

MULRC Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through September 25, 2009

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Federal Shield Law Bill Stalled in Senate Committee

The Senate Judiciary Committee debated a federal shield law bill at a mark-up on September 17, but ended the discussion without voting on the legislation. The bill, called the “Free Flow of Information Act of 2009” (S. 448), would provide a qualified privilege against disclosure of confidential sources. (The bill does not cover unpublished, non-confidential information.)

It was initially scheduled for mark-up on September 10, but committee members instead adopted a [Managers’ Amendment](#) put forward by the sponsors and agreed to postpone the formal mark-up by a week to provide more time for amendments. S. 448 was introduced in February 2009 by Sen. Chuck Schumer (D-NY) and Sen. Arlen Specter (D-PA), among others. It is similar to a federal shield law bill that passed the Senate Judiciary Committee in October 2007 ([S. 2035](#)). The House of Representatives passed a version of the “Free Flow of Information Act of 2009” ([H.R. 985](#)) in March 2009. It covers both confidential sources and unpublished information.

On September 17, most of the time scheduled for the mark-up was spent hearing about the bill’s shortcomings – particularly with respect to national security – from both Republicans and Democrats.

Sen. Jeff Sessions (R-AL) and Sen. John Kyl (R-AZ) each gave lengthy opening statements, effectively filibustering any votes on amendments to the Managers’ Amendment. They focused on leaks of classified information and cited opposition to the bill by current and former intelligence officials, including FBI Director Robert Mueller. Sen. Sessions, ranking Republican on the committee, argued that there was no need for the legislation as the Justice Department had subpoenaed few reporters in the last two decades.

Sen. Dianne Feinstein (D-CA), Intelligence Committee Chair, took issue with how the privilege would apply in cases involving national security. She argued that the bill unfairly weighed in favor of journalists in such cases.

As now drafted, the bill would require disclosure of information by the journalist (defined as a “covered person”) where the information:

- ◆ was “obtained as the result of the eyewitness observations of, or obtained during the course of, alleged criminal conduct by the covered person;”
- ◆ “is reasonably necessary to stop, prevent, or mitigate a specific case of (1) death; (2) kidnapping; or (3) substantial bodily harm;” or
- ◆ “would materially assist in preventing or mitigating, or identifying the perpetrator of (1) an act of terrorism; or (2)

other significant and articulable harm to national security that would outweigh the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information.”

As the opening statements during the mark-up continued, attendance decreased, eventually leaving too few Senators in favor of the bill with a quorum to cut off debate. The committee, however, adopted a [technical amendment](#) put forward by Sen. Schumer.

The technical amendment made a few substantive changes to the bill, including limiting the scope of persons covered by the legislation. The Managers’ Amendment defined “covered person” as a person who “with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes on such matters by

- (I) conducting interviews;
- (II) making direct observation of events; or
- (III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form; and has such intent at the inception of the newsgathering process.”

The definition of covered person includes “a supervisor, employer, parent company, subsidiary, or affiliate of such person.”

The technical amendment adds a requirement with respect to media, namely that the person “obtains the information sought while working as a salaried employee of, or independent contractor for, an entity

- (I) that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means; and
- (II) that (a) publishes a newspaper, book, magazine, or other periodical; (b) operates a radio or television broadcast station, network, cable system, or satellite carrier, or a channel or programming service for any such station, network, system, or carrier; (c) operates a programming service; or (d) operates a news agency or wire service.”

En Banc Military Appellate Court Holds that No Reporter's Privilege Exists in Courts Martial for Non-Confidential Materials

By Nicole A. Auerbach

On August 31, 2009, the Navy-Marine Corps Court of Criminal Appeals ("NMCCA"), sitting *en banc*, ruled that journalists do not possess a privilege against disclosure of non-confidential newsgathering materials subpoenaed for use in courts martial. The NMCCA's opinion in *United States v. Wuterich*, __ M.J. __, 2009 WL 2730890, is the latest development in a protracted battle between CBS and the government over a subpoena issued by the prosecution to CBS News for outtakes of a *60 Minutes* interview with Marine Staff Sergeant Frank Wuterich, who stands accused of killing some two dozen Iraqi civilians in Haditha, Iraq in 2005.

Over the objection of CBS and the accused, the Court held that it had jurisdiction under Article 62 of the Uniform Code of Military Justice to hear the government's interlocutory appeal of the trial court's Order quashing the subpoena. (The Court's interlocutory appellate jurisdiction over the case is the subject of a pending *cert.* petition to the Supreme Court regarding earlier appellate rulings in the case.). It then went on to hold that the Military Rules of Evidence do not allow the recognition of either a First Amendment or common-law reporter's privilege concerning non-confidential newsgathering materials, and remanded the case to the trial court for further proceedings. Further discretionary appeals to the Court of Appeals for the Armed Forces ("CAAF"), the highest military court, are also possible.

Background

Staff Sergeant Wuterich is charged with manslaughter and other crimes in connection with his involvement in the killing of some 24 Iraqi civilians in Haditha, Iraq in November 2005. The government alleges that, contrary to the military "rules of engagement," which require troops to positively identify a threat before using deadly force, Staff Sergeant Wuterich instructed his men to

"shoot first, ask questions later" as they used grenades and guns to "clear" several houses they believed to be hostile, although it turned out they were occupied by Iraqi civilians, including women and children.

On March 15, 2007, CBS aired a report concerning the incident on *60 Minutes* entitled "The Killings at Haditha." The centerpiece of the report was an interview of Staff Sergeant Wuterich by CBS News Correspondent Scott Pelley. In the interview, Wuterich described in detail the events surrounding the "clearing" of the houses in question and explained why he believed the killings had been warranted under the circumstances. In January, 2008, just before Staff Sergeant Wuterich was set to go to trial, the military prosecutors served a subpoena on CBS News calling for the outtakes from that interview.

Procedural History:

The First Trial Court Decision Quashing the Subpoena

The trial court judge, Lt. Col. Jeffrey Meeks, granted CBS's motion to quash the subpoena under Rule 703 of the Rules for Courts-Martial (the military analogue to Federal Rule of Criminal Procedure 17(c)), stating that "the information desired here by the government from CBS would be cumulative with what is already in the hands of the government." He therefore found that the "necessity" requirement under Rule 703 had not been met, and quashed the subpoena.

With respect to the reporter's privilege, Lt. Col. Meeks stated that, "although not required based on these findings

[T]he court held that ... Military Rules of Evidence do not allow the recognition of either a First Amendment or common-law reporter's privilege concerning non-confidential newsgathering materials...

announced above, the court is persuaded that a qualified reporter's privilege under the First Amendment does, in fact, exist under federal common law." While noting that this conclusion was *dicta*, he observed that "as the court does not find the subpoena meets . . . the lower standard articulated under R.C.M. 703, it is a

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logical conclusion that the greater standard required for disclosure under this qualified privilege has not been met.”

The First NMCCA Opinion Reversing the Trial Court

The NMCCA exercised its discretion under Article 62 to hear the government's appeal from the trial court Order and reversed Judge Meeks, finding that he had erred by concluding that the outtakes were cumulative and unnecessary without first conducting an *in camera* review of the materials. *United States v. Wuterich*, 66 M.J. 685, 688-92 (N.M. Ct. Crim. App. 2008). It also held that Wuterich did not have standing to challenge the Court's jurisdiction under Article 62, which allows the government to take interlocutory appeals of orders “exclude[] evidence that is substantial proof of a fact material to the proceeding,” including the order at issue.

The CAAF Opinion

Both CBS and SSgt. Wuterich sought review by CAAF. On November 17, 2008, CAAF vacated the NMCCA's opinion, but affirmed its reversal of Judge Meeks' Order quashing the subpoena. CAAF found that Wuterich did have standing to challenge this Court's exercise of jurisdiction, but went on to find that the appellate courts did have jurisdiction under Article 62 to entertain an interlocutory appeal of the military judge's discovery order. On the merits, CAAF agreed with the NMCCA that Judge Meeks had erred by ruling on the motion to quash without conducting an *in camera* review of the outtakes. In remanding the case, CAAF noted that such an *in camera* inspection would “provide the appropriate forum for consideration of issues pertinent to a motion to quash the subpoena, such as the existence, if any, of a qualified newsgathering privilege” as well as “the scope of any such privilege, and the application, if any, of such a privilege to the requested materials.” *Id.* at 79, *reconsideration denied*, 67 M.J. 205 (C.A.A.F. 2008).

The Trial Court's Decision on Remand

On remand, after reviewing *in camera* the eight DVDs containing CBS's outtakes, Judge Meeks found that the footage on five of the eight discs was not relevant, material, or necessary to the Government's case. Rather, such footage consisted of background material or the accused discussing events that occurred either before or after the events of November 19, 2005, that are the basis of the charges against him.

For the remaining three DVDs, which represented approximately 80 minutes of interview footage, the Military Judge found that, while they were material and relevant in that they contained footage of the accused discussing the events underlying the charges against him, their contents were “cumulative and available from other sources,” including from other statements of the accused. The Military Judge went on to find that these three tapes nonetheless met Rule 703's threshold requirements of materiality, relevance and necessity because “the evidence is presented in a professionally prepared video format” and “is obtained by the questioning of a skilled reporter who develops the information in a logical and a coherent manner.”

The Military Judge then ruled, however, that those three DVDs were shielded from disclosure by a common-law “qualified news gatherer's privilege with respect to non-confidential sources.” Specifically, Judge Meeks noted that “the nature of [the outtakes] is troubling. The press has an interest in being able to interview newsworthy individuals and obtain information to present in newsworthy cases.” He asserted that journalists have “the interest to be able to prepare and preserve their stories without becoming an investigative arm of the government in criminal cases.” Moreover, he noted, “[i]f the subpoena is enforced without the application of appropriate safeguards, the court is concerned that there will be a chilling effect on the freedom of the press.”

Accordingly, the Military Judge applied the three-part test employed by the Second Circuit in *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983), and evaluated whether the Government had met its burden of establishing

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that: (a) the footage was “highly material and relevant”; (b) it was “necessary or critical to the prosecution’s case”; and (c) the evidence was “not obtainable from other sources.” While he found that the footage was highly material and relevant, he concluded that the Government had failed to meet its burden of overcoming the second and third prongs of the test. Specifically, again relying on the evidentiary record he canvassed in connection with his initial ruling on the Motion, Judge Meeks found that “the statements of the accused [in the outtakes] are consistent with all prior statements and other testimony available to the government” and are “obtainable from other sources,” including substantial evidence “already in the possession of the government.” The Military Judge therefore quashed the subpoena a second time.

The Second Appeal to the NMCCA

The government once again appealed the trial court’s Order. The essential question on appeal was whether Military Rule of Evidence 501 (“MRE 501”) provides a basis for applying the qualified reporter’s privilege with respect to non-confidential materials in the military courts. Unlike the Federal Rules of Evidence, which leave the development of specific privileges to the Courts, the Military Rules set out a list of specifically enumerated privileges. However, MRE 501 allows the military courts to recognize privileges other than those contained within the rules themselves under certain limited circumstances. For example, MRE 501 (a)(1) authorizes the application of privileges “provided for in the United States Constitution as applied to members of the military.” And MRE 501(a)(4) allows the courts to apply privileges “provided for in . . . [t]he principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and

not contrary to or inconsistent with the code, these rules, or [the] Manual [for Courts Martial].”

On appeal, the government argued that Judge Meeks had erred in applying the qualified reporter’s privilege under MRE 501(a)(4) because: (a) the qualified privilege with

Unlike the Federal Rules of Evidence, which leave the development of specific privileges to the Courts, the Military Rules set out a list of specifically enumerated privileges.

respect to non-confidential materials was not “generally recognized” in criminal cases in the fed-

eral civilian courts; and (b) that application of the privilege would be “contrary or inconsistent” with the principles underlying the Military Rules of Evidence, in that it would lead to unwarranted uncertainty in a system in which certainty and efficiency are crucial.

CBS argued that the qualified reporter’s privilege applied both under MRE 501(a)(1) (allowing application of those privileges “provided for in the United States Constitution”) and under MRE 501(a)(4) (allowing the application of privileges “generally recognized” by the civilian courts). With respect to the application of MRE 501(a)(1), CBS emphasized that even those federal courts that have applied a “common law” privilege have recognized that the privilege is grounded in the First Amendment. It also noted that those military courts that had applied the privilege had spoken of it as a First Amendment privilege, recognizing the constitutional interests at stake. *See United States v. Bennett*, U.S.M.C., Sierra Judicial Circuit, Apr. 6, 1999 (quashing subpoena for unedited videotape of “Dateline NBC” interviews with accused’s alleged victims and other witnesses in sexual assault case); *United States v. Ashby*, U.S.M.C., Piedmont Judicial Circuit, Feb. 4, 1999 (quashing subpoena to CBS and *Rolling Stone* magazine for audio and video outtakes from interviews with the accused and an eyewitness, in case involving crash into Italian ski gondola cable resulting in 20 civilian deaths and causing international controversy).

With respect to the application of MRE 501(a)(4), CBS noted that of the eight Circuit courts to have considered the issue, six have recognized the applicability of the reporter’s

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privilege in the criminal context. See *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir.1980); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986). It also noted that of the six Circuits to consider directly whether the privilege applied to non-confidential materials sought in the context of criminal trials, four concluded that it did. See *LaRouche Campaign*, 841 F.2d at 1181-83; *Burke*, 700 F.2d at 77; *Cuthbertson I*, 630 F.2d at 147; *Caporale*, 806 F.2d at 1504. It therefore argued that the privilege was “generally recognized in the federal courts” and should be applied through MRE 501(a)(4).

On August 31, 2009, the NMCCA, sitting en banc, unanimously reversed the trial court. First, relying heavily on *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972), the court found that there was no First Amendment privilege that could be applied through MRE 501(a)(1). While the Court acknowledged that several of the cases cited by CBS had in fact been “grounded” in the First Amendment, it held that “these cases do not support the existence of a broadly based First Amendment privilege, nor of one ‘required by or provided for’ in the Constitution.” The Court therefore held that the qualified privilege could not be applied through Rule 501(a)(1).

Next, the Court considered whether a common law privilege with respect to non-confidential materials had been “generally recognized” in criminal cases by the federal civilian courts. Acknowledging that the federal courts have “generally recognized” a reporter’s privilege in civil cases, the court went on to find that recognition “of a reporter’s privilege in the criminal context . . . has most often been in cases of confidential sources or material.” The court emphasized that only four Circuit Courts (the First, Second, Third, and Eleventh Circuits) had applied the privilege to subpoenas for non-confidential information in criminal cases, and that four others (the Fourth, Fifth, Sixth and Seventh Circuits) had refused to apply the privilege in that con-

text. It then concluded that Judge Meeks had erred in not making a legal determination that the privilege was “generally recognized” in the civilian courts before applying it. It remanded the case once again to the trial court, noting that CBS was free to seek an appropriate protective order to prevent “disclosure of their newsgathering methods, editing techniques, and other proprietary interests.”

The Current Status of the Litigation

Neither CBS nor Staff Sergeant Wuterich has yet filed a notice of appeal. However, the government may seek “certification” from the Judge Advocate General of the Navy, which would require CAAF to hear the case. (In the military courts, the Government may request such certification even though it prevailed below, allowing it to seek extension of the ruling to the other service courts beyond the Navy-Marine Corps Court). In addition to any appeal that may take place, the ultimate outcome of this case could be determined by Wuterich’s pending petition for a writ of certiorari to the Supreme Court concerning the appellate courts’ jurisdiction over the government’s first appeal under Article 62. If the petition were to be granted, and if Wuterich were to prevail on this issue, all of the opinions after the initial Order by the trial court quashing the subpoena would be vacated. We expect the Supreme Court to act on the petition in the October term.

Lt. Col. Meeks retired the day after issuing his opinion on remand. Any further proceedings before the trial court will therefore be held before a different judge, who has yet to be named.

CBS Broadcasting Inc. was represented by Anthony Bongiorno, Carl R. Benedetti, Susanna Lowy, and Richard H. Altabef of CBS and Lee Levine, Seth D. Berlin and Nicole A. Auerbach of Levine Sullivan Koch & Schulz, L.L.P. The government was represented by LT Timothy H. Delgado, JAGC, USN. Staff Sergeant Wuterich was represented by Col. Dwight H. Sullivan, USMCR and LT Kathleen L. Kadlec, JAGC, USN.

Hawaii's New Media Shield Law Bolstered by Test Case

Kauai Judge Grants Order to Protect Documentary Filmmaker from Subpoena

Hawaii's [new media shield law](#), signed into law in July 2008, was applied for the first time this month. Hawaii Circuit Court Judge Kathleen Watanabe ruled that the statute protected an independent documentary filmmaker who was subpoenaed to testify as a non-party witness in a civil case and to turn over unpublished video footage. *Joseph A. Brescia v. Ka`iulani Edens-Huff*, No. 08-1-0107 (Sept. 2, 2009) (unpublished order).

