

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER

WEDNESDAY, NOVEMBER 10TH, 2010

HONORING MLRC'S 30TH ANNIVERSARY

Looking Back, Looking Forward: The Changing Business of News

Jill Abramson
The New York Times

Michael Kinsley
Politico

Jonathan Klein
CNN

Moderated by

Jonathan Alter
Newsweek

Cocktail Reception at 6:00 P.M.

Sponsored by AXIS PRO

Dinner at 7:30 P.M.

Grand Hyatt New York
Empire Ballroom, 109 East 42nd Street at Grand Central Station

RSVP by Monday, October 25, 2010

Business Attire

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER — WEDNESDAY, NOVEMBER 10TH, 2010

RSVP for Dinner by Monday, October 25, 2010

Reservations are not refundable for cancellations received after Friday, November 5, 2010.

Firm/Organization: _____

Contact Person: _____

Address: _____

Phone: _____ Fax: _____

E-mail: _____

Please reserve:

___ Single seat(s) at \$400 each

___ Table(s) for 10 at \$4,000 each *

___ Table(s) for 11 at \$4,400 each *

Amount Enclosed for Dinner Reservations: _____

Please make checks payable to:
Media Law Resource Center, Inc.
520 Eighth Avenue, North Tower — 20th Floor
New York, NY 10018

In honor of the Media Law Resource Center's 30th Anniversary, the 2010 Dinner Program will include a special section of commemorative ads from members and friends of MLRC.

* Guests at the 2010 Annual Dinner purchasing one or more tables receive complimentary ad space.

Please see next page for Dinner Program ad details.

DINNER PROGRAM JOURNAL

Guests purchasing one or more tables at the 2010 Annual Dinner receive complimentary ad space commemorating MLRC's 30th Anniversary as follows:

One Table: Quarter Page
Two Tables: Half Page
Three or More Tables: Full Page

Additional space may be purchased at the following rates:

Please indicate your choice: To increase from Quarter Page to Half Page: \$250 ____
To increase from Quarter Page to Full Page: \$750 ____
To increase from Half Page to Full Page: \$500 ____

Members and Friends of MLRC who do not purchase a whole table, or are unable to attend the 2010 Dinner, are welcome to purchase ad space commemorating MLRC's 30th Anniversary at the following rates:

Please indicate your choice: Quarter Page: \$250 ____
Half Page: \$500 ____
Full Page: \$1000 ____

Amount Enclosed for Dinner Program Ad: _____

Sorry, but we will be unable to refund for any cancellation of journal ads.

Please e-mail your ad copy no later than Friday, October 15, 2010 to medialaw@medialaw.org for inclusion in bound program journal.

Ad specifications:

For technical questions regarding Program ads contact Jake Wunsch at jwunsch@medialaw.org

Dimensions:

Full page: 7.5" x 9.5"
Half page: 7.5" x 4.5"
Quarter page: 3.5" x 4.5"

Accepted file formats: TIFF, JPEG, EPS

Color: Black and white only
Background: None **Bleeds:** None
Borders: None

Total Amount Enclosed for Dinner and Program Ad: _____

Please make checks payable to: Media Law Resource Center, Inc.
520 Eighth Avenue, North Tower – 20th Floor, New York, NY 10018

Media Law Resource Center, Inc.
212-337-0200 fax: 212-337-9893 www.medialaw.org

For questions regarding Dinner reservations or Program Ads contact Debra Danis Seiden at dseiden@medialaw.org.

MLRC DEFENSE COUNSEL SECTION

2010 ANNUAL MEETING

Thursday, November 11, 2010

Lunch will be served 12:00 NOON to 2:00 P.M.

Meeting will begin promptly at 12:30 P.M.

**Proskauer Rose Conference Center
1585 Broadway - 26th Floor**

Visitor entrance is on either 47th or 48th Streets, just west of Broadway.

Price per person: \$35.00

*We are required to submit a list of attendees prior to the event for security purposes
so please send in your reservation as soon as possible!*

RSVP by October 29, 2010

Reservations are not refundable for cancellations received after Friday, November 5, 2010.

MEDIA LAW RESOURCE CENTER, INC
520 EIGHTH AVENUE, NORTH TOWER—20TH FLOOR
NEW YORK, NY 10018

TELEPHONE: 212-337-0200 • FAX: 212-337-9893 • WWW.MEDIALAW.ORG

For further information contact Debra Danis Seiden at dseiden@medialaw.org.

MLRC DEFENSE COUNSEL SECTION 2010 ANNUAL MEETING

Yes, reserve _____ seats at the DCS Annual Lunch Meeting for:

Firm Name: _____

Address: _____

Phone: _____ Fax: _____

Please list names of individuals attending below (print clearly)

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Payment enclosed @ \$35.00 per person: _____

Reservations are not refundable for cancellations received after Friday, November 5, 2010.

Send payment to:

Media Law Resource Center, Inc.
520 Eighth Avenue, North Tower—20th Floor
New York, NY 10018

TELEPHONE: 212-337-0200 FAX: 212-337-9893 WWW.MEDIALAW.ORG

For further information contact Debra Danis Seiden at dseiden@medialaw.org.

