

MILRC Media Law Resource Center
MEDIA LAW LETTER

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MLRC ANNUAL DINNER
WEDNESDAY, NOVEMBER 7TH, 2007, NEW YORK CITY

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

DAVID FANNING, Creator and Executive Producer, FRONTLINE

Followed by a Panel Discussion: *Witnesses to Our Time: Independent Voices of the Documentary*

Lowell Bergman, Heidi Ewing, Alex Gibney, Moderated by Judy Woodruff

MLRC London Conference Explores International Media Law Issues *Content, Newsgathering and New Media Issues Discussed*

Over 200 lawyers from around the world convened at Stationers' Hall in London on September 17-18 for MLRC's Conference on International Libel, Privacy, Newsgathering and New Media Law. This was MLRC's largest conference in London to date, with new attendees from Argentina, Hong Kong, Hungary, Malaysia, and the Philippines.

Judge Loukis Loucaides of the European Court of Human Rights opened the event with a speech surveying the Court's expanding privacy law jurisprudence – which is impacting the media law landscape throughout Europe. Judge Loucaides, from Cyprus, has been a member of the Court since 1998. His speech, entitled "Freedom of Expression and the Right to Respect Private Life" – was a pointed reminder of the broad protection the Court is prepared to give to the right to privacy.

While acknowledging that a free press is fundamental to democratic society, Judge Loucaides stated that an "idealistic approach" to freedom of expression had given insufficient protection to privacy. He then outlined recent Court cases that have recognized a protection for privacy under Article 8 of the European Convention on Human Rights, including the Court's landmark decision in *Von Hannover v. Germany* which found that Princess Caroline of Monaco has a right not to be photographed in public by the press unless she is undertaking an official function.

Judge Loucaides concluded by noting that the Court would give wide latitude to the press to report on the private behavior of public officials and political candidates where their conduct impacts the functions of government. But he suggested that publication of "flashy news" – presumably gossip and celebrity



ECHR Judge Loukis Loucaides.

news – was not only potentially invasive of the right of privacy, but something which potentially undermines democracy itself.

September 17 Sessions

Nancy Hamilton, Jackson Walker LLP, and Mark Stephens, Finers Stephens Innocent LLP, then led a session on Libel Law developments in the UK, US and Europe. Among the issues of discussion was reporting allegations of misconduct, including recent libel cases in the UK and the US over reports on suspected connections to terrorism. The session also included a discussion of costs in UK libel litigations, in particular the conditional fee arrangements which allow for substantial "uplifts" in recoverable fees for successful plaintiffs.

David McCraw, The New York Times Company, and Gillian Phillips, Times Newspapers Ltd., led a discussion on Criminal Liability issues for the press. Topics included official secrets legislation and liability for protecting confidential sources.

The day concluded with a session on the Asian Media Law landscape. Justice William Henric Nicholas of the Supreme Court of New South Wales, Australia introduced the session with observations on free expression issues in

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Asian Media Law Panel. From left to right: Harry Roque, Cecil Abraham, Doreen Weisenhaus, Justice Nicholas.

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the region. Then Peter Bartlett, Minter Ellison and Kurt Wimmer, Gannett Company, Inc., led a panel session featuring Cecil Abraham (Malaysia); Harry Roque (Philippines); and Doreen Weisenhaus (Hong Kong).

September 18 Sessions

On September 18, David Schulz, Levine Sullivan Koch & Schulz LLP, moderated a discussion with English High Court Judge Michael Tugendhat and Justice Nicholas on UK and Australian libel practices and trends.

Kevin Bays, Davenport Lyons, and Elizabeth McNamara, Davis Wright Tremaine LLP, led a discussion on privacy law developments, including a discussion of the impact of the *Von Hannover* and recent English decisions on publishers. English author and barrister John Mortimer QC spoke at the end of the privacy law session. In a question and answer session led by Mark Stephens, Finers Stephens Innocent LLP, Mortimer discussed his own brushes with privacy issues, as well as the inspirations behind his famous fictional character Horace Rumpole.

Siobhain Butterworth, public editor at *The Guardian* and Dale Cohen, Cox Enterprises, Inc., moderated a panel session on Journalism & The New Media Environment. The panel featured Tim Brooks, Managing Director, The Guardian, Richard Sambrook, BBC Global News, Paisley Dodds, AP London Bureau Chief, and Lloyd Sheperd, former Director Yahoo! News Europe.

Louise Hayman, Independent News & Media, and Clifford Sloan, Washington Post.Newsweek Interactive led a discussion session on New Media & The Law, including discussion of Google litigations throughout the world that are challenging traditional notions of fair use/fair dealing.

The conference concluded with an Oxford-style debate on privacy law. The resolution for debate was: This House believes the press has no right to pry into the private lives of public figures. Michael Beloff QC, Blackstone Chambers, and Matthew Nicklin, 5RB, argued in favor of the resolution. Kelli Sager, Davis Wright Tremaine, and Charles S. Sims, Proskauer Rose LLP, argued against the resolution. Despite a strong show of hands against the resolution, Mr. Justice Tugendhat judiciously called the debate a draw.

Finally, on Wednesday morning September 19 approximately 50 in-house lawyers from the UK, US, Australia and Canada met to discuss their unique practice and management issues.



Counterclockwise from the top: Paisley Dodds, AP London Bureau Chief; Tim Brooks, Managing Director of *The Guardian*; and Richard Sambrook of BBC Global News, participating in a panel discussion on Journalism and the New Media Environment.



Mr. Justice Tugendhat, High Court England & Wales, and Justice Nicholas, Supreme Court New South Wales, Australia



Mark Stephens, Finers Stephens Innocent LLP, interviewing barrister and author John Mortimer.



Kevin Bays, Davenport Lyons, in the Privacy Law session.



Donald Verrilli, Jr., Jenner & Block, discussing *Viacom v. Google* in the New Media & Law session.



Kelli Sager, Davis Wright Tremaine LLP, in the Oxford-style debate on privacy law.

MLRC's London Conference 2007 Was Presented With The Generous Support Of:

Covington & Burling
Davis Wright Tremaine LLP
Finers Stephens Innocent LLP
Jackson Walker LLP
Miller Korzenik & Sommers
Prince Lobel Glosky & Tye LLP
Reynolds Porter Chamberlain

Hiscox Insurance
Chubb Insurance
Media/Professional Insurance

And the efforts of our conference planners and session facilitators:

Kevin Bays, Davenport Lyons
Peter Bartlett, Minter Ellison
Siobhain Butterworth, Guardian Newspapers Ltd.
Dale Cohen, Cox Enterprises
Jan Constantine, Authors' Guild
Stephen Fuzesi, Jr., Newsweek, Inc.
Nancy Hamilton, Jackson Walker LLP
Louise Hayman, Independent News & Media
David Hooper, Reynolds Porter Chamberlain
Lee Levine, Levine, Sullivan, Koch & Schulz LLP
David McCraw, The New York Times Company
Elizabeth McNamara, Davis Wright Tremaine LLP
Lynn Oberlander, The New Yorker
Gillian Phillips, Times Newspapers Ltd.
David Schulz, Levine, Sullivan, Koch & Schulz LLP
Clifford Sloan, Washington Post / Newsweek Interactive
Mark Stephens, Finers Stephens Innocent LLP
Kurt Wimmer, Gannett Company, Inc.
Sandra Baron & Dave Heller, MLRC

Tenth Circuit Affirms Dismissal of Federal Civil Rights and Privacy Tort Claims Brought Against a Television Station and Its Reporter

Broadcast of Video Excerpts Was Newsworthy

By Michael Berry

In a significant victory underscoring the freedom of the press, the Tenth Circuit Court of Appeals affirmed an Oklahoma federal district court's rulings dismissing a rape victim's claims against a television station and its reporter for broadcasting excerpts of video evidence of the rape. *See Anderson v. Suiters*, 2007 WL 2421765 (10th Cir. 2007) (Briscoe, Hartz, Gorsuch, JJ.).

The appellate court held that the press did not engage in joint action with the police officer who provided access to the confidential evidence – and thus did not become a state actor subject to liability under 42 U.S.C.

§ 1983 – even though the officer allegedly traded access to the tape for an opportunity to be interviewed on television and then placed a call to the victim asking her to talk to the reporter.

The court also held that, notwithstanding the sensitive nature of the video, its broadcast was protected by the First Amendment because the video was substantially relevant to a matter of public concern.

District Court Proceedings

Plaintiff was raped while unconscious by a local attorney who already was facing charges for two other rapes. Plaintiff discovered she had been raped several weeks later when she found a videotape of the alleged rape. She reported the rape to the local police and turned the tape over to a police detective, who purportedly promised he would only disclose the tape to his partner, the judge, and a jury, if necessary.

The detective then broke that promise by permitting KOCO-TV to record the tape. During KOCO-TV's evening news program, one of its reporters, Kimberly Lohman Suiters, reported on the latest rape allegation against the attorney. During the report, the station broadcast brief excerpts of the tape, which did not include any explicit images and did not identify the plaintiff in any way.

Plaintiff filed suit in the Western District of Oklahoma against Suiters, Ohio/Oklahoma Hearst-Argyle Television, Inc., which owns KOCO-TV, the detective, and others. Plaintiff originally asserted three claims against the media defendants: (1) a federal civil rights claim alleging that they conspired with the detective to violate her constitutional right to privacy, (2) a state-law intrusion claim alleging that the media defendants had intruded on her privacy by viewing the tape, and (3) a state-law claim for publication of private facts alleging that the media defendants invaded her privacy by broadcasting the contents of the tape.

The district court granted the media defendants' motion to dismiss the civil rights and intrusion claims, but allowed the publication of private facts claim to proceed, ruling that the news report itself was not properly before the court on a motion to dismiss. *See MLRC MediaLawLetter* November 2005 at 25-26 (discussing ruling in *Anderson v. Blake*, 2005 WL 2716302 (W.D. Okla. Oct 21, 2005)).

The media defendants quickly answered and filed a motion seeking summary judgment on the remaining privacy claim. The district court granted that motion and denied the plaintiff's request to add claims for promissory estoppel and tortious interference with contract. *See MLRC MediaLawLetter* February 2006 at 13-14 (discussing ruling in *Anderson v. Blake*, 2006 WL 314447 (W.D. Okla. Feb 09, 2006)). The plaintiff appealed each of the district court's rulings.

Court of Appeals Affirms

On August 28, 2007, the Court of Appeals affirmed each of the district court's rulings. The court agreed that plaintiff had failed to state a § 1983 claim against the media defendants because the plaintiff was unable to establish that the police and media defendants shared a joint purpose to violate the plaintiff's constitutional right to privacy.

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Although the video was of a “sensitive nature” and its disclosure might have been “highly offensive to a reasonable person,” according to the court, “that does not make the videotape any less newsworthy.”

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Each defendant had a separate goal: The detective wanted to be interviewed for the evening news, and the reporter wanted “exclusive access to the investigation.” Additionally, the media defendants always “retained editorial control over the use of the videotape.” The court emphasized that a reporter does not expose herself to a federal civil rights claim “simply because she has received and published information from a government official.”

The court further explained that although the detective’s call to the plaintiff on the reporter’s behalf was evidence of joint cooperation to secure an interview, it did not establish that the defendants acted jointly to violate the plaintiff’s privacy rights by airing excerpts from the videotape.

The appellate court also affirmed the trial court’s decision granting summary judgment in the media defendants’ favor on the plaintiff’s publication of private facts claim. The court explained that information contained in a news report is privileged – both as a matter of tort law and the First Amendment – if it is substantially relevant to a matter of legitimate public interest. The video excerpts met this standard because (1) the prosecution of plaintiff’s attacker was a legitimate matter of public concern; and (2) “[b]y airing the videotape, the media defendants heightened the report’s impact and credibility by demonstrating that the allegations rested on a firm evidentiary foundation and that the reporter had access to reliable information.”

Although the video was of a “sensitive nature” and its disclosure might have been “highly offensive to a reasonable person,” according to the court, “that does not make the video-

tape any less newsworthy.” The court empathized with the plaintiff, noting that it “understand[s] entirely why [she] found the publication of any portion of the tape highly distressing,” but concluded that “it is also difficult to see how the broadcast at issue could be said to have *no* legitimate public interest – the test we must apply.”

The court disposed of the other claims advanced by the plaintiff in summary fashion. It first declined to review the district court’s dismissal of plaintiff’s intrusion claim because the plaintiff had failed to advance any substantive argument in favor of that claim on appeal. The court also rejected plaintiff’s efforts to add claims for promissory estoppel and tortious interference with contract.

The appellate court held that the district court properly denied leave to add these claims because (1) plaintiff’s promissory estoppel claim asserted only emotional distress as an injury, which is not cognizable under Oklahoma law unless accompanied by a physical injury; and (2) plaintiff’s proposed tortious interference claim was deficient because she could establish only that the media defendants knew the confidentiality of the video was protected by state and local law, not that the video was protected by a separate agreement between the police detective and plaintiff.

Ohio/Oklahoma Hearst-Argyle Television, Inc. and Kimberly Lohman are represented by David A. Schulz and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P.; Robert D. Nelon and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelon; and Jonathan Donnellan and Kristina Findickyan of Hearst Corporation. The plaintiff is represented by Michael Salem.

Bulletin 2007 No. 1 (Feb. 2007):

MLRC 2007 REPORT ON TRIALS AND DAMAGES

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I Feel Good! - James Brown's Right of Publicity Claim Survives in Illinois

Brown Sued Over Photos on Licensing Website

By Samuel Fifer and Tiffany Wohlfeil

The Illinois Appellate Court danced between the lines of right of publicity and copyright law as it issued a recent opinion, *James Brown v. ACMI Pop Division, et. al.*, No. 1-06-0870, 2007 WL 2214544 (Ill. App. 1 Dist. Aug. 2, 2007) (Campbell, Quinn, Murphy, JJ.). Presented with two issues of first impression for the court, it considered whether online licensing of copyrighted images constitutes a commercial purpose under the Illinois Right of Publicity Act and whether the Right of Publicity Act is preempted by the Copyright Act. The court found for the plaintiff on both counts and James Brown's right of publicity claim survived the defendant's motion to dismiss.

Background

The late "Godfather of Soul" James Brown brought this right of publicity suit in 2002 against Corbis, which licenses copyrights for photographs. Corbis's potential customers, including the media, private parties and commercial users, can review Corbis's online catalog of images and identify the images they choose to license. Corbis either owns the copyright to those images or is authorized to license the copyright on behalf of photographers.

James Brown's photographs were displayed in the "professional use" section of Corbis's website which conditions the end user's right to use the image upon obtaining all necessary third-party "rights, releases and permissions." Brown sued Corbis alleging that Corbis infringed his right of publicity through the unauthorized commercial use of his image on the Internet.

Corbis filed a motion to dismiss. Corbis argued that "it is not selling a product but rather offering to license the copyrights it holds on the photographs." Thus, "any action by Brown for improper use of the photos by the end user licensee lies against that end user and not Corbis." Brown argued that the mere display of his photographs on Corbis's website without his permission constitutes an improper commercial purpose and violates his right of publicity regardless of how the image was ultimately used by Corbis's customers.

Trial Court Ruling

To decide whether Brown's right of publicity claims should be dismissed, the trial court considered whether Corbis used Brown's persona to sell or advertise any "product, merchandise, goods, or services." Initially, the trial court held that Corbis's actions were noncommercial because it acts only as a "vehicle of information." On reconsideration, the trial court reversed itself, holding that Corbis's actions would be noncommercial only if the images were used exclusively for the purpose of disseminating news or other public interest information.