Background

Filmmaker Keoni Kealoha Alvarez was subpoenaed by Joseph Brescia, a California developer whose construction of a house in Hawaii on land containing thirty graves has spawned an eight-year legal battle and prompted protests on his property. Brescia argued that the raw video footage Alvarez had collected while working on his documentary about Hawaiian burial practices was relevant to the civil suit Brescia had filed against 17 protesters that had allegedly trespassed on his land, delaying construction.

The requested video footage documents portions of meetings of the Kauai-Niihau Island Burial Council and related interviews. Alvarez explained to the press that because Hawaiian burial practices are considered "kapu," or taboo, by some, he had to promise his sources that any footage not used in his documentary would remain confidential, and "that the film and the interviews will not be released publicly until everyone in it has had a chance to review, comment, or object."

Before the September 2 hearing, Alvarez said that he was afraid of what a ruling in favor of Brescia would mean for the future of documentary filmmaking in Hawaii, warning that "the trust of the journalist will be destroyed" and "lots of really important Hawaiian cultural preservation work simply won't happen because people will be too afraid to do it."

Motion to Quash Subpoena

In July, Alvarez's attorney, James Bickerton, along with the Hawaii ACLU, moved for an order protecting Alvarez from the subpoenas. Brescia's attorneys, together with Hawaii Attorney General Randy Ishikawa, filed an [objection](#) on two key grounds. First, they argued that the privilege could be overridden by competing interests. Second, they asserted that Alvarez was not a "journalist" as defined under the Hawaii Shield Law, and was therefore not entitled to its protection.

In their reply, Bickerton and the ACLU contended that the plain language of the Shield Law, Act 210, provides absolute protection for journalists' sources and unpublished information except for a narrow carve-out applicable only in criminal cases. Act 210 (a)(2), states that a journalist cannot be compelled to disclose "any unpublished information obtained or prepared by the person while so employed or professionally associated in the course of gathering, receiving, or processing information for communication to the public." In their brief, Alvarez's attorneys argued that the statute provided greater protection than a First Amendment's "qualified privilege" standard and also protected Alvarez from having to testify as to his personal observations made while working on his documentary.

Brescia's other main argument was that Alvarez did not qualify as a "journalist" as defined in the statute. The Hawaii shield law, however, is not limited to professional journalists. The statute may also be invoked by any individual who shows by clear and convincing evidence that:

- (1) The individual has regularly and materially participated in the reporting or publishing of news or information of substantial public interest for the purpose of dissemination to the general public by means of tangible or electronic media;
- (2) The position of the individual is materially similar or identical to that of a journalist or newscaster, taking into account the method of dissemination;
- (3) The interest of the individual in protecting the sources and unpublished information ... is materially similar to the interest of [professional journalists]; and
- (4) The public interest is served by affording the protections of this section in a specific circumstance under consideration.

Alvarez contended that he "regularly and materially participated in the reporting or publishing of news or information of substantial interest for the purpose of dissemination to the general public." He was affiliated with Pacific Islanders in Communication, "a national non-profit media arts corporation," which gave him a

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\$36,840 grant for the project; he had been honored by the Governor for his work as a filmmaker; and he argued that the public's interest was served by the application of the media shield law in this case.

Kauai Circuit Judge Kathleen Watanabe chose to apply the shield law and ruled in favor of Alvarez on September 2, granting him and his sources protection from Brescia's subpoenas. In enacting the shield law last year, the Hawaiian legislature made it clear

that the public policy of Hawaii is to protect journalists. In a press release following the landmark ruling, Bickerton proclaimed "[w]ith this decision, the media shield law can now be confidently asserted by journalists seeking to protect their work."

Alvarez was represented by the American Civil Liberties Union of Hawaii ("ACLU") and James J. Bickerton, Bickerton Lee Dang & Sullivan, Honolulu, HI.

JUST PUBLISHED

[Bulletin 2009:3 International Media Law Developments](#)

International Media Law Developments includes a set of 11 articles by media lawyers from around the world on current issues and trends – from developments in privacy and libel law to the challenges of applying intellectual property law to websites and search engines. The articles illustrate the breadth of issues facing lawyers and publishers in the new global media environment.

Recent Developments in the Law of Privacy

By Kevin Bays and Paul Chamberlain

Liability of Online Publishers for User-Generated Content: An Overview of English, German and French Law

By Timothy Pinto, Niri Shan, Elisabeth von Braunschweig, Stefan Freytag & Valérie Aumage

Reportage and Neutral Reportage -- Are They Something New or Just Fair Report on Steroids?

By Harry Melkonian

The Supreme Court of Canada's Free Expression Docket: Will a New Legal Landscape Emerge?

By Brian MacLeod Rogers

Freedom of Expression and the Protection of Reputation: The Canadian Story

By Peter Jacobsen and Adrienne Lee

Libel Tourism and the Duke's Manservant

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A Growing Distance Between The Hague and Strasbourg? An International Criminal Tribunal and the ECHR Reach Different Results in Two Reporter's Privilege Cases

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Does Canadian Law Force News Media Organizations to Be "Net Nannies"?

By Wendy Wagner

News Aggregation Issues Joined, But Not Resolved: A Review of Past and Pending Litigation Worldwide

By David Hosp and Mark Puzella

Greeting Card that Spoofs Paris Hilton a Matter of Public Concern But Not Protected as a Matter of Law

Hallmark Files Petition for Rehearing

By Lincoln D. Bandlow

Hallmark Cards created a birthday greeting card (the “Card”) that morphed a photograph of Paris Hilton’s head on to a cartoon body and had Hilton interacting with a cartoon patron in a manner that poked fun at Hilton’s oft-used phrase “that’s hot.” Hilton brought an action contending that this violated her common law right of publicity and violated the Lanham Act and Hallmark moved to dismiss the claims and to strike the right of publicity claim under California’s anti-SLAPP statute.

On August 31, 2009, the Ninth Circuit issued an opinion holding that the Card is noncommercial speech that spoofs a controversial celebrity and her catchphrase, which are both matters of widespread public interest, and that the Card contains a stylized message and its own creative content. [Hilton v. Hallmark Cards](#), No. 08-5543 (Noonan, O’Scannlain, Graber, JJ.).

Despite these findings, the Panel concluded that the Card is not, as a matter of law, transformative or otherwise protected by the First Amendment. This unprecedented finding that the publicity rights of an iconic celebrity may trump the First Amendment in the context of fully-protected speech that spoofs that celebrity will drastically chill speech if allowed to stand. On September 18, 2009, Hallmark filed a Petition for Rehearing and Hearing En Banc. On September 21, the Ninth Circuit ordered Hilton to respond to the petition.

Facts

Hallmark created the Card, which depicts Hilton as a cartoon waitress serving a plate of food to a customer at a sit down

restaurant. In the dialogue bubbles on the Card, Hilton states to the customer: “Don’t touch that, it’s hot.” The customer asks: “What’s hot?” Hilton responds: “That’s hot.” The Card is titled “Paris’s First Day as a Waitress.” The greeting inside the Card reads “Have a smokin’ hot birthday.” The back of the Card contains a source identification which features Hallmark’s “Saturdays” brand and notes it is “[t]he casual way to connect from Hallmark.”

As alleged in her complaint, Hilton is an “American businesswoman, model, actress and recording artist.” She is often referred to as being “famous for being famous” and was once quoted saying “every decade has an iconic blonde – like Marilyn Monroe or Princess Diana – and right now, I’m that icon.” As she has said in her own autobiography, she is a woman whose “name is on everyone’s lips.”

Founded in 1910, Hallmark is a Missouri company that creates and publishes greeting cards, including the Card. Hallmark employs a creative staff of approximately 800 artists, designers, writers, editors and photographers to create its greeting cards. For decades, Hallmark’s cards have addressed a wide range of topics of public interest, including the Depression;

WWII; Prohibition; the economy; women’s suffrage and liberation; Vietnam; radio; jukeboxes; computers; hula hoops; atom bombs; mini skirts; quiz shows; fireside chats; Sputnik; beatniks; Charles Lindbergh; Mussolini; rationing; hippies; hillbillies; Valley Girls; dieting, fashion and other trends; politics and politicians; and celebrities. Sending greeting cards is one of the most accepted U.S. customs – seven billion greeting cards are given out a year.

District Court Proceedings

In September 2007, Hilton brought an [action](#) in federal court in Los Angeles, alleging claims for common law right of publicity, false designation of origin under the Lanham Act and

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EXHIBIT A

Greeting Card that Spoofs Paris Hilton a Matter of Public Concern But Not Protected as a Matter of Law

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infringement of her federally registered trademark in the words “that’s hot.” In November 2007, Hallmark filed a motion to strike the common law right of publicity claim under California’s anti-SLAPP statute and a motion to dismiss all claims under federal rule 12(b)(6) on the grounds that the claims are barred by the First Amendment. The District Court granted the motion to dismiss as to the claim regarding the registered trademark “that’s hot.”

However, while acknowledging that Hilton’s claims aim at speech about a “celebrity and media personality,” the District Court denied the motions as to the two other claims, holding that it could not dismiss the action because it could not determine at that early stage “whether the card is entitled to First Amendment protection as a parody” or whether the Card is “significantly transformative” to warrant dismissal under the First Amendment. Hallmark appealed to the Ninth Circuit.

Ninth Circuit Opinion

The Ninth Circuit held that the first prong of the anti-SLAPP statute was met, that is, that the Card relates to an issue of public concern. In so holding, the Ninth Circuit expressed a number of propositions that, it would seem, would equally compel the conclusion that the Card is protected by the First Amendment and thus Hilton’s claims fail as a matter of law.

The opinion, however, did not reach that second conclusion.

In addressing the first prong of the anti-SLAPP statute, the Ninth Circuit first recognized that the Card was clearly not “commercial speech” and thus was entitled to full First Amendment protection. Second, the Ninth Circuit repeatedly recognized the public interest in the well-known public figure Hilton and in the subject matter of the Card, stating that: (a) Hilton is “a controversial celebrity known for her lifestyle as a flamboyant heiress” and for being “famous for being famous”; (b) Hilton’s career is “something of concern to a substantial number of people”; (c) there is a public interest in Hilton’s “life, image, and catchphrase”; (d) the Card “involves a public issue”; and (e) “Hilton’s privileged lifestyle and her catchphrase (‘that’s hot’) are matters of widespread

public interest.”

Moreover, the Ninth Circuit repeatedly recognized that the Card contained an expressive message that directly commented on Hilton, holding that (a) the Card “spoofs Hilton’s persona”; (b) the Card “spoofs [Hilton’s] trademark phrase and her public persona - the very things that interest people about her”; and (c) the Card uses the phrase “that’s hot” as “a literal warning about the temperature of a plate of food” to spoof the fact that “Hilton says, ‘that’s hot,’ whenever she finds something interesting or amusing.”

Notwithstanding the Ninth Circuit’s holding that the Card (a) is not commercial speech, but fully protected speech; (b) relates to a public figure whose “life, image, and catchphrase” are “matters of widespread public interest” and (c) is an expressive work that “spoofs Hilton’s persona” and trademark phrase, which are the “very things that interest people about her,” the Ninth Circuit went on to hold that the Card, and its expressive content, were not as a matter of law protected by the transformative use test or otherwise by the First Amendment. In so holding, the Ninth Circuit made a number of errors.

Jurisdiction Over Denial Of Motion To Dismiss

It is well-established in the Ninth Circuit that the denial of a motion to strike under California’s anti-SLAPP statute is subject to an immediate appeal under the collateral order rule. The

question raised by the opinion was whether the Court also had appellate jurisdiction over the denial of the motion

the Card, and its expressive content, were not as a matter of law protected by the transformative use test or otherwise by the First Amendment.

to dismiss which, if it were the only motion below, would not normally be subject to an immediate appeal. The opinion concluded that the Court lacked appellate jurisdiction over the denial of the motion to dismiss.

The Ninth Circuit acknowledged, however, that it had appellate jurisdiction over the motion to dismiss if the issues in both motions were “inextricably intertwined,” that is, if “resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.” The Ninth Circuit then acknowledged that “the defenses [Hallmark] raises to Hilton’s Lanham Act claim are based on some of the same First Amendment concerns that animate its potential defenses to the misap-

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Greeting Card that Spoofs Paris Hilton a Matter of Public Concern But Not Protected as a Matter of Law

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propriation of publicity claim.” The Ninth Circuit appears to have concluded that *in the abstract* the denial or the grant of an anti-SLAPP motion might not necessarily resolve a motion to dismiss, rather than look at whether it would do so *in this particular case*.

Hallmark had argued on appeal that proper application of full First Amendment protection mandates that an expressive, non-commercial work such as the Card cannot, as a matter of law, be subjected to right of publicity and Lanham Act claims. Moreover, Hallmark contended that even if broad First Amendment protection did not trump the claims, the more specific “transformative use” First Amendment test barred the claims because that test is properly applied, the use of Hilton’s name and likeness in the Card is transformative as a matter of law, which resolves the anti-SLAPP motion, and such a ruling necessarily resolves the pendent issue of the legal sufficiency of Hilton’s Lanham Act claim (which was the issue in the motion to dismiss) because a use that is transformative necessarily meets the “artistically relevant” test under the Ninth Circuit’s holding in *E.S.S. Entertainment*. The opinion, having concluded there was no appellate jurisdiction, did not address those issues.

Transformative Use Test

The opinion purports to apply the *Hilton* transformative use test, which it acknowledges is “based on the First Amendment,” but its interpretation and application of that test conflicts with the decisions the opinion cites (*Hoffman*, *Comedy III* and *Winter*) as well as decisions from other courts which the opinion fails to address (*Kirby* and *ETW*). In doing so, the opinion concludes that whether an expressive work is transformative, and thus immune from a right of publicity claim, will virtually always be a question for a jury.

The opinion incorrectly envisions a transformative use “spectrum” on which only uses at opposite ends can be determined as a matter of law. At one end is an unprotected “literal, conventional” depiction like that of the Three Stooges in *Comedy III*; at the other end is the protected cartoon “half human, half worm” and “total, phantasmagoric conversion” of the Winter brothers in *Winter*. Everything between those two ends of the spectrum, according to the opinion, is “neither legally transformative nor legally not transformative.”

Thus, the opinion concluded it could not decide as a matter of law that the Card is transformative, despite recognizing that: (a) the “potential reach of the transformative use defense is broad” and protects parody, “fictionalized portrayal ... heavy-handed lampooning ... [and] subtle social criticism”; (b) courts cannot be “concerned with the quality of the artistic contribution” and it is “irrelevant whether Hallmark’s card qualifies as parody or high-brow art” under the test; (c) works that contain “expression of something other than the likeness of the celebrity” and that go beyond a “conventional portrait of a celebrity” are protected by the test; and (d) the Card “spoofed” Hilton and her catchphrase and added its own expressive content beyond Hilton’s identity.

The opinion’s failure to recognize the Card as transformative conflicts with *Hoffman*, and its inaccurate and abbreviated treatment of *Hoffman* fails to distinguish the two cases. *Hoffman* involved claims by Dustin Hoffman stemming from an image that recreated a “memorable still photograph” from *Tootsie* by “retain[ing] Hoffman’s head and the American flag background from the ‘Tootsie’ still, but graft[ing] onto it a body dressed in different clothing” and standing in the same pose as Hoffman in the film. *Hoffman*, 255 F.3d at 1182.

The opinion attempts to distinguish *Hoffman* by stating that it rested on Hoffman’s “allegation that the photograph is not a ‘true’ or ‘literal’ depiction of him, but a false portrayal” whereas Hilton “asserts that the card’s depiction copies too closely a scene that she made famous on her television show.” Thus, the allegedly false speech in *Hoffman* received protection but the allegedly truthful speech in the Card does not. That stands First Amendment jurisprudence on its head: it is false speech that potentially receives less First Amendment protection, not truthful speech. The opinion’s conclusion is also contrary to well-established law under which parodies or spoofs of other works are regularly deemed transformative and protected by the First Amendment.

The opinion also contends that in *Hoffman* “the composite person looked very different and was not doing or saying anything that one would have attributed to Hoffman himself” – which is simply incorrect – whereas the image of Hilton in the Card “more closely resembles Hilton’s previous work.” In reality, the use in *Hoffman* was much closer to Hoffman’s previous work than is the use in the Card to Hilton’s previous work. In *Hoffman*, the picture of Hoffman’s head was the exact image lifted from the film *Tootsie*. In addition, Hoffman’s body-dou-

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ble was posed in the identical position as the pose Hoffman had struck for the movie and its poster. Indeed, duplicating Hoffman's prior work was defendant's objective: the point was to illustrate how Hoffman would have appeared in Tootsie had he worn an updated dress and shoes. In contrast, the Card is very different from how Hilton appeared in the Show.