520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200

MULRC *Media Law Resource Center*
MEDIA LAW LETTER

Reporting Developments Through September 25, 2010

LIBEL & PRIVACY

- W.D. Wash. Court Issues First Order Dismissing Claim Under Anti-SLAPP law**..... **03**
Invasion of Privacy and Misappropriation Charges Against Sicko Producers Dismissed
Aronson v. Dog Eat Dog Films, Inc.
- N.Y. Sup. Court Dismisses Doctor’s Libel Suit Against *Daily News***..... **05**
But Declines to Extend Anti-SLAPP Statute to Media Defendants
Rubel v. Daily News, LP
- D. Mass. Documentary Filmmakers Prevail in Defamation Suit by Dominican Sugar Executives**..... **07**
Plaintiffs Held to Be Public Figures
Lluberes v. Uncommon Productions, LLC
- N.Y. Sup. Court Dismisses Claims Arising Out of Use of Photo in Comedy Film**..... **10**
Court Finds Release Bars Plaintiff’s Right of Publicity and Defamation Claims
Krupnik v. NBC Universal
- 9th Cir. Court Dismisses Right of Publicity Claims Over UK Newspaper’s CD Promo**..... **12**
Token Sales Not Enough to Sustain Choice of US Law
Love v. Associated Newspapers, Ltd.
- 5th Cir. Court Affirms Dismissal of Clemens’ Libel Suit Against Trainer**..... **13**
Finds a Lack of Minimum Contact with Texas
Clemens v. McNamee

PRIOR RESTRAINT

- D.C. Sup. Judge Issues Prior Restraint Against Legal Newspaper**..... **15**
POM Wonderful Seeks – Then Dismisses – Injunction Against Publication of Info from Public Court Files
POM Wonderful v. ALM Media

SUPREME COURT

- NFL Sacked by the Sherman Antitrust Act**..... **17**
Merchandise Licensing Subject to Antitrust Law
American Needle, Inc. v. National Football League et al.
- Court Upholds Statute Prohibiting “Material Support” to Terrorist Organizations**..... **20**
Content Based Prohibition Upheld
Holder, et al. v. Humanitarian Law Project, et al.

INTERNATIONAL

- Other Side of the Pond: Developments in UK and European Law**..... **23**
Libel Reform, CFA’s, Phone Hacking Scandal, Super Injunctions, ECHR Updates

ECHR **Court Reaffirms Source Protection Materials May Not Be Seized Absent Prior Impartial Review**.....**28**
Dutch Law Found to Violate Journalists’ Right to Keep Source Identities Private
Sanoma Uitgevers B.V. v. The Netherlands

ECHR **Turkey Violated Convention By Failing to Protect Journalist’s Life and Freedom of Expression**.....**30**
States Have Positive Obligation to Protect Journalists
Dink v. Turkey

FIRST AMENDMENT

9th Cir. **Court Holds Tattooing Is Protected Expressive Activity**.....**32**
Hermosa Beach Ban on Tattoo Parlors Deemed Unconstitutional
Anderson v. Hermosa Beach

NEWS & UPDATES

Under Pressure Craigslist Removes “Adult Services” Section.....**33**
Acquiesces to Demands of State Attorneys General



2010-11 UPCOMING EVENTS

MLRC Annual Dinner

November 10, 2010
Grand Hyatt
New York, NY
[For more, click here](#)

California Chapter Luncheon Meeting

December 15, 2010
Southwestern Law School
Los Angeles, CA
[For more, click here](#)

MLRC Forum

November 10, 2010
Grand Hyatt
New York, NY
[For more, click here](#)

MLRC/Southwestern Entertainment Law Conference

January 20, 2011
Los Angeles, CA

DCS Annual Meeting

November 11, 2010
Proskauer Rose Conference Center
New York, NY

MLRC/Stanford Digital Media Conference

May 19-20, 2011
Palo Alto, CA

London Conference

September 19-20, 2011
(In-house counsel breakfast Sep 21st)
London, England

Washington Federal Court Issues First Order Dismissing Claim Under Washington's Newly Enacted Anti-SLAPP law

By Noelle H. Kvasnosky and Bruce E.H. Johnson

In the first decision to apply Washington's enhanced anti-SLAPP statute, a federal district court in Washington granted defendant's special motion to strike, and dismissed claims of invasion of privacy and misappropriation against the producers of the documentary film *Sicko*. [Aronson v. Dog Eat Dog Films, Inc.](#), 2010 U.S. Dist. LEXIS 91417 (W.D. Wash. Aug. 31, 2010), *motion for reconsideration pending, notice of appeal filed* September 13, 2010.

This decision underscores the Washington's legislature intent to provide important procedural safeguards for media entities and others against unwarranted and meritless suits that stem from the exercise of defendants' First Amendment rights.

Background

Aronson involves claims of copyright infringement, invasion of privacy and misappropriation of likeness arising from the use of homevideo footage in *Sicko* in which plaintiff claims copyright, and which incidentally includes plaintiff's voice and photograph.

Sicko, an Academy Award nominated documentary film, examines the contemporary healthcare crisis in America through short vignettes of individuals' healthcare experiences. One of these vignettes shows Eric Turnbow, a former friend of plaintiff Ken Aronson, injuring his shoulder, and receiving treatment for the same, while visiting the U.K.

with Aronson. *Sicko* uses the footage at issue, which was released by Turnbow to Moore, to contrast the healthcare systems of the U.S. and U.K. Aronson claims Turnbow did not have authority to license the footage.

