disclosure." See S. Res. 400 (94th Cong., 1976), § 8. According to the Federation of American Scientists, the committee has never exercised this power.

A number of senators from both political parties have called for release of the section, including the senators who led the investigation, former committee chair Sen. Bob Graham (D-Fla.) and former committee vice chair Sen. Richard Shelby (R-Ala.). The government of Saudi Arabia, citizens of which are reportedly implicated as supporters of the terrorist attacks in the classified section, has also called for release of the redacted section.

But in a Sept. 9 letter to Graham, committee chair Pat Roberts (R-Kan.) and vice chair John D. Rockefeller IV (D-W.Va.) stated that "release of additional information from [the classified section] could adversely affect ongoing counterterrorism efforts." The full text of the letter is available at <http://www.fas.org/irp/news/2003/09/ssci090903.html>.

The letter states that the rationale for not disclosing the section is based on a closed hearing on Sept. 4 at which the committee heard testimony from CIA Director Robert Mueller and Deputy Director John McLaughlin.



## Half of FOIA Officials See No Change Under New Policy, But One-Third Do 2001 Ashcroft Memo Imposed Lesser Standard For Withholding Government Information

Almost half (48 percent) of the Freedom of Information officers at federal agencies say that a lower standard for keeping government information from the public, announced in a Oct. 12, 2001, memorandum from Attorney General John Ashcroft to the heads of all federal agencies and departments, has not resulted in a significant change in the amount of information released by their agencies. Almost two-thirds (62 percent) said that they had seen no change in the use of particular FOIA exemptions as justification for decisions to withhold government information.

But almost a one-third (31 percent) of the officials in a survey by the General Accounting Office said that their agencies released less information under the new policy, and three-quarters (75 percent) of these said that the new policy was a cause of the decline in information released. Two-thirds (67 percent) cited privacy concerns as a reason for the decline, and about the same share (65 percent) cited concerns that information was critical infrastructure information or otherwise involved homeland security issues.

Meanwhile, 6.6 percent said that the amount of material released has increased under the new policy, albeit most said that the volume of material withheld has increased only modestly or slightly.

The policy states that the Justice Department will defend FOIA denials as long as the agency could show a "sound legal basis" for the denial. This replaced a standard imposed in 1993 by then-Attorney General Janet Reno, which stated that information should be released unless its release could lead to "foreseeable harm." See *LDRC LibelLetter*, Oct. 2001, at 55. The Ashcroft memo is available at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

A quarter (25 percent) of the officials said that they had seen increased use of FOIA exemptions to withhold information. Of these respondents, almost two-thirds (62 percent) said that the new Ashcroft policy was the cause, while half (50 percent) cited critical infrastructure or homeland security concerns.

Almost of all the officers were aware of the policy shift: 88 percent had read the Ashcroft memo. Twenty

of the agencies distributed the memo to FOIA personnel, and eleven distributed supplemental material on applying the new standard. But only four agencies reported that they had elaborated on the criteria used to evaluate information disclosures under the new policy.

The GAO survey questioned 189 information officers at 23 of the 25 agencies that handle 97 percent of Freedom of Information Act requests. All but one of the agencies also responded to a questionnaire for the agency as a whole.

The report was requested by Sen. Patrick Leahy, ranking minority member of the Senate Judiciary Committee. It is available online at <http://www.fas.org/sgp/foia/gao-03-981.pdf>.

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## Supreme Court Considers Scope of Freedom of Information Act Exemption

By Elaine J. Goldenberg

In the upcoming months, the Supreme Court will hear and decide *Office of Independent Counsel v. Favish*, No. 02-954, an important Freedom of Information Act (“FOIA”) case that raises issues of serious concern to journalists, writers, and other members of the public who wish to use the FOIA to obtain information in the possession of the federal government. At issue in the *Favish* case is a FOIA request for a number of photographs of the body of former Deputy White House Counsel Vincent Foster taken at the scene of his death – photographs that were an important part of the various government inquiries into the death, which occurred at a time when Foster was in possession of information involving ongoing investigations of high-level government officials. In deciding this case, the Court may well decide a number of questions that will have implications reaching far beyond the facts of the case itself:

- how broadly the “public interest” served by FOIA should be construed,
- whether the “personal privacy” interest protected by the statute extends beyond individuals actually discussed or depicted in government records to cover family members or other third parties, and
- how courts should go about balancing public and private interests in a particular case.

### **Exemption 7(c)**

Although the FOIA embodies a general principle in favor of disclosure, it also includes nine specific exemptions that permit the government to withhold requested information under certain narrowly defined circumstances. One of these exemptions, exemption 7(C), protects from disclosure

“records or information compiled for law enforcement purposes, . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

5 U.S.C. § 552(b)(7)(C). This exemption requires the court to undertake a balancing of the public interest in disclosure of requested information against the countervailing interest in keeping that information private. See, e.g., *United States Dep’t of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 497 (1994). Under existing Supreme Court precedent, the public interest in this context is whether disclosure

“would she[d] light on an agency’s performance of its statutory duties or otherwise let citizens know what their government is up to.” *Id.*

In *Favish*, the government is relying on exemption 7(C) as the basis for its refusal to disclose the requested photographs. Supported by members of the Foster family, the government claims that the release of the photographs

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**Supported by members of the Foster family, the government claims that the release of the photographs would constitute an “unwarranted invasion” of the “personal privacy” not of Foster himself, but of Foster’s surviving relatives.**

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would constitute an “unwarranted invasion” of the “personal privacy” not of Foster himself, but of Foster’s surviving relatives, 5 U.S.C. § 552(b)(7)(C) – and, indeed, that there is no cognizable public interest at all in such a release. To support its argument, the government is urging the Court to adopt a restrictive test for determining whether there is a public interest to be weighed in the exemption 7(C) balance. According to the government, in cases in which the asserted public interest is one in exposing government misconduct, there is simply no interest in learning what the government is up to unless the requester has “identif[ied] new (as opposed to already refuted), credible, and objectively reasonable evidence of [government] misfeasance.” Gov’t Br. at 38, *Favish* (No. 02-954).

According to the government, in cases in which the asserted public interest is one in exposing government misconduct, there is simply no interest in learning what the government is up to unless the requester has “identif[ied] new (as opposed to already refuted), credible, and objectively reasonable evidence of [government] misfeasance.” Gov’t Br. at 38, *Favish* (No. 02-954).

### **Broad Exemption Would Impede the Press**

The issues raised by the case are of significant importance to the news media, for which the FOIA is an important tool in ferreting out information found in government records. The government frequently asserts exemption 7(C) in response to requests for law enforcement records, a category that encompasses a wide variety of information that may be

*(Continued on page 30)*

## Supreme Court Considers Scope of FOIA Exemption

*(Continued from page 29)*

of interest to the media and to the public at large. Although the FOIA is intended to ensure the “informed citizenry” that is “vital to the functioning of a democratic society,” a broadly interpreted exemption 7(C) could present a considerable obstacle to journalists, investigators, and writers who seek to disseminate such information to the citizenry. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also id.* (noting the need to “check against corruption and hold the governors accountable to the governed”). *See generally Estes v. Texas*, 381 U.S. 532, 539 (1965) (recognizing that the news media have been “a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences”).

Due to the importance of the issues involved, a number of media-related organizations filed amicus briefs in support of respondent Favish, arguing in favor of a narrow interpretation of exemption 7(C). The Reporters Committee for Freedom of the Press, along with seven other amici (including an organization that supports freedom-of-information coalitions in more than 30 states and a number of associations that represent reporters, editors, news executives, and communicators), filed a brief contending that the government’s proposed public interest test is inconsistent with the FOIA and that the significant public interest in disclosure of the photographs outweighs any privacy interest of Foster’s family, which is diminished by the extensive release of information about Foster’s death that has already taken place. In addition, the Silha Center for the Study of Media Ethics and Law filed an amicus brief contending that the privacy interests protected by the FOIA do not encompass the third-party “survivor” interests upon which the government relies in this case.

The Court’s decision in the case is expected in 2004.

Theodore B. Olson, Solicitor General, Washington, D.C., for Petitioner.

Allan J. Favish, Santa Clarita, CA, for Respondent Favish.

James Hamilton, Swidler Berlin Shereff Friedman, LLP, Washington, D.C., for Respondents Sheila Foster Anthony and Lisa Foster Moody.

Deanne E. Maynard and Elaine J. Goldenberg, Jenner & Block, LLC, Washington, D.C., for amici Reporters Committee for Freedom of the Press, American Society of Newspaper Editors, Radio-Television News Directors Association, Society of Professional Journalists, Association of Alternative Newsweeklies, National Press Club, Investigative Reporters and Editors, Inc., and National Freedom of Information Coalition.

Jane E. Kirtley, Minneapolis, MN, for amicus Silha Center for the Study of Media Ethics and Law.

Parker D. Thomson, Hogan & Hartson, Miami, FL, for amicus Teresa Earnhardt.

*Elaine J. Goldenberg is with Jenner & Block, LLC in Washington, D.C., and filed the amicus brief in this case on behalf of the Reporters Committee et al.*

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## Legislative Affairs Rundown

### Kevin Goldberg

After returning from its month-long Summer recess, Congress is now expected to work for about two more months before adjourning at the end of October. Although the number of media-related bills that have been introduced in 2003 is very small (and their impact even smaller), there is still time for the following legislation to make a late summer splash:

### ***Restore FOIA Act (S 609 / HR 2526)***

- Introduced in the Senate on March 12, 2003, with 5 original co-sponsors: Sens. Patrick Leahy (D-VT), Carl Levin (D-MI), Robert Byrd (D-WV), Joseph Lieberman (D-CT) and Jim Jeffords (I-VT). They have been joined by Senator Bob Graham (D-FL). On June 19, 2003, Rep. Barney Frank (D-MA) introduced the companion measure in the House.
- The Restore FOIA Act seeks to amend the sections of the Homeland Security Act of 2002, which allows private entities to submit information related to protection of the nation's critical infrastructure (mainly in the area of cybersecurity as it affected our nation's banking, water, oil, transportation, energy, telecommunications, and other important industries) in exchange for a promise that the information will not be accessible to the public through a FOIA request and will not be used as evidence of liability in a civil lawsuit. Though the Restore FOIA Act will not repeal these sections of the Homeland Security Act, they will greatly limit the scope of the bill and the protections offered to private industry.
- The push for this legislation has taken on a new urgency with the impending release of the implementing regulations by the Department of Homeland Security. (see page 33 of this *MediaLawLetter*). That agency accepted comments on the proposed rules until June 16 and is expected to promulgate the final rules in the early Fall. An interesting side note to this proceeding is that the agency refused to even release filed comments for public review until met with an outcry of several media and other right-to-know organizations.