The trial court reasoned that because Corbis offers images for sale to commercial users as well as the media, Corbis's action may be considered commercial and Brown's right of publicity claim should not be dismissed. The trial court then certified the issues for interlocutory appeal, a somewhat unusual move. As unusual, the court accepted and decided the appeal.

Appellate Decision

On appeal, the Illinois Appellate Court considered two questions. First, does Corbis's online display of copyrighted images of James Brown constitute a commercial purpose under the Illinois Right of Publicity Act? As an initial matter, the court traced the history of right of publicity law in Illinois and found that the Act essentially codifies the common law right of publicity, eliminating a distinction between the two for the purpose of this analysis.

The court answered the question, not by deciding how Corbis's use should be defined, but by finding that "the vast difference of opinion regarding the interpretation of the definition of what Corbis sells and the legal effect of such sales" creates sufficient ambiguity that the court could not definitively hold that Corbis's actions "did not in some way constitute an improper commercial use."

While the court stopped short of holding that Internet licensing of photo rights is, per se, a "commercial use" under the Right of Publicity Act, the court left open such a possibil-

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ity. Taken to the extreme, the decision could require licensors to obtain publicity rights from individuals depicted in photographs regardless of its contemplated use.

Second, the court considered whether Brown’s right of publicity claims are preempted by the Copyright Act – the first time this question has been considered by the Illinois Appellate Court. The trial court relied on *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005) to decide that Brown’s right of publicity claim was not preempted. In *Toney*, the Seventh Circuit found that a right of publicity claim is not preempted because “the subject matter of a Publicity Act claim is not a particular picture or photograph but, rather, the ‘persona of the plaintiff as a human being.’” Because *Toney*’s identity was not “fixed in a tangible medium of expression,” the Court held *Toney*’s identity was not protected by copyright law.

Corbis attempted to distinguish *Toney* by relying on *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134 (9th Cir. 2006). In *Laws*, the Ninth Circuit found a recording artist’s right of publicity claim against Sony was preempted under copyright law because the plaintiff’s “right of publicity was based solely on her voice ‘embodied within a copyrighted sound recording.’” The Ninth Circuit distinguished *Toney* by noting that the plaintiff in *Toney* “claimed misappropriation

of her identity separate and apart from any copyrighted work.”

The Illinois Appellate Court held that Brown’s right of publicity claims were not preempted by copyright law. To reach this conclusion and reconcile *Toney* and *Sony*, the court focused on the “tangible” nature of the use in question. The court determined that Corbis’s online display of James Brown’s photographs “can be interpreted as tangible” and thus, Brown’s right of publicity claims were not preempted by the Copyright Act.

In all, the decision is less than decisive and relies heavily on potential interpretations of scant facts to avoid dismissal of Brown’s claims as a matter of law. In addition, the interlocutory nature of the appeal leaves open the question of what may happen next and, indeed, the wisdom of the court’s choice to take this discretionary appeal and then to decide it, essentially applying *Toney* to the facts as pleaded. One is left to wonder whether the court expects to revisit either of these issues when presented with more record evidence in some future appeal of a final judgment in the case.

Samuel Fifer is a partner, and Tiffany Wohlfeil an associate, at Sonnenschein Nath & Rosenthal LLP in Chicago. The estate of James Brown is represented by William R. Coulson and Arthur S. Gold, Gold & Coulson, Chicago. Corbis is represented by Julie A. Bauer, Mary Patricia Benz, Winston & Strawn LLP, Chicago.

The screenshot shows the Corbis website interface. At the top left is the 'corbis.' logo. Below it are search tabs for 'Creative', 'Editorial', and 'All'. A search bar contains 'james brown' and a 'Search' button. To the right of the search bar are various filters: 'Rights Managed' (checked), 'Royalty-Free' (checked), 'Photography' (checked), 'Illustration' (unchecked), 'Color' (unchecked), 'Black & White' (checked), 'Only Model-Released' (unchecked), and 'Only Images on CD (RF)' (unchecked). There are also links for 'Collections Search (Turn On)', 'Advanced Search (Turn On)', and 'Search Tips'. Below the search bar, the results for 'james brown (All Images)' are displayed. A 'Change Page Layout' button and 'Sorting Options: Relevancy' are visible. A navigation bar shows 'All Images (196)', 'Commercial (1)', 'Editorial (18)', 'Historical (180)', 'Art (0)', 'News (1)', 'Sports (0)', 'Entertainment (98)', and 'RF (0)'. A 'Go to page' field is set to '1 of 4'. Below the navigation bar is a grid of five image thumbnails. Each thumbnail has a title, a 'Price Image' button, and 'Lightbox' and 'Cart' options. The thumbnails are: 1. 42-16064093 (RM) - A group of men in suits. 2. 42-15437036 (RM) - James Brown performing on stage. 3. 42-16507444 (RM) - James Brown performing on stage. 4. 42-16507042 (RM) - James Brown performing on stage. 5. 42-16507384 (RM) - James Brown performing on stage.

Jury Orders Station to Pay \$4 Million for News Director's Off-Air Statements

Station Vicariously Liable for Employee's Bizarre Off Air Statements

In mid-September, a South Carolina jury ordered a television station to pay \$3.95 million for defamatory, off-air statements made by a former station news director about a South Carolina attorney. *Elizabeth Murphy v. Jefferson-Pilot Communications*, No. 01-CP-10-1115 (S.C. Ct. C.P., Charleston County jury verdict Sept. 14, 2007); *Chris Murphy v. Jefferson-Pilot Communications*, No. 01-CP-10-2161 (S.C. Ct. C.P., Charleston County jury verdict Sept. 14, 2007).

Background

At issue in the case were statements made in 1999 by Donald Feldman, then the news director of WCSC-TV in Charleston, South Carolina. In statements first made to Sandra Senn, a lawyer and regular panelist on a WCSC-TV public affairs show, Feldman said he was on a flight with plaintiff Elizabeth Murphy, an attorney. He said that Murphy was drunk, and that she made slanderous remarks about the station and Senn. Feldman then prepared a letter on station letterhead threatening legal action against Murphy; claimed he had obtained the flight manifest and service log (showing what plaintiff drank on the flight); and claimed plaintiff had agreed to sign an agreement to stop defaming Senn.

Feldman's story began to unravel when a copy of the letter was actually delivered for the first time to plaintiff, and it became clear that Feldman was never on a flight with plaintiff, and that he had concocted the fabrications because he was infatuated with Senn.

Moreover, Feldman pleaded guilty in 2001 to embezzling almost \$2.5 million from the station, and was sentenced to three years in prison followed by three years of probation, and ordered to pay restitution to the station.

Libel Claims

Plaintiff's libel claims against Feldman and the station went to trial in 2003. Before the case was submitted to the jury, the trial judge, Circuit Judge Thomas Hughston, granted a directed

verdict to the station and its corporate owner. The judge described the facts as "bizarre" and "unique" and noted that "to extend vicarious liability to the facts of this case would be beyond reason." See *Murphy v. Jefferson-Pilot Communications*, No. 01-CP-10-1115, 2002 WL 34217984 (S.C. Ct. C.P., Charleston County jury verdict Sept. 14, 2007); see also *MLRC MediaLawLetter*, June 2003 at 12.

The jury went on to render a \$9 million damage judgment against the (indigent) former news director.

The South Carolina appeals court reversed the directed verdict in favor of the broadcaster. See *Murphy v. Jefferson Pilot Communications*, No. 3988, 2005 WL 1115211 (S.C. App. May 2, 2005); see also *MLRC MediaLawLetter*, May 2005 at 10.

The appeals court held that the jury should have been allowed to decide whether the broadcaster was vicariously liable for the news director's statements. The Court of Appeals agreed that the case was bizarre, but found conflicting evidence whether the news director was acting within the scope of his employment or simply pursuing a personal matter. Since this involved issues of credibility regarding the director, other station employees and witness, the court concluded these issues should have been decided by the jury.

Libel Trial

The latest jury award came after an eight-day trial and three hours of deliberation. The jury verdict included \$3.7 million to Elizabeth Murphy and \$250,000 to her husband Christopher Murphy. MLRC has asked trial counsel to submit a more detailed report on the trial.

John J. Kerr and Henry E. Grimball of Buist Moore Smythe McGee, P.A., in Charleston, SC represented the media defendants. Plaintiff was represented by John E. Parker and Ronnie Crosby of Hampton, SC.

Just Published!
MLRC's Bulletin 2007:3

**PUBLISHING IN THE GLOBAL ENVIRONMENT:
DEVELOPMENTS IN EUROPEAN AND AMERICAN MEDIA LAW**

THE LAW OF PRIVACY IN ENGLAND AND WALES

By Kevin Bays and Paul Chamberlain

POLICING PRIVACY

HOW U.S. LAW NAVIGATES THE BOUNDARY BETWEEN FREE SPEECH AND PRIVATE FACTS

By David A. Schulz and Ashley I. Kissinger

PUBLISHING IN IRELAND

By Karyn Harty

CAN WE BRIDGE THE TRANS-ATLANTIC COPYRIGHT DIVIDE

FAIR USE AND AUTHORS' RIGHTS IN NEW MEDIA

By Hubert Best

ONLINE INTERMEDIARIES AND THIRD PARTY CONTENT UNDER EU AND US LAWS

A BRIEF DISCUSSION OF THE DIFFERENT STANDARDS AND A POSSIBLE STRATEGY FOR
RESISTING A FOREIGN JUDGMENT INCONSISTENT WITH US LAW

By Patrick J. Carome, Colin Rushing, and Bart M.J. Szewczyk

MOCK TRIAL TALES

A COMPARISON OF MOCK JURY TRIALS IN THE UNITED STATES, CANADA, AND ENGLAND

By Charles L. Babcock, Jason S. Bloom and Thomas B. Kelley

JOURNALISTS ON THE FRONT LINE

THE GENEVA CONVENTIONS, THE BUSH ADMINISTRATION AND THE CHALLENGES OF WAR COVERAGE

By Scott Horton and Amin Kassam

PRESS FREEDOM IN THE BALANCE:

A COMPARATIVE EXPLANATION AND CRITIQUE OF ECHR'S DEVELOPING CASE LAW ON PRIVACY AND LIBEL

By David S. Korzenik and Mona Houck

The Bulletin is available online at www.medialaw.org

New Hampshire Supreme Court Modifies Prior Rulings on Fair Report

By William L. Chapman

Late last month, the New Hampshire Supreme Court modified its May 1, 2007 ruling on the fair report privilege. *Thomas v. Telegraph Publishing Co.*, No. 2005-751, 2007 WL 1299870, 35 Media L. Rep. 1769 (N.H. May 1, 2007), as modified on denial of reconsideration (Aug 29, 2007). See also MLRC MediaLawLetter, May 2007 at 13. The Court withdrew its entire discussion of the fair report privilege and substituted a new section addressing two issues: whether malice defeats the privilege, and the scope of the privilege.

The order came in response to a motion for reconsideration filed by Telegraph Publishing and supported by a coalition of New Hampshire media groups (collectively the “amicus news organizations”).

Background

The case arose out of a 1999 front page news article in *The Telegraph* headlined, “Police Said A Burglar’s Luck Has Run Out After 25 Years.” The gist of the article was captured in one of its lead sentences: “The Nashua resident is suspected in more than 1,000 home burglaries in Massachusetts and New Hampshire since the mid-1970’s, according to police and court records.”

Terry Thomas sued the newspaper, its publisher, a reporter, four law enforcement officers and a professor of criminal justice, claiming that 58 statements in the article were defamatory.

Thomas appealed a trial court ruling that some of the challenged statements were protected by the fair report privilege. He argued that the privilege did not apply because he had submitted “affirmative circumstantial evidence... from which actual malice could be inferred.” *The Telegraph* defendants countered that the fair report privilege does not depend on state of mind.

In its May 1, 2007 ruling, the New Hampshire Supreme Court ruled that the fair report privilege could be defeated on a showing of “malice.” The Court stated that “the malice inquiry... focuses upon the mental state of the reporter/publisher in publishing the false report.” But the Court did not explain what it meant by malice or state of mind.

The plaintiff had alleged that the police had “acted maliciously toward him” but the Court ruled that this conduct could not be imputed to the newspaper.

The New Hampshire Supreme Court also held that several statements drawn from an “Initial Investigation Report” that

was part of a public arrest record fell outside the privilege, concluding that “records of investigations are not inherently within the privilege” because they “do not involve official actions.”

Motion for Reconsideration

On motion for reconsideration, *The Telegraph*, supported by the amicus news organizations, renewed its argument that the fair report privilege does not depend on state of mind. In its August 29 order denying reconsideration, the New Hampshire Supreme Court ruled that actual malice does not defeat the privilege but common law malice does.

The Court distinguished between (1) “actual malice” – meaning “subjective awareness of falsity or probable falsity of a statement” – and (2) “common law malice – meaning “ill will or intent to harm

In doing so, the Court revised the focus of the “malice inquiry” to center on the plaintiff, not the “false report” as it had previously stated: “the malice inquiry... focuses upon the attitude of the defendant publisher vis-à-vis the plaintiff.” The court emphasized that by malice it meant “ill will targeted specifically at” the plaintiff. Continuing, it stated that proving malice “will likely be no easy task,” adding that “allegations that the Telegraph was careless [do not] amount to malice.”

Scope of the Privilege

As to the scope of the privilege, the court adopted the position urged by the amicus news organizations that the privilege covers the “fair and accurate” reporting of the contents of public records and proceedings. It also agreed, in part, with a position argued by *The Telegraph* that the privilege covers some types of oral statements.

In its earlier May 1 ruling, the court stated “that the term ‘report’ in the context of the fair report privilege, refers to the news report of an official action - not to the police record.” It quoted with approval a statement by the trial court “that only those statements that are reports of official actions are included in the privilege. An arrest... is an official action....”

As a result, the May 1 ruling could be read to mean that the privilege covers only the fair and accurate reporting of “official actions” set forth in public records as opposed to

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the contents of the record.

The court in its August 29 order clarified that the privilege covers the contents of arrest records or other “official” public records: “We agree that official police records, such as official blotters, official reports, and so forth, fall within the privilege.” However, the Court added this word of caution:

Documents authored by police officers do not become ‘official’ or matters of public record simply because they may be located in the police department ... They become ‘official’ when they bear adequate indicia of being ‘official’ or are actually in the public record. In addition to other circumstances, documents may be deemed ‘official’ when they are signed, correctly executed, filed or accompanied by an affidavit indicating they are official.

The Telegraph, in moving for reconsideration, argued that the privilege covers “all oral statements by both law enforcement officers and other public officials.” The court rejected this broad formulation. But for the first time it stated that the privilege covers reporting “based upon press

conferences, interviews with a police chief ... or other types of official ‘conversations.’” While the court noted this would not include “some unofficial version of events furnished by a policeman at a crime scene, or ... offhand prediction,” it did not amplify what it meant by “other types of official conversations.”

Needless to say, the August 29 order came as a great relief to the amicus news organizations and *The Telegraph*. The fair report privilege plays a vital role in reporting on “what the government is up to” and other issues of importance to the public. Like most courts, the New Hampshire Supreme Court rarely modifies one of its decisions. Although it gave no reason for doing so in its August 29 order, the fact that a number of news organizations supported *The Telegraph’s* motion for reconsideration may have made a difference.