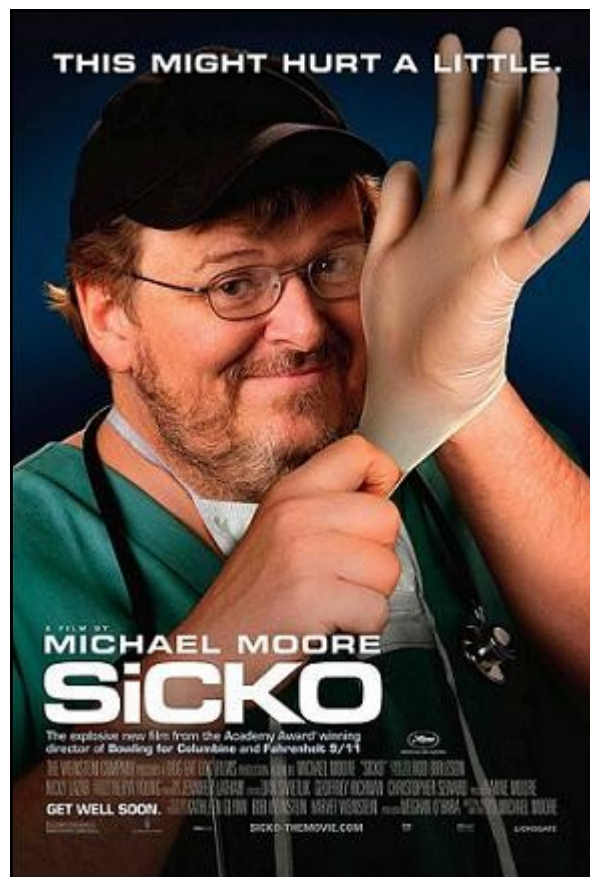
Aronson's voice and likeness appear in *Sicko* in a four-second clip that provides the context for Turnbow's visit to the U.K., and Aronson's voice is heard in the background when Turnbow's is injured and treated. Aronson's voice or likeness appear for a total of 16 seconds out of the 71 seconds of home video footage at issue in the lawsuit. Dog Eat Dog Films, Inc. filed a special motion to strike Aronson's state law claims under Washington's Anti-SLAPP statute, RCW 4.24.001 *et seq.*

Anti-SLAPP Statute

Aronson argued that Washington's newly enacted Anti-SLAPP statute did not apply to his claims because they were not based on defendant's exercise of free speech, and because defendant's claim of protected free speech activity was merely incidental to its knowing misuse of copyrighted material. Aronson also argued that regardless, the

Anti-SLAPP act should not apply to him because he is not a public figure and did not inject himself into the public debate on social medicine. The court disagreed.

(Continued on page 4)



***Aronson* involves claims of copyright infringement, invasion of privacy and misappropriation of likeness arising from the use of homevideo footage in *Sicko* in which plaintiff claims copyright, and which incidentally includes plaintiff's voice and photograph.**

(Continued from page 3)

First, the court held that plaintiff's claims arose from protected activity, as documentaries indisputably involve free speech. Additionally, it found that the subject matter of *Sicko*—the healthcare crisis in America—is an issue of public concern subject to the protections of the statute. Notably, whether a plaintiff “injected” himself into a discussion of public concern did not affect the Anti-SLAPP inquiry, where, as here, a direct connection exists between plaintiff and a discussion of a topic of widespread public interest.

This is the same principle from *M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623 (2001) (plaintiffs' claims, which arose from being pictured in an article about child molestation in youth sports, were subject to California anti-SLAPP protections even if plaintiff's connection to the issue of child molestation was not of their making, as the article addressed an issue of public interest). The court found that Aronson appears as a part of the discussion of healthcare because the footage in which Aronson's voice and likeness appear contextualizes the injured Mr. Turnbow's presence in London in the larger context of the healthcare debate.

Because the Anti-SLAPP act was found to apply, and Dog Eat Dog Films satisfied the threshold burden of showing Aronson's claims arose from protected activity, the Anti-SLAPP statute shifts the burden to Aronson to show a likelihood of prevailing on his claims by clear and convincing evidence. The court found Aronson was unable to meet that burden.

The court recognized that under the First Amendment a cause of action for misappropriation of another's name and likeness may not be maintained against expressive works, and that the use of a plaintiff's identity is not actionable where the publication relates to matters of the public interest. Additionally, under Washington common law and the statutory right to publicity, the court noted there is no cause of action for the publication of matters in the public interest. Because Aronson's state law claims for misappropriation are barred by the First Amendment, as well as being subject to a statutory exemption under Washington's right of publicity law, Aronson did not show by clear and

convincing evidence the probability of prevailing on the merits of these claims.

Additionally, the court found Aronson's claims of misappropriation of likeness and invasion of privacy are preempted by the Copyright Act. The Ninth Circuit applies a two-part test to determine whether a state law claim is preempted by Section 301 of the Copyright Act: first, the court determines whether the “subject matter” of a state law claim falls within the subject matter of copyright as described in Sections 102 and 103 of the Copyright Act. Second, if it does, the court determines whether the rights asserted under state law are equivalent to the rights contained in Section 106 of the Copyright Act.

Distinguishing *Downing v. Abercrombie & Fitch*, 264 F.3d 1994 (9th Cir. 2001), where the defendants had used the plaintiffs' images well beyond simply reproducing a photograph (and where state law claims were not preempted), the court found the use of Aronson's voice and likeness in *Sicko* akin to *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137-38 (9th Cir. 2006). In *Laws*, a misappropriation claim related to the use of plaintiff's voice was properly preempted because the entirety of the allegedly misappropriated vocal performance was contained within a copyrighted medium. Here, the court found that Aronson's state law claims arise solely from the use of home video depicting Aronson in which he allegedly owns the copyright, and thus were properly preempted by the Copyright Act.

Because plaintiff failed to demonstrate a probability of succeeding on the merits of any of his state law claims, Magistrate Judge Karen Strombom dismissed the claims of misappropriation of likeness and invasion of privacy and awarded defendant its fees and costs in bringing the motion, as well as the statutorily prescribed amount of \$10,000. Aronson has filed both a motion for reconsideration and a notice of appeal to the Ninth Circuit.

Bruce E.H. Johnson and Noelle H. Kvasnosky of Davis Wright Tremaine LLP in Seattle, WA represented Dog Eat Dog Films, Inc. Ken Aronson was represented by Thomas Vertetis and Bryan Doran of Pfau Cochran Vertetis Kosnoff of Tacoma, WA.

Because the Anti-SLAPP act was found to apply, and Dog Eat Dog Films satisfied the threshold burden of showing Aronson's claims arose from protected activity, the Anti-SLAPP statute shifts the burden to Aronson to show a likelihood of prevailing on his claims by clear and convincing evidence.