### ***Freedom to Read Protection Act (HR 1157 / S 1158)***

#### ***House Version:***

- Introduced March 6, 2003, by Rep. Bernie Sanders (I-VT). It has been steadily gaining momentum and now has 134 co-sponsors. The Senate version was introduced May 23, 2003, by Sen. Barbara Boxer (D-CA) and referred to the Senate Judiciary Committee which has taken no action on the bill. Senator Russ Feingold (D-WI) is also contemplating introducing a similar provision as an amendment to the appropriations bill for the Departments of Commerce, Justice and State.

*(Continued on page 32)*

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### Legislative Affairs Rundown

(Continued from page 31)

- This legislation will exempt libraries and booksellers from Section 215 of the USA Patriot Act. Section 215 states that the FBI can seek an order requiring the production of any tangible thing related to terrorism that is held by a business; it explicitly lists books, records, and other documents (including financial documents) as ripe for subpoena; the further catch is that the business receiving the subpoena is gagged from telling anyone that the documents have been requested. There is some question as to whether Section 215 would allow the search of a newsroom; there is nothing in that section, or the USA Patriot Act generally, which overturns, or even mentions, the Privacy Protection Act of 1980, which spells out the proper basis for a newsroom search. In any event, Rep. Sanders admits that his bill will have no applicability to newsrooms, if the USA Patriot Act applies to them.
  - At first glance, this bill may not appear to be of interest to MLRC members or your clients. However, the Department of Justice still has not officially expressed whether it believes Section 215 would apply to a newsroom search in a way that would modify the Privacy Protection Act of 1980 (in fact, it has unofficially expressed belief that it might allow for such searches). If the Department of Justice searches a newsroom under this provision of the USA Patriot Act, the news media might be spurred to lobby Rep. Sanders and his co-sponsors to amend
- Require that the government demonstrate probable cause before reviewing medical records, library records, or records involving the purchase of books, videos or music.
  - Require that any court order approving a wiretap contain either the location or identity of the proposed target.
  - Define with greater specificity the types of Internet usage and E-mail information that can be obtained, reducing government access to this type of content.
  - Provide for greater review of government requests for educational records.

their bill to prohibit such searches in the future. Rep. Sanders' staff has been very accessible and would be willing to listen to the news media's concerns.

Note, as well, that the American Civil Liberties Union has just filed a challenge to Section 215 of the USA Patriot Act, which may affect the need for, and vitality of, these bills.

### *Protecting the Rights of Individuals Act (S 1552)*

- Introduced August 1, 2003, by Sen. Lisa Murkowski (R-AK) and Sen. Ron Wyden (D-OR).
- This bill is intended to attack some of the overreaching provisions of the USA Patriot Act. Specifically, it would:
- There has not been much movement from this legislation since it was introduced. But introduction came just days before recess, which may have stalled its momentum out of the gate.

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or [kmg@cohnmarks.com](mailto:kmg@cohnmarks.com).

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## Media Groups Comment on Rules for Critical Infrastructure Information

The Department of Homeland Security's (DHS) proposed rule regarding the receipt, care and storage of Critical Infrastructure Information (CII) improperly broadens the rule to cover government agencies other than DHS; provides a means for private entities to shield non-critical information from public scrutiny; improperly leaves the determination of what is critical infrastructure information to private entities; and should not provide for criminal penalties against whistleblowers, according to comments by various journalism organizations in response to the proposed rule.

The Newspaper Association of America, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, Silha Center for the Study of Media Ethics and the Law and Society of Professional Journalists were among the 64 government agencies, industry and trade associations, public interest associations and others that submitted substantive comments in response to the proposed rule, which would implement Section 214 of the Homeland Security Act of 2002. *See MLRC MediaLawLetter*, April 2003, at 67.

In early September, DHS said that the rule would be finalized in a few weeks. The agency also indicated that it will provide public access to the comments via its website, although the organization OMB Watch has already posted the comments at <http://ombwatch.org/article/articleview/1774/1/18/>.

The proposed rule would provide stringent nondisclosure protections to any CII that is voluntarily submitted either directly or indirectly to DHS, including a blanket exemption from disclosure of such information under the Freedom of Information Act.

Additionally, the proposed rule makes no provisions for redacting critical infrastructure information and releasing the balance of CII submissions, and thus permits companies to include trace amounts of CII in submissions in order to prevent the entire submission from being disclosed. Because submitting corporations have the discretion to determine whether the volunteered information meets the definition of CII, the proposed rule may provide over-broad secrecy, civil immunity, preemption of state and local disclosure laws, and protection from whistleblowers to submitting corporations.

One federal agency, the Federal Energy Regulatory Commission (FERC), has already revised its regulations in order to limit disclosure of Critical Energy Infrastructure Information (CEII) submitted to the Commission and contained in its

files. *See* 68 Fed. Reg. 52089 (Sept. 2, 2003). All such submissions must be flagged, and the information placed in non-public file.

FERC's existing rules require companies making applications for the creation and abandonment of power facilities to disclose certain information to the public. Under the new rules, a company will not have to disclose information that it determines is CEII. People who want access to these files will have to make a request in writing to a designated CEII Coordinator, who may impose conditions upon the requester's use of the information, including the requirement that the requester sign a non-disclosure agreement. Determinations by the CEII Coordinator are subject to rehearing. The new rules will become effective Oct. 23, 2003.

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## More Post-9/11 Issues....

### *Newsroom Search Provision Unused, Ashcroft Says*

Amidst continuing complaints from librarians and civil rights groups, on Sept. 17 the Associated Press reported that Attorney General John Ashcroft, in a memo to FBI Director Robert Mueller, wrote that that "the number of times [that a controversial section of the USA PATRIOT Act allowing searches of materials and records held by entities including news organizations] has been used to date is zero."

In the memo, Ashcroft wrote that he had decided to release the information to "counter the troubling amount of public distortion and misinformation" regarding section 215 of the USA PATRIOT Act, which allows the FBI to seek an order for production of materials involving foreign intelligence or international terrorism from any source, including news organizations.

Prior to the USA PATRIOT Act, such orders could be issued by the Foreign Intelligence Surveillance Court only to obtain "business records" from common carriers, vehicle rental agencies, hotels and motels, and public storage facilities, as long as the FBI had "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." Pub. L. No. 105-272, 112 Stat 2396 (Oct. 20, 1998), § 602. Agents had to leave a copy of the warrant and a receipt for any material seized.

*(Continued on page 34)*

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**More Post-9/11 Issues....***(Continued from page 33)*

The USA PATRIOT Act amended this to allow orders covering “any tangible things” held by any person or entity, as long as the materials are sought for “an investigation to protect against international terrorism or clandestine intelligence activities” and the investigation “is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.” USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001), § 215, amending 50 U.S.C. § 1861. Also, the warrant need not be provided for 90 days, or ever. These amendments are scheduled to expire on Dec. 31, 2005. USA PATRIOT Act, § 224.

Last year, Assistant Attorney General Daniel J. Bryant wrote that under the new provision,

Such an order could conceivably be served on a public library, bookstore, *or newspaper*, although it is unlikely that such entities maintain those types of records (emphasis added).

Bryant made his statement in a written response to a letter from congressmen John Conyers, Jr. (D-Mich.) and F. James Sensenbrenner (R-Wis.) to Attorney General John Ashcroft seeking information on implementation of the Act.

Bryant’s statement creates an apparent conflict with the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, which generally prohibits federal and state investigators from search or seizing work product and other materials “possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.” The Privacy Protection Act provides various exceptions, including a national security exception, which may be invoked to obtain and serve an order on a newspaper or other media entity.

Disclosure of the memo came after Ashcroft toured several American cities to promote “understanding” of the USA PATRIOT Act. His first stop was a speech before the American Enterprise Institute in Washington, in which he said that “[i]t is critical ... for everyone to understand what the Patriot Act means for our success in the war against terrorism.” He continued:

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**Such an order could  
conceivably be served  
on a public library,  
bookstore, or newspaper**

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Armed with the tools provided by the Patriot Act, the men and women of justice and law enforcement have dedicated themselves to the unfinished work of those who resisted, those who assisted, and those who sacrificed on September 11th.

But criticism of the Act, and of section 215 in particular, continued. On July 22, the House of Representatives voted to deny funding to implement the provision, a position that will have to be reconciled with the Senate. See Roll Call No. 408 (107th Cong., July 22, 2003) (approving H.Amdt. 292 to H.R. 2799). And a week later, the American Civil Liberties Union and several Arab-American groups filed a lawsuit challenging the constitutionality of the provision. See *Muslim Community Assn. of Ann Arbor v. Ashcroft*, No. 03-CV-72913 (E.D. Mich. filed July 30, 2003). This was in addition to a prior suit filed in November by the ACLU and other First

Amendment groups seeking the number of orders issued against libraries, bookstores and Internet service providers. See *ACLU v. Department of Justice*, No. 02-CV-2077 (D.D.C.); see also *MLRC MediaLawLetter*, Nov. 2002, at 41.

Until Ashcroft’s statement, it had been unclear whether any orders have actually been issued against newspapers or other news organizations under the authority of the Patriot Act provision. Such orders would be issued by the Foreign Intelligence Surveillance Court, which holds its proceedings in secret without notice to the subject of the proposed order. See *LDRC MediaLawLetter*, Sept. 2002, at 39. Also, the provision itself contains a “gag order” provision prohibiting the target of such an order from revealing that s/he was targeted. See USA PATRIOT Act, § 215.

The Reporters Committee for Freedom of the Press, which has conducted several surveys of subpoenas served on media organizations, reported this spring that while comprehensive data was not available, “anecdotal evidence showed that media organizations had not received a large number of terrorism-related subpoenas from the federal government since September 11, [2001].” The report did not provide any statistics.