The opinion also conflicts with *Comedy III* and *Winter*. Under *Comedy III*, for a work to be transformative, "an artist depicting a celebrity must contribute something more than a 'merely trivial' variation, [but must create] something recognizably 'his own.'" 25 Cal. 4th at 408 (citation omitted). The opinion acknowledges that the Card contains a unique "stylized" message and depicts Hilton with an "over-sized head" and a "cartoon drawing" for a body. Moreover, in contrast to Hilton's appearance in the Show, in the Card "Hilton's uniform is different" (indeed, it is a cartoon uniform); "the style of the restaurant is different"; "the food is different" and the Card uses Hilton's catchphrase in its "familiar, idiomatic meaning" rather than how Hilton utters it when "she finds something interesting or amusing." These are more than "merely trivial" variations of Hilton's likeness, how she appeared on the Show and on her catchphrase, and they add things that are "recognizably [Hallmark's] own."

Under *Winter*, a work is transformative if defendant contributes "distinctive and expressive content" beyond the celebrity's image. 30 Cal. 4th at 891-92. The opinion distinguishes *Winter* by stating that the comic book characters there "did things that the actual musicians did not do." Op. 12137. The Card, however, depicts Hilton doing things she did not do in the Show. Moreover, a work can be transformative by context without transforming the celebrity's likeness. See *ETW v. Jireh Pub., Inc.*, 332 F.3d 915, 938 (holding literal depiction transformative because it conveyed a message about the celebrity).

Thus, a use is transformative as a matter of law if defendant makes creative contributions beyond "merely trivial" variations, creates a work that is more than a "literal, conventional" depiction of a celebrity such that "distinctions exist" between the celebrity and the work, or transforms the celebrity's identity by adding creative context. The Card not only does one of these things – which would be sufficient – it does all of them.

The opinion, however, erroneously signals that a use must reach a heightened level of creativity to be transformative as a matter of law, stating that as long as a use "is not in the same

category as the comic book in *Winter*" then it is not necessarily transformative and must go to a jury. Despite having noted that it must not be "concerned with the quality of the artistic contribution," the opinion disregards that admonition, stating that "[t]here is no larger story" to the Card and that "Hilton's cartoon body is that of a generic woman" rather than the "worm-like versions" in *Winter*.

Although recognizing that there were clear differences between the images and content contained in the Card, on the one hand, and Hilton's actual likeness and how she appeared in the Show, on the other hand, the opinion refused to deem the Card transformative because it was purportedly "just a spoof on a scene from Hilton's television program." However, spoofing how a celebrity appears in a work that the public commonly associates with that celebrity is a standard practice of satirists, parodists and other speakers. See *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1515 n.18 (9th Cir. 1993) (Kozinski, J., dissenting) ("the things that most reliably remind the public of celebrities are the actions or roles they're famous for"). Such uses are regularly deemed transformative. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) ("parody has an obvious claim to transformative value ... by shedding light on an earlier work, and, in the process, creating a new one"); *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (spoof of work protected). Indeed, a spoof must "mimic an original to make its point." *Campbell*, 510 U.S. at 580-81.

Indeed, the work in *Hoffman* was a "spoof" on how actors had appeared in their prior films, yet this was transformative and otherwise protected by the First Amendment. The opinion casts a dark shadow over that conclusion in *Hoffman*. Accordingly, the Opinion's misinterpretation and misapplication of the transformative use standard has far-reaching, speech-prohibitive implications to speakers who look to the "Court of Appeals for the Hollywood Circuit" for guidance on important First Amendment protections. *White*, 989 F.2d at 1521.

First Amendment Defense?

The opinion states that the challenge raised by Hallmark to Hilton's claims was limited to the transformative use and public interest defenses, and thus the opinion leaves "for another day the question of whether the First Amendment furnishes a defense to misappropriation of publicity that is broader" than these defenses. The opinion, however, is mistaken: Hallmark

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did raise a broad First Amendment challenge beyond the “transformative use” and “public interest” defenses, citing among other cases: (a) the Ninth Circuit’s decisions in *Leidholdt*, 860 F.2d 890, *Cher*, 692 F.2d 634 and *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118 (N.D. Cal. 2002); (b) the Second Circuit in *Rogers*, 875 F.2d 994; (c) the Tenth Circuit in *Cardtoons*, 95 F.3d 959; (d) the Third Circuit in *World Wrestling Federation*, 280 F. Supp. 2d at 445; (e) the California Supreme Court in *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860 (1979); and (f) the California Court of Appeals in *Polydoros v. Twentieth Century Fox*, 67 Cal. App. 4th 318 (1997).

The directly conflicts with *Cardtoons*, a case that involved directly analogous facts. (The Opinion cites *Cardtoons* in concluding the Card is noncommercial speech, but never mentions *Cardtoons* again despite its obvious parallels.)

In *Cardtoons*, celebrity baseball players brought right of publicity claims against a company that sold trading cards that spoofed the players. Recognizing that “[p]arodies of celebrities are an especially valuable means of expression because of the role celebrities play in modern society,” and that “[r]estricting the use of celebrity identities restricts the communication of ideas,” the Court held that the cards were protected by the First Amendment, barring plaintiffs’ claims. *Cardtoons*, 95 F.3d at 972; see also *Comedy III*, 25 Cal. 4th at 408-09 (agreeing with *Cardtoons*’ “unassailable” holding that “works parodying and caricaturing celebrities are protected by the First Amendment”).

“Public Interest” Defense

The Ninth Circuit ended with a “turn to Hallmark’s last redoubt” of the “public interest” defense. As the Ninth Circuit recognized, “no cause of action will lie for the publication of matters in the public interest” and that such a public interest “attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities.”

In ruling on the first prong of the anti-SLAPP statute, the Ninth Circuit specifically found that these precise elements of the “public interest” test were met in this case: (a) it concluded that the Card “involves a public issue” (and thus, by definition, the Card must be a “publication of matters in the public interest”); (b) it conceded (indeed, pointed out that Hilton had admitted) that Hilton was a matter “of concern to a substantial number of people”; (c) it acknowledged that there is a public

interest in Hilton’s “life, image, and catchphrase” (in other words, her “accomplishments or mode of living [has] create[d] a bona fide attention to [her] activities”); and (d) it recognized that “Hilton’s privileged lifestyle and her catchphrase (‘that’s hot’) are matters of widespread public interest” (there’s that “mode of living” thing again). Thus, based on the precise facts that the Court had already found and application of the cases addressing the “public interest” defense, it would seem that the Ninth Circuit would have agreed that this defense barred Hilton’s claims.

Rather than make this straight-forward application, however, the Ninth Circuit concluded that the defense only applies “to the publication of newsworthy items.” Thus, Hallmark could not rely on this defense because the Card did not “publish or report information.” There is no dispute, however, that the Card was published and the Ninth Circuit held that it contained information and images of a “newsworthy” person, thus there clearly was a “publication of newsworthy items.” Moreover, there is no doubt that the Card contains “information” and it is undisputed that the Card was published, so Hallmark did “publish or report information.” Accordingly, even applying the Ninth Circuit’s own reasoning and findings, it would seem that Hilton’s claims would be barred as a matter of law by the public interest defense.

Conclusion

The opinion holds that a right of publicity claim asserted by an iconic celebrity, stemming from an expressive work that “spoofs” that celebrity and her oft-repeated catchphrase, is not transformative or otherwise protected by the First Amendment. In his well-known dissent from denial of *en banc* review in *White v. Samsung*, Judge Kozinski expressed grave concern about courts giving celebrities a “right to keep people from mocking them or their work.” *White*, 975 F.2d at 1516. The opinion does exactly that, in direct conflict with numerous decisions by this Court and others, and to the detriment of the fundamental right of free speech.

Lincoln D. Bandlow is a partner in the Los Angeles office of Lathrop & Gage where he practices media and intellectual property litigation and is also an Adjunct Professor at USC where he teaches media and communications law. He represents Hallmark in this case. Paris Hilton is represented by Brent H. Blakely, Blakely Law Group, Hollywood.

First Amendment and Copyright Act Preemption Doom Musician's Appropriation Claims Over 'Unauthorized' DVD Performance

By Herschel P. Fink

A federal court in Detroit has found that the First Amendment and the copyright preemption doctrine trump an orchestra musician's novel claims that a copyright-licensed DVD that included his performance violated his right of publicity by misappropriating his "name, image and likeness," and was also a "false designation of origin" under the Lanham Act. *Ralphe Armstrong v Eagle Rock Entertainment*, 09-CV-11704 (E.D. Mich, Sept. 10, 2009).

Ralphe Armstrong is a professional musician who played bass guitar with the Mahavishnu orchestra at the Montreux Jazz Festival in Switzerland in 1974. As the court found, "The Mahavishnu Orchestra is a 'world renowned jazz-rock fusion group' led by John McLaughlin. The Montreux Jazz Festival, 'a prestigious gathering of eclectic musical artists,' has been held in Switzerland each year since 1967," and has been recorded every year by Montreux Sounds SA, which owns the performance copyrights, and licensed the defendant, Eagle Rock, to publish the recordings in which Armstrong is seen performing. His photograph also appears with the group on the back cover, as well as in two images contained in liner notes within the packaging.

Armstrong, who claimed he had not consented to use of his performance in the DVD, nor to the use of his photographs, sought an injunction and damages. Eagle Rock moved for summary judgment, raising the First Amendment and Copyright Act preemption among its defenses.

In its 21 page opinion granting summary judgment, the Court first noted that Armstrong met the threshold requirements for a right of publicity claim under Sixth Circuit law. The Court stated that, while Armstrong was far from a household name, "it is not necessary that Plaintiff be 'a national celebrity to demonstrate significant commercial value,'" and that Armstrong had at least established an issue of fact on that issue. The Court also found an issue of fact as to whether Armstrong had consented to production of the DVD, even though he knew he was being recorded.

Nevertheless, the Court concluded that "the First Amendment and Copyright Preemption foreclose submitting Plaintiff's appropriation claim to the jury."

The Court had little trouble finding that the inclusion of Armstrong's photographs was protected by the First Amendment from commercial appropriation claims:

"Works of artistic expression such as movies, plays, books and songs" are protected by the First Amendment. In addition the First Amendment privilege applies even if the material is published to make a profit. * * * Use of a picture containing Plaintiff performing at this event is a part of this "work of artistic expression." Accordingly, the use of a picture depicting Plaintiff performing at the Montreux Jazz Festival in 1974 cannot be the basis of a claim for misappropriation.

The Court, however, paused when it came to extending First Amendment protection to the video of the performance itself, troubled by the Supreme Court opinion in *Zacchini v Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the still-controversial "human cannonball" case. "Under *Zacchini*, the First Amendment does not protect the use of Defendant's performance on the DVD because it included Plaintiff's entire act, and was allegedly published without his consent," the Court said. It then turned to the Copyright Act, which it found "preempts Plaintiff's appropriation claim regarding his performance on the DVD."

The court finds that under the particular facts and circumstances of this case and the allegations actually pleaded, Plaintiff's appropriation claim based on the use of his performance in the DVD is not distinct from the copyright protections afforded to the holder of the copyright of the recording, Montreux Sounds SA.

* * *

Here, the work fits into general subject matter of Section 102 and 103 of the Copyright Act. It was originally recorded as a "motion picture." Montreux Sounds SA possesses the copyright to it. As in *Baltimore Orioles*, Plaintiff is attempting "to contest [the copyright holder's] right to create derivative works from its copyrighted work in gen-

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First Amendment and Copyright Act Preemption Doom Musician's Appropriation Claims Over 'Unauthorized' DVD Performance

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eral." Plaintiff is not asserting a claim based on "an inchoate 'idea' which is not amenable to copyright protection." Instead, Plaintiff is asserting a claim based on the sale of a recording that happens to include him.

* * *

Thus, even though Plaintiff's claim is couched as an appropriation of likeness claim, it is really a copyright violation claim.

Finally, the Court had little difficulty disposing of the Plaintiff's "false designation of origin" claim under the

Lanham Act, finding that "[n]o reasonable juror could be confused about the identity of the producer of the tangible DVD product that is offered for sale. It is clear from the cover that the Executive Producer is Montreux Sounds SA and that it is an 'Eagle Eye media release.' Plaintiff's picture on the back . . . cannot confuse a buyer into thinking that Plaintiff was the producer of the tangible DVD product."

Herschel P. Fink and Brian D. Wassom of Honigman Miller Schwartz and Cohn LLP, Detroit, represented defendant Eagle Rock Entertainment, Inc. Jeffrey P. Thennisch represented plaintiff Ralphe Armstrong.

MEDIA LAW RESOURCE CENTER CALENDER 2009-10

<p>MLRC Dinner 2009 November 11, 2009 Grand Hyatt NYC Reception : 6:00pm-7:15pm Dinner: 7:15pm-11:00pm</p>	<p>2010 NAA/NAB/MLRC Conference Planning Meeting November 12, 2009 Sonnenschein Nath & Roth 1221 Avenue of the Americas New York, NY 10020-1089 8:00am-9:00am</p>
<p>MLRC Annual Meeting November 11, 2009 Grand Hyatt NYC 2:30pm-3:30pm</p>	<p><u>MLRC London Conference</u> October 1-2, 2009 International Developments in Libel, Privacy Newsgathering and New Media Law</p>
<p>MLRC Forum November 11, 2009 Grand Hyatt NYC 4:00pm-6:00pm</p>	<p>MLRC Southwestern Conference January 14, 2010 Southwestern Law School, Los Angeles, Cal.</p>
<p>2009 DCS Annual Lunch November 12, 2009 Proskauer Rose LLP 1585 Broadway New York, NY 10036-8299 Noon-2:00pm</p>	<p><u>MLRC/Stanford Digital Media Conference</u> <i>Legal Frontiers in Digital Media</i> May 13-14, 2010 Stanford University, Palo Alto, CA</p>

Divided South Carolina Supreme Court Reinstates Public Official's Libel Action

Potentially Biased Source, Failure to Investigate Could Constitute Recklessness

A divided South Carolina Supreme Court reinstated a public official's libel suit over a newspaper article that reported allegations made by another state official. *Metts v. Mims*, No. 26712, 2009 WL 2709385 (S.C. August 31, 2009).

The majority found sufficient evidence of recklessness to withstand summary judgment where the source's information was apparently contradicted by an official document obtained by the reporter just before publication and the source was potentially biased against the plaintiff.

Background

At issue in the case was a front page article published in *The Berkeley Independent* and *Goose Creek Gazette* weekly newspapers entitled "It was helpful, but was it legal?" The article discussed a controversial policy that allowed county employees to perform work on private property in competition with private businesses.

A county councilwoman stated on the record that plaintiff had county workers perform landscaping work at his home. The article stated that local councilwoman Judy Mims "reports that a constituent called to tell her about seeing county trucks in Robbie Metts' driveway in Pinopolis, and employees cutting limbs from trees in his yard." Just a few hours before publication the reporter obtained a copy of an official document listing people who had used county workers for private work. Plaintiff's name was not on that list.

Metts sued the councilwoman and the newspaper publishers for libel alleging that the article falsely implied that he wrongfully used county employees. The trial court dismissed the claim for lack of actual malice and the appellate court affirmed in 2006. See No. 3-CP-08-2177, 2006 WL 2345989 (S.C. Ct. App. Aug. 14, 2006). The appellate court reasoned that the claim of actual malice hinged on the reporter's failure to investigate the councilwoman's allegations after receiving the official document which did not list plaintiff's name.

The appellate court, however, took note of the small size of the newspapers and the deadline for publication. Thus while the publication might have been negligent, there was no evidence to show that it was an extreme departure from the standards of investigation normally employed.

Supreme Court Decision

On appeal, the plaintiff renewed the argument that the discrepancy between the source's allegation and the document obtained by

the reporter constituted actual malice. Looking at the evidence "in a light most favorable to petitioner," a majority of the court agreed. In one paragraph of analysis the majority wrote that the failure to investigate the discrepancy coupled with an adversarial relationship between the source and plaintiff's boss should have caused the reporter to doubt the truth of the allegations.

A dissenting judge called the evidence of actual malice "patently insufficient."

Here, Newspapers published information about a county official, information given to them by another county official. That petitioner's name was not on a list provided by a different county official is not evidence that publishing the story was "an extreme departure from investigative standards" nor was there any evidence that Newspapers in fact harbored serious doubts about councilwoman Mims' story. Moreover, the reporter's knowledge of the political enmity between councilwoman Mims and petitioner, combined with her failure to further investigate Mims' statement before publishing it, is "patently insufficient" to prove actual malice. 2009 WL 2709385 at * 5 (Pleicones, J. dissenting).

Contempt Issue

The case is also notable for an interesting contempt issue arising from an unusual discovery order issued by a trial level judge. That trial judge granted plaintiff's motion to compel the newspapers to produce income and revenue statements. The newspapers argued that the information was confidential and had no relevance to the summary judgment motion based on actual malice. The newspaper refused to comply and asked another trial level judge to hold the newspapers in contempt in order to take an appeal. The judge did so but otherwise imposed no sanction. The intermediate appellate court did not address the contempt issue on appeal.