William L. Chapman is a partner with Orr & Reno, P.A., in Concord, NH. He filed the memorandum of law in support of The Telegraph on behalf of The Associated Press, Inc.; Hearst-Argyle Properties, Inc., owner of WMUR-TV/Channel 9; Keene Publishing Corp., publisher of Keene Sentinel; New Hampshire Association of Broadcasters; New Hampshire Press Association; Newspapers of New Hampshire, Inc., publisher of Concord Monitor and Valley News; Seacoast Media Group, publisher of the Portsmouth Herald; and Union Leader Corporation, publisher of Un-

Fair Report Privilege Protects Broadcast of Wrong Mug Shot

An Ohio trial court applied the fair report privilege to grant summary judgment to a television broadcaster that aired the wrong mug shot of a criminal suspect. *Martinez v. WTVG, Inc.*, No. CI 05-4055, 35 Media L. Rep. 2176 (Ohio Ct. C. P. July 11, 2007) (Jensen, J.).

In 2005, WTVG aired a report that “Ricardo Martinez” had been indicted for sex crimes. The report was illustrated with a mug shot photo of plaintiff who had the same name, but was not the “Ricardo Martinez” indicted for the crimes. The station had requested and obtained a copy of a mug shot from the local county jail. The plaintiff called the station shortly after the broadcast to complain. The station aired the report and mug shot a second time that same night, but the next day directed that it not be used. Plaintiff sued for defamation, negligence and intentional infliction of emotional distress.

On motion for summary judgment, the trial court agreed that the broadcast was privileged as a matter of law under Ohio’s qualified fair report privilege, Ohio Rev. C. 2317.05. The broadcast “accurately conveyed information reported by government officials and contained in government records.” Moreover, there was no evidence that defendants abused the privilege by airing the report “solely for the purpose of causing harm to the plaintiff.”

Defendants were represented by David L. Marburger, Baker & Hostetler, Cleveland, Ohio. Plaintiff was represented by Jerry P. Purcel, Toledo, Ohio.

D.C. Court of Appeals Reinstates Serbian Businessman's Defamation Action Against NGO

Description of Plaintiff as a Milosovic Supporter Defamatory

By Judith F. Bonilla

The U.S. Court of Appeals for the District of Columbia has concluded that a passage in an international watchdog group's report tying a Serbian businessman to deposed Serbian dictator Slobodan Milosovic was capable of a defamatory meaning. *Jankovic v. International Crisis Group*, 494 F.3d 1080 (D.C. Cir. July 24, 2007) (Rogers, Griffith, Kavanaugh, JJ.).

The appellate court, however, affirmed dismissal of the plaintiff's claims arising from two other publications because the statute of limitations had expired. The ruling permits the plaintiff, Serbian businessman Philip Zepter, who sued under his real name, Milan Jankovic, to proceed on his claims for defamation, false light invasion of privacy and tortious interference with business expectancy. The lawsuit is pending against International Crisis Group (ICG). ICG is a nonprofit, nongovernmental organization that advocates against deadly conflict.

Background

Zepter sued ICG and one of its employees based on three publications: a March 18, 2003, report, *Serbia after Djindjic*; a July 17, 2003, report, *Serbian Reform Stalls Again*; and an email by the ICG employee. The publications tied a number of individuals and businesses to Milosevic's political regime. Milosevic was put on trial as a war criminal before his death from natural causes.

On appeal, Zepter contended that the trial court improperly dismissed his original complaint for lack of diversity jurisdiction. The appellate court rejected his arguments, affirming the dismissal on the trial court's alternative ruling that there was no personal jurisdiction over the ICG employee. Additionally, upholding the trial court's application of the D.C. one-year statute of limitations, the court found no basis for Zepter's arguments of equitable estoppel, equitable tolling and lulling because there was no allegation that ICG took any affirmative action to conceal the existence of a claim or to prevent Zepter from properly filing his suit.

The court also considered whether the copying of a publication by a third party for distribution via the Internet constituted a new publication for which the original publisher could be held liable. The court held that just as a third-party copy in the print

media world would not constitute a new publication under the "single-publication" rule, neither would a copy on the Internet.

After upholding the dismissals of claims arising from that report and the email, the D.C. Circuit then examined three separate passages from the July 17, 2003, ICG report. The court held one passage, which alleged that Zepter Banka – an entity with which Zepter was associated – maintained close ties to the Serbian state security agency rumored to be involved in various criminal activities, was not "of and concerning" him. The passage neither mentioned nor referred to Zepter indirectly. Framing the issue as "whether the namesake of a corporation can be defamed when false misdeeds are attributed to his company[.]" the D.C. Circuit noted that under case law, "statements which refer to an organization do not implicate its members" and that "matters that might 'reflect[] poorly on an individual' are not necessarily 'concerning' that person." Also noting that Zepter's own lawsuit emphasized the expansive nature of his business enterprise, the court held that no reasonable reader would construe the passage to be about him personally.

The court similarly held that another passage referring to "a former employee of ... a Zepter company" was also not actionable, as it also was not "of and concerning" Zepter.

Defamatory Meaning

However, the D.C. Circuit found that the language of one passage, which referred to Zepter personally, was capable of a defamatory meaning. The passage alleged that Zepter and others supported and benefited from Milosevic's political regime. The district court had concluded that because the publication did not mention "war crimes or ethnic cleansing by Milosevic or the Serbian Government," the "allegations of mutual support" should be described as "political, not criminal" and therefore not capable of defamatory meaning. The appellate court disagreed:

Merely associating somebody with a foreign government would not ordinarily be defamatory, but in *Southern Air Transport, Inc. v. ABC, Inc.*, 877 F.2d 1010 (D.C. Cir. 1989), this court acknowledged that "[a]n inference that [a plaintiff company] was engaged in dealings with the [apartheid] gov-

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ernment of South Africa clearly would have a defamatory meaning because of the intense antipathy felt by a great number of Americans towards South Africa.” ... In that light, the passage could lead a reasonable reader to conclude that Philip Zepter was actively in alliance with Milosevic and his regime, and so, Philip Zepter has made sufficient allegations

to establish a *prima facie* case of defamation.

The claims arising from this passage were remanded to the trial court for review of the other defenses and privileges raised by ICG.

Judith F. Bonilla is an associate in the D.C. office of Holland & Knight LLP. Defendant was represented by Amy Neuhardt,

Speakers Bureau on the Reporter’s Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter’s privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a “turn-key” set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter’s privilege.

We hope to expand this project so that the reporter’s privilege is the first in a number of topics addressed by the speakers bureau.

If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact Maherin Gangat, (212) 337-0200, ext. 214, mangat@medialaw.org.

The Reporter’s Privilege

Protecting the Sources of Our News

This Presentation has been made possible by a grant from the McCormick Tribune Foundation

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Suggestion for background reading:
Custodians of Conscience by James S. Ettema and Theodore Glasser.
Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.

A Federal Shield Law?

- Bipartisan proposals for federal shield law in face of increased threats
- -- Need for nationwide uniformity
 - √ Reporters need to know the rules so they can do their jobs
 - √ Would-be whistleblowers and other potential sources need to be able to predict the risks
 - √ Will cut down on costly litigation over subpoenas

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What /s the “Reporter’s Privilege”?

Various rules protecting journalists from being forced, in legal and governmental proceedings, to reveal confidential and other sources.

- Sometimes also protects unpublished notes and other journalistic materials

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Third Circuit Affirms Dismissal of Libel Complaint Against Website

Claims Over Third Party Comments Barred by Section 230

In a short opinion, the Third Circuit Court of Appeals this month affirmed dismissal of a libel complaint against Tucker Max, operator of the eponymously named website TuckerMax.com. *DiMeo v. Max*, No. 06-3171, 2007 WL 2717865 (3d Cir. Sept. 19, 2007) (McKee, Ambro, Michel, JJ.). The court panel unanimously held that 1) Section 230 of the Communications Decency Act barred claims over third party comments on the defendant's website; and 2) the district court did not abuse its discretion when it refused plaintiff leave to amend the complaint to add claims for libel, emotional distress and RICO violations.

Background

Plaintiff Anthony DiMeo is the owner of a public relations firm. Tucker Max is an author and blogger, specializing in "fratire" – a genre of literature aimed at young males that focuses on depictions of drunken escapades, hedonistic living and sexual adventures. Max's goals, according to his website are: "To be a celebrity that gets paid to get drunk, act like an asshole, and get drunk some more."

At issue in the lawsuit were a series of comments posted to the website about a New Year's Eve party organized by plaintiff and his firm. Among the postings at issue were:

"Maybe you should find your validation elsewhere. . . preferably at the end of a magnum."; "I just wanted to let you know that I think that you are the biggest piece of shit I have ever heard of and I hope that you die soon."; "You threw an absolutely disastrous party on New Year's Eve precipitated by false advertising and possible fraud."

None of the statements at issue were written by Tucker Max, instead as noted in plaintiff's complaint Max "through his [website], publishe[d] defamatory statements aimed at" DiMeo. Last year the federal district court in Philadelphia granted Max's motion to dismiss, holding that he was protected by Section 230 and the First Amendment. *See DiMeo v. Max*, 433 F. Supp.2d 523 (E.D. Pa. 2006) (Dalzell, J.).

District Court Judge Stewart Dalzell, who was a

member of the three-judge panel that decided the original constitutional challenge to the CDA (*see American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996)), found that Max's website met all of the elements of an "interactive computer service" as defined in Section 230 and that several of the statements at issue were constitutionally protected expressions of opinion:

"There is no question that tuckermax.com could be a poster child for the vulgarity we had in mind in 1996 [when considering the constitutionality of the CDA]. But as we added then, 'we should also protect the autonomy that such a medium confers on ordinary people as well as media magnates.' Here we do so by protecting coarse conversation that, it appears, never ends on tuckermax.com."

Third Circuit Decision

The Third Circuit affirmed. Max's website was an "interactive computer service" within the meaning of Section 230 and plaintiff did not allege that Max

authored the complained of comments on the website. Under these circumstances "the requirements of § 230 immunity are satisfied."

On appeal plaintiff argued that Max was responsible for the postings "because he solicited and encouraged members of his message board community to engage in defamatory conduct" but the Third Circuit found that plaintiff's complaint was "devoid of any such allegations" to support the claim.

Finally, the district court did not abuse its discretion in denying plaintiff leave to add additional claims. Plaintiff's additional claims for libel and intentional infliction of emotional distress claims "would be futile in view of § 230." And plaintiff failed to allege any facts to support any claims for racketeering under the RICO statute, 18 U.S.C. § 1961.

Michael K. Twersky, John G. Papanou and Katherine Skubecz of Montgomery McCracken Walker & Rhoads, LLP in Philadelphia represented the defendant in this matter. Plaintiff was represented by Alan Nochumson on appeal.



Newspaper's Online Version a "Separate Edition" for Purposes of Single Publication Rule

Website Targets Separate Internet Audience, According to Court

In an interesting decision, a New York trial court ruled last month that a newspaper's online edition is a separate publication for purposes of applying the single publication rule – even where the online edition is identical to the hard copy publication. *Rivera v. NYP Holdings, Inc.*, 16 Misc.3d 1121(A), 2007 WL 2284607 (N.Y. Sup. Aug. 2, 2007) (Acosta, J.). A newspaper's website edition, the court said, is "a separate publication inasmuch as it is clearly targeted at a different audience that obtains its news through the internet."

Background

Plaintiff in this case is New York Supreme Court Judge Francois Rivera. Judge Rivera was the subject of a *New York Post* article discussing a corruption scandal in the city involving the alleged sale of judgeships. Under the headline "JUDGE SINGS: Explosive new testimony on court scandal," the newspaper reported that Judge Rivera was granted immunity to testify before a criminal grand jury about allegations he had paid a Brooklyn Democratic Party boss \$50,000 for his seat on the bench. The article appeared in morning and afternoon editions of the paper, as well as on the paper's website www.nypost.com.

The article was discussed that same day on NY1, a local cable news channel owned by Time Warner. In a segment entitled "In the Papers," the host displayed and summarized the contents of the *Post* article.

Judge Rivera sued Time Warner, NYP Holdings, two *Post* reporters and their unidentified sources over the separate hard copy and online editions of the "JUDGE SINGS" article, as well as another *Post* article on the scandal that did not specifically mention Judge Rivera.

Trial Court Decision

The trial court granted the *New York Post's* motion to dismiss the counts of the complaint over the article that did not mention plaintiff. It also granted Time Warner's motion to dismiss because of plaintiff's failure to plead actual malice against the cable company. Plaintiff's complaint stated that Time Warner "acted in a grossly irresponsible manner and had, or should have had, substantial reason to question the accuracy of the articles conveyed in the broadcasts and that [Time Warner] made no effort or attempt to verify the accuracy of the information." "These allegations," the court ruled, "do not spell out actual malice with sufficient specificity."

The court also noted that the very nature of the "In The Papers" segment alerted the audience that it was a report about the content of newspaper article – and not an endorsement of the truth of the article. Moreover, plaintiff failed to identify any substantial reason for Time Warner to have questioned the accuracy of the articles or the bona fides of the *Post* reporters. The court dismissed plaintiff's argument that Time Warner had reason to doubt the accuracy of the articles because all grand jury witnesses in New York receive automatic immunity. A lay person would not know that different rules apply in testifying before a grand jury and before a jury trial (or the procedures involved that would prohibit a judge from continuing to hear cases while a probe is pending).

Single Publication Rule

The court denied the *Post's* motion that plaintiff had only one claim for the hard copy and website publications of the identical article. "Separate editions are separate publications," the court stated, "even if the article is identical."

Notwithstanding the *Post's* invitation for this Court to create a new rule in New York, the existing rule works fine, inter alia, because separate editions of a publication are geared to reach different audiences. *Firth v. State*, 98 N.Y.2d 365, 371 (2002). That other states may take a different approach, see, e.g. *Belli v. Robert Bros. Furs*, 49 Cal.Rptr. 625 (Cal App.1966) (decided under the Uniform Single Publication Act, which is not part of New York law), is of no moment. Similarly, the website publication is also a separate publication inasmuch as it is clearly targeted at a different audience that obtains its news through the internet.

Pennsylvania State Court Dismisses Developer's Libel and Privacy Claims

Plaintiff an All Purpose and Limited Purpose Public Figure

By Robert C. Clothier

A Pennsylvania state court judge granted a motion for summary judgment in favor of a newspaper and reporter sued for defamation and invasion of privacy. *Mendelson v. The Morning Call Inc.*, No. 2005-C-0386 (Pa. Ct. C. P. Sept. 4, 2007) (Brenner, J.).

The court held that the plaintiff, a real estate developer, was both an all purpose and a limited purpose public figure as a result of his ongoing disputes with city officials and others regarding his properties, all of which was covered by the media. The court then held that the plaintiff had failed to adduce clear and convincing evidence that the newspaper and reporter knew that the article contained false facts or entertained serious doubts about its truth.

The court rejected the plaintiff's contentions that his denials to the reporter and his attorney's pre-publication letter to the paper evidenced actual malice. And the court rejected the plaintiff's defamation-by-implication claim, finding that there was no evidence that the reporter intended the alleged defamatory implications.

Background

The genesis of the lawsuit was a 9,400 word article written by Tim Darragh, a reporter for *The Morning Call*, a newspaper based in Allentown, Pennsylvania. The article chronicled the public controversies and legal battles surrounding the plaintiff, Mark Mendelson, and his numerous highly visible buildings located in downtown Allentown, Pennsylvania, and elsewhere.

The article ran above the fold on Sunday, November 22, 2002, with a first paragraph that compared renovated theatres and hotels in other nearby cities with the deteriorating ones owned by the plaintiff in Allentown, culminating in a headline stating: "One Man is Behind Allentown's Nightmare: Mark Mendelson."