*(Continued on page 35)*

**More Post-9/11 Issues....**

(Continued from page 34)

***Compromise On Immigration Hearing Closure***

In the face of a challenge by *The Detroit News*, the government dropped its request that a deportation proceeding be closed to the public and the press. But the government did request closure of portions of the hearing including a declaration by a FBI agent in the case, and the hearing officer agreed.

The hearing in which the government moved for closure involves the deportation of Nabil al-Marabh, who was arrested on Sept 21, 2001, for alleged connections to terrorists. Although evidence of such ties has never been presented in court, al-Marabh was convicted of immigration violations and is thus subject to deportation. The hearing, to determine whether al-Marabh would face torture if he was deported to his native Syria, was held Sept. 10 and was partially closed.

The government's request to close the hearing claimed that classified information could be released at the proceeding. *The Detroit News*, represented by Leonard Niehoff of Butzel Long in Ann Arbor, opposed the closure motion.

Last year, the Sixth Circuit held that a blanket rule closing immigration hearings related to the Sept. 11 attacks was unconstitutional. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); see *LDRC MediaLawLetter*, Sept. 2002, at 3. That ruling stands in sharp contrast to a Third Circuit ruling upholding the blanket closure policy. See *North Jersey Media v. Ashcroft*, 308 F.3d 198, 31 Media L. Rep. 1065 (3rd Cir. 2002), *reh'g denied*, No. 02-2524 (3rd Cir. Dec. 3, 2002), *cert. denied*, 123 S.Ct. 2215, 155 L.Ed.2d 1106 (U.S. 2003); see also *LDRC MediaLawLetter*, Oct. 2002, at 11.

***Military Used Media As Weapon in War***

American military officials speaking at a conference on the media's role in the Iraqi war told an audience at the U.S. Army War College that the military undertook certain activities with the intention that coverage by embedded American reporters would intimidate Iraqi forces, according to report from Reuters.

Among the activities that were undertaken for media consumption were the deployment of airborne troops who were shown embarking in the desert and a "thunder run" of

tanks through Baghdad in order to show that American forces controlled the city.

"We've turned the media into a mechanism for communicating information from the action to the consumer, including the enemy," Army Brig. Gen. Vincent Brooks of the Joint Chiefs of Staff said. "What we don't engage in is deception or manipulation."

"I just wanted them to report what happened," said the commander of the 3rd Infantry Division's 2nd Brigade. "If having the media report accurately is using them, then they were used."

"As a war fighter, I am going to leverage information," said Major Gen. James Thurman, who oversaw land operations in the conflict. "I'd be foolish not to."

***Technician Gets Probation***

A Fox News technician who was stopped after U.S. Customs discovered a dozen paintings from Iraq in his luggage was fined \$2,000 and sentenced to one year probation after pleading guilty to one count of smuggling. He was also fired by Fox.

The government said that the paintings depicted Saddam Hussein and his son Odai, and were taken from the son's place.

Benjamin James Johnson also had packed two chemical suits, a gas mask, and Iraqi monetary bonds. He had not declared any of the items as he returned from Iraq to Washington Dulles International Airport on April 17.

A *Boston Globe* reporter was permitted to keep most of the souvenirs he brought back from Iraq, except for a painting of Saddam Hussein. But a book author was arrested for bringing three, 4000-year-old stone seals from Iraq. See *MLRC MediaLawLetter*, Aug. 2003, at 52.

***Developments on the Ground in Iraq***

***Protection for Journalists Sought:*** After the United Nations Security Council unanimously adopted a resolution calling for increased protection of UN workers in Iraq and other conflict areas in response to the bombing of the international organization's Baghdad office, the International Federation of Journalists called for similar protection for reporters in war zones.

(Continued on page 36)

**More Post-9/11 Issues....**

*(Continued from page 35)*

“We cannot forget that journalists and media staff are among the most vulnerable groups in modern conflict,” said IFJ General Secretary Aidan White. “All parties involved in armed conflict must protect journalists and recognize their status as independent, neutral observers.”

Eighteen journalists and assistants have died while covering the war in Iraq, including 12 in combat situations.

**British Investigate Deaths:** A British Army investigation into the death of ITN reporter Terry Lloyd has revealed that Lloyd survived an incident in which the two-jeep convoy in which he and three other journalists were traveling was attacked by coalition troops with only minor injuries. But Lloyd was killed several hours later when a minibus whose driver had stopped to take him to a hospital was attacked by an American helicopter.

The driver had also picked up four injured Iraqi soldiers, one of whom was killed in the helicopter attack.

Initial reports on the incident stated that Lloyd had been killed by the initial attack. See *MLRC MediaLawLetter*, July 2003, at 32.

The investigation also concluded that two journalists who have been missing since the incident – cameraman Frederic Nerac and translator Hussein Othman – were captured by Iraqi forces and killed.

The fourth journalist, Belgian cameraman Daniel Demoustier, survived the incident by hiding in a ditch.

**Report on Hotel Incident Classified:** The Pentagon report on the firing upon a Baghdad hotel that housed many journalists has been classified, even though the report’s conclusions were disclosed in a press release. The report concluded that the shelling of the Palestine Meridien Hotel, which killed two reporters and injured three others, was “proportionate and justified” based on the circumstances. See *MLRC MediaLawLetter*, Aug. 2003, at 61.

A separate investigation of the incident by the Committee to Project Journalists concluded that the attack was not intentional. But CPJ concluded that it was avoidable, since commanders knew the hotel was housing journalists but had not informed their troops.

**Media Restrictions Enacted, Then Rescinded:** On Aug. 14, American military officials in Iraq issued a new policy restricting the ability of embedded journalists to

accompany troops on hazardous or sensitive missions, but rescinded the policy a few hours later.

The new restrictions would have applied to the relative handful of journalists still embedded with American troops. While more than 700 reporters participated in the program at the height of the war, by early July the number had dwindled to only 23.

**Iraqi Media Need Help:** As the United States appointed a commissioner to oversee print and broadcast media in Iraq, the United Nations said that assistance for Iraqi media is “urgently needed.”

Simon Haselock, formerly a spokesman and media advisor for the U.N. in Kosovo, was appointed in August, two months after he wrote a report on Iraqi media proposing a commission to regulate journalists’ activities. The commission would primarily be responsible for enforcing an order on “prohibited media activity” issued by the Coalition Provisional Authority; the order is available at <http://www.cpa-iraq.org/regulations/CPAORD14.pdf>. American forces have acted against several Iraqi journalists who have been said to have violated the order. See *MLRC MediaLawLetter*, Aug. 2003, at 51.

Several U.N. agencies, led by UNESCO, will hold a donors conference in Madrid in late October to discuss the need for journalism training programs, the creation of media centers, and other media development projects in Iraq.

**Web Site on Press-Military Issues**

Military Reporters and Editors, a group that formed during the buildup to the war in Iraq to advocate for press access to American military activity, has launched a revised web site, [www.militaryreporters.org](http://www.militaryreporters.org), to allow reporters and editors to share information on military issues.

<p style="text-align: center;"><b>SAVE THE DATE!</b></p> <p style="text-align: center;"><b>DCS ANNUAL BREAKFAST MEETING 2003</b></p> <p style="text-align: center;"><b>FRIDAY, NOVEMBER 14</b></p>
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## Ninth Circuit Holds that Communication Decency Act Protects Internet Dating Service

By Timothy L. Alger

The Ninth Circuit Court of Appeals has held that information collected from third parties and formatted or manipulated by an Internet service is subject to publisher immunity under the Communications Decency Act of 1996, 47 U.S.C. § 230(c) (“CDA”). In doing so, the court affirmed summary judgment for Lycos, Inc., operator of the Matchmaker.com dating service, on claims of libel, disclosure of private facts, negligence, and misappropriation. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1110 (9th Cir. 2003).

Lycos’ winning argument to the Ninth Circuit was rejected twice previously in the District Court, first by Judge Carlos Moreno (now on the California Supreme Court) on a Rule 12(b)(6) motion to dismiss, and by Judge Dickran Tevrizian, on a Rule 56 motion for summary judgment. Judge Tevrizian granted summary judgment to Lycos (which purchased Metrosplash.com, Inc., owner of the Matchmaker dating service, in 2000), after finding that the plaintiff was a public figure and could not establish constitutional actual malice by clear and convincing evidence. Judge Tevrizian’s decision was reported in the June 2002 MLRC *MediaLawLetter*, at 23.

The Ninth Circuit affirmed the grant of summary judgment, but this time agreed with Lycos that the CDA gave it immunity from suit as a publisher of third-party content. The Ninth Circuit did not reach the issue of the plaintiff’s public-figure status or the question of actual malice, and in a footnote explicitly left undisturbed the District Court’s reasoning on those points — which is good news for media defendants facing lawsuits by entertainers. See *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055 (C.D. Cal. 2002) (holding that television actress with limited fame was a general purpose public figure because of the nature of her profession).

### *User Posed As Actress*

Christianne Carafano, who uses the stage name Chase Masterson (“Leeta, the D’abo girl” in *Star Trek: Deep Space Nine*), sued Lycos and its subsidiaries, Metrosplash.com, Inc. and Matchmaker.com, Inc., for libel, invasion of privacy for disclosure of public facts, appropriation of her right of publicity, and negligence. Carafano contended that Lycos

was responsible for a fabricated dating profile that had been posted by an unknown person on the Matchmaker service.

Matchmaker maintains a database of personal profiles posted by members, including trial members who receive free access for several weeks. To become a member, a person must select a “community” (focusing on a particular city or special interest) and complete a questionnaire of up to 62 multiple-choice questions. A member also must answer at least one of a series of essay questions, and may post up to 10 photographs. The answers to the questions, and the optional photographs, become the data that makes up the member’s “profile.” Membership is anonymous.

Matchmaker does not review the text of profiles prior to posting. As soon as a member completes and submits his or her questionnaire on-line, the answers are automatically formatted into a profile that is made available to other members of the community.

On October 23, 1999, an unknown person posted a profile, under the name “Chase529,” on Matchmaker’s Los Angeles community. Matchmaker’s records show that the profile was posted, and subsequently modified one time, by a person using computer terminals in Europe. The profile included four photographs of Carafano. The answer to an essay question contained plaintiff’s home address.