Plaintiff asked the Supreme Court to rule that it was error for the lower court's not to impose a sanction on the newspapers for disobeying the discovery order. In something of a consolation, the Supreme Court rejected the request holding that it was within the trial court's discretion not to impose contempt sanctions on the newspapers.

John J. Kerr, of Buist, Moore, Smythe & McGee, of Charleston, S.C. represents the newspaper defendants. Plaintiff is represented by E. Paul Gibson; Stephen F. DeAntonio, Charleston, S.C.

Westchester Supreme Court Dismisses SLAPP Suit on Pre-Discovery Summary Judgment Motion

Although Holding That the Defamation Claims Had No Substantial Basis in Fact or Law, Court Declines to Award Fees, Costs or Damages

On August 27, 2009, Westchester County Supreme Court Justice Richard B. Liebowitz dismissed a defamation complaint by former Congressman and Pace Law School Dean Richard Ottinger and his wife seeking damages for critical online comments about their controversial home construction project in Mamaroneck, New York. *Ottinger v. Tiekert*, No. 08-16429 (Westchester Sup. Ct., August 27, 2009) (Liebowitz, J.). While ruling that the Ottingers' complaint was a SLAPP suit, the court nevertheless denied damages to the victim of the SLAPP.

The defendant in the Ottinger action originally posted his comments criticizing the Ottingers' permit applications anonymously on a community forum hosted by the *Journal News*. The Ottingers successfully brought a special proceeding to force disclosure of the blogger's identity, over the first amendment objections of the Gannett-owned newspaper. See *MediaLawLetter* July 2008, p. 19; see also *When Anonymity is Denied: What Defending a (Formerly) Anonymous Blogger Teaches About the Standards for Protecting Anonymous Speech* in *MLRC Bulletin 2009:2* available [here](#). (login required)

The poster was then identified as Stuart Tiekert, a self-employed gardener in Mamaroneck. In their action against Tiekert, the Ottingers sought \$1.5 million in compensatory and punitive damages, claiming that his critical posts were defamatory and published with knowledge of their falsity or reckless disregard for their truth.

Claiming that the lawsuit was a "SLAPP suit," Tiekert invoked New York's anti-SLAPP statute, which provides for an accelerated judgment dismissing the action unless the plaintiff can establish a "substantial basis in fact and law" for the claim, CPLR §3212(h). Tiekert also sought his attorneys' fees as well as compensatory and punitive damages under §70-a(1) of the N.Y. Civil Rights Law.

Tiekert argued that there could be no substantial basis in law for the claims because his posts were constitutionally-protected statements of opinion. He also argued there was no substantial basis in fact for the claims because there was no basis for alleging that he published false facts about the Ottingers with "actual malice." (Regardless of whether or not the plaintiff in a SLAPP suit is considered a public figure or official, he or she must still "establish [] by clear and convincing evidence that any communication which

gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue." N.Y. Civil Rights Law §76-a(2).)

In their response to the motion, the Ottingers conceded that they were public applicants but argued that the SLAPP statute should not be applied in their case. They also conceded that they would be unable to prove that certain of the statements were published with actual malice; however, they argued that other statements in the blog posts were factual, false and published with actual malice.

In his opinion Justice Liebowitz rejected the Ottingers' arguments, holding, without extended analysis, that the action was a SLAPP suit subject to the special law and that the Ottingers' claims had no basis in fact or in law:

"This Court has carefully reviewed the applicable law and the facts of the case at bar, and has heard oral argument from the parties in regard to same. Based on the foregoing, the Court finds that the within action, which action involves public petition and participation brought by a public applicant, and which action is materially related to the defendant's efforts to comment on, challenge or oppose said application, is a SLAPP within the meaning of Civil Rights Law §76-a(1)(a). Since the Ottingers have failed to demonstrate that their action has a substantial basis in fact and law, or is supported by a substantial argument for an extension, modification or reversal of existing law, the Court grants Tiekert's motion for summary judgment pursuant to CPLR §3212(h) and dismisses this action." Slip op., at 5-6.

Disappointingly, however, Justice Liebowitz declined to award the costs and attorneys' fees that are provided for under §70-a(1)(a) when, as here, the court finds the suit "was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." Although the statute is not cast in the mandatory ("costs and attorneys' fees *may* be recovered" upon the finding of no substantial basis – see §70-a(1)(a)), the court provided no explanation for its decision not to award fees and costs beyond stating that it was made in the "exercise of its discretion." Slip op. at 6.

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Westchester Supreme Court Dismisses SLAPP Suit on Pre-Discovery Summary Judgment Motion

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But an award of fees and costs would seem to be an essential part of the statutory scheme to deter the filing of baseless SLAPP suits. Certainly, a SLAPP victim's rights cannot be fully vindicated without also accorded the financial remedies provided for under the statute, including at minimum the reimbursement of attorneys fees and costs. In this case, as a former Congressman and Law School Dean, the lead plaintiff can be assumed to understand the law and legal process. Permitting such a sophisticated plaintiff to commence an action, found to be without substantial basis in fact and law, yet to permit such a plaintiff to walk away from the action without compensating the defendant whose rights have been violated, would allow a plaintiff so motivated to effectively punish his critics by imposing substantial costs and fees with no recourse.

Judge Liebowitz also dismissed Tiekert's claim for the compensatory and punitive damages available under § 70-a(1)(b) and (c), holding that he "has not established that the Ottingers brought or continued the within lawsuit with the requisite malicious intent." *Id.* at 6. Again the court offered no window into its reasoning, nor did it provide any explanation why Tiekert should be denied the

opportunity to establish, through discovery, that the Ottingers had brought the suit for the "purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights," as provided in the statute.

Justice Liebowitz's decision represents a welcome and relatively rare application of the New York SLAPP statute for purposes of an early grant of summary judgment. However, in failing to make a fee award in the SLAPP victim's favor, the court has continued a long-standing trend to apply the SLAPP statute narrowly which has left the statute's salutary purposes largely unfulfilled.

At this time it is undecided whether Tiekert will be required to continue to pursue his claims for fees, costs and damages, in the trial court or on appeal, in an attempt to realize the full promise of the statute.

Henry Kaufman and Michael Cantwell of Henry R. Kaufman, PC of New York represented defendant Stuart Tiekert. Russell Ippolito of White Plains, New York represented the plaintiffs.

JUST PUBLISHED

[MLRC Bulletin 2009:2, The First Amendment Online & MLRC's Annual Supreme Court Report](#)

The latest issue of the Bulletin contains a series of articles on the challenges of applying First Amendment doctrine in the new media environment.

In "Public Figures And The Internet," Michael Kovaka discusses how the public figure doctrine can be expected to apply to Internet cases.

In "Fringe Publishers Test The Limits of Prior Restraints," Katherine Vogelesse Griffin examines recent online prior restraint cases that are testing courts' commitment to traditional prior restraint principles.

In "When Anonymity Is Denied: What Defending A (Formerly) Anonymous Blogger Teaches About The Standards For Protecting Anonymous Speech," Henry R. Kaufman and Michael K. Cantwell discuss how standards for protecting anonymous speech online can be most effectively applied and improved to maximize protection for the First Amendment interests at stake.

The Bulletin also surveys the case law protecting anonymous speech online and contains a report on MLRC's data on claims against bloggers to offer a sense of the types of legal proceedings being brought against bloggers, and the fate of these proceedings.

Bodybuilding.Com Flexes Its Muscles To Protect Free Speech On The Internet

M. Kelly Tillery and Christopher D. Olszyk, Jr.

Yet again, Section 230 of the Communications Decency Act proves instrumental in saving an Internet Service Provider from liability for the allegedly defamatory statements of others. In *Derek W. Cornelius and Syntrax Innovations, Inc. v. Ryan DeLuca d/b/a Bodybuilding.com et al*, No. Civ. 09-72, 2009 WL 2568044, (E.D. Mo. Aug. 18, 2009), United States District Court Judge Stephen N. Limbaugh, Jr. recognized and protected the vital importance of an open and free Internet by granting Bodybuilding.com defendants' motion to dismiss under Section 230.

Background

Bodybuilding.com is the world's premier website for all things bodybuilding. The website caters to both the professional bodybuilder and the novice lifter seeking to improve his/her physical fitness. The site operates as a store, offering the latest and greatest in equipment, clothing and supplements and is highly touted as being the best resource for bodybuilding information. See www.bodybuilding.com. Bodybuilding.com also hosts a number of interactive message boards/chat rooms, collectively known as the "Forum", wherein members of the bodybuilding community can exchange information and ideas about any and all bodybuilding topics.

Like most boards of its type, the Forum permits registered members to post questions, comments and responses, and to engage in back-and-forth banter about bodybuilding topics of interest. The Forum is self-regulated by member-monitors who actively attempt to steer conversations to the topic area of the particular room. One such popular topic over the past few years is the continuing negative publicity surrounding supplement manufacturers whose products contain compounds allegedly responsible for causing serious liver damage and death, and have been subject to significant FDA warnings and investigations. Plaintiff Syntrax Innovations, Inc. was a distributor of supplements containing the compounds and accordingly became the subject of substantial criticism on the Forum.

Considering any negative statement about its products and company (regardless of their veracity) as an attack on their business, a campaign began in 2007 to crush any unflattering comments appearing on Bodybuilding.com's Forum message board. Initially, Plaintiffs' related-entity SI03, Inc. filed a lawsuit in the United States District Court for the Northern District of Illinois, No. 1:07-cv-03266, against twenty-two anonymous Internet posters, as "John Does," responsible for making purportedly defamatory statements about the company on the forum.

As part of the Action, SI03 served a third-party subpoena on Bodybuilding.com in Idaho, seeking the actual identities of these anonymous (and pseudonymous) forum posters. Bodybuilding.com refused to comply, holding the privacy of its members' identities and the preservation of an open and free forum in such high regard that it preferred to litigate in defense of its members' privacy rather than disclose their identities and inhibit a free exchange in the forum. Plaintiffs in such suits count on, and hope that Internet Service Providers ("ISPs") decide the game is not worth the candle and simply disclose. To its credit, Bodybuilding.com refused to take the easy route. Plaintiffs kicked sand in the wrong guy's eye – this was no 98 pound weakling.

Bodybuilding.com initially prevailed completely against SI03's motion to compel before the United States District Court for the District of Idaho. In a lengthy and scholarly opinion, Chief U.S. Magistrate Judge Larry M. Boyle, a former Justice of the Idaho Supreme Court, found disclosure of any of the anonymous posters' identities was unwarranted, finding many of the statements not capable of defamatory meaning and the First Amendment protections paramount.

The Magistrate Judge's excellent survey of the scant law on these issues included a reproduction of the famous 1993 *The New Yorker* cartoon of Peter Steiner of two dogs at a computer terminal, one telling the other, "on the Internet, no one knows you are a dog." *SI03, Inc. v. Bodybuilding.com*, No. CV-07-6311-EJL, slip op. at 4 (D. Idaho May 1, 2008). Subsequently, the Idaho District Court permitted SI03 a second bite at the apple to reargue its position after

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giving proper notice to the Anonymous Posters themselves so they might have an opportunity to oppose. This time Bodybuilding.com prevailed with respect to the vast majority of the speakers, save four (4) speakers whose identities are now currently the subject of a Bodybuilding.com-filed Objection to the Magistrate Judge's Order. See *SI03, Inc. v. Bodybuilding.com*, No. CV-07-6311-EJL, slip op. at 24-25 (D. Idaho Dec. 23, 2008).

Public critique by anonymous and/or pseudonymous authors has a long and important history in this country. From Ben Franklin writing as "Silence Dogood" to Abraham Lincoln as "Aunt Rebecca," the great and the not-so-great, have published criticism of government, other people, companies, products, ideas, etc. The Supreme Court has made clear that the First Amendment protects anonymous/pseudonymous speech anywhere, including on the Internet. However, the Court has made it equally clear that the First Amendment does not protect defamatory speech, anywhere, including on the Internet. The difficulty for courts has been striking the proper balance between these competing interests.

CDA Section 230 Immunity Defense

Undeterred by SI03's failures in the District of Idaho, Mr. Cornelius (the principal of the Plaintiff) and SI03, sister company, Syntrax Innovations, Inc. returned to their home court in the State of Missouri, in yet another lawsuit, now pursuing actions against fifteen of their competitors (believed by them to be the employers of the Anonymous Posters), as well as Bodybuilding.com and its principals, Ryan DeLuca and Bryna Matthews DeLuca. Plaintiffs alleged that the competitors conspired with Bodybuilding.com to post defamatory statements about their products and the company on the Forum.

Bodybuilding.com promptly removed the case to the United States District Court for the Eastern District of Missouri and moved to dismiss the suit on several bases: (1) that the Moving Defendants are immune from such claims

as a provider of interactive computer service under Section 230 of The Communications Decency Act, 47 U.S.C. § 230; (2) the Court has no personal jurisdiction over Defendants Ryan DeLuca and Bryna Matthews DeLuca; and (3) that Plaintiffs failed to plead facts sufficient to support a claim for Civil Conspiracy. The three Bodybuilding.com Defendants were successful on all defenses presented and dismissed from the case.

Section 230 of the Communications Decency Act of 1996 has become an effective tool for Internet Service Providers fighting to preserve a free and open Internet, and an absolute necessity to avoid the devastating effects of imposing censorship obligations on ISPs. It provides unequivocally

that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" and that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. §§ 230(c)(1) and (e)(3).

Without this immunity, every provider of interactive computer services, that being every ISP operating a message board, chat room, blog, listserv, social media site, etc., would be compelled to monitor and censor every statement appearing on its site so as to ensure not a word exists placing another in a negative light. Not only would the time, money and resources required to comb through endless pages of postings grind these sites to a halt, the resulting content would be so filtered as to render it practically useless. And they would still get sued anyway. John Stuart Mills' "marketplace of ideas" is no longer on the street corners of colonial cities, but rather on the electronic information superhighway that can literally permit all of humanity to communicate with one another in real-time, simultaneously. Without Section 230 immunity, that marketplace will be shuttered.

Litigation is expensive. And defending First Amendment rights in Federal Court can be especially so. Unless ISPs, such as Bodybuilding.com have the resources and will

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Bodybuilding.Com Flexes Its Muscles To Protect Free Speech On The Internet

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to aggressively defend these suits, *and* the courts begin to act swiftly to dismiss such claims and sanction those who bring them, such litigation will continue to inhibit the free exchange of ideas and information on the Internet.

Judge Limbaugh, however, appropriately saw through Plaintiffs' transparent efforts to implicate Bodybuilding.com as something more than simply an Internet Service Provider and not an active participant in the allegedly defamatory postings. The Court found that Bodybuilding.com never posted any of its own messages about Plaintiffs on the Forum message board, and absent any evidence beyond merely permitting postings to be placed on the Forum – libelous statements or not - this does not constitute conspiracy. Given the Section 230 immunity provisions, no facts plead by Plaintiffs made it “plausible” that the Bodybuilding.com Defendants “could be held liable for the statements of others.” Unlike in *Alice in Wonderland*, just saying it does not make it so.

This is yet another important case in the continuing battle to insulate chat room hosts/providers from expensive, freedom-of-speech chilling, meritless lawsuits. If chat room providers were subject to such lawsuits, the availability of these very important forums for the exchange of ideas and information would diminish, if not disappear. While Section 230 of the Communications Decency Act has been relied upon for over a decade to protect ISPs from liability for the torts of others, disgruntled and angry plaintiffs continue to file lawsuits against both the speaker and the ISP. As the Citizen's Media Law Project has stated upon analysis of the history of Section 230 immunity, “courts have

held with virtual unanimity that such claims against a website are barred by Section 230.” Citizen's Media Law Project, Immunity for Online Publishers Under the Communications Decency Act, <http://www.citmedialaw.org/legal-guide/immunity-online-publishers-under-communications-decency-act> (last visited Sept. 14, 2009). Yet these lawsuits continue to be filed by parties and attorneys who are either familiar with the law, hopeful that the Courts and Defendants are unfamiliar with the law, trying to send a message (however misguided), seeking retribution and/or attempting to secure nuisance settlements. The majority, however, are most often turned away quickly by well-crafted motions to dismiss, having their hopes of sending a message to ISPs quickly crushed, as the law is not in their favor.

Conclusion

While Section 230 is a noble and effective shield for ISPs, using it can be time-consuming and expensive. Freedom from suits of this kind will only come when better sense or sanctions are visited on those who wield the litigation sword.

M. Kelly Tillery and Christopher D. Olszyk, Jr. in the Philadelphia office of Pepper Hamilton LLP and Gary A. Pierson, II in the St. Louis office of Husch Blackwell Sanders, LLP represented the Bodybuilding.com Defendants in this case. Jonathan E. Fortman of the Law Office of Jonathan E. Fortman and Matthew A. Rosenberg of the Law Offices of Matthew Rosenberg LLC, represented the Plaintiffs.