Historically litigious, Mendelson sued the paper and its reporter, alleging defamation and invasion of privacy (false light, publication of private facts, intrusion upon seclusion). He filed his lawsuit in Philadelphia, claiming that, because he lived just outside of Philadelphia and did business in Philadelphia County, he was primarily damaged there. Gathering affidavits

from over ten likely witnesses, including six public officials, the paper successfully petitioned the Philadelphia court to transfer the case to Lehigh County, where Allentown is located. That ruling was affirmed by the Superior Court. The paper's motions to dismiss and for judgment on the pleadings, however, were denied.

Summary Judgment Motion

By summer 2007, discovery was concluded, and the paper and its reporter filed a motion for summary judgment. They argued (1) that Mendelson was an all purpose public figure and/or a limited purpose public figure, and (2) that Mendelson had failed to adduce clear and convincing evidence of actual malice. They also argued that Mendelson's invasion of privacy claim was legally and factually infirm.

Mendelson's response asserted that he was a "retired" businessman who had "withdrawn" from Allentown – an assertion contradicted by ample media coverage and documented dealings with city officials and others regarding his properties. On the issue of fault, Mendelson focused primarily on the paper's supposed negligence by, for example, failing to give him a copy of the article before publication and by failing to report on other local real estate developers.

Perhaps because he had uncovered no evidence that the reporter knew anything was materially false, Mendelson recast his case as a defamation-by-implication claim, asserting that the article said all sorts of things it didn't say, and then arguing that the reporter knew those things weren't true.

The paper countered with two arguments. It argued first that the article simply didn't have these far-fetched meanings. And assuming it did, the paper argued that for defamation by implication claims, a libel plaintiff must adduce clear and convincing evidence that the reporter *intended* the implication and *knew* the implication was false. The paper contended there was no such evidence.

The Court's Decision

Six days before what would have been a four week trial commencing September 10, 2007, the Honorable Lawrence Brenner issued his Order and Opinion granting summary judgment

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ment.

The judge adopted a belts and suspenders approach to Mendelson's public figure status, ruling that he was both an all purpose and limited purpose public figure.

Applying the factors set forth in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D. C. Cir. 1980), the trial court found that all but one of the relevant factors showed that the plaintiff had achieved sufficient fame or notoriety in the Allentown and Lehigh Valley community.

The court noted the following:

- (1) plaintiff's admissions in his complaint that he had acquired these properties and blamed the city for their downward spiral;
- (2) the chronic disputes between the plaintiff and the city over unpaid taxes and assessments, overdue water and sewer bills, and code violations and safety issues for his properties;
- (3) affidavits provided by 12 Allentown "public officials, business leaders and civic figures" stating that the plaintiff was a "prominent," "notorious" and "controversial" figure whom many blamed for holding up the revitalization of downtown Allentown;
- (4) the over 200 articles and broadcasts on the plaintiff and his properties showing that he "had access to the media and was regularly reported on by the media"; and
- (5) the plaintiff's support of and access to many federal, state and city politicians and officials. Based on these undisputed facts, the court found that the plaintiff "should be deemed a general purpose public figure."

The court also ruled that the plaintiff "should be conferred the status of a limited purpose public figure" because he "voluntarily injected himself and was drawn into a whole series of highly publicized controversies regarding the Allentown properties and ventures over the course of decade."

The court noted that city officials "openly criticized" the plaintiff for his failure to maintain his properties and pay taxes and assessments, and there were "numerous lawsuits and legal proceedings" regarding the properties. All of these disputes "clearly involved matters of public concern and many stemmed from [the plaintiff's] own ac-

tions." In ruling the plaintiff was a "public figure for a limited range of issues," the court cited *Greenbelt Cooperative Publishing Assoc., Inc. v. Bresler*, 298 U.S. 6 (1970) (real estate developer who engaged in controversial negotiations with city held to be a public figure) and *McDowell v. Paiewonsky*, 769 F.2d 942 (3d Cir. 1985) (architect who bid on controversial project held to be public figure).

Failure to Show Actual Malice

The court recognized that the First Amendment provides "protections ... so great that they amount to severe restrictions on a public figure plaintiff's right to recover in a defamation action." See *Norton v. Glenn*, 860 A.2d 48 (2004), cert. denied, 544 U.S. 956 (2005). Declaring itself "most cognizant and respectful of the fundamental rights and freedoms" guaranteed by the First Amendment, the court rejected each of the plaintiff's actual malice arguments.

The plaintiff claimed that he told the reporter that he was "mistaken about who owned what," that he was no longer co-trustee of the two trusts that had recently acquired some of the Allentown properties, and that the reporter should "be accurate" in his

reporting. The court found this insufficient because the reporter had hired an outside consultant/title company that confirmed the ownership as reported in the story.

The plaintiff also claimed that his attorney's letter to the paper shortly before publication was evidence of actual malice. The court disagreed, saying that the letter "merely cautioned the [reporter] to take care that the article was based on fact. No where in the letter does it indicate that the [paper and reporter] were obtaining or about to report inaccurate information."

Several of the plaintiff's actual malice arguments related to the article's reporting on a mid-1990s FBI investigation into a Philadelphia hospital of which the plaintiff had been chairman of the Board. The plaintiff argued that he had told the reporter that he had "nothing to do" with the FBI investigation referenced in the story. The court held that the plaintiff's denial "is not evidence of actual malice."

And the plaintiff claimed that the article implied that he was involved in a possible illegal arms sale to South Africa when it reported: "FBI memos also show that as the Franklin Square case stretched into 1995, the investigation bogged down as Justice Department attorneys assigned to the case

The article was "not republished" but rather merely "archived on The Morning Call website."

pursued other matters, including a possible illegal arms sale to South Africa.” Citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511-513 (1984), the court held that the plaintiff had adduced “no clear and convincing evidence that [the reporter] knew or strongly suspected that the publication as a whole could present a false and defamatory impression of events. In fact, Defendants denied any intention to make any such implication.”

Impact of Weaver v Lancaster?

The court did not believe that the outcome was affected by a recent Pennsylvania Supreme Court case, *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007). (That decision was reported in the July 2007 MLRC MediaLawLetter at p.11) In that case, the Supreme Court held that the republication of the defendants’ letter to the editor on a website maintained by a third party can be relevant to the determination of actual malice and that the trial court should have considered such republication when deciding defendants’ motion for summary judgment. The Court also noted, in dicta, that “[t]he proof of actual malice calls a defendant’s state of mind into question and does not readily lend itself to summary disposition,” citing *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), especially when the issue rests on oral testimony.

This case represented the first libel decision addressing the impact, if any, of the *Weaver* decision on the ability of trial courts to grant summary judgment in public figure libel cases. The plaintiff made the *Weaver* decision the centerpiece of his arguments on actual malice. He argued that the paper’s continued publication of the article at issue on the paper’s website after the filing of the lawsuit was a “republication” that evidenced actual malice and precluded summary judgment.

The court rejected that argument, finding that the article was “not republished” but rather merely “archived on The Morning Call website.” This result is consistent with cases around the country holding that the print and online publication of an article is a single publication. The court also found that the *Weaver* decision “did not hold that summary judgment was inappropriate in all cases” and found that its own ruling rested not on oral testimony but “rather on substantive evidence.”

The court could have added that the burden rested on the plaintiff to prove the lack of actual malice, and his failure to do so means that the court’s decision rested not on oral testimony or on substantive evidence, but rather on the lack of

evidence.

Other Claims

Having dismissed the first count for defamation, the court easily dismissed the second count for invasion of privacy (which plaintiff never addressed in his brief), ruling that the article’s reporting on the plaintiff’s “personal” information was true, not private and/or a matter of public concern.

The court was quite impressed with the work that went into the article, noting that the reporter “diligently spent approximately half a year researching and investigating” the article, that “no off-the-record information was put in the article,” that the reporter “repeatedly went back to sources to double-check information, that the reporter was “subject to extensive editorial supervision and review,” and that the reporter “interviewed the Plaintiff himself

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three (3) times in an effort to furnish Plaintiff Mark Mendelson with every opportunity to present his side of the story.”

The court found that the reporter “documented every fact contained in the article at issue.” Thus, even though the grounds for dismissal was premised on the absence of actual malice, the court’s decision vindicated the reporter’s professionalism and integrity.

Conclusion

The result is significant for several reasons. It confirms that Weaver did not change prior Pennsylvania law authorizing Pennsylvania courts to dismiss public figure libel lawsuits where the plaintiff cannot adduce clear and convincing evidence of actual malice. It also shows that the actual malice standard remains an onerous, difficult one in Pennsylvania, and

one suitable for dismissal on summary judgment, despite the fact that it calls into question the defendants’ state of mind. And it shows that a non-celebrity – here a real estate developer – can be an all purpose public figure. Indeed, it appears to be the first reported decision in Pennsylvania finding a libel plaintiff to be an all purpose public figure.

Robert C. Clothier and Andrew Bonekemper of Fox Rothschild LLP in Philadelphia, and Malcolm J. Gross of Gross, McGinley, LaBarre & Eaton, LLP in Allentown represented The Morning Call and its reporter, Tim Darragh. Tribune counsel was David S. Bralow. Plaintiff was represented by William A. Harvey and A. Grant Phelan of Klehr, Harrison, Harvey, Branzburg & Ellers, LLP in Philadelphia.

Now Available

Basic Guide to Employment Defamation and Privacy Law

Prepared by the Media Law Resource Center Employment Law Committee, this pamphlet provides a practical overview of defamation and privacy issues in the workplace and is intended to assist non-lawyers – supervisors and human resource professionals – who face these issues on a daily basis.

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Illinois Becomes Latest State to Enact Anti-SLAPP Legislation

By **Brendan Healey and Lindsay LaVine**

On August 28, 2007, Illinois joined twenty-five states and jurisdictions in enacting anti-SLAPP legislation. Strategic Lawsuits Against Public Participation, or SLAPPs, are generally filed to prevent individuals from engaging in protected First Amendment activities such as filing petitions, participation in government, and speaking freely about issues of concern within the community. The Citizen Participation Act, 735 ILCS 110/1-110/99, provides for prompt resolution of such litigation.

The road to passage of the Act was a long one. Illinois senator John Cullerton (D-Chicago) tried to pass anti-SLAPP legislation for more than five years. This year, the bill passed unanimously in the House and Senate.

The Act recognizes that “[t]he threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights.”

Under the Act, citizens who believe they are being targeted by a SLAPP lawsuit may challenge the suit. The party that brought the initial suit must “produce clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act.” A hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent. If the party filing the anti-SLAPP lawsuit prevails, the party that brought the initial suit must

pay attorney fees and costs.

The language of the Illinois statute is extremely broad. For example, section 15 of the Act states that “[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome,” and section 30(b) states that “[t]his Act shall be construed liberally to effectuate its purposes and intent fully.”

Typically, SLAPPs are filed in real estate and labor disputes but can also be found in malicious prosecution actions. Often such suits take aim at citizen groups and the media. In 2005, Mandell Menkes performed a national study of anti-SLAPP motions and found that individuals filed 38% of the motions, and corporations, including media companies, filed 33%. Fifty-nine percent of anti-SLAPP claims fully succeeded. Media movants achieved a 70% success rate in anti-SLAPP motions.

Illinois’ new statute is being put to use quickly. Defendants in the *Thomas v. Page* case recently filed a motion for relief from judgment based on the Act, and defendants in a case pending in central Illinois are also using the Act to seek dismissal.

Brendan Healey and Lindsay LaVine are with Mandell Menkes LLC in Chicago.

SAVE THE DATE

November 9, 2007

New York City

Defense Counsel Section Breakfast

7:00 A.M. – 9:00 A.M.

Proskauer Rose LLP Conference Center
1585 Broadway (betw. 47th and 48th St.), 26th Floor

New York Trial Court Dismisses Public Permittee's Defamation Claim, but Holds that SLAPP Statute does not Apply to the Press

By Michael Berry

On September 5, 2007, Justice Paul J. Baisley, Jr. of the New York Supreme Court dismissed a defamation claim pending against a newspaper and its reporter in Suffolk County. While the claim itself was not particularly remarkable – a public permittee complained about a newspaper's coverage of false information submitted in connection with two permits – the court's dismissal of the claim is noteworthy in two respects. First, the court ruled that New York's SLAPP statute does not apply to the press. Second, the court held that the allegedly defamatory information in the news reports is covered by New York's fair report privilege, even though the reporter relied primarily on articles in another newspaper. *Chowlowsky v. Civiletti*, No. 1444-2007, 2007 WL 2684684 (N.Y. Sup. Ct. Sept. 5, 2007).

The Challenged Publications

On December 14, 2006, *The News-Review* published two news reports written by Denise Civiletti about permit applications Michael Cholowsky had submitted to the New York State Department of Environmental Conservation ("DEC") for two of his companies, Calverton Industries and Emjay. In the first article, Civiletti reported that DEC had allowed Calverton to operate at a local landfill "in violation of its DEC permit since at least 2004," explaining that Calverton's permit "is explicitly conditioned" on Cholowsky "having no involvement with the solid waste industry." *Id.* The article stated that this special condition was imposed in light of Cholowsky's admitted criminal past, which was described as follows:

Mr. Cholowsky testified in 1999 that he had paid bribes totaling \$20,000 to Republican party leader John Powell for the right to dump at the town landfill. . . . Mr. Cholowsky later pled guilty to a felony count of conspiracy to defraud the United States, and was sentenced to one year probation.

Notwithstanding the express limitation on Cholowsky's involvement in the solid waste industry, the report continued, Cholowsky is "back in the solid waste business" and had

received a DEC permit for his company Emjay "to operate a solid waste facility." The article also reported that Emjay's permit application to the DEC failed to disclose that Cholowsky had been convicted of a crime involving "fraud, bribery, perjury, theft or an offense against public administration."

In the second report, Civiletti criticized the DEC for inspecting the landfill where Calverton operated only "once or twice a week." The report stated that "this would be unsettling enough if it weren't for the identity of the operators of the site." It continued:

Enter Michael Cholowsky, Calverton Industries president. He testified in federal court that he bribed Brookhaven town officials to gain access to the town landfill, where he dumped solid waste in the mid to late 1990s. Cholowsky had a close relationship with East Patchogue salvage yard owner Joseph Provenzano, who pled guilty in 1999 to 17 counts of federal stolen truck, extortion, witness tampering and racketeering charges. . . . Evidence gathered by federal investigators established that Provenzano was using Cholowsky's hauling permit (issued to his company Sky Materials) to illegally dump hazardous waste at the Brookhaven landfill, according to reports in *Newsday* in 1999.

After the two reports were published, DEC charged Cholowsky with offering a false instrument to the state, revoked Calverton's permit, and initiated steps to revoke Emjay's permit. The day after the state announced that it had initiated proceedings against his companies, Cholowsky filed suit against the newspaper's owner and Civiletti.

Defendants' Motion to Dismiss

In his complaint, Cholowsky asserted a defamation claim against the two defendants and sought \$10 million in damages. The complaint alleged that the newspaper falsely

reported that Cholowsky: (1) was involved in a bribery scheme to gain access to the landfill; (2) admitted paying Powell \$20,000 for the right to dump waste at the landfill; (3) pleaded guilty to a felony count of conspiracy to defraud the United States; and (4) allowed Provenzano to use a permit held by one of his companies to dump hazardous waste at the landfill.