Carafano alleged that other essay answers and the answer to a multiple-choice question falsely characterized her as licentious. The profile also included an e-mail address which, when contacted, sent out an automatic reply that included a sexual taunt and Carafano’s home telephone number.

Carafano testified at deposition that she received obscene phone calls and a threatening fax because of the false profile, and was compelled to flee her home for several months for fear for her safety. She also testified that she became so distressed that she was unable to work as an actress for about a year.

### *CDA Immunity Invoked*

At the outset of the litigation, Lycos moved to dismiss Carafano’s claims, arguing that it was immune under the CDA, which provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or

(Continued on page 38)



## Communication Decency Act Protects Internet Dating Service

(Continued from page 37)

speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). The CDA defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . .” *Id.* § 230(f)(2). Judge Moreno denied the motion, holding that the CDA applied only to Internet service providers, and not website-based interactive computer services such as Matchmaker.com. (This limited view of the CDA’s scope has since been rejected by appellate courts that have considered the question, most recently by the Ninth Circuit in *Batzel v. Smith*, 333 F.3d 1018, 1030 & n.15 (9th Cir. 2003)).

After discovery, Lycos moved for summary judgment, again pursuant to the CDA. Lycos also moved for summary judgment on the alternative ground that Carafano was a public figure and, because Matchmaker did not review users’ postings before they became available on the service, it could not have known that the Carafano profile was false or probably false. Judge Tevrizian (to whom the case was assigned after Judge Moreno was appointed to the California Supreme Court), agreed with Lycos that the Matchmaker service was an “interactive computer service,” as defined by the CDA.

But Judge Tevrizian went on to conclude that the process by which the member profiles are created — through the use of multiple-choice questions and specific essay questions — made the service an “information content provider,” and therefore unable to claim immunity from publisher liability under section 230(c)(1). *See* 47 U.S.C. 230(f)(3) (an “information content provider” is someone who “is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service”).

Judge Tevrizian then went on to the alternative public figure-no actual malice argument, and granted summary judgment to Lycos. Carafano appealed, contending, among other things, that Matchmaker delayed removing the fabricated profile after being contacted by her assistant, and this constituted actual malice.

### *Ninth Circuit Rules For Lycos*

In urging the Ninth Circuit to affirm the judgment, Lycos raised the CDA *again* — this time, successfully. Lycos also

argued that the District Court correctly held that Carafano was a public figure and there was no actual malice.

After oral argument on June 2, 2003, in the *Carafano* case, the Ninth Circuit decided *Batzel*, which represented the court’s first opportunity to interpret the CDA. In *Batzel*, the court held that the distributor of an Internet newsletter fell within the scope of section 230(c), but remanded the case because there was evidence that the third party who provided the allegedly false information that was included in defendant’s newsletter did not intend for it to be posted on the Internet. *Batzel*, 333 F.3d at 1034. In addressing the CDA’s scope, the Ninth Circuit held that the selection of content and minor editing of the on-line newsletter did not make the editor a “content provider” of the allegedly false statements. *Id.* at 1031.

Given this, the Ninth Circuit had little trouble applying the CDA’s immunity to the Matchmaker service. Judge Tevrizian had concluded that Matchmaker shaped the content of the user profiles by providing the questions that, when answered, generated the profiles, and therefore participated in the “creation or development” of the false Carafano profile. This reasoning was rejected by Ninth Circuit Judges Sidney R. Thomas and Richard A. Paez and Nevada District Senior Judge Edward C. Reed, Jr. (sitting by designation):

Doubtless, the questionnaire facilitated the expression of information by individual users. However, the selection of the content was left exclusively to the user. The actual profile “information” consisted of the particular options chosen and the additional essay answers provided. Matchmaker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph. Matchmaker cannot be considered an “information content provider” under the statute because no profile has any content until a user actively creates it. *Carafano*, 339 F.3d at 1124.

The use of multiple choice questions and the formatting of the member’s answers into a profile that could be searched also did not turn Lycos into a co-author of the profile or, as Carafano argued, “a ‘developer’ of the ‘underlying misinformation,’” the court said. “Without standardized, easily encoded answers, Matchmaker might not be able to

(Continued on page 39)



**Communication Decency Act Protects Internet Dating Service***(Continued from page 38)*

offer these services and certainly not to the same degree,” Judge Thomas wrote. “Arguably, this promotes the expressed Congressional policy ‘to promote the continued development of the Internet and other interactive computer services.’” 47 U.S.C. § 230(b)(1). *Carafano*, 339 F.3d at 1125.

Finally, the Ninth Circuit made clear that in evaluating a claim implicating the CDA, a court must look at the specific information that is alleged to be false, *i.e.*, an interactive computer service might be a “content provider” of some information, but, by making *it’s* content available on the Internet, it does not become liable for *other* content on the service’s site that is provided by third parties. Judge Thomas wrote:

[E]ven assuming Matchmaker could be considered an information content provider, the statute precludes

treatment as a publisher or speaker for “*any* information provided by *another* information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added). The statute would still bar Carafano’s claims unless Matchmaker created or developed the particular information at issue.

*Id.* at 1125. In other words, a web posting can be a mix of protected and unprotected content, and a court should not consider all of the content as a combined whole, causing the service to lose its immunity under the CDA for third-party material because of its own contribution.

*Mr. Alger is a partner at Quinn Emanuel Urquhart Oliver & Hedges LLP in Los Angeles. He represented Lycos, Inc. in the Carafano case, in the trial court and on appeal. Plaintiff was represented on appeal by Stephen F. Rhode and Mechele M. Berencsi of Rhode & Victoroff in Los Angeles.*

## Injunction Barring Posting of Trade Secrets on the Internet Held Not to Violate First Amendment

By Robert G. Sugarman and Geoffrey D. Berman

On August 25, the California Supreme Court held that a properly issued preliminary injunction barring publication of wrongfully obtained trade secrets is not a violation of the First Amendment of the United States and California Constitutions. *DVD Copy Control Ass’n v. Bunner*, 2003 WL 21999000, 4 Cal. Rptr. 3d 69 Cal., 2003. The holding has implications beyond California because the injunction was issued pursuant to a provision of the California Trade Secrets Act, some version of which has been adopted by many states.

### ***The Right to Publish v. The Right to Protect***

The case concerns Andrew Bunner, who, in the Fall of 1999, posted on the Internet a computer code allowing users to decrypt data on DVDs containing copyrighted motion pictures.

Utilizing a system called the Content Scramble System (CSS), the copyrighted motion picture content on DVDs is

encrypted to prevent unlawful copying. Using CSS, licensed DVD players automatically decrypt the data, allowing viewing of the motion picture. The program posted on the Internet by Bunner and others – called DeCSS – both allows the motion picture to be viewed on unlicensed players and facilitates unauthorized copying and distribution without compensation to the artists and producers who created them.

DVD Copy Control Association (DVD CCA) – a trade association composed of licensees of the technology in the motion picture, computer, and consumer electronics industries – filed suit in California shortly after DeCSS was posted and moved preliminarily to enjoin

postings of the code, which contains DVD CCA’s trade secrets, including algorithms needed to decrypt the DVD data. The court granted the motion.

Bunner (the only defendant to have appeared on the merits of the case) appealed, claiming that the preliminary injunction was a violation of his First Amendment rights because it amounted to an illegal prior restraint on publica-

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***The Court applied  
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### **Injunction Barring Posting of Trade Secrets on the Internet Held Not to Violate First Amendment**

*(Continued from page 39)*

tion. The Court of Appeal for the Sixth District agreed and vacated the injunction, holding that DeCSS was pure speech and that the injunction violated Bunner's First Amendment rights. *DVD Copy v. Bunner*, 113 Cal. Rptr. 2d 338, Cal. App. 6th Dist., 2001.

The California Supreme Court granted DVD CCA's petition for review and overturned that ruling. In its appeal to the California Supreme Court, DVD CCA had a broad range of amicus support, ranging from the Recording Industry Association of America, the Director's Guild, the Screen Actor's Guild, Microsoft, AOL-Time Warner and the Attorney General of California (who participated in the oral argument as well).

### ***Is Computer Code Speech?***

The Court first held that computer code is speech, and therefore is entitled to First Amendment protection. In that regard, the Court observed that just as only English speakers will understand English speech, only those versed in computer code will understand speech in that language. But it is speech nonetheless.

### ***Level Of Scrutiny***

The Court then turned to the question of what level of First Amendment scrutiny to apply. The Court's analysis turned on whether the injunction at issue was content based or content neutral.

Here, the Court ruled the injunction was content neutral because it was not aimed at the content (*i.e.* the message or subject-matter) of the speech. Rather it was aimed at protecting DVD CCA's property. Bunner was still free to comment on and criticize the encryption system so long as he did not publish the trade secrets. Thus, the Court applied "intermediate scrutiny," under which the injunction must "burden no more speech than necessary to serve a significant government interest."

### ***The Significant Government Interest***

The Court held that the injunction was properly crafted to protect a significant government interest – the enforcement of trade secret laws which encourage innovation by

allowing inventors to reap the fruits of their labor. The Court also noted that by punishing the unauthorized use of another's proprietary information, the trade secret laws encourage commercial ethics. The Court concluded that the injunction at issue was a proper way to protect these interests because preventing valuable data from unauthorized distribution is "the very definition of the property interest."

The Court rejected Bunner's argument that he should be immune from the injunction because he himself did not obtain the trade secrets by improper means. The trade secrets were initially posted on the Internet by a Norwegian named Jon Johansen. The Court held that since, as found by the trial court, Bunner either knew or should have known that the trade secrets were illegally obtained, the injunction could be applied to him. The Court also found that because the injunction did not concern or prevent dissemination of information of public concern, it did not implicate the "core purpose of the First Amendment."

Finally, the Court held that the injunction is not an unlawful prior restraint. Because the injunction is content neutral and addressed Bunner's previous publication of the trade secrets, it was free from the heavy presumption against prior restraints.