New York Court Dismisses Doctor's Libel Suit Against *Daily News*

But Declines to Extend Anti-SLAPP Statute to Media Defendants

By Andrew Goldberg

The New York Supreme Court dismissed a defamation action against the Daily News by a doctor who alleged that an article in the newspaper falsely identified and wrongly implicated him in the death of a mentally ill patient in the psychiatric waiting room area at Kings County Hospital. [*Rubel v. Daily News, LP*](#), No. 100023/09 (N.Y. Co. 2010).

In siding with the newspaper, the Court held that the published statements, which were based on an official report by the City Department of Investigation (DOI), were absolutely protected under the state's fair report privilege. The Court, however, rejected the Daily News' additional argument to dismiss the case under New York's anti-SLAPP statute, noting that the statute was not intended to protect media defendants.

Background

The article at issue in the case discussed the circumstances surrounding the tragic (and notorious) death of Esmine Green, a mentally ill patient who had waited some 24 hours for treatment in the psychiatric emergency room at Kings County Hospital before collapsing and ultimately dying on the waiting room floor, where she lay face-down for more than an hour before a nurse approached her. The ensuing investigation by the DOI found that Dr. Steven Rubel, the plaintiff, made entries in the patient's medical record that repeated false statements made by a nurse that Green's vital signs had been checked and were found to be normal during the time when the video surveillance cameras in the waiting room showed her on the floor, prone and unattended.

The plaintiff argued that the Daily News falsely identified him as one of four doctors on duty the night of Green's death

who "created records that were contradicted by video." He also claimed that the DOI Report cleared him of any wrongdoing.

The Court, however, strongly disagreed, finding that plaintiff's interpretation of the Report was "wholly inaccurate," and that the allegations in plaintiff's Complaint were "flatly contradicted by the Report."

The Fair Report Privilege

The Daily News maintained that it was shielded from plaintiff's defamation suit by Civil Rights Law § 74, which provides newspapers with absolute immunity for the publication of fair, substantially accurate reports of official proceedings. In agreeing with the newspaper and applying the fair report privilege here, the Court emphasized the broad interpretation the statute has historically been given.

A comparison of the *Daily News* article with the actual contents of the DOI Report clearly indicated the substantial accuracy of the article: Plaintiff was one of four doctors on duty the night of Green's death and had created records that were contradicted by the video. As a result, the Daily News was entitled to immunity.

The Court was quick to dismiss plaintiff's other arguments. Dr. Rubel contended that the Daily News article distorted the Report because it neglected to mention that investigators conceded that plaintiff could have made the false entries either "innocently," by merely echoing false statements made by a nurse, or intentionally. But the Court noted that there is no "requirement that reporters depict all

(Continued on page 6)

In siding with the newspaper, the Court held that the published statements were absolutely protected under the state's fair report privilege. The Court, however, rejected the Daily News' additional argument to dismiss the case under New York's anti-SLAPP statute, noting that the statute was not intended to protect media defendants.

(Continued from page 5)

sides of any one story,” adding that the DOI’s inability to resolve the issue of plaintiff’s state of mind was compromised by plaintiff’s taking the Fifth Amendment when DOI sought to question him.

Finally, the Court rejected the argument that the issue of whether the privilege applies is a question for the jury. “Courts routinely grant pre-discovery dismissals on the ground that the statements are covered by the fair report privilege as a matter of law,” it said.

New York’s Anti-SLAPP Statute

The Daily News argued that the lawsuit was a transparent attempt to suppress reporting on an egregious violation of standards of medical care, and thus amounted to nothing more than a SLAPP action (a strategic lawsuit against public participation) by a physician involved in that care. To that end, the Daily News contended that the suit should be promptly dismissed under New York’s anti-SLAPP statute (CRL § 76-a), which entitles defendants to recover their fees, costs, and other damages.

The Court, however, rejected this argument, reasoning that New York courts have never held that media defendants are entitled to the protections of the anti-SLAPP statute.

To date twenty-six states and one territory have passed anti-SLAPP statutes. While such statutes are generally designed to prevent plaintiffs from chilling free speech through the threat of litigation, the procedural protections they afford defendants vary by state. Some, like California’s, are highly protective of free speech; others, like New York’s, have been interpreted to give decidedly less protection to media defendants.

Under CPLR 3211(g), to avoid dismissal of a SLAPP suit in New York, the burden is placed on the plaintiff to establish by clear and convincing evidence a “substantial basis” for his claims. As the Court noted in *Duane Reade, Inc. v. Clark*, Index No. 107438/03, 2004 WL 690191 (Sup. Ct. N.Y. Co. Mar. 31, 2004), the Legislature viewed “substantial” as a more stringent standard than the “reasonable” standard that would otherwise apply.

In deciding whether the anti-SLAPP statute applies to a particular action, the Court must first determine whether the plaintiff is “a public applicant or permittee,” meaning

someone who “obtained a license, certificate or other entitlement from any government body.”

It must then determine whether the lawsuit is an “action involving public petition and participation,” which is “an action, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendants to report on, comment on, rule on, challenge, or oppose such application or permission.”

Here, the Daily News argued that the plaintiff, a physician licensed to practice in New York, was clearly a “public permittee.” It also maintained that his defamation claim was “materially related” to the Daily News’ efforts to “report on” his professional conduct. The newspaper added that courts have held that the anti-SLAPP statute applies where the sued-upon statements were made not just to government agencies, but also in the press.

The Court, however, did not reach the merits of the Daily News’ anti-SLAPP argument. Instead, it decided as a threshold matter that the newspaper was not entitled to the protections of the statute. Relying on *Chowlosky v Civiletti*, 16 Misc 3d 1138, 851 NYS2d 57 [Sup Ct, Suffolk County 20071 *affd* 69 AD3d 110,887 NYS2d 592 [2dDept2009]], the Court wrote: “[S]ince this law took effect in 1993, there has never been a case in which a newspaper successfully came under the umbrella protection of this statute for articles or stories generated by its writers.”