D.C. Appeals Court Affirms JNOV in False Light Case

Telling One Person Is Not “Publication”

The District of Columbia Court of Appeals has upheld a trial court’s grant of judgment notwithstanding the verdict (JNOV) that vacated a \$75,000 libel award against a Small Business Administration official who told a business newsletter that another SBA official had gotten her job illegitimately. *Bean v. Gutierrez*, No. 07-CV-1135, 2009 WL 2876789 (D.C. Sept. 10, 2009).

Background

The case stemmed from an article published in the monthly Asian American Business Roundtable *Business Bulletin*, which has a circulation of 2,800, including subscribers in Congressional offices, high-level officials at the Small Business Administration, and business trade associations that deal with the SBA.

Virtually all the contents of the *Bulletin* were written by *Bulletin* editor and publisher Rawlein Soberano, who also served as the president of the Asian American Business Roundtable. The article at issue, which was published in print and online on July 1, 2004, criticized SBA official John Whitmore. The article alleged that Whitmore had acted improperly in promoting Bridget Bean, a George Mason University graduate who began working for the Small Business Administration in 1986 and was promoted to a Senior Executive Service (SES) position with the agency.

Among the charges in the article was that Whitmore “recently finagled the paperwork for Bridget Bean to SES, knowing fully well that she did not qualify and [that] her academic papers were questionable (which means nothing to Whitmore), resulting in her bust and demotion.” The article also asked, “How many Bridget Beans are in its [sic] payroll, because they are buddies of John Whitmore, who betrayed the public trust?”

Later, Soberano identified his source for these allegations as Jose Gutierrez, another SBA employee. Soberano said that Gutierrez also told him that Whitmore and Bean had a sexual relationship. Gutierrez denied that he had spoken to Soberano about Bean.

Bean, through counsel, demanded a retraction of the statements. Instead, the Sept. 1, 2004 issue of the *Bulletin* stated that

◆ AABR stands by what it said about the people at SBA in the July 1 issue of the *Bulletin*[,] which it got from a reliable source.

◆ No threat of a lawsuit or an actual lawsuit will intimidate AABR from backing off its expose’ of ‘waste, fraud & abuse’ involving federal employees...

◆ The person who threatened a lawsuit is skating on thin ice. I’m not going away. I will see *her* in court anytime she decides to go that route. I look forward to it. Her lawyer demands “a retraction of the defamatory statements and compensation for damages” she suffered? Da! Worst combination: dumb and money-hungry. *What was written about her is public knowledge at SBA. ...*

◆ If mistakes were made (no one is infallible), they will be acknowledged, apologies made, and corrections put in place.

Two Lawsuits

Bean sued Soberano, publisher of the newsletter, and the AABR in District of Columbia Superior Court, claiming defamation and false light invasion of privacy *Bean v. Soberano*, No. 2004 CA 007071 (D.C. Super. filed Sept. 17, 2004). After the defendants removed the case to federal court on diversity grounds, plaintiff filed an amended complaint making claims for defamation, false light, and disparagement / injurious falsehood. *Bean v. Soberano*, Civil No. 04-1713 (D.D.C. filed Nov. 30, 2004). In May 2005, the court dismissed the disparagement claim.

As the federal case against Soberano and AABR was proceeding, in June 2005 Bean filed a separate suit in District of Columbia Superior Court against Jose Gutierrez, who Soberano identified as the source for his article. *Bean v. Gutierrez*, No. 2005 CA 004732 (D.C. Super. filed June 20, 2005).

Plaintiff’s Verdict Against Source

The trial court denied a defense motion for summary judgment in that case in December 2006, and the case proceeded to trial in May 2007.

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D.C. Appeals Court Affirms JNOV in False Light Case

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After a three-day trial, on May 9, 2007 the eight-member jury returned a verdict for Gutierrez on the defamation claim, and for Bean on the false light claim, for which it awarded \$75,000.

After trial, the defendant filed a motion for judgment as a matter of law (JNOV) or, in the alternative, for a new trial. The court granted JNOV in August 2007, thus vacating the trial award. *Bean v. Gutierrez*, Civil No. 2005 CA 4732 (D.C. Super. order Aug. 22, 2007) (granting JNOV).

The trial court based its decision on the “publication” element of the false light claim, which it defined for the jury as “communication with the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” Slip. op. at 3, n. 6. This definition is the same as in the Restatement, see *Restatement (Second) of Torts* Sec. 652D cmt. a (1977), and adopted in the District of Columbia by *Vassiliades v. Garfinkel’s, Brooks Bros.*, 492 A.2d 580, 587 (D.C. 1985).

After acknowledging that its instructions to the jury on the definition of this term were unclear, the court discussed the two theories that the jury could have used in finding the defendant liable. “To the extent the jury may have premised liability on defendant’s statement to Dr. Soberano, the Court finds as a matter of law that his communication to a single person does make something public knowledge,” the Court wrote, Slip op. at 4, also stating that “[t]o the extent the jury may have premised liability on the theory that defendant and Dr. Soberano were acting in concert and that defendant should be held liable for the publication, there are several problems with this contention.” *Id.*

On Sept. 16, 2007, plaintiff appealed the JNOV grant.

Federal Case Settles

Meanwhile, on May 15, 2007 the district judge denied a defense motion for summary judgment in the federal case against Soberano and AABR. The defense then filed a motion for reconsideration of this ruling, and later notified the federal court of the JNOV in the District of Columbia Court. The reconsideration motion was denied in January 2008, and the case was referred to a magistrate for settlement discussions.

Finally, in November 2008 the parties agreed to a settlement in the federal case. Soberano made a declaration as to his fi-

nancial difficulties, and agreed to publish a “mea culpa” in the next issue of the Bulletin, stating that the “statements I made about Ms. Bean, her employment qualifications and her ascent at the SBA were untrue.”

“From this experience,” the statement concludes, “I have since made it my duty and personal practice to conduct my own due diligence and investigation in order to confirm information provided to me before publishing it in the *AABR Business Bulletin*.”

JNOV Upheld

In May 2009, the D.C. Court of Appeals heard the appeal of the JNOV grant. In the appeal, Bean argued that the motion was improper because Gutierrez had not moved for summary judgment prior to the jury’s verdict, and that the trial court had improperly interpreted the “publicity” requirement of the false light tort.

The appeals court refused to consider the first point, holding that Bean had waived the point by not raising it before the trial court. *Bean v. Gutierrez*, No. 07-CV-1135, 2009 WL 2876789, at *3 (D.C. Sept. 10, 2009). On the second point, while acknowledging that “[t]here does not appear to be case law in this jurisdiction addressing whether the source of information for a newspaper article can be held liable for false light invasion of privacy,” *id.*, “there was simply no evidence to allow a reasonable juror to conclude that by providing information about Bean to Soberano, Gutierrez had the knowledge or intent that the information would be made public.” *Id.*

Thus the appeals court affirmed the JNOV grant by the trial court.

The plaintiff was represented in both cases by John F. Karl, Jr. of McDonald & Karl in Washington, D.C. The defendant in the District of Columbia case, Jose Gutierrez, was represented by Ronald L. Vavruska, Jr. of Washington, D.C. In the federal case, Soberano was represented by Simon Michael Kann of Bernstein & Feldman in Annapolis, Md., and Yvonne M. Williams of Miller & Chevalier in Washington, D.C. AABR was represented by Mark J. Rochon and Yvonne M. Williams of Miller & Chevalier in Washington, D.C. and Patrick P. de Gravelles of McTigue & Porter in Washington, D.C.

Blogger Libel Lawsuit Settles During Trial

“Patent Troll” Case Crosses Bridge, Doesn’t Reach Other Side

A defamation case that raised several legal issues in an online context was settled on September 21, the evening before it was about to be presented to a jury after a four-day trial.

Albritton v. Cisco Systems, Civil No. 08-00089 (E.D. Tex. filed March 14, 2008), stemmed from postings on the Patent Troll Tracker blog (www.trolltracker.blogspot.com; now members only) which alleged that the attorneys in a patent lawsuit got a court clerk to change the filing date of the suit in order to keep it viable.

The blog’s name refers to “patent trolls,” a pejorative term for individuals and companies that register patents, but not exploit them until another entity creates an apparently infringing product or service, upon which the patent holder sues for infringement.

The blogger behind the site was anonymous, beyond saying that he was “just a lawyer, interested in patent cases, but not interested in publicity.”

Blog Postings At Issue

The blog postings, from October 17, and 18, 2007, alleged that the complaint in *ESN, LLC v. Cisco Systems, Inc.*, Civil No. 07-00156 (E.D. Tex. stipulated dismissal Nov. 2, 2007) was filed on Oct. 15, 2007 – one day before the patent at issue in the lawsuit (Patent No. 7,283,519, issued Oct. 16, 2007) was issued – and that plaintiff’s counsel convinced a court clerk to change the date of filing to Oct. 16 in order to avoid having the case dismissed. (The parties in the patent case eventually agreed to a stipulated dismissal in November 2007, although another case with the same parties and claims was two months later. *See ESN LLC v. Cisco Systems, Inc.*, Civil No. 08-00020 (E.D. Tex. filed Jan. 31, 2008). That case is pending.)

Two days before the Patent Troll Tracker blog posting, the same charge was made in a brief note on the Patently-O blog (www.patentlyo.com). The Oct. 18 posting on the Patent Troll Tracker concluded as follows:

You can't change history, and it's outrageous that the Eastern District of Texas may have, wittingly or unwittingly, helped a non-practicing entity to try to manufacture subject matter jurisdiction.

This is yet another example of the abusive nature of litigating patent cases in the Banana Republic of Texas.

The Eastern District of Texas has the highest number of patent cases of all federal districts, and is reputed to be very friendly to plaintiffs alleging infringement. The court also has a special docket for such cases which allows for prompt resolutions.

A few days later, the “Banana Republic of Texas” paragraph was replaced with the following:

Even if this was a "mistake," which I can't see how it could be, given that someone emailed me a print-out of the docket from Monday showing the case, the proper course of action should be a motion to correct the docket.

In later litigation, ESN’s attorneys said they filed the original patent suit on at 12:01 a.m. on Oct. 16. But, they explained, under a procedure then in place in the clerk’s office, a “shell case” was filed the day before, to facilitate filing of suits at a particular time. (The exact time of filing suit is important, since there is often a race to determine venue in patent disputes. At the same time that ESN was filing its suit in Texas, Cisco filed its own suit in Connecticut seeking a declaratory judgment that it was not infringing ESN’s patents. *See Cisco Systems, Inc., v. ESN LLC*, Civil No. 07-01528 (D. Conn. filed Oct. 16, 2007). The parties agreed to a stipulated dismissal of that case, without prejudice, on Nov. 5, 2007.)

Anonymous Blogger Removes Cloak

T. John Ward, Jr., one of ESN’s attorneys in the patent case filed a defamation suits against the anonymous author of the Patent Troll Tracker blog in November 2007. *See Ward v. Doe*, No. 2007-2502-A (Tex. Dist. Ct., Gregg County filed Nov. 7, 2007). Ward is a frequent plaintiff’s counsel in patent cases in the Eastern District of Texas, and son of the court’s chief judge.

One month later, patent attorney Ray Niro of Niro, Scavone, Haller & Niro in Chicago, who had been criticized on

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Blogger Libel Lawsuit Settles During Trial

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the Patent Troll Tracker blog for his suits on behalf of patent holders, publicly offered \$5,000 “to anyone that can provide information that leads me to the identity of Troll Tracker.” Niro later tripled the reward amount.

In February 2008, the anonymous blogger behind the Patent Troll Tracker site received an e-mail which apparently made it clear that the sender knew his identity, and threatening to name him. Instead, the blogger identified himself in a blog posting on Feb. 23, 2008: he was Richard Frenkel, an attorney and a director in Cisco Systems' intellectual property group.

Ward soon amended his suit to name Frenkel and his employer as defendants, justifying the latter on the grounds that Frenkel's blog was within the scope of his employment.

While Frenkel wrote the blog on his own, Cisco took responsibility for the contents because this was not stated on the blog. It also changed its blogging policy to require that employees who comment on company business on their personal blogs identify themselves as Cisco employees, and state that their views are their own.

Another attorney in the original patent litigation, Eric Albritton, filed a separate lawsuit over the blog postings against Frenkel and Cisco on March 3, 2008. *Albritton v. Cisco Systems*, No. 2008-481-CCL2 (Tex. County Ct., Gregg County filed March 3, 2008). Two weeks later, Cisco moved this case to federal court. *Albritton v. Cisco Systems*, Civil No. 08-00089 (E.D. Tex. removed from state court March 14, 2008).

Ward, meanwhile, dismissed his suit in Texas state court and refiled the same day in federal court in Arkansas, naming both Frenkel and Cisco as defendants. *Ward v. Cisco Systems*, No. 08-4022 (W.D. Ark. filed March 13, 2008). In August, the plaintiff then voluntarily dismissed the claims against Frenkel, 2008 WL 4079286 (W.D. Ark. Aug. 28, 2008) (granting dismissal; denying Frenkel's motion for costs), leaving Cisco as the sole defendant. This case is in discovery, with trial on the remaining claims currently scheduled for February 2010.

Trial and Settlement

After local judges recused themselves, District Judge Richard Schell was brought in from another division of the district to preside over the federal case. *Albritton v. Cisco*

Systems went to trial in the Eastern District of Texas courthouse in Tyler, Tex. on Sept. 14.

The plaintiff tearily testified at trial that Frenkel's posts hurt him by accusing him of a crime, and said that the date change was just a minor correction. The plaintiff also showed the jury e-mails between Frenkel, his supervisor and Cisco press relations officer John Noh about the blog, encouraging Frankel to write about ESN's suit against Cisco. In one e-mail, Noh said that he “play[s] a game” with journalists by pretending he did not know who wrote the blog.

A court clerk for the Eastern District testified that there is a glitch in the court's filing system, which records the date on which the program is opened as the filing date for a complaint, not the date on which the actual document is submitted. Plaintiff argued that the date change was to account for this discrepancy, since local rules provide that the case is filed when the complaint is uploaded.

The defense countered that the facts in the blog post were true, and that other comments in the post were opinion. The defense also disputed that the posts labeled Albritton as a criminal, and argued that the true goal of the suit was shut down the blog, and to hamper criticism of “patent trolls” generally.

On September 21, after four days of testimony, District Judge Richard Schell largely denied a defense motion for judgment as a matter of law based on the argument that Albritton was a limited purpose public figure who had to show actual malice, but did agree with the defense argument that the issue was one of public concern, so that the jury had to find actual malice in order for Albritton to receive punitive damages. Closing arguments were scheduled for the next morning, and then the case was due to be presented to the jury.

But the parties reached a confidential settlement that evening. In a statement issued by Cisco regarding the settlement, Frenkel and the company apologized for the blog comments about Albritton.

Cisco was represented by Charles “Chip” Babcock and Crystal J. Parker of Jackson Walker LLP in Dallas, while Frenkel was represented by George L. McWilliams of Texarkana, Tex. Albritton was represented by Nicholas H. Patton of Patton, Tidwell and Schroeder LLP in Texarkana; James A. Holmes of Henderson, Tex.; and Patricia L. Peden of Emeryville, Cal.

Summary Judgment Granted for Newspaper and Reporter Defendants in Defamation Action Based on Substantial Truth and Fair Report

By Elizabeth A. Ritvo and Samantha L. Gerlovin

On August 17, 2009, the Massachusetts Superior Court, in a thirty-one page decision, granted summary judgment in favor of the newspaper defendant and its reporter, in a defamation action brought by a *pro se* prisoner. *Edmund D. LaChance, Jr. v. Boston Herald, Inc. and Michele McPhee, Essex Superior Court Civil Action No. 07-00334A*.

The plaintiff had alleged that he was defamed by the publication of ten separate statements about him in three newspaper articles that focused on the dangers of websites that feature personal ads posted by incarcerated violent felons. The articles stated that the plaintiff, who had posted a personal ad on such a website at the time of the articles' publication, was in prison for manslaughter, when in fact he was serving time for aggravated rape (his second rape conviction), kidnapping, indecent assault and battery, and assault with a dangerous weapon. The plaintiff further alleged that the articles misstated certain details concerning his crimes.

Procedural Background

The Superior Court had previously denied the defendants' motion to dismiss argued on the grounds that the plaintiff was libel proof, finding that the complaint did not set forth sufficient evidence, such as substantial publicity of his crimes, that the plaintiff's reputation with the public was so poor that it could not be further damaged by the articles at issue. Following that decision, the plaintiff served fifteen separate sets of document requests, interrogatories, and/or requests for admissions, and at least ten discovery-related motions. Although the parties had not yet conducted depositions or third party discovery, the court granted the defendants' motion to stay the case, including all discovery, pending the defendants' moving for summary judgment. However, the court limited summary judgment to the issues on which discovery had been conducted to date. Thus, for example, it prohibited the defendants from basing their motion for summary judgment on issues concerning the defendants' lack of fault, because the plaintiff had not yet deposed the reporter who wrote the articles at issue.