### ***Final Disposition***

This decision by California's highest court does not end the matter. The Court assumed that the injunction had been properly issued – an issue not reached by the Court of Appeal. The Court, therefore, remanded the case to the Court of Appeal to consider this issue. Bunner is likely to argue that DeCSS had been so widely disseminated at the time the preliminary injunction was issued that it was no longer a trade secret, and therefore not entitled to protection. The trial court rejected that argument at the time the injunction was issued on the grounds that DVD CCA had acted expeditiously and should not, therefore, be denied relief.

*Robert G. Sugarman is a partner and Geoffrey D. Berman an associate at Weil, Gotshal & Manges LLP, which represented DVD CCA.*

## Ninth Circuit Applies U.S. Copyright Law to Use Overseas

By Bob Vanderet

On August 21, 2003, the Ninth Circuit handed down its latest decision (the fourth in this long-running copyright case), which addresses important issues relating to the extent of damages recoverable under US copyright laws for infringements that have effects overseas. *Los Angeles News Service v. Reuters Television International Ltd.*, 340 F.3d 926 (9th Cir., Aug 21, 2003).

Plaintiff LANS filmed the now-famous "Beating of Reginald Denny" helicopter footage of the beating of a white truck-driver during the riots in Los Angeles following the controversial verdict in the Rodney King beating trial. The footage was licensed by LANS to NBC, with a limitation on international distribution. Defendant Reuters had a feed agreement with NBC, and having received and copied the footage in New York, unaware of the license limitation on international distribution, distributed it in turn to its international subscribers.

Reuters originally won partial summary judgment from the district court on LANS' inability to recover for any overseas infringements by Reuters' subscribers, and LANS was awarded statutory damages for the US single act of copying only. On an appeal in 1998, the Ninth Circuit reversed the partial summary judgment in Reuters' favor, holding that although the district court was correct in concluding that US copyright laws do not apply extraterritorially, an exception applied where the act of infringement was completed domestically and allowed exploitation of the infringed work abroad. *Los Angeles News Service v. Reuters Television*, 149 F.3d 987 (9th Cir., 1998).

Relying on the Second Circuit's 1939 *Sheldon* decision (*Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939)), which held that profits earned overseas from exploitation of the fruits of a domestic infringement were recoverable under US copyright laws on a "constructive trust" rationale, the Ninth Circuit in 1998

remanded the case for a trial on damages abroad flowing from the exploitation of the domestic act of infringement by Reuters.

Although LANS claimed to have lost millions in lost licenses overseas, the district court on remand again granted partial summary judgment to Reuters on actual damages, holding that under the *Sheldon* "constructive trust" rationale adopted by the 9th Circuit, a plaintiff could only recover the additional profits earned by the infringer overseas flowing from the domestic act of infringement, not "actual damages," i.e. losses suffered by the plaintiff from the distribution. Since the court found it undisputed that Reuters had earned no additional profits from the distribution of the footage to its existing subscribers, it granted summary judgment on the issue of actual damages.

Plaintiff declined to accept the statutory damage award of \$60,000, and made the required election instead for actual damages and appealed the district court's ruling on remand.

On this latest appeal, a divided panel of the Ninth Circuit affirmed the ruling of the district court, and

confirmed the "narrow application of the adoption in *Reuters III* (the 1998 decision) of the *Sheldon* exception to the general rule." The court concluded,

"Accordingly, we read *Reuters III* to allow only a narrow exception for the recovery of the infringer's profits to *Subafilm*'s general rule against extraterritorial application."

Judge Silverman, in dissent, pointedly accused the majority of "redecid[ing the 1998 case] the other way" and ended by saying, "I would remand for a trial on actual damages (just as we did the last time) except this time, I would add that we really, really mean it."

Robert Vanderet, Paul Salvaty and Vanessa Kouhry of O'Melveny & Myers LLP in Los Angeles represented Reuters on the remand and on the successful appeal; George Caplan of Kaye Scholer LLP represented LANS.

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**Although the district court was correct in concluding that US copyright laws do not apply extraterritorially, an exception applied where the act of infringement was completed domestically and allowed exploitation of the infringed work abroad.**

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## On-Line Business Has Sufficient Contacts for California Jurisdiction

In *Gator.com Corp., v. L.L. Bean, Inc.*, 2003 WL 22038396 C.A.9 (Cal.), 2003, filed on September 2, the Ninth Circuit Court of Appeals ruled that online retailer L.L. Bean, by way of its internet-based “virtual store,” has sufficient contacts with the state of California to support the assertion of general jurisdiction over the company. The ruling restores a declaratory judgment action initiated by pop-up advertiser Gator.com. against L.L. Bean in the Northern District Court of California.

Gator.com develops and distributes software to consumers who purchase goods on the Internet. When a user visits a website, the so-called “Gator program” analyzes the Uniform Resource Locator (“URL”) associated with that website to determine whether the URL has been pre-selected. If the program identifies the URL as a pre-selected site, it displays a pop-up window offering an advertisement coupon. Gator users who visit L.L. Bean’s website are offered coupons for clothing competitor Eddie Bauer in the form of a pop-up window that partially obscures the L.L. Bean website.

In response to a 2001 cease-and-desist letter sent by L.L. Bean, Gator filed a declaratory judgment action in the Northern District Court of California requesting a judgment that Gator’s program does not infringe or dilute any trademark held by L.L. Bean and that it does not constitute unfair competition, fraud or false advertising. L.L. Bean countered by filing a motion to dismiss for lack of personal jurisdiction. District Court Magistrate Judge Maria-Elena James granted the motion. *Gator.com, Corp. v. L.L. Bean, Inc.*, 2001 WL 1528393 (N.D.Cal. Nov 21, 2001). Gator appealed.

Now, in a decision written by Judge Warren J. Ferguson, the Ninth Circuit has overturned the district court dismissal. The Circuit court held that L.L. Bean’s contacts with California through mail-order and internet-based commerce in the state are sufficient to support the assertion of general personal jurisdiction.

Relying on, while simultaneously distinguishing this case from, *Bancroft & Masters, Inc. v. Augusta Nat’l*

*Inc.*, 223 F.3d 1082 (9th Cir. 2000), the court applied a “sliding scale” test for internet companies. This test requires that the party in question clearly does business over the internet and that the internet business contacts with the forum state be substantial or continuous and systematic. The standard is one of “approximate presence” rather than actual presence; factors to be considered in this analysis include whether defendant solicits or engages in business in the state, serves the state’s markets or makes sales in the forum state.

In this case, the Ninth Circuit based its decision on the collection of several facts: in 2000, L.L. Bean’s website accounted for over \$200 million, or 16 percent of the company’s total revenue. Although L.L. Bean is not authorized to do business in California, the company generated about six percent of its total sales there.

The court, however, accentuated that mere sales, regardless of magnitude, did not justify asserting jurisdiction over the case. The court pointed out that in addition to selling products to California residents, L.L. Bean: main-

tains online accounts for customers residing in California; advertises in national print and broadcast that include California; and maintains relationships with numerous vendors in California.

Counsel: For Plaintiff-appellant (Gator.com): Michael Traynor (argued), SF, California. Cooley Goodward (appeared only), Reston, Va. And Brian E. Mitchell, SF, Cal. For Defendant-appellee (L.L. Bean): Peter J. Brann, Lewiston, Maine.

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***The Circuit court held that L.L. Bean’s contacts with California through mail-order and internet-based commerce in the state are sufficient to support the assertion of general personal jurisdiction.***

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***Any developments you think other MLRC members should know about?***

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Media Law Resource Center, Inc.  
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## Survey Seeks to Identify Concerns Over Internet Jurisdiction

By Jon Hart and Steve Blumenthal

In August 2003, the American Bar Association and the International Chamber of Commerce, an international business organization based in Paris ("ICC"), distributed an Internet jurisdiction survey to hundreds of companies in 29 countries. The goal of the survey is to examine the practical effects of Internet jurisdiction concerns on companies worldwide.

Survey participants have expressed their intention to provide the survey results to the European Commission ("EC") and the Hague Conference on Private International Law. The EC and the Hague Conference are pursuing legislative initiatives on jurisdiction and international law. The ICC and others who helped craft the survey want these legislative initiatives to apply the "country of origin" principle of jurisdiction, under which the law of the country in which a company is established governs non-contractual disputes arising from online content or services provided by the company.

### Background

#### Rome II

On July 22, 2003, the EC approved a regulation concerning the applicable law for non-contractual obligations in situations involving a choice between the laws of different countries (the so-called Rome II regulation). The EC has submitted the Rome II regulation to the European Council for adoption as a European Union regulation.

The Rome II regulation provides that, in general, the law applicable to a non-contractual obligation arising out of a tort is the law of the country in which the loss is sustained. The Rome II regulation further provides that the law applicable to a non-contractual obligation arising from a violation of private or personal rights (including defamation) is the law of the country in which the loss is sustained.

The EC adopted the Rome II regulation over the objections of the Media Law Resource Center (MLRC), the ICC and a large number of other media and business organizations. In its October 16, 2002, comment letter to the EC,

the MLRC said that the Rome II regulation would chill public discourse and allow the most restrictive defamation laws in Europe to dictate the way publishers operate through the European Union.

In an open letter to the member states of the European Union posted on the ICC website, the ICC has requested that the member states urge the EC to re-evaluate the Rome II regulation.

#### Hague Convention

Since 1997, the Hague Conference has been negotiating and drafting a multilateral treaty entitled "the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters" (the Hague Convention). The Hague Convention is intended to establish international principles on jurisdiction and applicable law.

Under the latest draft, the Hague Convention applies to all civil and commercial matters, with certain delineated exceptions. With respect to actions arising in tort, Article 10 of the draft Hague Convention provides that a plaintiff may bring an action in the jurisdiction

in which the act or omission that caused injury occurred or in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of such nature in such jurisdiction.

The draft Hague Convention also provides that a plaintiff may bring an action in tort in a jurisdiction in which, or towards which, the defendant has engaged in frequent or significant activity, provided that the claim arises out of that activity and the overall connection of the defendant to that jurisdiction makes it reasonable that the defendant could be subject to suit in that jurisdiction. The draft Hague Convention includes an exception that provides that the foregoing jurisdiction provisions do not apply when the defendant has taken reasonable steps to avoid acting in or directing activity into the jurisdiction.