The defendants filed a motion to dismiss, or in the alternative for summary judgment, raising two arguments. First, the defendants contended that the reports were protected by the absolute fair report privilege provided under section 74 of New York's Civil Rights Law. Specifically, they noted that all of the information published in *The News-Review* was a fair and true report of the criminal proceedings involving Cholowsky, even though Civiletti had relied, in part, on *Newsday's* coverage of those proceedings. Second, the defendants argued that Cholowsky could not establish fault under either the actual malice or grossly irresponsible standards. In the motion, the defendants invoked New York's SLAPP statute, which requires a plaintiff that is a "public applicant or permittee" to establish that his claim "has a substantial basis" in fact and law if that claim is "materially related to . . . efforts of the defendant[s] to report on, comment on, rule on, challenge or oppose" the application or permit.

The Trial Court's Opinion

The court began its opinion by stating that the SLAPP statute does not apply to the press. In reaching this conclusion, the court ignored the actual language of the SLAPP statute, which expressly protects "reports" and "comments" on issues involving public permits. The court simply noted that "there has never been a case in which a newspaper successfully came under the umbrella protection of [the SLAPP statute] for articles or stories generated by its writers," ignoring that no reported decision had ever addressed the question, that no court had ever held that New York's SLAPP statute did not apply to the press, and that the New York County Supreme Court previously had awarded attorney's fees under the SLAPP statute to a newspaper that had been sued for statements made in an advertisement appearing in its pages. The court instead rested its ruling on its view that the statute is intended "to protect citizen activists – not the media – who are at a disadvantage in defending lawsuits brought by financially

able public applicants or permittees who seek to quell opposition to their applications." This ruling, however, proved to be irrelevant to the court's disposition of the motion.

The court dismissed Cholowsky's defamation claim because each of the alleged misstatements was protected as a fair and true report of judicial proceedings and supported by the public record. For instance, Cholowsky pleaded guilty to violating 18 U.S.C. § 371 (titled "conspiracy to commit offense or defraud United States") by conspiring to commit a crime under 18 U.S.C. § 666 (titled "theft or bribery concerning programs receiving federal funds"). Explaining that "newspapers cannot be held to a standard of strict accountability for use of legal terms of art," the court concluded that the titles and text of the two statutes alone supported the statements that Cholowsky had pled guilty to conspiring to defraud the United States and had bribed John Powell.

Turning to the statement concerning the alleged dumping of hazardous material at the landfill, the court noted that the defendants "essentially concede that they made a mistake" because the criminal complaint alleged that Cholowsky's co-conspirator "was planning to dump hazardous materials and not that he actually had dumped hazardous materials." Nevertheless, the court explained that the privilege provided by section 74 is "liberally applied" and extends to articles "containing partial inaccuracies, even if misleading," as long as the reports are substantially true. Here, the report concerned judicial proceedings and "accurately portrayed the gist of what transpired" in those proceedings.

Defendants Denise Civiletti and Times/Review Newspapers Corporation are represented by David A. Schulz, Nicole A. Auerbach, and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P. Plaintiff Michael Cholowsky is represented by Peter Sullivan and Brian Gardner of Sullivan Gardner, P.C.

SAVE THE DATE

November 7, 2007

MLRC ANNUAL DINNER

New York City

Sanctions Against Libel Plaintiff, Counsel, for Hiding Criminal Record in Discovery

By Charles D. Tobin

Calling her explanations for failing to disclose discoverable information “borderline ridiculous” and her counsel’s investigation “laughable,” a federal district court in Hammond, Indiana has ordered a libel plaintiff and her lawyer to pay sanctions to a Lee Enterprises newspaper, finding that the plaintiff lied in her deposition. *Filippo v. Lee Publications, Inc.*, No. 2:05 CV 64 (N.D. Ind. September 12, 2007).

U.S. District Judge James T. Moody ordered the plaintiff and her lawyer to bear the expenses *The Times* newspaper incurred in uncovering the criminal record that the plaintiff hid during discovery.

The lawsuit arose out of a series of articles, editorials, and cartoons in *The Times*, Lee’s newspaper serving Northwest Indiana and suburban Chicago, about the 2003 drunken driving arrest of the plaintiff. At the time, Filippo was vice chair of the Partnership for a Drug-Free Lake County, a quasi-public agency that educates youth about the dangers of drugs and alcohol. Filippo was acquitted a year later after a jury trial.

In April 2007, Judge Moody entered a summary judgment order in favor of the newspaper, finding that Filippo had failed to establish actual malice, and the editorials and cartoon were protected opinion. The court has withheld final judgment pending its decision on the newspaper’s request for attorney’s fees under the state’s anti-SLAPP statute.

Plaintiff Violated Discovery Obligations

In the order this month, Judge Moody agreed with the newspaper that Filippo violated her discovery obligations in failing to disclose that she had previously been charged with DUI and other crimes. Throughout discovery, the newspaper repeatedly asked Filippo if she had a prior criminal record. She had responded to an interrogatory asking for her entire criminal history by saying: “None for the past 10 year[s].” When asked outright in the deposition if she has previously been accused or convicted of a crime, she said, “No.”

Following the deposition, *The Times* uncovered a handwritten notation in storage in the local state court, and a microfiche file in another court clerk’s office, reflecting that Filippo had been arrested twice in 1989 – once for DUI, and the second time for disorderly conduct, criminal trespass, public intoxication and intimidation after threatening a police officer in a bar. Filippo pleaded guilty to criminal trespass a year later and re-

ceived a suspended jail sentence, according to these records.

The records showed that in each of these prior arrests, Filippo had been represented by the same lawyer who represents her in the libel lawsuit.

Filippo had agreed to sit for a second deposition in the libel case on the issue of damages. After concluding that examination, the newspaper’s counsel confronted Filippo with the criminal records. She refused to answer any questions. When pressed, her lawyer said that he had forgotten about the incidents and that all of her old records had been left at his prior law firm.

In opposing the newspaper’s request for sanctions, Filippo and her counsel asserted that she had forgotten the previous arrests. Her lawyer argued that the newspaper had an obligation to disclose all of the records it uncovered before taking her second deposition, and claimed that he had forgotten the prior incidents and left her records at his previous law firm so that he could not have consulted them in responding to discovery.

Reviewing this record and upholding the magistrate’s recommendation of sanctions, Judge Moody, in a 20-page opinion, showed no tolerance for these excuses. He observed that: “Barring some medical evidence of incapacity or faulty memory,” her explanation that she had forgotten her criminal record was “borderline ridiculous.” Moreover, “Unless a person is a habitual criminal, and in and out of court so often that proceedings start to blur together, one does not forget something like this.”

Judge Moody also called her lawyer’s interrogatory responses “blatantly incomplete” and his purported efforts to investigate his client’s criminal record “laughable” and a violation of duty.

The court also held that plaintiff’s lawyer – not defense counsel – had a duty to supplement discovery regarding Filippo’s criminal past, and that the newspaper’s counsel had acted in good faith.

The court ordered Filippo to pay \$9,800 in sanctions and her lawyer to pay \$6,900.

Charles D. Tobin and Eric Dorkin, Holland & Knight LLP, Washington D.C. and Chicago represented The Times and Lee Enterprises. Lita Filippo is represented by Mark Van Der Molen, Merrillville, IN.

New York Court Rejects Constitutional Challenge to State's Shield Law

By Indira Satyendra

Another New York trial court has unequivocally rejected a constitutional challenge to New York's Shield Law, while at the same time reaffirming the strict application of the statutory three-part test to criminal defendants who seek unpublished newsgathering material. *People v. Forde*, No. 5544/00 (N.Y. Sup. Ct. N.Y. Co., September 12, 2007) (Wiley, J.).

The two defendants, labor union leaders on trial for allegedly taking a bribe from organized crime related to a construction project at the Park Central Hotel in New York City, sought the outtakes of an interview conducted by ABC News of the prosecution's key witness against them.

In quashing the subpoena, the *Forde* decision joins *People v. Hendrix*, 820 N.Y.S.2d 411 (Sup. Ct. Kings Co. 2006) in rejecting the argument that the New York Court of Appeals opinion *People v. Combest*, 4 N.Y. 3d 341 (2005) should be interpreted as an invitation to find the Shield Law unconstitutional as applied to criminal defendants or as authority to apply a weaker version of the statutory test to criminal defendants seeking unpublished newsgathering material that is not from a confidential source.

Background

The subpoena arose from an ABC News 20/20 program titled "Secrets of the Mob: Former Mob Insider Tells All," which aired in December 2000. The program featured an interview with Sean Richard, a contractor who is the former son-in-law of the leader of the DeCavalcante Crime Family of New Jersey, who was also an associate of the Lucchese crime family in New York, and who became an informant for the State against numerous defendants allegedly involved in criminal schemes related to the construction industry.

In the broadcast interview Richard discussed his personal life and his participation in organized crime, including, in general terms, his involvement in the corruption of union officials in the construction industry.

In overturning defendants' convictions in their first trial based on juror misconduct, the court noted that the convictions were based "almost entirely on the testimony of Richard and [his associate Anthony] Rucereto, testimony which in its most important part is utterly inconsistent." *People v. Forde*, 801 N.Y.S.2d 780 (Sup. Ct. N.Y.

Co. 2005). To prepare for the second trial, defendants sought the outtakes of the Sean Richard interview in the hopes that it would contain further evidence to undermine Richard's testimony against them.

Remarkably, defendants persisted in seeking the ABC News outtakes despite discovering that a prior decision by the same trial court had already quashed a subpoena for the very same ABC News outtakes in a case in which Sean Richard also figured as a key prosecution witness. *In re Subpoena Duces Tecum to American Broadcasting Companies, Inc. Concerning People v. Crea*, 735 N.Y.S.2d 919 (Sup. Ct. N.Y. Co. 2000).

In that case, defendant Steven Crea, indicted as the leader of the Lucchese Crime Family, sought the outtakes from the same ABC News 20/20 interview with Sean Richard to help Crea prepare for his trial for corruption, bribery and other crimes related to the construction industry.

The court granted ABC's motion to quash using well-established criteria, finding that unpublished news can be required to be disclosed "only as a last resort," where the defense "virtually rises and falls with the admission or exclusion of the proffered evidence," *Id.* at 922, and that potential evidence sought to impeach the credibility of a witness, even a key witness, is not "critical or necessary" to the defense so as to require compelled disclosure. *Id.*

In *Forde*, neither defendants' names nor the specific facts of the indictments were mentioned in the broadcast interview, so defendants would face an even more difficult burden than Crea, who was mentioned in the interview, to compel disclosure of the outtakes under the Shield Law.

Constitutional Challenge Rejected

Undeterred, defendants nevertheless sought to compel disclosure by arguing that the Shield Law itself was unconstitutional. They relied heavily on *Combest*, asserting that *Combest* clearly invited challenges to the Shield Law as applied to criminal defendants. The defendant in *Combest* sought footage of defendant's custodial interrogation by the police to support his claim that his confession was coerced. The Court of Appeals declined to reach the constitutional question because it held that the defendant had met the three-part test under the Shield Law.

But the Court noted that "[i]n a criminal case, defendant's

(continued on page 28)

(continued from page 27)

interest in nonconfidential material weighs heavy,” 4 F.3d at 346, and it left open the question of “what standard is constitutionally required in order to overcome a criminal defendant’s substantial right to obtain relevant evidence.” *Id.* at 347.

Defendants, all but conceding that they could not satisfy the “critical and necessary” prong of N.Y. Civil Rights Law § 79-h, argued in the alternative that *Combest* is authority for the proposition that criminal defendants should only be required to make a showing under the first and third prongs of the statute – that the material sought is highly relevant and material to the defense and not available from alternate sources – and that criminal defendants should not be required to satisfy the “critical and necessary” prong of the statute when seeking unpublished news that is not from a confidential source.

Defendants also sought in camera review, complaining that they had no way of knowing what was on the outtakes and it would thus be impossible for them to make a clear and specific showing that the unknown material was critical and necessary for the defense. They claimed that strict application of the Shield Law to criminal defendants without in camera review amounted to the deprivation of their Sixth Amendment right to a fair trial.

ABC News argued, among other things, that defendants failed to address any of the cases involving the rights of criminal defendants to subpoena privileged documents from non-parties, and that those cases show that the Shield Law’s three-part test of materiality, necessity and availability from other sources would more than meet any standard that courts have applied when balancing state privileges against constitutional rights.

The *Forde* court, like the trial court in *Hendrix*, squarely addressed the constitutional question and found no violation of constitutional rights. Where Justice Tomei in *Hendrix* analyzed each possible source of constitutional right to the subpoenaed non-party material to find that defendants’ constitutional rights were not violated or even implicated, Justice Wiley’s opinion in *Forde* was short and sweet. The court bluntly stated: “Defendants have not directed the court to even a single case in which any court anywhere has ever found a similar qualified reporter’s privilege to violate the Sixth Amendment, as defendant claims this statute does. Accordingly, this court declines to hold the shield law facially unconstitutional.”

The court found that the Legislature had already properly balanced the State’s interest in the free flow of information against the rights of a criminal defendant and noted that “a criminal defendant can overcome the privilege and obtain nec-

essary evidence if it is truly critical to his case, but professional journalists are protected from improper requests for information.”

Outtakes Not Critical to Defense

The court then turned to whether or not the defendants met the three-prong test of the Shield Law to overcome the privilege, and ended the inquiry when it found that defendants failed to demonstrate that the outtakes were critical and necessary to their defense, noting that the potential impeachment evidence defendants sought “is precisely the type of information repeatedly held to be protected by the Shield Law.”

Significantly, the court cut through the rhetoric about *Combest* to find that all the Court of Appeals actually did was apply the Shield Law’s three-part test to the facts:

“Essentially, defendants read *People v. Combest*, 4 N.Y.3d 341 (2005), to have essentially rewritten the Shield Law, effectively writing out the second prong of the balancing test where a criminal defendant seeks non-confidential unpublished news. However, the *Combest* court held no such thing. Rather, the Court of Appeals in *Combest* held that the defendant had met the statute’s three-prong test.”

Notably, although the Court of Appeals mentioned in *Combest* that it might have been a good idea for the trial court to have reviewed the outtakes in camera, 4 N.Y.3d at 349 n.4, Justice Wiley quashed the subpoena without ordering, or even mentioning, in camera review.

Conclusion

Although criminal defendants appear to have been emboldened by *Combest* to demand more lenient treatment by courts when seeking unpublished news, the opinions in *Forde* and *Hendrix* indicate that so far New York trial courts have not understood *Combest* to be a mandate to overturn or judicially alter the statute.

Instead, these decisions provide strong support for the proposition that trial courts can squarely address the constitutional question, uphold the constitutionality of the Shield Law, and continue to rigorously apply the statutory language and established case law.

Indira Satyendra of ABC, Inc. and Nathan Siegel of Levine Sullivan Koch & Schulz LLP represented ABC News in this case. Michael Forde was represented by Andrew M. Lankler and James W. Versocki of Lankler & Carragher, LLP. Martin Devereaux was represented by Michael G. Dowd.

Senate Judiciary Committee Begins Mark-up on Shield Law Bill

At press time, the Senate Judiciary Committee moved a federal shield law bill one step further in the legislative process when it began mark-up of S. 2035 on September 27. The bill, introduced earlier this month by Sens. Arlen Specter, Richard Lugar and Chuck Schumer, would provide a qualified privilege for confidential sources and information received in confidence; it would not cover unpublished information.

Committee members offered over 20 amendments to the bill prior to mark-up. Four of the amendments were taken up by the Committee before it recessed early in the day. The Committee, however, is expected to continue mark-up of the bill next week. The text of the Senate bill follows below:

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Free Flow of Information Act of 2007'.