While the Court agreed with the Daily News that the anti-SLAPP statute applies to sued-upon statements made to the press, it countered that the case law is silent on whether the statute applies to sued-upon statements made *by* the press. In declining to apply the anti-SLAPP statute in this case, it reiterated the Court’s reasoning in *Chowlosky*. “The intent behind the statute was and is to protect citizen activists - not the media - who are at a disadvantage in defending lawsuits brought by financially able public applicants or permittees who seek to quell opposition to their applications by private individuals or non-profit groups who cannot afford to defend such suits,” it said.

Anne B. Carroll, Daily News Deputy General Counsel, represented the defendants, with assistance from the author, who was the Daily News Media Fellow at the time. David J. Seidemann of Seidemann & Mermelstein, represented plaintiff.

Documentary Filmmakers Prevail In Defamation Suit By Dominican Sugar Executives

By John B. O'Keefe

Two brothers who control a prominent sugar consortium in the Dominican Republic have been held to be public figures for purposes of a documentary film depicting the treatment of cane-cutters on Dominican plantations and therefore could not maintain their defamation claims against the filmmakers in the absence of evidence of actual malice.

On August 16, 2010, the United States District Court for the District of Massachusetts granted a motion for summary judgment by the producers of *The Price of Sugar* in a defamation action brought by brothers Felipe and Juan Vicini Lluberes. [*Lluberes v. Uncommon Productions, LLC*](#), No. 07-CV-11623, 2010 WL 3245283 (D. Mass. Aug. 16, 2010) (Woodlock, J.). The Vicinis had alleged that the film unfairly portrays the working and living conditions of the Haitian laborers who harvest the Vicinis' sugar crop with machetes and reside in company-owned villages known as "bateyes."

Specifically, the brothers claimed they were personally defamed by a series of implications they ascribed to the film: that they were responsible for the kidnapping and murder of Haitians; that they would kill one of their workers but for the presence of a Roman Catholic missionary, Father Christopher Hartley, who had drawn public attention to their labor practices; that they had threatened the worker and effectively imprisoned him and his family; that they had allowed child labor, malnourishment, and horrific workplace injuries to

occur on their plantations; and that they had forcibly prevented laborers from leaving the *bateyes*. *Id.* at *1-3.

The film, which was released to critical acclaim in 2007, is narrated by Paul Newman and focuses on the missionary work of Father Hartley, a disciple of Mother Theresa, as he attempts to aid the Haitian migrants who toil in the cane fields of his parish.

As its title suggests, the film raises questions about the connection between the conditions endured by these laborers and the consumption of the sugar that is ultimately exported to the United States under laws that guarantee above-market rates. Many of the plantations in the priest's parish were owned and operated by companies controlled by the Vicinis, who declined the filmmakers' interview requests but who were briefly depicted in the film and described as the leaders of a "network of Vicini corporations" that also includes interests in "banking, property, and the media."



Two brothers who control a prominent sugar consortium in the Dominican Republic have been held to be public figures for purposes of a documentary film depicting the treatment of cane-cutters on Dominican plantations and therefore could not maintain their defamation claims against the filmmakers in the absence of evidence of actual malice.

Public Figure Issue

The plaintiffs, scions of one of the wealthiest families in the Dominican Republic, contested their status as limited-purpose public figures on several grounds. First, they argued that the relevant

public controversy addressed by the film was far narrower than the issue of "conditions on Dominican sugarcane plantations" (a subject on which there was a long and well-documented history of public engagement) and instead was limited to the specific issue of "Father Hartley's allegations

(Continued on page 8)

(Continued from page 7)

regarding the conditions for migrant Haitian workers on Vicini-owned *bateyes*.” *Id.* at *6.

Second, the Vicinis made “a geographical argument: that because the controversy exists in the Dominican Republic – not in the United States, where the film was released – the Vicinis cannot be public figures for purposes of the defamation.” *Id.* at *7. Third, the Vicinis claimed that, prior to the film’s release in 2007, the activities they engaged in to affect the outcome of the public controversy “were simply defenses to the defamatory statements made by Father Hartley in other contexts,” and therefore should not qualify as voluntary participation in the controversy. *Id.* at *8.

Applying the widely followed, three-pronged public figure standard from *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1293-94 (D.C.Cir.1980), the district court rejected each of the Vicinis’ arguments and concluded that they had in fact “‘thrust themselves to the forefront’” of a broad, ongoing public controversy about the treatment of Haitian laborers in the harvesting of Dominican sugar cane, *Lluberes*, 2010 WL 3245283, at *4 (citation omitted), when they “assumed important roles in the[ir] family business,” *id.* at *8, and, as a result of that and their “involvement with Father Hartley, the media, and government officials regarding the treatment of sugarcane laborers,” the Vicini brothers had “achieved a ‘special prominence’ in the debate,” *id.* at *4 (citation omitted).

The Vicinis’ attempt to narrow the public controversy was “implausibl[e],” the court said, and their suggestion of a geographic limitation on the scope of the controversy was untenable in light of the abundant evidence that “[t]he labor conditions [on Dominican sugar plantations] were followed by American media outlets” and that U.S. government officials “had taken notice of the problem.” *Id.* at *6-7. The court compared the “interest of United States actors and organizations in the [Haitian labor] issue” on Dominican *bateyes* to the circumstances presented in *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431 (5th Cir. 1987), “where the plaintiff was the president of a Guatemalan soft-

drink bottling company whose antiunion violence drew international attention and criticism.” *Lluberes*, 2010 WL 3245283, at *7.