In an August 19, 2003 letter, the Hague Conference Secretary General, Hans van Loon, announced that the draft Hague Convention will be submitted to a special

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***The ICC and others who helped craft the survey want these legislative initiatives to apply the "country of origin" principle of jurisdiction.***

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## Survey Seeks to Identify Concerns Over Internet Jurisdiction

*(Continued from page 43)*

commission to be convened in December 2003. Comments on the Hague Convention must be submitted before November 1, 2003.

### **The Survey**

#### **Scope**

The Internet jurisdiction survey seeks to identify when Internet jurisdiction issues emerge as serious concerns for companies operating online, which issues pose the greatest concern and how companies are responding to these issues. The survey is being distributed to small, medium and multinational companies in 29 countries in North America, South America, Europe, Asia, Africa and the Middle East.

The survey asks in-house counsel and their advisors to identify jurisdictional concerns and to identify how their companies have adjusted the way they do business in response to these jurisdictional concerns. Each respondent is asked to describe her company's presence on the Internet (for example, whether the website is global or country-specific and whether products and services are actively promoted and sold through the website); whether her company has altered or blocked the content or services offered by its website in certain jurisdictions; if applicable, how and why her company actively refrains from interacting with certain jurisdictions (for example, through user registration); and whether the terms of use of the company website specify a choice of law and choice of forum.

#### **Use of Survey Results**

At the 2003 Winter Working Meeting of the Cyberspace Law Committee of the Business Law Section of the ABA, those orchestrating the Internet jurisdiction survey project stated their expectation that the survey results will help steer the Rome II regulation and the Hague Convention towards adopting the country of origin jurisdictional princi-

ple in non-contractual disputes. Michael Hancock, a co-chair of the project and co-chairman of the ICC task force on jurisdiction and applicable law, said that the ICC expects the survey results to demonstrate the chilling effect caused by the aggressive assertion of jurisdiction and applicable law in business-to-consumer e-commerce. The ICC intends to present the survey results to the EC.

The survey's initial findings are anticipated to be released in the middle of November 2003. The survey findings will be used to develop a Internet jurisdiction issues best-practices guide for companies and their advisors. A workshop on Internet jurisdiction issues is currently slated for the ABA Business Section Spring Meeting in April 2004.

For more information, see:

- The ABA press release regarding the Internet survey: <http://www.abanet.org/media/aug03/080403.html>
- The ICC request for re-evaluation of the EC Rome II regulation proposal: <http://www.iccwbo.org/law/jurisdiction/rome2/index.asp>
- The EC press release regarding the Rome II regulation proposal: [http://europa.eu.int/comm/justice\\_home/news/intro/news\\_220703\\_1\\_en.htm](http://europa.eu.int/comm/justice_home/news/intro/news_220703_1_en.htm)
- The home page of the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters: <http://www.hcch.net/e/workprog/jdgm.html>

*Jon Hart is a member in the Washington, D.C. office of Dow, Lohnes & Albertson, PLLC. Steve Blumenthal is an associate in the Atlanta office of Dow, Lohnes.*

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***The survey asks in-house counsel and their advisors to identify jurisdictional concerns and to identify how their companies have adjusted the way they do business in response to these jurisdictional concerns.***

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## Judge Denies Injunction Sought By Alleged Cult

A federal judge in upstate New York has rejected efforts by a group that claims to be a personal improvement organization, but that critics have labeled a cult, to obtain a temporary restraining order and a preliminary injunction to force a prominent critic to remove material from his web site about the group. *NXIVM Corp. v. Ross Institute*, No. 03-CV-976 (N.D.N.Y. order Sept. 9, 2003).

The group NXIVM (pronounced NEX-ee-um), also known as as Executive Success Programs, filed two lawsuits in August against Rick Ross and his Ross Institute, which maintains an online “database of information about cults, destructive cults, controversial groups and movements.” Ross’ web site includes a section on NXIVM, including articles by two psychologists evaluating the group’s literature.

The first lawsuit, which claims product disparagement, breach of contract, conversion and fraud, alleges that a former NXIVM student, Stephanie Franco, had given Ross the group’s training materials in violation of a signed confidentiality agreement. *NXIVM Corp. v. Ross Institute*, No. 03-CV-976 (N.D.N.Y. filed Aug. 6, 2003). The second suit alleges Lanham Act claims on the same facts. *NXIVM Corp. v. Ross Institute*, No. 03-CV-1051 (N.D.N.Y. filed Aug. 6, 2003).

The suits were filed after material on Ross’ site led actress Goldie Hawn to cancel a scheduled speech before the group, and the material was cited by opponents of a conference center that NXIVM hopes to build in Halfmoon, New York, about 12 miles north of Albany.

U.S. District Judge Thomas J. McAvoy initially declined to issue a temporary restraining order on Aug. 6, and denied motions for a preliminary injunction and for reconsideration of the decision on the temporary order in a Sept. 9 ruling. In his ruling, McAvoy said that NXIVM had not shown that it would suffer irreparable harm unless the web site was restrained. He also declined to order that the training manuals be returned, but did order that the former student not show the manual to anyone other than her attorney.

Ross and the Ross Institute are represented by Thomas F. Gleason of Gleason, Dunn, Walsh & O’Shea in Albany, N.Y. Franco is represented by Keith D. Barrack

and Anthony J. Slyvester of Riker, Dazing, Scherer, Hyland, and Perretti of Morristown, N.J. and Linda Blom Johnson of Hinman, Howard & Kattell in Binghamton, N.Y. Kevin A. Luibrand of Tobin & Dempf in Albany and Arlen L. Olsen of Schmeiser, Olsen & Watts of Albany represent the plaintiffs.

### **UPDATE:**

#### **Pennsylvania Attorney General to Halt Secret Prior Restraint Orders**

Confronted with a federal lawsuit filed by the Washington-based Center for Democracy & Technology (“CDT”), the American Civil Liberties Union (“ACLU”) of Pennsylvania, and Plantagenet Inc., a Pennsylvania based ISP, Pennsylvania’s attorney general has elected to stop sending secret censorship orders that force Internet service providers (“ISPs”) to block access to child porn Web sites. Under the court-approved agreement between the two civil liberties groups and state Attorney General Mike Fisher, the attorney general’s office must now notify the plaintiffs no less than five days before requesting a court order to block a website.

A Pennsylvania statute passed in 2002, entitled “Internet Child Pornography,” sets forth a formal procedure that requires the state attorney general to apply for a court order before sending notice to an ISP that it should block access to that website that contains child pornography. Pursuant to the statute, if an ISP fails to remove access to the website that ISP faces misdemeanor charges and a fine. Upon subsequent offenses, an ISP may face felony charges along with stiffer fines and possible imprisonment. See *MLRC MediaLawLetter*, July 2003, at 51.

Despite these state regulations, Attorney General Fisher developed an informal system whereby his office would bypass seeking a court order and send notices to ISPs without first taking judicial action. According to CDT, the Attorney General has issued over three hundred orders to date requiring that specific web sites be blocked.

*(Continued on page 46)*

## PA Attorney General to Halt Secret Prior Restraint Orders

(Continued from page 45)

On September 9, the CDT, ACLU of Pennsylvania and Plantagenet filed a request for a temporary restraining order in the Eastern District Court of Pennsylvania to stop the Pennsylvania Attorney General's practice of imposing secret censorship orders. The court granted the TRO based on an agreement between the parties. The Attorney General has promised to continue pressuring suspect websites, but this time he will adhere to the statutes as written.

Litigation on the matter is still pending, however. Plaintiffs are seeking to have the 2002 Pennsylvania statute declared unconstitutional. The challenge argues that the Pennsylvania law is a prior restraint on speech that violates the First and Fourteenth Amendments and the Commerce Clause of the Constitution.

## UPDATE:

### Ditto Heads Back to Trial Court After Ninth Circuit Revises Decision

Withdrawing an earlier decision in the case, on July 7 the Ninth Circuit held that while the fair use doctrine provides immunity to image search engines for gathering and making thumbnail copies of online images, and remanded for further proceedings on the issue of whether the practice of linking directly to the original images on the plaintiff's server violated plaintiff's public display right. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. July 7, 2003).

In its original decision, the same three-judge panel had held that linking to the original images was a violation of the public display right and not protected by fair use. See *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. Feb. 6, 2002) (withdrawn). But the new decision withdrew the public display portion of its opinion and remanded to the trial court on this issue.

#### *Searching the Web Via Images*

Arriba Soft – which changed its name to Ditto.com, Inc. and was acquired by now defunct Sorcerer, Inc. of New York City<sup>1</sup> – maintained a web site that allowed

users to search the Internet by viewing web-based images rather than text. When users search for a subject, Ditto displayed the search results as a collection of thumbnails.

Prior to July 1999, clicking on a thumb-nail produced an "Images Attributes" page, containing the original image (directly from the web site from which it originated), along with information about the image. Starting in July 1999, the search results page contained thumbnail images accompanied by two links called "Source" and "Details." "Details" linked to a page similar to the Images Attributes page but with a thumbnail rather than the original image, while the "Source" link opened two new windows: one containing the original, full-size image (directly from the source web site) and the other containing the home page of the source site.

Ditto collected images and information from web sites by use of a "crawler," a computer program that traverses the web looking for new images by following links from one web page to another. When the crawler found images, it downloaded temporary copies of the files; generated smaller, lower-resolution "thumbnails" of the images for display in the search results; and then deleted the full-size, copied images.

Les Kelly is a professional photographer who publishes his photographs of the American West on the web and in books, and maintains his own website to promote his services. In early 1999, Ditto crawled Kelly's site and included thumbnail images of Kelly's photographs in its search engine database. Ditto removed the images after Kelly complained about this use, but he still filed suit.

#### *Infringement or Fair Use?*

In December 1999, the District Court held that Ditto's creation and use of reduced-size thumbnails of Kelly's images and any subsequent link to the original, full-size images on his Web site was fair use under the Copyright Act, and granted summary judgment to the defendant. See 77 F. Supp. 2d 1116 (C.D. Cal., Dec. 15, 1999); see also *LDRC LibelLetter*, Jan. 2000, at 30. Kelly appealed.