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

(a) Conditions for Compelled Disclosure- In any proceeding or in connection with any issue arising under Federal law, a Federal entity may not compel a covered person to provide testimony, or produce any document, relating to protected information, unless a Federal court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person--

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document;

(2) that--

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person--

(i) there are reasonable grounds to believe that a crime has occurred;

(ii) the testimony or document sought is essential to the investigation or prosecution or to the defense against the prosecution; and

(iii) in a criminal investigation or prosecution of an unauthorized disclosure of properly classified information by a person with authorized access to such information, such unauthorized disclosure has caused significant, clear, and articulable harm to the national security; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is essential to the resolution of the matter; and

(3) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.

(b) Limitations on Content of Information- The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible--

(1) be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.

SEC. 3. EXCEPTION RELATING TO CRIMINAL OR TORTIOUS CONDUCT.

(a) In General- Section 2 shall not apply to any information, record, document, or item obtained as the result of the eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the covered person, including any physical evidence or visual or audio recording of the observed conduct, if a Federal court determines that the party seeking to compel disclosure under this section has exhausted reasonable efforts to obtain the information from alternative sources.

(b) Exception- This section shall not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue.

SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING, OR SUBSTANTIAL BODILY INJURY.

Section 2 shall not apply to any protected information that is reasonably necessary to stop, prevent, or mitigate a specific case of--

(1) death;

(2) kidnapping; or

(3) substantial bodily harm.

SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR HARM TO THE NATIONAL SECURITY.

Section 2 shall not apply to any protected information that a Federal court has found by a preponderance of the evidence would assist in preventing a specific case of--

- (1) terrorism against the United States; or
- (2) significant harm to national security that would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens.

SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) Conditions for Compelled Disclosure- With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) Notice and Opportunity Provided to Covered Persons- A Federal court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)--

- (1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and
- (2) an opportunity to be heard before the court before compelling testimony or the disclosure of a document.

(c) Exception to Notice Requirement- Notice under subsection (b)(1) may be delayed for not more than 45 days if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation. This period may be extended by the court for an additional period of not more than 45 days each time the court makes such a determination.

SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITHOUT PROMISE OR AGREEMENT OF CONFIDENTIALITY.

Nothing in this Act shall supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure by a covered person or communications service provider of--

- (1) information identifying a source who provided information without a promise or agreement of confidentiality made by the covered person as part of engaging in journalism; or
- (2) records, communication data, documents, or information obtained without a promise or agreement that such records, communication data, documents, or information would be confidential.

SEC. 8. DEFINITIONS.

In this Act:

- (1) COMMUNICATIONS SERVICE PROVIDER- The term `communications service provider'--
 - (A) means any person that transmits information of the customer's choosing by electronic means; and
 - (B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 or 230 of the Communications Act of 1934 (47 U.S.C. 153 and 230)).
- (2) COVERED PERSON- The term `covered person' means a person who is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such person.
- (3) DOCUMENT- The term `document' means writings, recordings, and photographs, as those terms are defined by rule 1001 of the Federal Rules of Evidence (28 U.S.C. App.).
- (4) FEDERAL ENTITY- The term `Federal entity' means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.
- (5) JOURNALISM- The term `journalism' means the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.
- (6) PROTECTED INFORMATION- The term `protected information' means--
 - (A) information identifying a source who provided information under a promise or agreement of confidentiality made by a covered person as part of engaging in journalism; or
 - (B) any records, communications data, documents, or information that a covered person obtained or created--
 - (i) as part of engaging in journalism; and
 - (ii) upon a promise or agreement that such records, communication data, documents, or information would be confidential.

California Rejects Privacy Challenge To Disclosure of Public Employee Salaries

Public Employees Have No Reasonable Expectation of Privacy in Salary Amount

By Karl Olson

“Openness in government is essential to the functioning of a democracy.” Those ringing words by California Supreme Court Chief Justice Ronald M. George set the tone for that Court’s recent decision holding that the names and salaries of public employees must be disclosed. *International Federation of Professional and Technical Engineers Local 21 v. Superior Court (Contra Costa Newspapers)*, 165 P.3d 488 (Cal. Aug. 27, 2007).

The Court rejected a privacy-based challenge from the state’s powerful public employee unions to such disclosure, and in the process disapproved a four-year-old Court of Appeal decision, *Teamsters Local 856 v. Priceless LLC*, 112 Cal. App. 4th 1500 (2003) which had stated that public employees had a privacy interest in their salaries.

The court’s decision in *Contra Costa Newspapers* and its decision in a companion case, *Commission on Peace Officer Standards and Training v. Superior Court (Los Angeles Times)*, 2007 Cal. LEXIS 8916, were the first Public Records Act victories for the media in that court in 21 years. They were especially welcome after a setback last year in *Copley Press v. Superior Court*, 39 Cal. 4th 1272 (2006), where California’s high court held that police officer disciplinary records could not be disclosed, in a decision notable for its anti-access tone.

In one sense, the Court’s decision in *Contra Costa Newspapers* shouldn’t have been necessary. Courts in virtually every other state which have considered the question have ruled in favor of public employee salary disclosure, as the Supreme Court observed in footnote 5 of its decision and as the California Court of Appeal had concluded when it considered this case.

Likewise, a regulation under the federal Freedom of Information Act, 5 C.F.R. section 293.311, requires that salary rates of federal employees be made public. And in the city in question, Oakland, a Sunshine Ordinance mandated salary disclosure and the city had, for many years, disclosed the salary of all employees.

Union Challenged Salary Disclosure

But the state’s public employee unions, especially powerful police unions, have waged a vigorous attack on such salary disclosure, and they won a preliminary victory four years ago in the *Priceless* case. Although the Court of Appeal’s decision in that 2003 case simply affirmed a preliminary injunction – a point the Supreme Court took note of in calling its precedential value “slight” – dicta from that case stated that public employees do have a reasonable expectation of privacy in their salaries.

Not any more. The Supreme Court held that *Priceless* was “unpersuasive,” stating, “we conclude that public employees do not have a reasonable expectation of privacy in the amount of their salaries.” The court took note of numerous newspaper articles in the record illustrating nepotism and favoritism, holding, “the public has a strong, well-established interest in the amount of salary paid to public employees.”

It then gave the back of its hand to assertions of privacy which had been raised: “The interest of employees in avoiding unwanted solicitations or marketing efforts is, on the other hand, comparatively weak.” While the *Priceless* court had speculated that salary disclosure might lead to identity theft, there was no evidence of that in the voluminous record of the *Contra Costa Newspapers* case.

The public employee unions had relied on a California statute, Government Code section 6254(c), which exempts documents creating an “unwarranted invasion of personal privacy” from the state’s Public Records Act. They also invoked the state’s constitutional right to privacy, which on matters ranging from abortion rights to financial records has been construed broadly by the California Supreme Court. But on the core issue of public employee salary disclosure, the court unanimously ruled that disclosure of a named employee’s salary is not an unwarranted invasion of privacy.

The *Contra Costa Newspapers* case involved the newspapers’ request for the names and salaries of employees who earned over \$100,000 a year, but the Court’s decision – rejecting the notion that public employees in general have a reasonable expectation of privacy in their salaries – extends beyond the “\$100K Club.”

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Public agencies which have received records requests in the wake of the decision have agreed, with all but one small agency turning over the salaries of all of their employees. The Court did indicate, in a minor “carve-out,” that if salary disclosure might endanger the safety of undercover police officers, names could be withheld. A few agencies in the wake of the decision have withheld names of undercover officers, but the majority appear to have supplied all names.

The court rejected separate arguments raised by peace officers in the *Contra Costa Newspapers* case and the companion *POST/Los Angeles Times* case. A California law exempts certain peace officers’ “personnel records” from disclosure, but the court gave that law a common-sense, narrow construction and ruled that officer names, salaries and hiring and termina-

tion dates are not exempt from disclosure.

Taken together, these decisions further the fundamental purpose of the California Public Records Act; that access to information concerning the conduct of the public’s business is a “fundamental and necessary right of every person” in California. They are sure to be cited by the media in California, and perhaps beyond, in future battles over public records.

Karl Olson and Erica L. Craven of Levy, Ram & Olson represented Contra Costa Newspapers in the Contra Costa Newspapers case. Kelli L. Sager, Alonzo Wickers, IV, and Rochelle L. Wilcox of Davis Wright Tremaine in Los Angeles, and Karlene W. Goller represented the Los Angeles Times in the POST/Los Angeles Times case.



First Amendment Speakers Bureau **Publishing Online**

The MLRC Institute will soon roll out a second topic for presentation through its First Amendment Speakers Bureau: Publishing Online.

We are looking for volunteers to give talks and help organize presentations.

This topic will address:

- the media’s use of the Internet
- news organizations’ interaction with their audience online
- the use of content submitted by readers and viewers
- blogs, whether kept by media staff, readers or others
- liability for defamation for statements made online
- copyright and privacy law

Speakers will have access to a turn-key set of presentation materials prepared by the MLRC Institute. As with talks on the reporter’s privilege, the first topic taken up by the Speakers Bureau, presentations on publishing online will be done at colleges, high schools, bookstores, and libraries, and before rotary clubs, chambers of commerce and other civic organizations.

The MLRC Institute has received a grant from the McCormick Tribune Foundation to develop and administer the First Amendment Speakers Bureau.

If you are interested in joining the Speakers Bureau or in helping to organize a presentation in your area, please contact:

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Tenth Circuit Imposes Constitutional Scrutiny on Copyright Restoration Act

By Toby Butterfield and Lisa Digernes

In a surprising recent development, the Tenth Circuit Court of Appeals granted a victory to those on a mission to limit copyright protection for creative works. *Golan v. Gonzalez*, No. 05-1259, 2007 WL 2547974 (10th Cir. September 4, 2007).

Background

The plaintiffs are individuals who, together with Lawrence Lessing at Stanford Law School, sued the U.S. Attorney General and the Copyright Office challenging both the 1998 Copyright Term Extension Act (“CTEA”), which extended copyright protection by 20 years, and the 1994 Uruguay Round Agreement Act Section 514, 17 U.S.C. §104A (“URAA”), which implemented Berne Convention revisions.

Specifically, the URAA restored copyright protection for foreign works that fell into the public domain in the US for failure to comply strictly with US copyright formalities, and instead gave restored works the term of copyright they would otherwise have enjoyed.

The Tenth Circuit affirmed the District Court’s dismissal of plaintiffs’ CTEA copyright term extension claim, finding it was foreclosed by the Supreme Court’s decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), but remanded the URAA claim for the district court to determine whether that statute survives First Amendment scrutiny.

Plaintiffs argued that the CTEA extends copyrights in violation of the “limited Times” in the Copyright Clause, U.S. Const. Art. I, § 8, cl. 8, and that Congress exceeded its powers by shrinking the public domain. Although plaintiffs tried to distinguish their claims, the Court easily affirmed the district court’s dismissal, citing the Supreme Court’s dismissal of a very similar challenge in *Eldred* and the Ninth Circuit’s recent dismissal of a nearly identical challenge to the CTEA itself. *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007).

Uruguay Round Agreement

Turning to the URAA, the Tenth Circuit relied on the Supreme Court’s indication in *Eldred* that the copyright acts are not “categorically immune from challenges under the First Amendment.” *Eldred*, at 219-21. Despite the free speech safeguards built into the copyright law under the idea/expression dichotomy and the fair use defense, the Court construed *Eldred* to permit First Amendment review when an act of Congress has “altered the traditional contours of copyright protection.” *Golan* at 10, quoting *Eldred* at 221.

Finding that URAA’s restoration of foreign copyrights did just that, the Court then curiously avoided conducting that review by remanding the case for the district court to decide whether URAA survives such First Amendment scrutiny.

Public Domain Works

Devising a new test for whether a statute passes Constitutional muster, the *Golan* Court recognized that *Eldred* did not define the “traditional contours of copyright protection.” Nevertheless, the *Golan* Court found that a court must determine whether removing a work from the public domain alters the ordinary scope of copyright protection, and whether historical practice of copyright and public domain provides any support for doing so.

Interestingly, in discussing the public domain, the Court only cited cases about works which lacked sufficient originality to be copyrightable. The Court simply did not discuss the nature of the foreign works restored under URAA, although they include classic 20th Century works by Europeans that were injected into the public domain in the U.S., for example, for failure to include a U. S. copyright notice when published abroad, although no such notice was required in Berne Convention countries.

Applying this new test, the Court found little support for either side in the Framers’ views. The Court did agree with plaintiffs that when the First Congress conferred copyright protection on already-created works, the works were already covered by state com-

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mon-law copyright – thus the first Congress only altered the theory of copyright protection, not “its traditional contours.”

Arguably ignoring an analogous situation, the Court did not take into consideration that the works restored under URAA were similarly protected by copyright (albeit under their national laws) when they landed in the public domain in the US. In fact, one of several requirements for URAA restoration is that the work is still in copyright under its national law, rather than in the public domain there due to the expiry of its copyright term.

Nevertheless, the Court concluded that “the URAA transformed the ordinary process of copyright protection and contravened a bedrock principle of copyright law that works in the public domain remain in the public domain.” *Golan* at 27.

First Amendment Review Argument

The Court then explained how this alteration of the “traditional contours” of copyright protection affects plaintiffs’ First Amendment interests. Although the facts are less than clear, the Court apparently accepted plaintiffs’ claims to have relied on works being in the public domain prior to 1994. It is not clear how the Court intends to distinguish distinct categories of users: (i) those who used the works prior to 1994; (ii) those who had adapted such works prior to 1994; and (iii) those who wished to make new uses or adaptations after 1994. The Court simply found that “[b]y removing works from the public domain, §514 arguably hampers free expression and undermines the values the public domain is designed to protect.” *Golan* at 30.

The Court also found that one of URAA’s safe harbor mechanisms was insufficient First Amendment protection for the URAA to pass constitutional muster overall (absent a determination that the Act as a whole was content based or content neutral).

The safe harbor mechanism provides that a third party user of the restored work can continue to use such work until he receives notice by the owner of the restored work, either via a notice of intent to enforce the copyright filed with the Copyright Office within the first year of the enactment of URAA, or via a notice sent directly to the third party user at any time. The third party user then has a 12-month grace period to sell off any copies of the restored work.

The Court found this safe harbor mechanism insufficient. It apparently ignored the URAA’s other safe harbor, the derivative work exemption, which provides that an author who created a derivative work before the effective date of URAA, using a foreign work in the public domain that is then restored, may continue to exploit the derivative work, provided he pays reasonable compensation to the owner of the restored copyright.

Interestingly, the district court had found that both the 12-month grace period and the derivative work exemption strike “a careful balance between the plaintiffs’ interests as reliance parties and Congress’ express purpose.” *Golan v. Gonzales*, 74 U.S.P.Q.2d 1808, 1822 (D. Colo. 2005). If Congress struck such a careful balance, arguably Courts should defer to Congress’ view, rather than recalibrate the scales of justice later.

Conclusion

It will be interesting to see how this case fares on remand, or possibly on a direct appeal to the Supreme Court. Procedurally, at least one noted commentator queries how the Circuit Court could remand for such analysis, having itself answered many of the Constitutional questions raised. Perhaps the Circuit Court was inviting a more careful analysis. Either way, this decision may well end up being appealed again. It remains to be seen, however, whether other circuits will adopt such additional procedural and substantive reviews of Congress’ attempts to conform our copyright laws to our treaty obligations.