Like the article at issue in *Trotter*, the court said, *The Price of Sugar* dealt with “a public controversy in the United States” because “the Dominican Republic is a Western Hemisphere country whose sugar products are exported to the United States under a heavy subsidy, and whose labor and human rights records have raised domestic concern.” *Id.* The court further held that the Vicinis’ could not, as a matter of law, deny the voluntariness of their participation in the controversy on the theory that they were merely responding to defamatory accusations made by persons other than the filmmakers, including because the Vicinis had failed to offer any evidence that those prior accusations were false. “The Plaintiffs do not allege that the Vicini *bateyes* lacked the general conditions described both in the film and by Father Hartley in his . . . statements [made prior to the film’s release].” *Id.* at *10. Moreover, the court found that the Vicinis’ earlier attempts to quell criticism of their labor conditions were “part of an affirmative program to cultivate favorable publicity in the public controversy out of which the alleged defamation arose,” and not merely defensive rebuttals. *Id.* at *11.

Emotive Statements Not Defamatory

Having found the Vicinis to be “public figures as a matter of law regarding the matters at issue in this case,” *id.*, the court then addressed the Vicinis’ claim that the alleged implications were actionable and published with actual malice.

Of the seven “statements” in the film that the plaintiffs claimed supported the alleged implications, the court found three to be incapable, as a matter of law, of supporting the defamatory meanings the Vicinis sought to ascribe to them. Thus, the court said, when one of the Haitian workers is depicted telling the filmmakers that, if Father Hartley leaves the country, “I am not going to wait for the Vicini to send someone to kill me . . . I would kill myself” and that “[a]

(Continued on page 9)

Applying the widely followed, three-pronged public figure standard from *Waldbaum v. Fairchild Publications, Inc.*, the district court rejected each of the Vicinis’ arguments and concluded that they had in fact “‘thrust themselves to the forefront’” of a broad, ongoing public controversy when they “assumed important roles in the family business.”

(Continued from page 8)

nyone following Father Christopher's path is in great danger," no reasonable viewer would understand that to be an assertion of fact. Rather, the "statement is an emotive one of opinion" that obviously "express[es] a subjective view, an interpretation, a theory, conjecture, or surmise," and consequently is not actionable under defamation law. *Id.* at *15 (citation omitted).

Similarly non-actionable, the court said, was a statement by the film's narrator that the worker "and his family have been threatened with eviction from their home; but without legal status, they are unable to go elsewhere to make a living." The court concluded that the remark was not "of and concerning" the Vicinis, and thus could not support a defamation claim by them, because "the implication concerns Dominican immigration practices, not the Vicinis." *Id.* at *16.

The court likewise rejected the Vicinis' claim that "a series of still images [included in the film] depicting child workers, a child chewing on sugarcane holding a syringe near his mouth, and a pair of hands with a missing finger" might reasonably be understood as a factual assertion that the "these images were taken on Vicini property." *Id.* at *17.

Rather, the court said, "the defamatory sting of [the challenged montage] is that the images depict the conditions on Vicini *bateyes*, not that the particular individuals and locations shown on screen are on Vicini property." *Id.* The fact that these particular images were captured on other plantations was therefore immaterial to the Vicinis' claim unless the depicted conditions differed in material respects from the conditions on the Vicinis' *bateyes*, and the Vicinis failed to offer evidence that they did. *Id.*

No Evidence of Actual Malice

In any event, the court concluded that there was no evidence indicative of actual malice by the filmmakers with respect to any of the implications the Vicinis had alleged. The court observed that "[a] significant portion of the Plaintiffs' opposition memorandum [was] devoted to attacking the credibility of Father Hartley as a source of information for the documentary," but dismissed these attacks as mere bias evidence that was in no way probative of the filmmakers' state of mind in "reporting the information they obtained from him." *Id.* at *12. "Self-interest (and the related desire to place opposing views and persons in an

unfavorable light) motivates many news sources" and does not give rise to "an obvious reason to doubt [the sources'] veracity." *Id.* (citations omitted).

With respect to the claims of kidnappings and murders, the court found that "the record shows . . . the filmmakers had reason to believe that workers on the Vicini plantation did in fact 'disappear.'" *Id.* at *14. As for the working and living conditions depicted in the film, the court also found no evidence of actual malice.

The court noted that the filmmakers' "research confirm[ed] that the Vicini plantations had poor and dangerous working conditions[,] . . . that workplace injuries are common, that workers receive little medical care, . . . that cane cutters often work barefoot without any protective gear" and that there were credible "reports of child labor on the Vicinis' plantations." *Id.* at *18.

The Vicinis, moreover, "essentially [did] not challenge the truth of these claims or the research used to support them," the court said. *Id.* The court further found that "the Defendants did not falsely portray . . . living conditions" on the Vicini *bateyes*. *Id.*

On the subject of malnutrition among *bateye* dwellers, the court found support for the filmmakers' account in the "evidence of their own experience, their own interviews, and their own documentation on film of the food and nutrition conditions on Vicini *bateyes*." *Id.* at *20. Indeed, as the court noted, one of the Vicinis had, like the filmmakers, toured his families' *bateyes* with Father Hartley and testified that he himself was "shocked" by the conditions he encountered there. *Id.* at *8.

On that record, the court found no basis for the Vicinis' case to proceed and granted summary judgment to the filmmakers. Plaintiffs have given notice that they will appeal the judgment to the United States Court of Appeals for the First Circuit.

Defendants Uncommon Productions, LLC, and William Haney III were represented by Elizabeth C. Koch, Thomas Curley, and John B. O'Keefe of Levine Sullivan Koch & Schulz, L.L.P. and Jonathan Albano and Lisa Kirby Haines of Bingham McCutchen LLP. Plaintiffs Felipe Vicini Lluberés and Juan Vicini Lluberés were represented by Read McCaffrey, Benjamin G. Chew, Stephen Diaz Gavin, Carolyn McIntosh, Christopher Hellmich, Nigel Wilkinson, and Kristen M. Johnson of Patton Boggs LLP and Jessica Block of Block & Roos LLP.