Substantial Truth

The court held that all ten statements the plaintiff sued on were not actionable, because they were true or substantially true, pro-

tected by the fair report privilege, non-actionable opinion, and/or did not concern the plaintiff. The court acknowledged that the facts of this case were dissimilar from "substantial truth" cases which focus on a matter of degree (i.e., stating that a person was convicted of stealing \$50,000 when they in fact stole \$500).

However, the court noted that the substantial truth doctrine has been applied more liberally over time in Massachusetts and stated, "the court's research of the evolution of the common law substantial truth doctrine reveals a move away from a highly strict and narrow application of the doctrine to a more expansive one." The court also noted that other courts have broadened the doctrine to include "accusations of a different, although similar, bad act." The court held that, taken in the context of articles which exposed the dangers of online dating by prisoners convicted of violent offenses, no reasonable jury would find the charge of manslaughter to have any different mental effect upon readers than that of his actual convictions.

The court also found the article's characterization of the plaintiff's personal ad as "full of lies" to be substantially true, in light of the fact that the ad contained inaccurate release and birth dates for the plaintiff, stated "I treat everyone the way I wish to be treated," and omitted his criminal convictions.

Opinion and Fair Report Privilege

Additionally, the court held that the statements in the articles describing the details of the plaintiff's crimes, which were based on the plaintiff's rape victims' testimony at his criminal trials, were protected by the fair report privilege. One of the allegedly defamatory statements, which was based on an inaccurate entry on the court docket from the plaintiff's criminal trial, was similarly held to be within the scope of the fair report privilege. The court also found that four of the statements on which the plaintiff sued were non-actionable opinion, and noted that if a statement of opinion were based on a false or defamatory fact, the opinion itself would not be actionable, even if the defamatory statement of fact would be.

The defendants in this case were represented by Elizabeth A. Ritvo, Samantha L. Gerlovin, and Nathan C. Forster of Brown Rudnick LLP in Boston, MA. The plaintiff in this case, Edmund D. LaChance, represented himself.

Critical Comments About Community Activist Protected as “Pure Opinion”

A Pennsylvania appellate court affirmed summary judgment for the source of a newspaper article, holding that critical comments about a community activist were statements of pure opinion. *Alston v. PW-Philadelphia Weekly, et al.*, No. 2008 CD 2008, 2009 WL 2762697 (Pa. Cmwlth. Sept. 2, 2009) (Pellegrini, Hannah Leavitt, Flaherty, JJ.).

At issue was an August 10, 2005, article in the PW-Philadelphia Weekly entitled “Strange Brew” which discussed various people and entities involved in a redevelopment plan for a low income neighborhood in Philadelphia. Among other things the article stated:

Some point out that while [plaintiff] is quick to criticize speculators snatching up properties on the cheap, he’s collected more than a dozen addresses himself, paying less than market value for some of them. [Authority] spokesperson Frank Keel characterizes Alston as a world-class rabble-rouser. “He is no more than a land speculator who cloaks himself in the guise of a community activist.”

The plaintiff at the time was the president of the African-American Business & Residents Association. He filed a libel suit against the newspaper, the on-the-record source, as well as the Mayor of Philadelphia and a Deputy City Solicitor who plaintiff alleged were off the record sources for the article. The newspaper defendants settled the claim with plaintiff.

The trial court granted the source’s preliminary objections and dismissed the claim against him. The trial court held that the statements were protected as pure opinion. The appellate court agreed. Reviewing Section 566 of the *Restatement (Second) Torts*, the court reasoned that the quoted statement was a “simple expression of opinion based on disclosed or assumed non-defamatory facts” and thus, were “not itself sufficient for an action of defamation, no matter how unjustified and unreasonable ... [the] opinion may be or how derogatory it is.”

Plaintiff acted pro se on appeal. The source, Frank Keel, was represented by David J. Perlman, Philadelphia.

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District Court Acknowledges “Well-Established” First Amendment Protection for Credit Ratings

By Andrea Butler

Recent litigation has put the established First Amendment protections afforded the ratings issued by credit rating agencies (“CRAs”) such as Moody’s Investors Service, Inc. (“Moody’s”) and Standard & Poor’s Rating Service (“S&P”) in the spotlight. CRAs gather and analyze information about issuers, form opinions about that information and disseminate their forward-looking opinions to the public. The CRAs provide such analysis for hundreds of thousands of instruments relating to trillions of dollars of debt each year. The potential for inhibition of the free flow of information inherent in imposing virtually unlimited liability for an assessment that, in hindsight, appears arguably erroneous or mistaken is plain. As a result, courts have afforded substantial constitutional protection to ratings opinions and other statements issued by CRAs, including their ratings on corporate, municipal and other debt.

First Amendment protections have long been applied to credit rating opinions in a variety of contexts. *See, e.g., Compuware Corp. v. Moody’s Investors Services, Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (applying First Amendment to dismiss both contract and defamation claims); *Jefferson County School District v. Moody’s Investor’s Services, Inc.*, 175 F.3d 848, 856 (10th Cir. 1999) (dismissing injurious falsehood, tortious interference, and antitrust claims brought against Moody’s in connection with a bond rating report on the grounds that analysis of creditworthiness constitutes a “protected expression of opinion”); *In re Enron Corp. Securities Derivative & “ERISA” Litigation*, 511 F. Supp. 2d 742, 812 (S.D. Tex. 2005) (applying First Amendment to negligent misrepresentation claims); *First Equity Corp. v. Standard & Poor’s Corp.*, 690 F. Supp. 256 (S.D.N.Y. 1988), *aff’d on other grounds*, 869 F.2d 175 (2d Cir. 1989) (dismissing negligence claim with respect to report on bond).

Nonetheless, the tumultuous events in the financial markets over the past two years have focused new attention on CRAs and their ratings, and in particular on ratings of structured financial products such as residential mortgage-backed securities (“RMBS”) and other mortgage-backed securities, collateralized debt obligations (“CDOs”) and

structured investment vehicles (“SIVs”) that invest in MBS and other products. Not surprisingly, numerous lawsuits have been filed seeking to hold various participants in the financial markets (including banks, the CRAs, and many others) responsible for investor losses. In the face of significant market losses, some in the financial and legal press have questioned whether the traditional protections for ratings opinions should continue to apply.

The issue was recently addressed in the United States District Court for the Southern District of New York, the first decision since the 2007-08 market turmoil to address the question. The case, *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, --- F. Supp. 2d ---, 2009 WL 2828018, at *9 (S.D.N.Y. Sept. 2, 2009), expressly reaffirmed “the well-established” First Amendment protections generally afforded credit ratings, while declining to apply that protection at the pleading stage based on allegations suggesting a dissemination so narrow as not to render the ratings a matter of “public concern.”

Background

In August 2008, Abu Dhabi Commercial Bank filed a putative class action in the United States District Court for the Southern District of New York asserting claims against the arranger (Morgan Stanley & Co. Inc. and related entities) of an SIV known as Cheyne and against Cheyne’s trustee and administrator (The Bank of New York and related entities), as well as against Standard & Poor’s and Moody’s. In March 2009, the complaint was amended, and King County, Washington was added as an additional plaintiff. The Amended Complaint alleged that Abu Dhabi Commercial Bank and King County had each purchased senior notes issued by the Cheyne SIV through a private placement, and had lost a portion of their investments when the Cheyne SIV went into receivership. According to the Amended Complaint, plaintiffs learned of the ratings on the senior notes purchased through an Information Memoranda issued by the Cheyne SIV. Plaintiffs allege that those ratings were “false and misleading” because, among other things, the rating agencies allegedly knew that “the models used to generate

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District Court Acknowledges “Well-Established” First Amendment Protection for Credit Ratings

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the high ratings were inherently flawed and utterly unreliable” (Amended Complaint ¶ 7). Plaintiffs asserted eleven causes of action against the rating agencies, including claims for negligence, negligent misrepresentation, breach of contract, unjust enrichment and fraud, as well as a claim for aiding and abetting the alleged misdeeds of each of the other defendants.

The rating agencies moved to dismiss the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that none of the causes of action was properly stated as a matter of law. In addition, the rating agencies’ motion argued that each of the non-fraud tort claims was preempted by New York’s Martin Act, and that all claims could also be dismissed as barred by the First Amendment. (The other defendants also separately moved to dismiss.)

The District Court Opinion

On September 2, 2009, the District Court issued its opinion in the *Abu Dhabi* case, dismissing ten of the eleven causes of action against the rating agencies on various grounds. Among other things, the Court ruled that the non-intentional tort claims asserted by plaintiffs — including their causes of action for negligence and negligent misrepresentation — were preempted by New York’s Martin Act. The Court ruled the contract-based claims were not properly alleged.

With respect to the sole remaining claim for fraud, the Court considered — and ultimately rejected — the rating agencies’ argument that the claim as pleaded should be dismissed as barred by the First Amendment. Notably, however, in doing so the Court found that “[i]t is well-established that under typical circumstances, the First Amendment protects rating agencies, subject to an ‘actual malice’ exception, from liability arising out of their issuance of ratings and reports because their opinions are considered matters of public concern.” *Abu Dhabi Commercial Bank*, --- F. Supp. 2d at ---, 2009 WL 2828018 at *9 (citing the *Compuware*, *Jefferson County* and *First Equity* cases). The Court went on, however, to find that that the First Amendment offered no protection at the motion to dismiss

stage on the facts alleged in the *Abu Dhabi* case because “where a rating agency has disseminated their ratings to a select group of investors rather than to the public at large, the rating agency is not afforded the same protection.” *Id.* (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-62 (1985) and *In re Nat’l Century Fin. Enters. Inv. Litig.*, 580 F. Supp. 2d 630, 640 (S.D. Ohio 2008)). In applying this ruling to the *Abu Dhabi* case, the Court said that the “plaintiffs have plainly alleged that the Cheyne SIV’s ratings were never widely disseminated, but were provided instead in connection with a private placement to a select group of investors.” *Id.* This focus on plaintiffs’ deliberate avoidance of allegations of public dissemination was also the basis for the Court’s ruling denying a Moody’s motion to dismiss in the *National Century Financial Enterprises* case. See *In re Nat’l Century Fin. Enters.*, 580 F. Supp. 2d at 640. Although the allegation in the *Abu Dhabi* case of private dissemination is at odds with the actual public dissemination of the very ratings at issue in the *Abu Dhabi* case on rating agency websites, S&P’s RatingsDirect, and in the press, in ruling on a motion to dismiss under Rule 12(b)(6), the District Court was required to accept plaintiffs’ allegations as true. The District Court also concluded that plaintiffs’ allegations, accepted as true at the pleading stage, sufficed to allege that “defendants knew that the credit ratings were false.” *Abu Dhabi*, --- F. Supp. 2d at ---, 2009 WL 2828018 at *11.

Because the District Court granted plaintiffs leave to amend certain of their contract-related claims, along with certain aiding and abetting claims, the final nature of plaintiffs’ claim against S&P and Moody’s — as well as whether plaintiffs are able to prove any of their allegations — remains to be seen.

Floyd Abrams, Dean Ringel, Adam Zurofsky and Andrea Butler of Cahill Gordon & Reindel LLP represent The McGraw-Hill Companies Inc. and Standard & Poor’s Rating Services in the case. Joshua Rubins, James Coster and Aaron Zeisler of Satterlee Stephens Burke & Burke LLP represent Moody’s Investors Service, Inc. and Moody’s Investors Service Ltd. in the case.

Fifth Circuit Rejects First Amendment Challenge to Texas Open Meetings Law—For Now

By James C. Ho

Media organizations have frequently—and successfully—invoked the First Amendment to require that various judicial and other governmental proceedings be held in the open, accessible to both the media and the general public. So it would be surprising—if not alarming—if public officials began to argue that the First Amendment somehow *forbids* public access and open government. Yet that is precisely what is happening in Texas.

The en banc panel of the U.S. Court of Appeals for the Fifth Circuit recently dismissed such claims by a 16-1 vote—and in so doing, left intact the State's victory in the district court, which had upheld the Texas Open Meetings Act (TOMA). But the Court dismissed the claims on mootness grounds, and counsel has made clear they will not rest until TOMA is struck from the books.

Background

Two Alpine City Council members were indicted in February 2005 for violating TOMA. According to local prosecutors, Avinash Rangra and Katie Elms-Lawrence wrote a series of private e-mails discussing official business with a quorum of the council. Because the public was not given advance notice of the discussion, Rangra and Elms-Lawrence were charged with conducting an illegal closed meeting. The charges were later dropped.

Rangra and another city council member, Anna Monclova, subsequently filed suit in federal court (*Rangra and Monclova v. Brown and Abbott*), seeking injunctive relief against the district attorney and the attorney general, along with a declaration that the criminal provision of TOMA ([Tex Gov't Code § 551.144](#)) violates the First Amendment rights of public officials. The plaintiffs are represented by noted Texas criminal defense lawyer Dick DeGuerin and Alpine attorney Rod Ponton.

The district court rejected Plaintiffs' claims (2006 WL 3327634), but a three-judge panel of the Fifth Circuit reversed and remanded ([566 F.3d 515](#))—holding that TOMA is a content-based regulation of speech by public officials and thus should have been subject to strict scrutiny.

The State sought rehearing en banc on May 7. (To the State's surprise, Plaintiffs filed their own en banc petition on May 8, thus agreeing with the State that their panel win should be vacated.)

The Fifth Circuit granted en banc rehearing, and vacated the panel opinion accordingly, on July 27.

Texas Open Meetings Act

The Texas Open Meetings Act is based on a simple premise: Elected officials work for the people—and the people have a right to know how public officials are conducting public business on their behalf.

Open meeting laws further, rather than frustrate, First Amendment values, by informing the public about their government. Indeed, courts have repeatedly invoked the First Amendment to *require* public access to various judicial and other governmental proceedings (*see, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)). It would be surprising if the Constitution somehow prohibited what in many contexts it actually requires.

Every state in the nation has enacted an open meeting law. Provisions vary from jurisdiction to jurisdiction, but they all share a common design: the establishment of a legally enforceable right of any member of the general public to observe governmental proceedings. And given the ubiquity of such laws, it is unsurprising that *every* court to have addressed the validity of state and federal open meeting laws to date has upheld them against First Amendment challenge.

Although there is a national legislative and judicial consensus behind open meeting laws, the U.S. Supreme Court to date has not articulated precisely which First Amendment standard applies to such laws. But the State has filed extensive briefing arguing that open meeting laws should be analyzed—and upheld—as content-neutral framework articulated in *Ward v. Rock Against Racism*, 491 U.S. 781 (time, place, and manner regulations, pursuant to the 1989).

To be sure, TOMA applies only to public officials, and it applies only when the discussion involves public business. But that alone does not make the law a content based regulation of speech, presumptively unconstitutional unless it can satisfy strict scrutiny. To the contrary, the government interest served by TOMA is to expand—not suppress—communication. Any alleged adverse impact on speech caused by TOMA is not only incidental and unintended—it is antithetical to the interest in open government served by the Act. TOMA is thus content neutral under *Ward*.

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Fifth Circuit Rejects First Amendment Challenge to Texas Open Meetings Law—For Now

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Mootness Issue

The State is eager to defend the principle of open government before the 17-member Court. But the case has taken some notable twists and turns in recent months.

Rangra left the city council in late May 2009, as Monclova had done three years earlier. As a result, neither plaintiff in the case remains subject to TOMA today. Because neither plaintiff continues to suffer the on-going First Amendment injury alleged in their complaint, neither retains standing to seek declaratory or injunctive relief. Their claims are accordingly now moot.

It is “the duty of counsel to bring to [the Court’s] attention, without delay, facts that may raise a question of mootness.” *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997). So when the Attorney General’s office first learned of Rangra’s departure from the city council, we immediately informed the Court on August 10.

Plaintiffs’ counsel countered that the case was not moot, based on the novel legal theory that Rangra and Monclova filed suit, not in their personal capacity, but in their official capacity as members of the city council—so their successors in office should be automatically substituted as Plaintiffs.

The State responded that this new theory was untimely and, in any event, meritless. After all, the criminal penalties under TOMA apply to governmental officials personally—not to the governmental bodies they serve on, and certainly not to their successors in office. Had Rangra been convicted, he—and no one else—would have been subject to any penalties.

On September 10, the Court dismissed Plaintiffs’ claims as moot by a 16-1 vote. Judge James L. Dennis—the author of the original three-judge panel ruling—authored the sole dissenting opinion.

The case has taken some additional turns in recent weeks. Since the September 10 ruling, Plaintiffs’ counsel has issued statements to the media criticizing the Court for allegedly mishandling the case.