Toby Butterfield is a partner and Lisa Digernes an associate at Cowan DeBaets, Abrahams & Sheppard LLP, New York. Plaintiffs were represented by Lawrence Lessig, Center for Internet and Society, Stanford Law School and Hugh Q. Gottschalk and Carolyn J. Fairless, Wheeler Trigg Kennedy LLP, Denver, Colorado.

California Appellate Court Affirms Summary Judgment Dismissing Implied Contract Claim Against *Rounders* Motion Picture

By Robert S. Gutierrez

In the seminal case of *Desny v. Wilder*, 46 Cal.2d 715, 299 P.2d 257 (1956), the California Supreme Court confirmed that ideas are free as the air for common use and can only be subject to payment where there is an agreement, express or implied, to pay for their use. Fifty-one years later, *Desny*'s principles were applied to put an end to a multi-year lawsuit against the writers, producers and distributors of the 1998 motion picture *Rounders* starring Matt Damon and Ed Norton as high stakes poker players.

This month, a California appeals court affirmed summary judgment for Miramax Film Corp., producers Joel Stillerman and Spanky Pictures, and screenwriters David Levien and Brian Koppelman on Jeff Grosso's complaint for breach of implied-in-fact contract. *Grosso v. Miramax Film Corp.*, No. B193872, 2007 WL 2585053 (Cal. App. 2 Dist. Sep 10, 2007) (Turner, Armstrong, Kriegler, JJ.).

Relying on *Desny*, the court affirmed the trial court's finding that there was no evidence of an implied-in-fact contract between Grosso and any of the defendants.

Relies on *Desny v. Wilder*

In *Desny*, the plaintiff claimed to have submitted an idea for a film to director Billy Wilder in two separate telephone conversations with Wilder's secretary. In the first conversation, Desny described his idea for a film based on true events and then offered to send a copy of his story. Wilder's secretary told Desny that Wilder would only read a summary of the story.

Desny insisted on writing his own synopsis and, in a second telephone conversation, dictated his synopsis over the phone to Wilder's secretary. The defendants conceded (for purposes of their summary judgment motion) that, in this second telephone conversation, Desny told Wilder's secretary that they could use the story only if they paid him the reasonable value of the work.

Based on this record, the Supreme Court reversed summary judgment to the defendants on Desny's implied contract claim against the film *Ace In The Hole*. The Court explained that use of another's ideas can only be subject to payment where there is either an express or an implied promise to pay. In the first

instance, the offeror obtains from the offeree an express promise to pay before or after disclosing the idea. In the second instance, the offeror clearly conditions disclosure on an obligation to pay and the offeree, knowing of this obligation, voluntarily accepts the disclosure and thereafter uses the idea.

The *Desny* Court reasoned that "[t]he idea man who blurts out his idea without first having made his bargain has no one but himself to blame for the loss of his bargaining power." An oft-quoted passage from the decision explains that

the law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit . . . even though the conveyance has been made with the hope or expectation that some obligation will ensue.

Implied Contract Claim

In contrast to the agreement to pay that was conceded in *Desny*, Grosso claimed that an implied-in-fact contract requiring payment for use of his poker story ideas was created with Miramax and *Rounder*'s producers and screenwriters simply by the fact that he sent his script entitled *The Shell Game* to Gotham Entertainment Group in response to the following entry in the *1997 Writer's Market Guide*:

GOTHAM ENTERTAINMENT GROUP, 99 Hudson St., Suite 200, New York, NY 10013. (212) 376-6063. Director of Development: Noah Baylin. Estab. 1995. Theatrical features. Buys 5-10 scripts/year. Works with 10-25 writers/year. Buys all rights. Accepts previously produced material on occasion. Reports in 2 weeks. Query with completed script. *Writer's Market* recommends sending a query first. Makes outright purchase. Needs: Film (35mm). "We produce only feature films. We need big action scripts. We have a deal with Miramax films on our productions. Call us." Tips: Trends in the business include less and less sex and exploitation in features.

Grosso claimed that Gotham, which had a first-look deal for

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a year with Miramax and had an office in the same building as Miramax, gave a copy of his screenplay to Miramax and that Miramax thereafter used it as the basis for *Rounders*. Grosso's complaint listed various claimed similarities between the two works, both of which centered on the underground world of poker play in New York City. Grosso did not name Gotham as a defendant.

In July 2006, Los Angeles Superior Court Judge Edward A. Ferns granted the *Rounders* defendants' motion for summary judgment on Grosso's breach of implied contract claim. Grosso appealed from the judgment

Prior Copyright Infringement Claim Dismissed

Grosso's initial complaint, filed in state court in August of 1999, alleged claims for breach of contract, breach of implied contract, breach of confidence, intentional interference with a contractual relationship, and fraud. The action was removed to federal court on the grounds that all of Grosso's claims were disguised claims for copyright infringement. Grosso filed a First Amended Complaint in district court, alleging copyright infringement and also realleging the same claim for breach of implied contract. In October 2000, District Court Judge Audrey Collins dismissed the implied contract claim on preemption grounds.

In late 2001, Judge Collins granted summary judgment to the *Rounders* defendants on Grosso's copyright infringement claim, finding that defendants "demonstrated that there is an utter lack of evidence tending to show that any of them had access to 'The Shell Game' before 'Rounders' was written and/or produced." Judge Collins also found that *The Shell Game* script and the *Rounders* motion picture were not substantially similar in protected expression.

In May 2004, the Ninth Circuit affirmed the District Court's grant of summary judgment to the *Rounders* defendants, but reversed the District Court's dismissal, on preemption grounds, of Grosso's implied contract claim. 383 F.3d 965. These prior proceedings set the stage for Grosso's return to state court to pursue his implied contract claim.

Expectation Of Payment Held Insufficient

Writing for the Second District panel in *Grosso*, Justice Turner reviewed the *Desny* decision and found that the *Rounders* defendants met their summary judgment burden of showing there was no implied-in-fact contract with Grosso. Justice Turner reasoned that unlike *Desny* where the defen-

dants conceded that they agreed to pay if they used the ideas submitted to them, there was no evidence that Grosso conditioned his disclosure to Gotham on any obligation to pay for his ideas if used, or that Gotham or any defendant accepted Grosso's script with knowledge that it was conditionally offered.

Applying *Desny*, the Court of Appeal found that no circumstances preceding or attending the disclosure of *The Shell Game* script to Gotham showed an implied promise by Gotham or Miramax to pay. Justice Turner explained, "Plaintiff simply mailed his script to Gotham. Plaintiff's expectation of payment does not establish an implied agreement to do so."

Responding to Grosso's evidence, in the form of his own declaration attesting to his personal expectation of payment and his understanding of "custom" in the industry, the Court of Appeal concluded that "plaintiff's own expectation and understanding is insufficient to raise a triable issue of material fact as to the existence of an implied-in-fact contract. There must be evidence of circumstances such that an agreement to pay can fairly be implied."

The *Rounders* defendants presented uncontroverted evidence demonstrating that Gotham and the *Rounders* defendants never had contact with Grosso, the *Rounders* defendants never received a copy of Grosso's script, and Gotham never acquired an interest in the script and never submitted it to Miramax or anyone else.

Even as to Gotham, the Court of Appeal found that there was no evidence from which it reasonably could be inferred that the *Writer's Market Guide* entry for Gotham was an authorized solicitation by Gotham accompanied by a promise to compensate. The Court of Appeal similarly rejected Grosso's argument that Gotham was Miramax's agent and therefore an implied contract with Gotham extended to Miramax, finding that there was no triable issue as to an implied-in-fact contract between Grosso and Gotham. Because Grosso raised it for the first time on appeal, the Court of Appeal refused to consider Grosso's argument that he was a third party beneficiary of the first-look deal between Gotham and Miramax.

Half a century later, *Desny* still controls and requires that a plaintiff do more than assert that everyone knows that the idea man expects to be paid.

Robert S. Gutierrez and Louis P. Petrich of Leopold, Petrich & Smith in Los Angeles, represented Miramax Film Corp., Spanky Pictures, Joel Stillerman, David Levien and Brian Koppelman in this matter. Plaintiff was represented by John A. Marder and Sylvia E. Havens of Manning & Marder, Kass, Ellrod, Ramirez LLP.

“Breach of the Fourth Wall” a Well-Recognized Cinematic Technique Not Protectable in Copyright Litigation Over “Faux Movie Trailers”

By Roger Myers & Adam Brezine

In a decision that illustrates how a district court should apply the substantial similarity test to claims of infringement in movies – or, in this case, in “faux movie trailers” designed to remind theater patrons to turn off their cell phones – the district court in San Francisco granted defendants’ motion for judgment on the pleadings on all copyright claims asserted in two related cases, *Identity Arts, LLC v. Best Buy Enterprise Services, Inc., et al.* (“*Best Buy I*”), and *Gee Jeffery & Partners Advertising, Inc. v. Best Buy Co., Inc., et al.* (“*Best Buy II*”), 2007 U.S. Dist. LEXIS 32060 (N.D. Cal. April 18, 2007).

After detailed analysis, the court concluded that plaintiffs in both cases were “attempting to claim an overly broad protection for a general genre of cleverly disguised movie trailers involving a ringing cell phone and exhortation to patrons not to use their cell phones,” but that “there is no substantial similarity of protected expression here that can support an infringement claim.” *Id.* at *81-82. With respect to the plaintiffs’ assertion that defendants’ faux trailers copied the sequence of events in plaintiffs’ faux trailers, culminating in a “breach of the fourth wall” between the characters on the screen and the audience when the characters realize the cell-phone ringing is coming “from the audience,” the court found that breaching the fourth wall is a well-known cinematic technique, “not a unique or concrete element susceptible of copyright protection.” *Id.* at *79-80.

The “Silence is Golden” Campaign

At issue in both cases are a series of courtesy messages largely created by defendant Best Buy, sponsored by defendant Sprint and shown before movies in defendant AMC’s theaters from 2003-05 as part of the “Silence is Golden” campaign to encourage patrons to turn off their cell phones before the movie starts. The messages mimicked trailers for a coming attraction, but the action on the screen was interrupted by a cell-phone ringing, which one or more of the characters would identify as coming “from the audience,” and which would alter the outcome on the screen (typically causing the “hero” to lose).

In 2003, a Canadian advertising agency known by its initials, GJP, sent a demand letter to Best Buy’s corporate headquarters asserting that in 1997 it had created a “cell phone

courtesy spot,” which it referred to by the title “Phone Bomb,” that it marketed and sold in Canada and elsewhere outside the United States. That spot was intended to be shown in movie theaters. It depicts a military-style team of uniformed men working to defuse a “sound-sensitive” weapon. Just as the bomb is about to be defused, the ringing of a cell phone is heard – the characters onscreen recognize that the sound is coming “from the audience,” and the bomb explodes. The spot ends with a reminder to theater patrons to turn off their cell phones for the feature.

“Phone Bomb” was actually one of three similar spots. GJP received some critical acclaim for the spots, including a Cannes Lion award. GJP also alleged that it attended a meeting in 2000 with executives from Best Buy and Sprint in Cincinnati, at which they claimed to have shown two of the spots and offered them as a “licensing opportunity.”

Best Buy forwarded a copy of GJP’s demand letter to an agency in San Francisco called Identity Arts, which in 2003 had presented to Best Buy a rough cut of a short spot called “Submarine,” in which the crew of a WWII-era submarine attempted to stay silent to avoid detection, but are distraught (and presumably detected) after hearing the ringing of a cell phone that comes from the audience. Best Buy produced and showed a version of “Submarine” in AMC theaters, as well as several other “faux movie trailers” using the same idea but different plots and themes. For example, Best Buy created a spot called “Return of Kwan,” a spoof of martial arts movies like “Crouching Tiger, Hidden Dragon,” in which dueling warriors are interrupted by the sound of a cell phone ringing “in the audience.”

In a surprising turn, Identity Arts and its principals filed suit in federal district court in San Francisco in November 2005 against Best Buy for copyright infringement and various state law claims. The Identity Arts plaintiffs alleged that, as a result of watching a movie-goer being harassed when his cell phone rang during a showing of the movie “Gladiator” in 2000, they had independently hit on the idea to create “faux movie trailers” to be shown at the beginning of a film to encourage patrons to turn off their cell phones. During the spots, the action on the screen would be interrupted by the sound of a cell phone ringing, which the characters would recognize as coming “from the audience.” From that idea, they created and filmed an example,

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called “Submarine,” which they had marketed and sold to defendant Best Buy in 2003. Identity Arts claimed that Best Buy’s subsequent spots infringed their “Submarine” spot, and that Best Buy was not authorized to create the later spots under the parties’ written agreement.

Not to be outdone, GJP filed suit in federal district court in New York the next month. In *Best Buy II*, GJP alleged that its “cell phone courtesy spots” were infringed by “Submarine” and another Best Buy spot. GJP alleged that its spot entitled “Phone Bomb,” in which military-like personnel are foiled in their attempt to defuse a sound-sensitive bomb by a cell-phone ringing in the audience, was infringed by “Submarine.” GJP also alleged that its spot “Action Fighter,” a faux trailer for a Hong Kong-style action movie in which badly dubbed Kung Fu fighters are also interrupted by a cell phone, was infringed by “Return of Kwan.” GJP sued not only Best Buy, but also Identity Arts, Sprint and AMC. GJP also asserted state law claims for unjust enrichment and breach of implied contract based on the 2000 meeting in Cincinnati.

Best Buy II was transferred to San Francisco and consolidated with *Best Buy I* for pre-trial proceedings and discovery. Rather than proceed with what could have been costly and time-consuming discovery, defendants in both cases opted to file Rule 12(c) motions for judgment on the pleadings on the ground that, by simply comparing the works in question – which were attached as exhibits to the complaints – the court could determine as a matter of law that plaintiffs failed to meet the extrinsic test used in the Ninth Circuit to determine whether protectable elements of the works were sufficiently similar to survive a motion.

After Reviewing Works - No Substantial Similarity

Although some cases suggest substantial similarity is an issue for the trier of fact, the court agreed that it can be decided as a matter of law “where the facts asserted by the non-moving party in its pleadings – including the attached works themselves – and all reasonable inferences from those facts, show the absence of substantial similarity.” *Identity Arts*, 2007 U.S. Dist. LEXIS 32060 at *15 (citation omitted). In these two cases, the court concluded that the plaintiffs sought to define the scope of copyright protection too broadly, and that “actual analysis of the works in question ... reveals significant differences and few real similarities between the works as regards to plot, theme, dialogue, mood, setting, pace, charac-

ters, and sequence of events.” *Id.* at *27.

No Substantial Similarity Based on General Similarities of Theme and Treatment

The Court found that there were some broad similarities among the spots at issue, but at too general a level to warrant a finding of substantial similarity under the extrinsic test. For example, with respect to “theme,” the Court found that “Phone Bomb” and “Submarine” shared “similar themes of military activity, danger, and impending death,” but that “it takes more than ... broad similarity in themes to rise to the level of substantial similarity worthy of copyright protection. ... [T]here must be an actual similarity of expression that is apparent in the overall ‘concept and feel’ of the works in question.” *Id.* at *72 (citation omitted.) With respect to the characters in the spot, while the “genre of the character may be similar (i.e., martial arts fighter), this is not enough to support a finding that that characters themselves are similar.” *Id.* at *77.

No “Catchphrase” Protection

Plaintiffs in both cases sought protection for their use of the phrase “it’s coming from the audience” (or a similar phrase) – the “catchphrase” uttered by the characters onscreen when they hear the ringing of a cell phone. But the Court declined to provide such protection, finding that it was inappropriate to pull this “isolated phrase” from the overall dialogue of the spots, and that, in any event, “there is no copyright protection that can be extended to short words and phrases such as the single phrase that plaintiff focuses on here.” *Id.* at *74 (citations omitted).