New York Trial Court Dismisses Right of Publicity and Defamation Claims Arising Out of Use of Photograph in Comedy Film

By Amanda M. Leith

A New York trial court recently dismissed an action against NBC Universal and Universal City Studios LLLP arising out of the use of plaintiff's photograph in a prop brochure for the movie *Couples Retreat*. [*Krupnik v. NBC Universal*](#), No. 103249/10 (N.Y. Sup. Ct. June 29, 2010) (Sherwood, J.).

Deciding defendants' motion to dismiss, the court found that a release signed by the plaintiff in connection with the taking of the photograph completely barred plaintiff's claims for the unauthorized use of her likeness, defamation and unjust enrichment. The court also found that plaintiff could not state a claim under New York law for the unauthorized use of her likeness as the use of her image in a comedy film does not constitute use for advertising purposes or purposes of trade within the meaning of Sections 50 and 51 of New York's Civil Rights Law.

Background

Defendants were the creators and distributors of the movie *Couples Retreat*, a comedy that tells the story of four Midwestern couples who travel to a fictional couples resort, "Eden West." Actors Jon Favreau and Kristin Davis play one of the couples. During a scene in the film, Favreau's character is shown in the couple's suite picking up a brochure for a sister "singles" resort, "Eden East," and briefly becoming infatuated with the bikini-clad model. He is

depicted making preparations to masturbate while viewing the brochure, but his attempt is interrupted before it begins when a waiter bringing room service barges into the room, putting a quick end to his fleeting fantasy.

The model depicted in the fictional resort brochure was the plaintiff, a professional image consultant and makeup

artist who has also worked as a nude and bikini model. The photograph at issue was taken during a 2001 photo shoot, in which plaintiff was employed to model bikini bathing suits. In connection with the shoot, plaintiff executed a broad Model Release, in which she granted perpetual rights to use her name and likeness "in any way whatsoever" and to, *inter alia*, "publish, modify or license the same in whole or in part in all media (including but not limited to, internet or television" and further agreed to waive any right to control the use of the images and to release any claims, including but not limited to "all claims and demands relating to libel, invasion of privacy ... and violation of publicity rights," that might arise in connection with any future modification or use of the photographs.

Subsequently, photographs from the 2001 shoot, including the photograph used in *Couples Retreat*, were made available for

commercial use through various stock photo licensing companies, which listed the photograph as "Young woman in bikini on beach." Universal Pictures obtained and paid for a

(Continued on page 11)



The plaintiff brought suit, contending that defendants' use of the photograph in *Couples Retreat* had caused her emotional distress, embarrassment and harmed her reputation as a professional image consultant and make up artist.

(Continued from page 10)

license to use the photograph in the movie. Defendants did not alter the photo, but simply inserted it into the prop brochure used in the film. The image of plaintiff appeared on screen for a total of nine seconds of the film.

The plaintiff brought suit, contending that defendants' use of the photograph in *Couples Retreat* had caused her emotional distress, embarrassment and harmed her reputation as a professional image consultant and make up artist. Her complaint alleged three causes of action: unauthorized use of her likeness in violation of Section 51 of the New York Civil Rights Law, defamation and unjust enrichment.

The plaintiff conceded that she had signed the Model Release, but contended that she did not consent to the use in the movie—which she described as a “derogatory and humiliating” context—and argued that defendants had altered the photograph in such a manner that the use was not covered by the release. Defendants moved to dismiss, contending that the Model Release barred all of plaintiff's claims and that, alternatively, she had failed to state a valid claim because no commercial use of her likeness had been made, the use of her image was not defamatory as a matter of law, and her unjust enrichment claim was preempted by Section 51. The trial court granted the motion and dismissed the complaint with prejudice.

Right of Publicity Claim

In support of her claim for violation of privacy and right to publicity under Section 51 of the Civil Rights Law, plaintiff alleged that defendants “published her likeness in a vulgar context . . . and thereby used her picture and likeness for advertising purposes or for the purposes of trade” without obtaining written consent. In making this argument, the plaintiff relied primarily on a 1959 decision in *Russell v. Marboro Books*, 18 Misc. 2d 166 (Sup. Ct. NY County 1959), in which a photograph created for a text book advertisement of a model in a single bed reading a book was altered and then used by a third party without authorization in a salacious advertisement. *Russell* found that, under the circumstances present there, a claim could be stated.

Rejecting the plaintiff's claims here, the court first found that the Model Release was far broader than the release at issue in *Russell* and was not limited to a specific photo, and thus provided written consent to use plaintiff's photograph. The Model Release further released all claims based on that use, including claims for invasion of privacy or violation of

publicity rights. According to the court, clear written language of the Model Release reflected that the photo might be used in an unanticipated manner, but plaintiff nevertheless waived any right to inspect or approve the final product. The court therefore concluded that plaintiff waived any right to object to the material “with which her photo might be juxtaposed.”

Significantly, the court also recognized and adopted a second independent legal ground for dismissing plaintiff's right of publicity claim; namely, that the use of the photo in the movie does not constitute a use for advertising or purposes of trade within the meaning of Section 51. Thus, the court joined other New York courts which have held that the use of a person's likeness in movies or other entertainment media is not actionable as a “use for advertising or purposes of trade” under Section 51.

Defamation

Plaintiff alleged that she was defamed when “defendants published her photograph . . . in a degrading and vulgar context as a prop for a masturbation scene,” as such publication could lead viewers to “reasonably but falsely” understand that she “is the type of person who would agree to having her photograph . . . used publicly as an object for masturbation.” As with her claim for invasion of privacy, the court held that the plaintiff had “released any such claim” pursuant to the Model Release. The court further found that plaintiff's “failure to contest” defendants' dispositive argument that the use of the photo was non-defamatory as a matter of law provided an “independent ground to grant the motion to dismiss the defamation claim.”

Unjust Enrichment

In support of her unjust enrichment claim, plaintiff alleged that defendants were “unjustly enriched as a result of their unauthorized use of plaintiff's photograph.” The court dismissed the cause of action as “pre-empted by section 50 and 51 of the Civil Rights Law,” which “preempts all common law claims based on unauthorized use of name, image, or personality, including unjust enrichment claims.”