(Continued on page 47)

## Ditto Heads to Trial After Ninth Circuit Revises Decision

(Continued from page 46)

The Ninth Circuit issued its initial opinion in the case on Feb. 6, 2002. After quickly finding a prima facie case of infringement, the panel applied the four-factor test for “fair use” under Section 107 of the Copyright Act and found that Ditto’s use of thumbnail versions of Kelly’s images was transformative and would not impact their value, and thus were “fair” under the copyright act. But the panel further held that Ditto’s display of and linking to Kelly’s full-size images constituted infringement and was not fair use, and remanded for a determination of damages. 336 F.3d 811.

### *The Ninth Circuit Reconsiders*

Ditto filed a motion for rehearing with a suggestion for rehearing en banc, arguing that the panel’s decision on the public display right was contradictory with Ninth Circuit and Supreme Court precedent and contending that the panel misunderstood critical factual issues. The opinion, Ditto argued, could be used to assert copyright claims for deep-linking, and would mark a departure from current cases. See, e.g., *Ticketmaster v. Tickets.com*, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. 2000) (“hyperlinking does not itself involve a violation of the Copyright Act ... since no copying is involved.”) and *Bernstein v. J.C. Penny*, 1998 U.S. Dist. Lexis 19048, 26 Media L. Rep. 2471

(C.D. Cal. 1998) (granting motion to dismiss claim for copyright liability for linking).

After ordering further briefing from both parties, on July 9 the same panel issued a new decision in the case, withdrawing the earlier opinion. The new ruling preserved the original result regarding the thumbnails: the use of them on Ditto’s site, the court ruled, was fair use, and thus Ditto would not be liable for its infringement. But it abandoned its earlier ruling regarding the display of the full-scale images, holding instead that the district court should not have granted summary judgment because the issue had not been raised in the parties’ motions for summary judgment.

The appeals court remanded the case to the District Court for further proceedings with regard to this issue.

Ditto was represented in the appeal by Judy Jennison, David Burman, Kurt B. Opsahl, and David Saenz of Perkins Coie, LLP. Kelly was represented by Charles D. Ossola of Arnold & Porter and Steven Krongold, formerly of Arter and Hadden and now with Turner Green Afrasiabi & Arledge, LLP.

<sup>1</sup> TLS Technologies, LLC of Naperville, Ill. currently runs the search engine at ditto.com, having licensed the technology from Ditto.com, Inc.

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## “The Best” Websites for Media Lawyers

By Steven D. Zansberg

Even though the bursting of the dot.com bubble has caused Wall Street to question the economic viability of certain segments of e-commerce, the Internet remains a vast and ever-growing resource of information on *all* topics. For lawyers hoping to benefit from this seemingly boundless universe of free information, the task can be overwhelming. Moreover, because the Internet is continuously evolving, it is often difficult to “keep current” with the latest and best means by which to access this treasure trove of digital data.

This article has the ambitious objective of identifying, as of the time of publication, the best websites for media

attorneys to find case law and other useful resources for use in our daily practice. Of course, this survey of sites is more selective than comprehensive (which is literally impossible). Identified below are a set of sites you may wish to “bookmark” or add to your list of “favorites.”

### 1. First Amendment Precedents:

The First Amendment Center at Vanderbilt University has assembled an extremely helpful First Amendment library that contains links to Supreme Court cases and other primary resources organized by topic. The index to the topics is available at <http://www.firstamendmentcenter.org/faclibrary/index.aspx>.

(Continued on page 48)

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## “The Best” Websites for Media Lawyers

(Continued from page 47)

A listing of Supreme Court cases relating only to press issues, organized by topic, can be found at [http://www.fac.org/press/cases\\_resources\\_summary.aspx](http://www.fac.org/press/cases_resources_summary.aspx) and by case name at [http://www.firstamendmentcenter.org/faclibrary/libraryexpression.aspx?topic=press\\_freedoms](http://www.firstamendmentcenter.org/faclibrary/libraryexpression.aspx?topic=press_freedoms).

### 2. More First Amendment Precedents:

Another helpful set of links to seminal First Amendment case law, organized by topic, can be found at [http://www.bc.edu/bc\\_org/avp/cas/comm/free\\_speech/decisions.html](http://www.bc.edu/bc_org/avp/cas/comm/free_speech/decisions.html). This is an internal page hosted by Boston College in connection with the book, *Freedom of Speech in the United States*, by Thomas L. Tedford and Dale A. Herbech. An overview of the book, including updates to its Table of Contents for the past three years, can be found at [http://www.dc.edu/dc\\_org/avp/cas/comm/free\\_speech/](http://www.dc.edu/dc_org/avp/cas/comm/free_speech/).

### 3. Best One-Stop Shopping Site:

Without question, one of the most useful sites on the Web for the whole host of topics that are the focus of media lawyers' daily pursuits is the website of the Reporters Committee for Freedom of the Press at <http://www.rcfp.org/>. The Reporters Committee has made a tremendous investment of time and money to make its website extremely user-friendly and to provide invaluable resources including: a fully searchable guide to open records and open meetings laws; its First Amendment Handbook; “Can We Tape?,” a guide to surreptitious taping of conversations (organized by state); and its most recent addition, a state-by-state, and circuit-by-circuit guide to the reporter's privilege. If you're wondering if anyone has recently (or ever) encountered the same problem you're facing (even in an unreported deci-

sion), simply enter the appropriate words in a search of the organization's news archives at <http://www.rcfp.org/news/search.cgi>.

### 4. Helpful Narrative Annotations, Annual Update & Case Law:

FINDLAW, a general legal research and information site, contains a helpful set of annotations to the First Amendment, which are organized by topic and include hot links to Supreme Court cases, at <http://caselaw.lp.findlaw.com/data/constitution/amendment01/> - annotations. A helpful annual survey of media law developments can be found at The Media Institute's website at <http://mediainstitute.org/ONLINE/FAM2003/toc.html>.

### 5. Supreme Court Cases, etc. on Media Law:

The Legal Information Institute at Cornell University also has a media law page at <http://www.law.cornell.edu/topics/media.html> which includes links to recent media law cases from the United States Supreme Court and from U.S. Circuit Court of Appeals. This site also has a search form for Supreme Court syllabi on free press issues from 1990 to the present, which can be found at <http://www4.law.cornell.edu/cgi-bin/empower?DB=SupctSyllabi&TOPDOC=0&QUERY00=media%20or%20newspaper%20or%20broadcast%20or%20internet&PROP00=t=b>.

(Continued on page 49)

## “Website of the Month”

A “Website of the Month” column will be a regular feature of upcoming editions of the MediaLawLetter. Please send your suggestions for helpful websites to be featured here to [szansberg@faegre.com](mailto:szansberg@faegre.com). Thanks.

## MLRC Website: The New One is Still in Progress

We believe that in the not-so-distant-future, the MLRC website — [www.MediaLaw.org](http://www.MediaLaw.org) and [www.MediaLaw.com](http://www.MediaLaw.com) — will be a “best” resource online for the MLRC membership. It was due to be tested this month and “live” by November. We have run into some significant issues, however. MLRC and its generous pro bono counsel, Dow Lohnes & Albertson, are working to get it all back on track. We hope to have a timetable for all of us on this shortly. We are profoundly sorry about the delay. We will continue to update the current site in the interim.



## “The Best” Websites for Media Lawyers

(Continued from page 48)

### 6. **Historical Texts:**

For serious history buffs, there is a wonderful collection of historical documents (that you may use to pepper your brief to curry favor with Justice Scalia) at the Founders' Constitution website, [http://press-pubs.uchicago.edu/founders/toes/amendI\\_speech.html](http://press-pubs.uchicago.edu/founders/toes/amendI_speech.html). Another wonderful collection of historic free speech documents can be found at the Boston College website at [http://www.bc.edu/bc\\_org/avp/cas/comm/free\\_speech/historicdocuments.html](http://www.bc.edu/bc_org/avp/cas/comm/free_speech/historicdocuments.html).

### 7. **Broaden the View Finder:**

For general legal research, (not limited to First Amendment or free press case law), my personal favorite is American Law Sources Online, which lists all U.S. law at: <http://www.lawsources.com/also/usa.cgi?us1>. This extremely well-organized site allows access to case law from the United States Supreme Court & lower courts, United States Code, Code of Federal Regulations, rules of civil and criminal procedure, etc. Another helpful general legal research site is hosted by Washburn University School of Law at <http://www.washlaw.edu/searchlaw.html>. Ready access to federal law and all federal courts can be found at <http://www.thecre.com/fedlaw/default.htm>. A set of links to all federal courts, organized by circuit, can be found at the Federal Judiciary's website at <http://www.uscourts.gov/allinks.html>. All 50 states' statutes are available at <http://www.prairienet.org/~scruffy/f.htm>.

### 8. **FOIA:**

For lawyers interested in a free, online guide to the federal Freedom of Information Act and its exemptions, including case law applying and interpreting those exemptions, the U.S. Department of Justice "Guide to the Freedom of Information Act" is available at <http://www.usdoj.gov/oip/foi-act.htm>. Two other helpful guides to the FOIA can be found at the University of Missouri website at <http://foi.missouri.edu/laws.ht> and at the Reporter's Committee website at <http://www.rcfp.org/foiact/index.html>.

### 9. **Journalism Ethics:**

The two best websites for journalism ethics codes and materials are the Society of Professional Journalists site,

<http://spj.org/ethics.asp> and the American Society of Newspaper Editors site, <http://www.asne.org/index.cfm?ID=387>.

### 10. **News About News Companies:**

To keep up with the latest developments within the news industry, you can visit the Associated Press' Media News page at <http://www.ap.org/pages/indnews/>, *Editor and Publisher*: <http://www.editorandpublisher.com/editorandpublisher/index.jsp>, or [journalism.org](http://journalism.org): <http://www.journalism.org/>. A collection of links to numerous other sites offering information and articles about the media can be found at [http://dmoz.org/News/Media/Industry\\_News/](http://dmoz.org/News/Media/Industry_News/).

### 11. **All The News That Fits:**

Although there are numerous wonderful sites that offer breaking news from all over the world, the following websites are particularly useful compendiums of existing news outlets' websites: <http://www.crayon.net/using/links.html>. Other similar collections of news links are: <http://www.socsciresearch.com/r8.html>; and <http://www.blacksheepnews.com/>.