No Protection for “Sequence of Events”

The court also rejected plaintiffs’ argument that the sequence of events in their spots was entitled to protection and had been copied because a cell phone is heard ringing “at a crucial moment in the spots,” which interrupts the action, and is followed by the characters on screen “break the fourth wall” by communicating directly with the audience that the ringing is coming from the theater. *Id.* at *34, 78-79. The plaintiffs sought to define “the scope of copyright protection too broadly,” the court concluded, “and impermissibly [sought] protection for the general idea, or concept, of a movie or film spot whose true nature is a cell phone courtesy message, instead of seeking protection for [their] own expression of the same idea.” *Id.* at *78-79 (emphasis in original) (citation omitted). In essence, the court found, the plaintiffs were seeking protec-

tion for “scenes a faire that flow from the use of the cinematic format,” rather than specific protected expression. *Id.* at *79. Plaintiffs in both cases also sought protection for their spots by saying that the elements – if not individually protectable – were capable of protection as a “unique or creative combination or sequence of elements.” *Id.* at *80. The court disagreed. “While there are a few striking similarities to be sure,” the court said, “the fact remains that the works have nothing else in common aside from a broad general plot or theme.” *Id.* at 81.

No Preemption of State Law Contract Claims

While the court dismissed state law claims for unfair competition and unjust enrichment as preempted by the Copyright Act, *id.* at *56-59 and *87-88, it found that the breach of implied contract claims were valid under *Desny v. Wilder*, 46 Cal. 2d 715 (1956), which was decided before the 1976 Act broadened the preemptive nature of federal copyright law, but which the Ninth Circuit recently found was sufficient to avoid preemption without analysis of the difference between the 1909 and 1976 Acts. *Grosso v. Miramax Film*, 383 F.3d 965 (9th Cir. 2004). In *Best Buy II*, the court declined to find on a pleading motion that the claim was barred by California’s two-year statute of limitations, as the court felt unable to determine as a matter of law that any breach accrued in November 2005,

the month when defendants said their faux trailers debuted and one month before GJP filed suit.

Defendants Seek Attorneys Fees

In *Best Buy I* the court entered partial judgment on the copyright claims, and Best Buy has filed a motion for attorneys fees and costs under 17 U.S.C. § 505 that the court has indicated it will determine on the pleadings. Plaintiff Identity Arts has filed a notice of appeal. In *Best Buy II*, the parties (except for Identity Arts as a defendant in that case) have agreed to a settlement conference before a magistrate judge on the issue.

Roger Myers is a partner and Adam Brezine a senior associate in the San Francisco office of Holme Roberts & Owen LLP, which represents defendants Best Buy and Sprint in Best Buy II. Robert Hinton and David Martinez of the Los Angeles office of Robins, Kaplan, Miller & Ciresi LLP represent defendant Best Buy in Best Buy I and defendant AMC in Best Buy II. Thomas Burke and Catherine Maxson, of the San Francisco and Seattle offices, respectively, of Davis Wright Tremaine LLP, represent Identity Arts as defendant in Best Buy I, while Drexel Bradshaw of Bradshaw & Associates represents Identity Arts as plaintiff in Best Buy I. Francis Dehn and David Atlas of Smith, Dornan & Dehn LLP in New York, with Michael Dergosits of Dergosits & Noah, LLP in San Francisco, represent plaintiff GJP in Best Buy II.

MLRC Member Lawyer to Lead Pro Bono Media Law Initiative in West Africa

DCS member lawyer Dan Byron of Bingham McHale in Indiana has been selected to participate in a pro bono project in West Africa this Fall. Dan will be working with the Media Law Foundation for West Africa based in Accra, Ghana. He will lead a team of West African lawyers as they attempt to end impunity for violence against journalists, publishers and broadcasters and combat laws that limit freedom of expression.

The lawyers will seek to: 1) analyze and prioritize existing cases relating to these issues, 2) develop and implement litigation strategy for these cases, 3) establish and organize a media defense bar for West Africa, and 4) seek change in the legislative and regulatory climate with regard to broadcasters, newspapers and journalists.

The mission is sponsored by the International Senior Lawyers Project (ISLP). The ISLP provides volunteer legal services by skilled and experienced attorneys to advance democracy and protect human rights worldwide. Through the pro bono work of legal practitioners, ISLP helps governments and citizens in developing countries with regard to these goals.

The scope of the mission includes the following West African countries: Benin, Burkina Faso, Cote D’Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

Nevada Federal Court Strikes Down State Statutes Restricting Advertising Of Legal Brothels

The Nevada federal district court last month struck down as unconstitutional two Nevada statutes that prohibited advertising of legal brothels on all Nevada roads, in public theaters, and in counties where prostitution is not permitted. *Coyote Publishing, Inc. v. Heller*, No. CV-06-329-JCM-PAL, 2007 WL 2254702 (D. Nev. Aug. 3, 2007) (Mahan, J.).

Background

Nevada is the only state which allows the licensing of brothels for legal prostitution. The licensing of brothels is an option at the county level for counties with populations under 400,000 inhabitants.

Plaintiffs, a group of local newspapers and one Nevada brothel owner, filed suit over the constitutionality of two Nevada statutes that prohibit certain kinds of advertising relating to legal brothels. Nevada Revised Statute (“N.R.S.”) § 201.430 prohibits legal brothels from advertising “[i]n any public theater, on the public streets of any city or town, or on any public highway” or “[i]n any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.”

Section 201.430 goes so far as to prohibit “publication of the address, location or telephone number” of legal brothels. The publication of such information is “prima facie evidence of advertising for the purposes of this section” and punishable under the statute. For any location where prostitution is illegal (including Las Vegas, the state’s largest city) N.R.S. § 201.440 prohibits any person or company allowing an advertisement for a legal brothel. Both statutes contain criminal penalties for violations.

Summary Judgment for Plaintiffs

With regard to the restriction on publishing the name and address of brothels, the court found that the information could be used in a noncommercial manner and therefore was “prima facie evidence” that the statute restricted noncommercial, as well as commercial, speech.

Because of the possible noncommercial nature of the speech, the restriction is subject to strict scrutiny analysis. The district court found that the government failed to offer a compelling interest and failed to show that restricting this type of speech was the least restrictive means of achieving any possi-

ble compelling interest.

Next the district court dealt with the statutory provisions that prohibited advertisements of legal brothels on public roads and in theaters. The district court used the four-part Central Hudson test for determining when restrictions on commercial speech are constitutional. *Central Hudson Gas & Electric Corp. v. Public Services Comm’n*, 447 U.S. 557, 566 (1980). This test first directs that in order for commercial speech to be protected, the speech must be non-misleading and concern a lawful activity. Next, the government’s interest in prohibiting this type of speech must be substantial. The district court found that the government failed to put forth a substantial interest, and thus the government failed on this step of the Central Hudson analysis.

The two interests that were offered by the government were the protection of children and the limitation of legal prostitution. The district court relied on Supreme Court precedent for the proposition that the interest of protecting children is not strong enough to justify prohibition on commercial speech aimed at adults. As for the interest of limiting legal prostitution, the district court found that the Supreme Court had spoken directly on this issue when it declared that there is no “vice exception” to the constitutional protection of commercial speech. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513-14 (1996).

The Nevada court also found unconstitutional the statutory prohibition on advertising in counties where prostitution is illegal. For this ban the government offered two more interests. First, the government suggested that banning advertising of legal brothels will prevent illegal prostitution. The district court found that not only did the government fail to show that this is true, but instead found that such a ban could possibly cause more illegal prostitution by creating confusion as to where prostitution is legal.

The government also suggested that prohibiting advertisements in counties where prostitution is illegal would protect the interests of the people in those counties. However, the Supreme Court has held that one state may not prohibit the advertising of an activity that is illegal in that state, but is legal in another state. *Bigelow v. Virginia*, 421 U.S. 809 (1975). The Nevada court found that this extended to advertising among counties as well as among states.

“Courtesy” and “Civility” Provisions of Michigan’s Attorney Conduct Rules Held Unconstitutional

This month a federal court in Michigan held two provisions of the state’s attorney conduct rules unconstitutional on their face as both overbroad and vague. *Fieger v. Michigan Supreme Court*, No. 06-11684, 2007 WL 2571975 (E.D. Mich. Sept. 4, 2007) (Tarnow, J.).

At issue were the state’s “courtesy” and “civility” conduct rules which place restrictions on attorney speech directed toward tribunals and persons involved in the legal process. The rules were challenged by high profile lawyer Geoffrey Fieger and a Michigan bar colleague.

Striking down the provisions, a Michigan federal district court stated:

“In this case, the vague and overbroad courtesy provisions that enforce silence in the name of preserving the dignity of the bench, does not override an attorney’s right to speak her mind against public institutions, especially an elected judiciary, regardless of whether that speech is in good taste.”

Background

Last year the Michigan Supreme Court had held that Fieger could be punished under the state’s attorney conduct rules for making disparaging statements about a panel of appellate court judges after they reversed a multimillion dollar verdict Fieger had won at trial. *Fieger v. Michigan Grievance Administrator*, 476 Mich. 231, 719 N.W.2d 123 (Mich. 2006), cert. denied, 127 S.Ct. 1257 (2007).

Fieger made the statements on a radio show he hosted. Among other things, he said: “I declare war on you” and told the judges to “kiss my ass.”

Referring to his client, Fieger then said, “He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.” Two days later, on the same radio show, Fieger called the judges “three jack-ass Court of Appeals judges.” And after another person involved in the broadcast used the word “innuendo,” Fieger stated, “I know the only thing that’s in their endo should be a large, you know, plunger about the size of, you know, my fist.”

The Attorney Grievance Commission filed a complaint against Fieger under Michigan’s Rules of Professional Conduct which provide, in part, that a lawyer shall not “engage in

undignified or discourteous conduct toward the tribunal” (Michigan Rules of Professional Conduct 3.5(c) (“MRPC”)) and “[a] lawyer shall treat with courtesy and respect all persons involved in the legal process” (MRPC 6.5 (a)). The Michigan Attorney Discipline Board ruled that the professional conduct rules did not apply to Fieger’s out of court statements and, alternatively, that applying them here would violate the First Amendment.

Michigan Supreme Court Decision

The Michigan Supreme Court reversed the board’s decision, holding that the attorney conduct rules could be applied to out of court statements because otherwise they would be “largely superfluous, and of little practical utility” since courts already have inherent contempt power to control statements in court. Upholding the constitutionality of the rules as applied, the court rejected Fieger’s argument that they were vague or only applicable to deliberately false statements of fact.

The rules did not prohibit Fieger from criticizing judges, they “only precluded him from casting such disagreement and criticism in terms that could only bring disrepute on the legal system.” To the extent the rules chilled speech, the court noted it would “only chill, those comments that are properly ‘chilled’ among members of a profession who are bound to conduct themselves in a courteous and civil manner.”

Earlier this year, the U.S. Supreme Court declined Fieger’s petition for certiorari. The petition asked the court to decide whether lawyers have a “First Amendment right to publicly express non-defamatory personal criticism of judge when that criticism could not affect any pending trial.”

Federal District Court Decision

In federal district court, Fieger and another attorney (who was not previously sanctioned under the attorney conduct rules) brought a facial challenge to the supreme court’s interpretation of the rules under the Declaratory Judgment Act. Plaintiffs sought a declaratory judgment that the rules, as interpreted by the Michigan Supreme Court, were unconsti-

(continued on page 42)

(continued from page 41)

tutionally overbroad and vague.

Overbreadth

The district court began its analysis by noting that it was bound by the Michigan Supreme Court's interpretation of the state attorney conduct rules. The court found several reasons why the supreme court's interpretation of the rules left them unconstitutionally overbroad. The first reason was that the supreme court failed to define what type of conduct constitutes 'discourteous' and 'undignified'. Thus the rule regulates unprotected speech, such as vulgarities, but also unconstitutionally prohibits protected speech, such as political speech.

The rules were also overbroad because the supreme court failed to make a distinction between speech that "may harm the fair administration of justice" and speech "that merely harms the dignity of the judiciary." This distinction is crucial, the district court explained, because speech that harms the interest of fair administration is subject to greater restriction than speech that harms judicial dignity.

The district court concluded that the Michigan Supreme Court failed to incorporate considerations of the interests the rules are trying to protect into the rules themselves. Furthermore, the interpretation of the rules, while legitimately restricting some unprotected speech, swept in too much protected speech.

Vagueness

The district court also found the rules to be unconstitutionally vague. The court noted that in order to determine if a statute is unconstitutionally vague "a Court must look to whether the statute is 'so imprecise that persons of ordinary intelligence must guess at its meaning and may differ in their understanding to its application.'" (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)). The Michigan Supreme Court failure to define the terms "discourteous" and "disrespectful," and the failure of the rules and their commentary to provide guidance as to their meaning, leave the rules open to guessing as to what their proper application is.

The district court also found vagueness in an inherent contradiction between a lack of guidance on the meaning of the terms and the supreme court's declaration that the rules are not meant to silence speech or bar criticism. Further-

more, the district court viewed the law as overly subjected to the differing sensibilities of individuals. Given the lack of guidance and the chilling effect on speech critical of the judiciary, the district court found the rules, in addition to being overbroad, were also unconstitutionally vague.

Plaintiffs were represented by Michael R. Dezsi of Fieger, Fieger, Kenney & Johnson, P.C. of Southfield, MI and Richard L. Steinberg, Richard L. Steinberg Assoc. of Detroit, MI, pro se. Defendants were represented by Heather S. Meingast, Margaret A. Nelson, Richard P. Gartner, Susan Przekop-Shaw and Brenda E. Turner of the Michigan Department of Attorney General in Lansing, MI.

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MLRC Calendar of Events

NOVEMBER 7, 2007

MLRC Forum

Media Going Digital: Advising Clients on their Internet Operations
Moderated by Barbara Wall, Gannett

Panel will include:

Andy Mar, Microsoft Corporation; Jon Hart, Dow, Lohnes & Albertson
Karole Morgan-Prager, The McClatchy Company; Ken Richieri, New York Times Company
Grand Hyatt, Conference level
2:30-4:30 P.M.

RSVP dseiden@medialaw.org

MLRC Annual Meeting

Grand Hyatt, Conference level
5:00-6:00 P.M.

MLRC Annual Dinner 2007

Honoring David Fanning,
Creator and Executive Producer of the PBS series, FRONTLINE
Grand Hyatt, Empire Ballroom
6:00 P.M. Reception
7:30 P.M. Dinner

[Registration for tables and individual seats](#)

NOVEMBER 8, 2007

Planning Meeting for NAA/NAB/MLRC CONFERENCE 2008

12:30-1:30 P.M.

Davis Wright Tremaine
1633 Broadway (betw. 50th and 51st St.), Suite 2700
All are invited to discuss ideas for the Conference in 2008
RSVP dseiden@medialaw.org

NOVEMBER 9, 2007

Defense Counsel Section Breakfast

7:00 A.M. – 9:00 A.M.

Proskauer Rose LLP Conference Center
1585 Broadway (betw. 47th and 48th St.), 26th Floor

[Registration for seats](#)

JANUARY 31, 2008

Avoiding Digital Fault Lines in Entertainment and Media Law

- * The New Business Relationship
- * Talent and Guild Relationships
- * User Generated Content

MLRC/Southwestern Law School Conference
2- 7 p.m.
Los Angeles, California