Specifically, Plaintiffs have attacked the Court for “dismiss [ing] the case without obtaining and reviewing all briefing in the case.” They claim the Court violated their right to file a reply to the State’s supplemental en banc brief. But no such right exists.

Plaintiffs’ attack appears to confuse regular briefing before the three-judge panel with supplemental briefing before the en banc Court. Plaintiffs have already filed their opening and reply briefs,

over a year ago, before the three-judge panel. When the Court grants en banc rehearing, it typically allows the parties to file “supplemental” briefing, under a tightened schedule. In this case, the Court ordered Plaintiffs and the State to file their supplemental briefs by August 18 and September 9, respectively. So both sides have fully briefed their arguments on rehearing en banc—and the Court properly dismissed Plaintiffs’ claims the day after the close of briefing. (Notably, under Plaintiffs’ theory, they would have been entitled to file a reply brief, pursuant to the traditional 14-day rule, by September 23—just *one day* before the originally scheduled oral argument. Nothing in the Court’s rules remotely contemplates granting Plaintiffs such an advantage.)

Plaintiffs’ attack on the Court is additionally curious, considering that they failed in their own duty to inform the Court of Rangra’s departure from the city council.

Plaintiffs have also recently announced yet another new theory of standing. They note that, because Rangra left office on May 19, 2009, he remains subject to prosecution until May 19, 2011, for any TOMA offense he may have committed on his final day in office. But this theory of standing does not coincide with Plaintiffs’ own complaint—a facial challenge seeking prospective relief only, and not an as applied challenge based on conduct on May 19, 2009 (years after they filed their complaint). To establish standing to obtain prospective relief, Plaintiffs must allege future First Amendment injury—on-going activity chilled by TOMA. That is of course impossible here—Plaintiffs no longer serve on the city council and are thus no longer governed by TOMA.

In all events, counsel has announced they will seek another round of en banc rehearing. Should that fail, they say they will either seek relief from the U.S. Supreme Court, or simply refile on behalf of new plaintiffs in federal district court. The saga of this litigation thus appears destined to continue for the foreseeable future.

Open government is precisely what the First Amendment envisions, not condemns. Open meeting laws expand the rights of listeners—the general public—without unduly burdening the rights of the officials who work for them. Time will tell whether courts will continue to affirm and enforce these fundamental principles.

James C. Ho is the Solicitor General of Texas and lead counsel for the State in Rangra v. Brown. He was previously a member of the Media and Entertainment practice group of Gibson, Dunn & Crutcher LLP.

**THE OTHER SIDE OF THE POND:
Developments in
UK and European Media Law**

***Single Publication Rule in the UK; Cost Capping in
Libel Cases; PCC and Privacy and More***

By David Hooper

Although this is traditionally a quiet time in the media law field with most of the courts closed in August, there have been a couple of very significant developments. The first is the publication by the Ministry of Justice (MoJ) on 16 September 2009 of a consultation paper entitled *Defamation and the Internet: the Multiple Publication Rule*. The consultation is scheduled to end on December 16, 2009 and any submissions – on an area of considerable interest to American media organizations – should be in by that date. The consultation paper and an explanation of how submissions are made is available [here](#).

Important Changes in Libel Law

In essence, the consultation paper addresses the lack of a single publication rule as a result of the 19th century case of *Duke of Brunswick –v- Harmer* [1849] 14 QB 185 which gave birth to what the consultation paper calls the “multiple publication rule.” The extraordinary upshot of that was that a case, where the Duke sent out his butler to acquire a copy of a book published 17 years previously and His Grace was able to sue on a fresh act of publication for libel, now governs the downloading of material from the internet. In England, each act of downloading is a fresh act of publication which means that material stored in archives can be accessed by third parties and this access can be sued upon years after the original publication.

The consultation paper considers what limitation period for defamation actions should be appropriate in the light of a recommendation by the English Law Commission in its 2002 report "*Defamation and the Internet: A Preliminary Investigation, Scoping Study Number 2, December 2002* which, rather surprisingly, had recommended that the limitation period should be changed from the existing period of one year from the *date of publication* to 3 years from the *date of knowledge* of the allegedly defamatory material with a ten year longstop (another cricketing term) from the date of publication. That recommendation would have proved to be

something of an open sesame for Claimants who would no doubt have produced heart-rending accounts of how they came not to learn about the libel.

The preliminary view of the Ministry of Justice does *not* favour extending the limitation period of one year. If the multiple publication rule were retained, the limitation period should not, they feel, be extended from the current period of one year. If a single publication rule were to be introduced, they consider that the arguments for extending the limitation period beyond one year are not strong, but they seek views on whether a “date of publication” or “date of knowledge” approach should be used and whether the latter should be accompanied by a ten-year longstop from the date of publication.

The Ministry of Justice will also consider whether the statutory defence of qualified privilege under Schedule 1 and Section 15 Defamation Act 1996 should be extended to online archives outside the one year limitation period for initial publication. This statutory qualified privilege comes in two forms. In its first form which would cover matters such as fair and accurate reporting of court proceedings, the Claimant is not entitled to any statement by way of explanation or contradiction. In its second form, however, which would cover matters such as reports of certain public meetings, the Claimant is entitled to have a reasonable statement by way of explanation or contradiction – *not* an apology – published which is in effect a form of a statutory right of reply. If the Defendant fails to publish such a statement on request, it may lose its defence of qualified privilege.

Just as the courts have been attracted by the idea of online archive copies of disputed articles carrying, where appropriate, a note of objection, so the Ministry of Justice may be attracted by the suggestion that if a publisher refuses or neglects to update the electronic version of the article on request with a reasonable letter or statement by the Claimant by way of explanation or contradiction, the defence of qualified privilege would be lost and the publisher of the material in the online archive could be liable to be sued for defamation outside the one year limitation period.

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The consultation paper notes there is no statutory definition of what constitutes an online archive and for these purposes it should be taken to encompass electronic versions of traditional archives such as those maintained by newspapers as well as blogs and other electronic discussion forums. The paper notes that each hit on a webpage creates a new publication potentially giving rise to a separate cause of action. The paper also notes that the fact that each separate publication is subject to a limitation period of one year from the date that the material is accessed was upheld by the House of Lords in *Berezovsky –v- Michaels* [2000] 1 WLR 1004 and by the Court of Appeal in *Loutchansky –v- Times Newspapers Limited* [2002] 1 All ER 652.

Attempts to persuade the English courts – or for that matter the European Court of Human Rights in the Loutchansky appeal - to follow the US decision of *Firth v. State of New York*, [98 N.Y.2d 365](#) (2002), have so far failed.. The English courts - and for that matter the European Court of Human Rights - have ducked the issue of the problems thrown up by a multiple publication rule. Deciding issues of online publication by reference to man servants buying copies of books or for that matter by what was displayed on a notice board in a tennis club in the 1930s was always bound to give rise to problems. The courts have tried to get around this by saying that as there were only limited acts of publication, damages would be modest, but that is not the point. There are clearly freedom of speech issues and so often in English libel cases, the legal costs in fact dwarf the damages.

It is recognized by the MoJ and the Law Commission that after a lapse of time it may be extremely difficult for Defendants to mount an effective defence after a lapse of time because records and witnesses are no longer available. They also note that it is a relatively simple matter to place a note on the archive which may considerably lessen the impact of the defamation in that if a warning notice were placed alongside the relevant archive material, this could reduce or remove the possibility of further proceedings being brought. The paper examines the arguments in favour of a multiple publication rule and the potential injustices to Claimants if it were abolished. It also makes the interesting point that if the single publication rule were to be adopted it might be necessary to consider whether there was a need to strengthen the Press Complaints Commission and Ofcom Codes. The Ofcom Code being a statutory obligation does not extend to the internet whereas with the PCC the obligation to correct inac-

curate and misleading material would appear to extend to newspaper archives.

One of the questions (number 5) specifically asks “*if a single publication rule were introduced, do you consider that the approach taken in the United States in respect of what constitutes a new publication of hard copy material would be workable? If not, what changes should be made?*” The conclusion of the MoJ is that the limitation period should not be extended beyond one year. The jury is still out on whether a single publication rule will be introduced, but there seemed to be indications that the MoJ are tilting in the direction of the single publication rule.

The MoJ, however, still has an open mind as to whether the limitation period should run from the date of publication or date of knowledge. If it were to run from the date of knowledge that could be a charter for stale claims to be brought. Media Defendants should press for a single publication rule and a one year limitation period.

Readers should consider whether the organizations which they represent and which may, whether they like it or not, be “publishers” of potential defamatory material in the United Kingdom, want to make representations on the subject. If so, put the date December 16, 2009 in your calendar.

Cost Capping in Libel Cases

An important change which comes into effect on October 1 is a one year cost capping pilot scheme for libel and malicious falsehood claims. In all claims started after this date parties are required to exchange and file costs budgets before every Case Management Conference. The court must manage the litigation so that the costs are proportionate to the value of the claim and the representational issues at stake and so that the parties are on an equal footing. The court must decide at each Case Management Conference whether the costs proposed are reasonable. If they do so, those costs are likely to be allowed on assessment at the conclusion of the case. Only if there are exceptional circumstances, will courts allow the recovery of costs which they consider are unreasonable. Parties are required to confirm to each other every month that costs are on budget.

On the face of it, this should like good news, but it does depend on an interventionist approach by libel judges to the question of costs – something which has been rather lacking hitherto with Claimants being able to recover surprisingly

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The Other Side of the Pond: Developments in UK and European Media Law

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large levels of fees. The scheme does not extend to privacy or confidence claims. One other problem is that by the time that the Case Management Conferences start, the Claimant could already have run up a six figures sum in costs. Much will depend on how tough the libel judges are willing to get on the question of costs. What the court will allow for costs tends to start with what the Claimant's solicitors seek with that being trimmed down slightly. If it did not take Claimant's solicitors long to work out that the more they ask, the more they get and that 80% of a very large sum is better than 80% of a large sum. However, the regime is meant to bring libel costs under control and if costs capping issues reach the Court of Appeal, one can expect some fairly strong pressure to bring the level of costs down.

Recoverability of ATE Premiums

Another change taking effect on 1 October 2009 is that the Civil Procedure Rules in two significant regards alters the rules about the recovery of After the Event (ATE) insurance premiums.

In "publication proceedings," that is to say defamation, malicious falsehood or claims for breach of confidence involving publication to the public at large, the Claimant's ATE premium will not be recoverable where a case is resolved without proceedings having been issued if an admission of liability leading to settlement was made by the Defendant within 42 days of being notified of the ATE. The rules also require that a Defendant should be told about the ATE "as soon as possible" even before the proceedings are issued. Unless the court orders otherwise, "a party cannot now recover an ATE premium if they have not given notice as soon as possible."

It seems that the government had wanted to implement a 42 day window during which a Defendant could admit liability without having to pay a Claimant's ATE premium. Claimant's lawyers were said to be under pressure from insurers to take out the ATE premium at the very outset if they wished to be able to obtain cover. Furthermore, one also found that they were taking out multiple premiums which meant that at £8,000 a throw the costs could be enormous, even if the matter was very promptly settled. However, the 42 day period does not apply where all proceedings are issued but is limited only to costs only proceedings.

It seems therefore that to obtain benefit from this rule change, it will be important to settle a dispute before proceedings are issued and that may involve admitting liability within 14 days of the receipt of the letter of claim or seeking to persuade the Claimant not to issue proceedings. The more aggressive Claimant lawyers may therefore as a matter of policy, issue proceedings at the first available moment. It remains to be seen how this works in practice as one may find that the courts will look with disfavour on ATE policies being taken out prematurely. This is clearly a welcome development but the question is how tough a line the courts will take in relation to cases which are settled within 42 days where the claim was issued within that period.

Welcome to the Supreme Court

After 133 years sitting as the Appellate Committee of the House of Lords, the highest court in the United Kingdom will now be known as the Supreme Court. It has moved out of the Houses of Parliament, where it sat rather uncomfortably constitutionally, to the other side of Parliament Square. Now, after a £60 million refurbishment and a carpet designed by the artist Sir Peter Blake, best known to lawyers of a certain age as the designer of the sleeve for *Sergeant Pepper's Lonely Hearts Club Band*, the Supreme Court opens for business on October 1 operating under the Supreme Court Rules SI 2009/1603.

Privacy

On July 2, 2009 the Press Complaints Commission published new guidance on payments to parents for material about their children. This was raised out of some unsavoury stories about which particular pubescent child had fathered a 15 year old's baby. The unlikely 13 year old candidate who was later proved not to be the baby's father received (with his family) payment for their story. The PCC has now recommended that editors should ask whether the payment alone might tempt parents to discuss matters about their child which would not be in the child's interests and might on occasions even lead them to exaggerate or fabricate material. Above all, they had to ask whether the payment was in the child's interest. One sensed that the PCC thought that these stories fell the wrong side of the line.

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The Other Side of the Pond: Developments in UK and European Media Law

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Reality TV raises various privacy issues. Sky One in its series *Road Wars* had featured the arrest of a Mr Billy Johnson who was the worse for drink and was arrested on suspicion of causing criminal damage to the door of what he thought was his home, but in fact was a flat which in his sober moments he might have realised belonged to someone other than himself. Ofcom, (Broadcast Bulletin Issue 139) however, considered that Mr Johnson did not have a legitimate expectation of privacy in circumstances where he was filmed committing an offence for which he was subsequently fined and where his actions were not of a particularly sensitive or private nature i.e. kicking down the front door. Different considerations might have arisen if the programme had identified where Mr Johnson lived, but as he had gone to the wrong flat there was rather less of a problem than it might have been!

There was also an interesting decision by the PCC on June 22, 2009 in its adjudication against the Scottish Sunday Express. The paper, in an article headlined "*Anniversary Shame of Dunblane Survivors*" commented on how the survivors of a terrible shooting tragedy at the Dunblane School in 1996 who were now turning 18, had "*shamed*" the memory of the deceased with "*foul-mouthed boasts about sex brawls and drink-fuelled antics*". To write the story the newspaper had accessed what appeared on these youths' social networking sites and they claimed that the information was publicly accessible. The PCC however, felt that publication of this material in the Scottish Sunday Express represented a serious error of judgment bearing in mind that the individuals concerned were not public figures and had done nothing to attract media scrutiny.

Recent regulatory developments include the publication of an updated handbook by the Information Commissioner's Office entitled "*Privacy Impact Assessments*" designed to help organisations address the risks to personal privacy before implementation of new initiatives and technologies and considers, amongst other things, the question of how risks of losing data should be addressed and ensuring that privacy safeguards are built into systems at the outset rather than bolted on as an inadequate and expensive afterthought.

New guidance was on July 22, 2009 introduced by CAP (Committee of Advertising Practice) and BCAP (Broadcasting Committee of Advertising Practice) on advertisements for video games and films giving guidance as to

matters such as content and context, age related products and time of broadcast.

France

Two interesting developments in France. The first is that the National Assembly has approved a bill allowing internet access to be cut off for one year for copyright piracy plus a fine of up to €300,000. Apparently one in three French people admit to online piracy. The proposal is supported by the President, but concerns have been raised about the possibility of surveillance to monitor internet use.

The second development in France is no less alarming. It concerns what is essentially an allegation of slander against Dominique de Villepin who was Prime Minister of France from 2005 to 2007. Remembering perhaps the Elf Oil scandal, he was unwise enough to believe forged documents which appeared to show substantial pay-offs to various French political figures in relation to the sale of frigates through accounts operated by a Luxembourg bank. Rather than this simply being a slander case, Villepin finds himself facing charges of complicity in slander, use of forged documents and possession of goods obtained by breach of trust and fraud. He faces a prison sentence of up to five years and a fine of up to €48,000, if found guilty. President Sarkozy, forgetting for a moment his Gallic courtesy, appears supportive of the prosecution chillingly observing in language reminiscent of World War Two that the authorities should "hang whoever did this on a butcher's hook". Villepin seems equally to have no love lost for his former colleague who he refers to as "the dwarf". The trial is with a fine historical sense taking place in the courtroom from which Marie Antoinette was despatched to the guillotine.

Italy

Unbelievably, the behavior of Italy's Prime Minister Silvio Berlusconi is even worse. He is currently suing La Repubblica for libel objecting to questions they have raised about his relationship with several women of the 18 year old model variety, questions which also seem to have been raised by Mrs Berlusconi. La Repubblica have launched an online petition in defense of press freedom which has attracted more than 420,000 signatures. A public demonstra-

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The Other Side of the Pond: Developments in UK and European Media Law*(Continued from page 36)*

tion is scheduled to take place in Rome at the beginning of October. The petition is available [here](#).

Berlusconi is also threatening to sue *Nouvel Observateur* in France for its story "*Sex, Power and Lies*" and also *El Pais* in Spain which published pictures of naked guests at a Berlusconi villa in Sardinia. Berlusconi's behavior is all the more unattractive in that he wields immense media power in Italy which is remorselessly used to attack his enemies. A seven year battle with the *Economist* ended with a Milan court dismissing his charges of libel. The Berlusconi press with no obvious irony, had accused the London editors of the *Economist* of being drunk with power. In reality the state of the press in Italy gives rise to a number of serious concerns.