This list only scratches the surface of the "best" websites available for media law information. There are countless other extremely helpful sites, including those of the Media Law Resource Center <http://www.ldrc.com/>, the ABA Forum on Communication Law <http://www.abanet.org/forums/communication/home.html>, the Poyntner Institute <http://www.poynter.com>, and myriad other publications and organizations devoted to press freedoms and free speech issues more broadly defined. This is not to mention the plethora of other websites collecting actual newspapers and broadcast media sources, and information about related legal topics such as intellectual property, privacy, cyberlaw, censorship, FCC practice, etc.

My objective here was, in part, to inspire *you* to pass on your personal favorites to the MLRC.

*Steven D. Zansberg is a partner in the Denver office of Faegre & Benson LLP.*

## Lawsuit Tests Limits of SEC's Power over Publishers

By Bruce W. Sanford and Bruce D. Brown

Agora, Inc., a Maryland-based publisher with a wide range of newsletters that offer stock tips and investment advice, is defending an unusual securities action in federal court in Baltimore, one with possibly far-reaching implications for the nation's media, particularly for publishers who regularly carry financial news and stock recommendations.

In April, the Securities and Exchange Commission filed a lawsuit against Agora and two of its affiliates in which the agency is attempting to expand its jurisdiction over publishers in a startling new direction. In its complaint, the SEC claims that the Agora defendants are liable under the federal securities laws for knowingly publishing false information about a publicly-traded company that was the subject of one of its stock tips. But what sets the litigation apart from previous cases – and makes it so potentially dangerous for publishers across the country – is that the SEC acknowledges that Agora had no financial interest in the company's stock.

Thus, unlike past cases where the SEC has prosecuted financial writers who defrauded readers by "pumping" stocks in which they secretly held positions and then "dumping" those shares after the stock jumped, Agora is accused simply of publishing information about a publicly-traded company that the SEC believes is false. No so-called "disinterested" publisher has ever been held liable under the federal securities laws on such a theory. Agora, which also publishes many health and travel newsletters as well as literary titles through its Pickering & Chatto division, filed a motion to dismiss in June before U.S. District Judge Marvin J. Garbis.

The case arises out of a recommendation by an Agora writer in mid-May 2002, regarding United States Enrichment Corporation ("USEC"), a Bethesda, Maryland-based company whose shares are traded on the New York Stock Exchange. The writer believed that USEC, which purchases uranium fuel from decommissioned Soviet warheads for use in American nuclear reactors, stood to profit from an upcoming U.S.-Russian summit in Moscow at which a new arms control treaty was expected to be signed. (Such an agreement was indeed formalized later in the month at the summit by Presidents Bush and Putin.) The SEC claims that Agora's

coverage of USEC falsely attributed certain information about the upcoming treaty – and its potential benefits to the company – to a USEC official.

The government sued Agora under Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder, which prohibit fraudulent activities in connection with the purchase or sale of securities. Rule 10b-5 is, of course, the "catchall" provision on which the SEC relies when it pursues "insider trading" cases, and it has been applied in other contexts, to be sure. But the Rule has never been used to impose liability on a financially-disinterested publisher on the basis of statements made regarding publicly-traded companies. Were the SEC's theory in this case validated, it would expand dramatically the scope of potential civil liability for publishers, especially in the area of falsehoods that are not defamatory but which regulators or investors claim were inaccurate or misleading in some fashion.

In its motion to dismiss, Agora maintained that, because

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***What sets the litigation apart from previous cases – and makes it so potentially dangerous for publishers across the country – is that the SEC acknowledges that Agora had no financial interest in the company's stock.***

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it did not trade in USEC shares, its recommendations relating to the company fail to meet the statutory requirement of conduct "in connection with" the purchase or sale of a security. It also argued that the SEC had failed to plead the existence of a materially-false statement, as mandated by the securities laws. Additionally, drawing upon an affidavit from the writer of the USEC recommendation, Agora conveyed to the Court that its statements about the company were published in good faith and without knowledge of any possible falsity. (The SEC does not dispute that the Agora writer interviewed the USEC official at length as a part of his research on the company; the agency instead posits that the writer knowingly misreported that conversation to his readers.)

Finally, Agora contended that the SEC's request for injunctive relief was wholly inappropriate, given the strong First Amendment presumption against prior restraints. Briefing on the motion to dismiss concluded at the end of August, and a decision is pending.

*Bruce W. Sanford and Bruce D. Brown represent Agora, Inc. and its affiliates in SEC v. Agora, Inc. et al., No. MJG 03-1042, in the U.S. District Court for the District of Maryland. They are, respectively, a partner and an associate in the Washington, D.C. office of Baker & Hostetler LLP.*

## ETHICS CORNER

### “On Advice of Counsel”: A Trap for the Unwary Client ... and Lawyer

By Len Niehoff

The ethical principle of confidentiality and the evidentiary principle of attorney-client privilege are distinct and not coextensive. Nevertheless, the two principles have much in common. In addition, proper counseling about the privilege is essential to protecting confidentiality and to offering competent representation.

In some cases, it may be appropriate for a client to sacrifice confidentiality and reveal their attorney's advice in order to advance a specific claim or defense. A defendant might pursue such a strategy in a patent case, for example, where an attorney's guidance regarding the scope of existing patents may help demonstrate the good faith of an alleged infringer. *See, e.g., Central Soya Co. v. Geo. A. Hormel & Co.*, 581 F. Supp. 51 (W.D. Okla. 1982). For years, our own bar has engaged in a lively debate as to the advisability of relying on an attorney's pre-publication review of an article or broadcast in defending against a defamation claim.

Of course, such a strategy comes with an understood cost. Confidentiality cannot serve as both a sword and a shield. Accordingly, a client's invocation of their attorney's advice in support of a claim or defense will typically waive the privilege. The significance of this decision is compounded by the fact that many courts hold that such waivers extend to the entire subject matter of the communication, and broadly construe the subject matter at issue. So, for example, in the *Central Soya* case cited above the defendant in a patent infringement action produced two legal opinions in support of its argument that its infringement was not deliberate; the court held that the plaintiff was entitled to discover approximately forty other legal opinions as well.

A decision to waive confidentiality under these circumstances therefore must be made with the greatest care. The opportunity for such careful consideration can be lost, however, if the client stumbles into a waiver of confidentiality through his or her conduct. The recent case of *In Re Grand Jury Subpoena*, 2003 U.S. App. LEXIS 16918 (4<sup>th</sup>

Cir. 2003), decided in August of this year, demonstrates the point in a troubling way.

In that case, the FBI interviewed the Appellant, who was of Middle Eastern descent, to see if he had any information that might be helpful in connection with a terrorism investigation. In the course of the interview, the FBI asked the Appellant about his “green card” application. Specifically, the FBI wanted to know why he had answered “no” to a question asking whether he had been convicted of any crimes. In fact, the FBI knew that the Appellant had a shoplifting conviction at the time he completed the form. In response, the Appellant stated “I answered ‘no’ to the question ... under the advice of an attorney.”

A federal grand jury subpoenaed the Appellant's lawyer, who was asked whether she had indeed advised the Appellant to answer the question “no.” The attorney refused to respond, on the basis of the attorney-client privilege, and the government filed a motion to compel. The district court granted the motion, and the Fourth Circuit affirmed.

The Fourth Circuit concluded that the question posed by the grand jury did indeed seek information generally protected by the attorney-client privilege. Further, the court noted that “Appellant filled out and submitted [the ‘green card’ application] himself; that he may have answered a question in a particular way on the advice of his attorney does not subject the underlying attorney-client communications to disclosure.”

Nevertheless, the court concluded that the Appellant waived that privilege through his statement to the FBI agents. The court noted that the privilege belongs to the client, and the client can waive the privilege expressly or implicitly. The court reasoned that the Appellant's statement was an “implied waiver” of the privilege because he had “clearly stated to a third party that his attorney had advised him to answer ‘no.’”

Certainly, this case raised the issue of waiver in a singularly unsympathetic context. As noted above, this case involved a terrorism investigation, a witness who lied when

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**Specifically, the FBI wanted to know why he had answered “no” ... the Appellant stated “I answered ‘no’ to the question ... under the advice of an attorney.”**

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(Continued on page 52)

**ETHICS CORNER***(Continued from page 51)*

completing a federal government form, and a lawyer who might have encouraged the lie. On the facts, perhaps the result should not trouble us. The legal reasoning, on the other hand, raises some disquieting questions.

Perhaps most disturbing is the court's conclusion that the Appellant's answer amounted to a "clear state [ment]" that his attorney "had advised him to answer 'no.'" At most, the Appellant's statement seems ambiguous: does the statement mean (a) the lawyer *told* him to answer 'no,' or (b) he sought advice from his lawyer and then *decided* to answer 'no.' A fairly persuasive argument can be made that the latter is at least as reasonable an interpretation of his statement as the former.

This latter interpretation would correspond to a number of analogous situations in which courts generally would not find waiver. Criminal defendants who invoke the Fifth Amendment routinely do so "on advice of counsel." Witnesses who rely upon a broad array of other testimonial privileges (such as the attorney-client or physician patient privileges) often decline to answer "on advice of counsel." And it is not at all uncommon for a client who is testifying about their decision-making process to note, at least in passing, that it included consultation with their lawyers. These statements may, to some substantial degree, reveal or suggest the advice offered by the lawyer to the client, but they do not waive confidentiality as to all of the communications between lawyer and client as to that subject matter. Nor should they; after all, they are not clear and intentional disclosures of protected information.

It is, of course, possible to dismiss this case as an aberration arising from unsympathetic facts. We do so, however, at the cost of a valuable lesson the case has to offer. Whenever, in the course of testifying, our clients take note of the fact that they consulted with counsel they create some risk of waiver. We can significantly reduce (or eliminate) the risk by properly preparing our clients and by interposing an objection – *before* the answer is given – to any question that might encompass confidential attorney-client communications. This helps us to preserve the privilege, and to fulfill our ethical obligation to protect confidentiality.

MLRC ANNUAL DINNER  
NOVEMBER 12, 2003

**IN THE TRENCHES REVISITED:  
WAR REPORTING AND THE FIRST  
AMENDMENT – PART II**

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The Dallas Morning News

**Mary Beth Sheridan**  
The Washington Post

**Michael Weisskopf**  
TIME Magazine

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