Schadenfreude Corner

In case any readers missed it, the death has been announced of Sheikh Khalid bin Mahfouz, he was the man who sued Rachel Ehrenfeld in respect of her book "*Funding Evil*" as well as 40 other writers and publishers. Judgment had been obtained against Ms Ehrenfeld despite the very limited publication in this jurisdiction by the Sheikh's well-oiled libel machine. Rachel Ehrenfeld's [obituary](#) of the Sheikh in *Front Page* gives a new dimension to the concept of revenge being a dish best served cold.

In the United Kingdom it is normally the Attorney General who is seeking fines to be imposed on the media for shortcomings such as contempt of court. It was unusual therefore to find on 22 September Baroness Scotland, the present Attorney General, being fined £5,000 for what was described (by her) as an "*administrative technical error*." She had fallen foul of legislation she had helped steer through the legislature, in that she had not kept records of matters about her employee's immigration status, such as her passport, when she employed a Tongan housekeeper called Loloahi Tapus. Baroness Scotland had acted in good faith, but was nevertheless fined £5,000. Indeed employing illegal immigrants may have a resonance with American readers recollecting various failed presidential appointments. Indeed, New Yorkers may recollect Attorney Generals who have been bitten kerbside by the very legislation they helped to create.

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Seinfeld Defeats Cookbook Competitor's Copyright & Trademark Infringement Claims

No Substantial Similarity Between Books on Cooking Healthy for Kids

Jessica Seinfeld, wife of comedian Jerry Seinfeld and author of best seller *Deceptively Delicious: Simple Secrets to Get Your Kids Eating Good Food*, and publisher HarperCollins, won summary judgment this month on copyright, trademark and related claims brought by Missy Chase Lapine, author of *The Sneaky Chef: Simple Strategies for Hiding Healthy Food in Kids' Favorite Meals*. *Lapine v. Seinfeld*, No. 08 Civ. 128, 2009 WL 2902584 (S.D.N.Y. Sept. 10, 2009) (Swain, J.)

The court found no substantial similarity to support plaintiff's infringement claims. An additional state law claim for defamation against Jerry Seinfeld, who joked on the David Letterman Show that assassins often have three names, like plaintiff's, was dismissed for lack of jurisdiction after the dismissal of the federal claims.

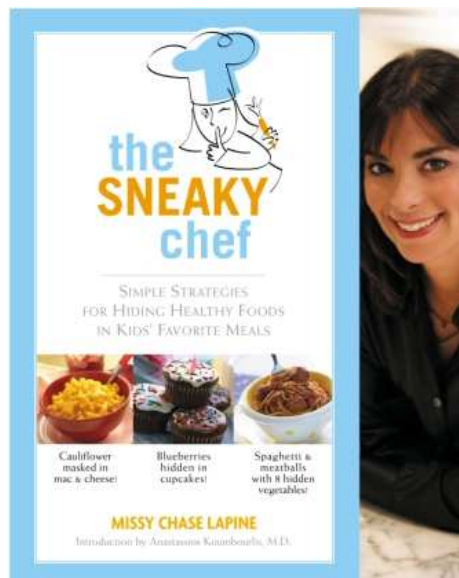
Background

Plaintiff Lapine is a classically-trained cook, member of Parenting Magazine's team of experts, and former faculty member at New York's New School Culinary Arts Program. HarperCollins rejected her original proposal for *Sneaky Chef* twice in early 2006, and the book was later published by Running Press in April 2007. Seinfeld's allegedly infringing work was published by HarperCollins in October of that same year. Both books were built on the theme of "camouflaging carefully-selected pureed healthy food inside children's favorite meals."

District Court Decision

As Judge Swain emphasized in her September 15 opinion, the only similarities that matter in an infringement case are those concerning the

elements of a work that are protected under copyright law. Indeed, Lapine acknowledged that neither her individual



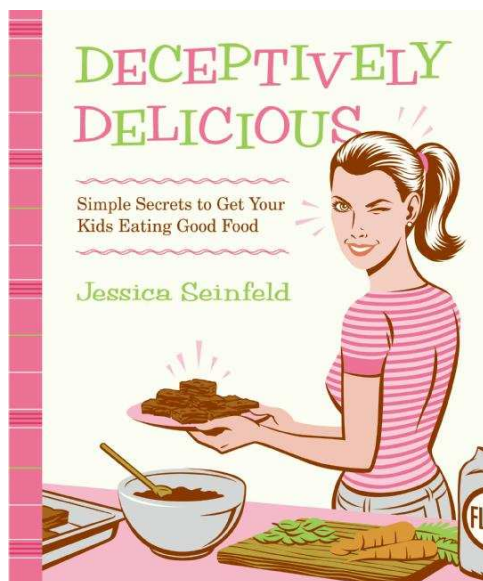
recipes, nor the idea of camouflaging vegetables in kid-friendly food, are copyrightable per se. Lapine instead argued that her unique arrangement of a variety of elements, which are not copyrightable in themselves, is itself copyrightable as an original compilation. She further argued that

while the *idea* of sneaky cooking may not be copyrightable, her particular *expression* of it is.

Copyright protection is generally extended to compilations so long as they embody some small degree of creativity. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991). The amount of protection given to such works is often rather thin, though it can vary depending on the measure of creativity contained therein. Rather than attempting to articulate those creative aspects of *The Sneaky Chef* which are subject to copyright protection, the court investigated each point of alleged similarity for possible infringement. Many of the similarities, the court determined, were the almost inevitable result "of the similar medium of expression used, or of the similar subject matter that both cookbooks address."

Anecdotes about mothers dealing with picky eaters and drawings of cooks winking or holding their finger up to their lips in a shushing gesture were held to be stock elements, which are never offered copyright protection. The manner in which chapters were organized, or in which kitchen tools and ingredients were listed, were also found to be insufficiently novel.

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Seinfeld Defeats Cookbook Competitor's Copyright & Trademark Infringement Claims

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After undercutting the foundation of Lapine's argument for protection based on creativity, the court compared the "look and feel" of each work considered as a whole. Lapine's work, which includes discussions of child behavior, parenting, and food philosophy in addition to its more traditional cookbook component, was described as text-heavy, relatively colorless, and didactic as opposed to collegial. *Deceptively Delicious*, on the other hand, was said to target a different audience, with its cheerfully splashy color spreads, simplified cooking instructions, and personal tone.

Given the low level of copyright protection available to Lapine's work, combined with the dissimilar "look and feel" of the two cookbooks, the court found no support for "a finding of substantial similarity between the two works." As a result, the court granted summary judgment in favor of Seinfeld and HarperCollins, dismissing Lapine's copyright infringement claims.

Trademark Infringement Claims

The reasons for the failure of Lapine's trademark claims and for the failure of her copyright claims are related. Assuming that there are trademarks affiliated with *The Sneaky Chef* that are protected by law (the court does not waste its time investigating this claim), the marks are not similar enough to sustain a claim of infringement. Under both the Lanham Act and New York Law, the plaintiff must show that the defendant's actions are "likely to confuse consumers as to the source or sponsorship of [plaintiff's product]." The court's comparison of Seinfeld's marks—which include a colorful and detailed drawing of a casually-dressed

woman, a pink plaid pattern, and the title phrase "Deceptively Delicious"—with Lapine's marks—which include a simple and mostly colorless sketch of a chef, and a different title and overall aesthetic—yielded few similarities.

The only meaningful similarities between these marks were the result of theme and necessity. Motivated by these findings, the court found that the marks were not confusingly similar as a matter of law, entitling Seinfeld to summary judgment on the trademark claims.

Defamation Claim

The defamation claim against Jerry Seinfeld was based on a comedic exchange in October 2007 on the David Letterman show. Although he did not mention Lapine by name, Seinfeld referred to her claim against his wife as "vegetable plagiarism,"; noted that "wackos will wait in the woodwork ... to inject a little adrenaline in your life experience"; and that the complaining author "was a three name woman — many of the three-named people do become assassins."

Plaintiff was represented by Christopher Seeger, David Buchanan, Seeger Weiss LLP, NY; and Howard B Miller, Joseph Gjonola, Girardi & Keese, Los Angeles, CA. Defendants were represented by Orin Snyder, Theodore Boutrous, Gibson, Dunn & Crutcher LLP; and Richard Glen Menaker, Cheryl Lynette Davis, Menakder and Herrmann, Los Angeles, CA.

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FCC Chair Genachowski Announces Support for “Net Neutrality”

“How do you design a network that is ‘future proof’ – that can support the applications that today’s inventors have not yet dreamed of?” With this quote from historian John Naughton, new FCC Chairman Julius Genachowski announced on September 21 that the FCC would back “net neutrality.”

“Net Neutrality” is a catch phrase for the general principle of equal treatment in online traffic – and short hand for various proposals for new government regulation. Proponents of net neutrality object to “traffic shaping” by Internet service providers, usually by slowing down some forms of online traffic, like file-sharing, while giving others priority.

The issue began to gather steam in 2007, when the AP reported that Comcast, the nation’s largest cable TV operator and No. 2 Internet provider, was blocking some Internet traffic. Nationwide tests conducted by the AP found that users could download files without hindrance from file-sharing sites like BitTorrent, but uploading files were blocked or delayed by Comcast. The technology used by Comcast was described by the AP as thus: “If it were a telephone conversation, it would be like the operator breaking into the conversation, telling each talker in the voice of the other: ‘Sorry, I have to hang up. Good bye.’” Following the article, public interest groups such as Public Knowledge began to embrace the concept of “net neutrality,” and while campaigning, President Obama pledged to endorse it.

The “National Broadband Plan,” as introduced by Genachowski, would expand rules that prohibit ISPs from filtering or blocking net traffic, seeking to cover all broadband connections, including data connections for smartphones. In addition to the four current broadband principles—often condensed to “any lawful content, any lawful application, any lawful device, any provider”—Genachowski suggested adding two more, first denying broadband providers the right to discriminate against services or applications by slowing them down, and second, by requiring broadband providers to tell customers how the engineers manage the network when it gets congested.

Proponents argue that no commercial entity should be able to pick the winners and losers, such as by crippling the growth of technologies requiring large bandwidth such as file-sharing sites like BitTorrent or other applications such as Skype. As Genachowski stated, the lack of competition in the broadband market means the providers’ “rational bottom-line interests may diverge from the broad interests of consumers in competition and choice.”

Opponents argue that the rules will mark the end of the era of “all-you-can-eat, flat-rate internet access,” as companies and consumers using broader bandwidth will be charged more. Furthermore, they argue, the rules will stifle attempts at innovation, such as finding ways to prioritize video calls over less urgent traffic such as photo uploads. Given that bandwidth is not unlimited, the ISPs argue that their engineers need the freedom to shape traffic in order to stop spam and viruses, and to keep the system running during peak times.

Further reading:

Marc Lawrence-Apfelbaum, “The Net Neutrality Debate,” MLRC MEDIA LAW LETTER, [July 2007](#), at 49.

Dylan F. Tweney, *FCC Position May Spell the End of Unlimited Internet*, Wired.com, Sept. 21, 2009, at <http://www.wired.com/epicenter/2009/09/fcc-neutrality-mistake/>.

Public Knowledge, “Network Neutrality,” <http://www.publicknowledge.org/issues/network-neutrality> (last visited Sept. 25, 2009).

Carole E. Handler, *The Struggle Over Net Neutrality*, Law.com, Feb. 23, 2009, at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202428474927>.

ETHICS CORNER:

Blawgging Regulated Like Advertising

Legitimate Concern or Simply Dead Thread?

By Luther Munford and Justin Matheny

The majority explained:

Earlier this year the appellate courts of New York dealt with a fax advertising case in a way that caused some legal bloggers – or “blawgers” – to fear future changes in the law. They were afraid that the law might cause internet blog posts to no longer be a safe place to let everybody know your name. But at the end of the saga, the fears subsided.

Appellate Division Causes Concern?

Between November 25, 2003 and March 29, 2005, attorney Peter Stern received fourteen faxes from attorney Andrew Bluestone titled the “Attorney Malpractice Report.” Each fax was billed as a “Free Monthly report on Attorney Malpractice From the Law Office of Andrew Lavoott Bluestone.” All of the faxes contained a one page essay on issues and trends in the field of legal malpractice. All of the faxes contained Bluestone’s contact information, including his website. Some of the faxes had Bluestone’s telephone number, some specifically claimed the fax was not an advertisement, and a couple stated the fax was an educational document. Some were duplicates. Stern’s fax number had been obtained through the New York Lawyers Directory and Manual.

The trial court granted summary judgment as to liability against Bluestone under the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 (“TCPA”). Bluestone’s faxes were “unsolicited advertisements” in the same boat as otherwise non-exempt faxes, such as those unwanted stock solicitations or promises of great deals on pharmaceuticals. The court even went so far as to find that Bluestone could be liable for treble damages under the TCPA [By the way – or “BTW” if this was a blog post – this was not Bluestone’s first offense, he lost a TCPA case in 2004 based on similar faxes].

In January 2008, the Appellate Division was quick to affirm that Bluestone’s faxes were “unsolicited advertisements” and prohibited by the TCPA. His defense on appeal was that the faxes were “purely informational” and did not “explicitly offer services,” but the court said his position “defie[d] common-sense.”

The faxes at issue certainly have the purpose and effect of influencing recipients to procure Bluestone’s services, which are for the specialized field of legal malpractice claims. First, the faxes include the name of Bluestone’s law firm and contact information. Second, while the faxes do not directly offer Bluestone’s services as a legal malpractice attorney, they indirectly advertise the commercial availability and quality of such services. Not only do the faxes invite contact for further information but they also list two web sites that boast Bluestone’s specialization in attorney malpractice suits. Thus, it is clear that the faxes indirectly proposed a commercial transaction and had the effect of influencing recipients to procure Bluestone’s services. Contrary to the dissent’s viewpoint, Bluestone’s motive is not a factor in the determination that these faxes are advertisements. It is not necessary to probe that deeply, since simply looking at the faxes in the context in which they were sent is sufficient to establish them to be advertisements. *Stern v. Bluestone*, 47 A.D.3d 576, 580, 850 N.Y.S.2d 90, 95, N.Y. Slip Op. 00611 (Jan. 31, 2008).

Blawggers were quick – as is the nature of the blogging business – to see the decision as an attack on more than just lawyer faxes.

Court of Appeals Saves the Blawg?

Blawggers’ [posted] fears subsided by the time Bluestone’s case reached the New York Court of Appeals. The high court rejected the finding that the faxes were “unsolicited advertisements.” It looked to the FCC’s TCPA regulations instead of a cursory review of the statutory language, and beyond Bluestone’s prior violation. The faxes then became “information messages” transmitted by fax, defined by the FCC as:

facsimile communications that contain only information, such as industry news articles, legislative up-

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Ethics Corner: Blawgging Regulated Like Advertising:*(Continued from page 41)*

dates, or employee benefit information, would not be prohibited by the TCPA rules. An incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement...Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote its commercial products.

Stern v. Bluestone, 12 N.Y.3d 873, 875-76, 2009 WL 1616529, at *2 (N.Y. June 11, 2009) (quoting 71 Fed Reg 25967, 25973 [2006], codified at 47 C.F.R. 64.1200) (Opinion uncorrected and subject to revision before publication in the New York Reports.) Bluestone's faxes contained information about attorney malpractice suits, the content was different for his different issues, and he was not promoting a commercial product. The possible motive behind them, *i.e.*, to impress other lawyers and generate referral business, was merely incidental and, in the court's view, did not make the faxes "unsolicited advertisement."

There are at least two ways for blawggers – who are, by definition, lawyers after all – to view the Bluestone saga. First, it can be distinguished on its facts and the lack of any likely impact in the world of blogs. Whether the Court of Appeals saved the day or not, the TCPA is not applicable to the internet. It only applies to faxes and telemarketing. That is its purpose explained by Congress: calls are a nuisance and faxes can cost the recipient money, or at least fax paper. But really, who actually sends faxes any more? Not even the most desperate legal marketing peddler would suggest you build a practice through a telemarketing campaign. So why worry?

Another, and perhaps better view, is a cut and paste application of the Court of Appeals' "information message" and "incidental advertisement" reasoning to the blawg. The fact that the author(s) name(s) are attached is merely incidental. Indeed, most blawg posts that over hype the author or come across as an overt marketing tool presumably do not generate hits. And most important, readers have to seek out a blawg page as opposed to it seeking them. If they do not want to read it, they simply do not have to navigate to the blawg page.

At bottom, Bluestone's faxes themselves have not directly answered the question of whether blawgs can be regulated like

advertising. However, we will have to wait and see if a better example of attempted blawg regulation will arise. In the meantime, this is probably a dead thread.

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