NBC Universal and Universal City Studios LLLP were represented by Robert Pechina and Amanda M. Leith of the New York office of Levine Sullivan Koch & Schulz, L.L.P., and plaintiff was represented by Thomas M. Mullaney.

Ninth Circuit Dismisses Right of Publicity Claims Over UK Newspaper's CD Promo

Token Sales Not Enough To Sustain Choice of US Law

By Harry Melkonian

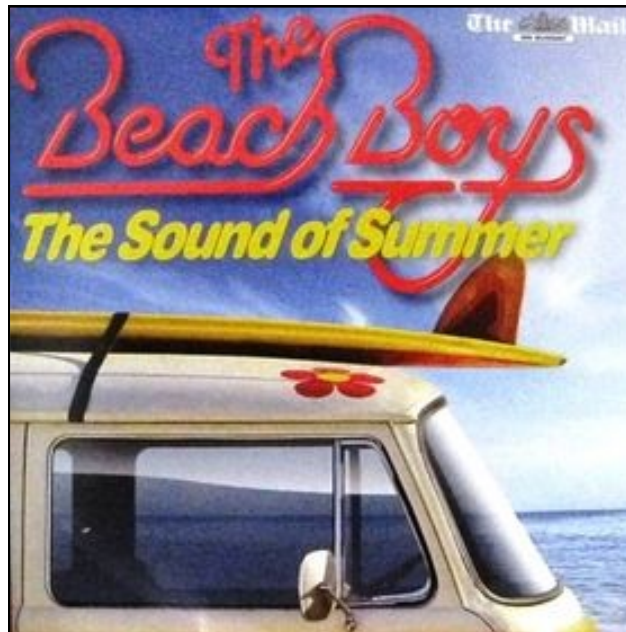
In a decision that may find application in a variety of trans-national media disputes, the Ninth Circuit affirmed dismissal of Lanham Act and right of publicity claims in a case involving well-known musicians connected with the Beach Boys. *Love v. Associated Newspapers, Ltd*, 611 F3d 601 (9th Cir July 2010) (Thomas, Silverman, Fogel, JJ.).

This case, filed in the Central District of California, pitted Mike Love, a resident of Nevada, one of the founding members of the Beach Boys against Brian Wilson who was not only one of the founding members but was also the composer of many of that group's most notable hits; also named as defendants were various European entities that were involved in the widespread distribution of a free CD with the UK newspaper *Mail on Sunday*. The CD included Brian Wilson's solo version of some iconic Beach Boys hits. The CD jacket contained photographic images of the original Beach Boys, including Mike Love.

Love had previously acquired exclusive rights to use the Beach Boys trademark in live performances. He contended that the cover of the CD infringed both California statutory and common law rights of publicity as well as trademark claims under the federal Lanham Act. Significantly, British law does not furnish a cause of action in any way analogous to California's common law or statutory rights of publicity. With respect to Love's

right of publicity claims, the fact most central to the court's decision was that approximately 2.6 million copies of the CD were distributed with the *Mail* in the UK and Ireland, only 425 copies of the newspaper were distributed in the US and only 18 in California, and, none of the US copies contained the complained of CD.

Indeed, the only CDs found in the US were evidently acquired by someone affiliated with plaintiff's counsel through eBay and were kept by counsel in his office and had never entered the stream of commerce in the US. *See* 611 F3d at 608.



Plaintiff Mike Love contended that the cover of the CD infringed both California statutory and common law rights of publicity as well as trademark claims under the federal Lanham Act. Significantly, British law does not furnish a cause of action in any way analogous to California's common law or statutory rights of publicity.

Choice of Law Analysis

Using California choice of law methodology, the right of publicity claims were dismissed. California employs a governmental interest test for conflicts that has several components:

1. The court examines the substantive law of each jurisdiction to see where they differ.
2. If the laws differ, the court must determine whether both jurisdictions have an interest in having their law applied to the dispute.
3. If both jurisdictions have a legitimate interest, the court must apply the law of the jurisdiction whose interest would be most impaired if its laws were not applied to the dispute. Only if both jurisdictions have a legitimate

(Continued on page 13)

(Continued from page 12)

interest is a true conflict of laws situation presented. 611 F3d at 610.

While California has both statutory and common law rights of publicity, the UK has neither. However, the court concluded that a conflict of laws was not present because California did not have a legitimate interest in having its laws applied. None of the parties were resident in California and only *de minimis* copies of the offending CD were present in the State. On the other hand, the UK's interest in applying its laws (or the lack thereof) was paramount as the newspaper was British and virtually all of the copies were distributed in that jurisdiction.

California's interest was in protecting or safeguarding its citizens from diminution in the value of their names and likenesses and this interest was notably absent. The court added that even if California had a sufficient interest to create a true conflict of laws situation, UK law would still prevail because the UK interest in the millions of copies of newspapers in that country far exceeds California's interest in only a few copies. The court added, in dictum, that while the UK does not recognize a right of publicity, it does offer stronger protections against defamation. See 611 F3d at 611.

The willingness of the American court to apply UK law even though the application of that law was equivalent to a defense judgment, could be a sound persuasive argument in other situations, such as so-called Libel Tourism cases filed

in England or other nations. For example, using the reasoning of the *Love* decision, the English court in its now infamous decision against Rachel Ehrenfeld might have reasoned that English interests in having its law applied were *de minimis* based on the citizenship of the parties and the handful of copies present in London compared to the enormous distribution in the US. Of course, being fair to the High Court, *Ehrenfeld* was a default judgment and the court was never presented with a conflict of law argument.

While the *Love* case may not be breaking new ground, its timing is fortuitous as Libel Tourism is a matter of current sensitivity. The *Love* decision, by demonstrating American restraint in extraterritorial application of its speech-related laws, could furnish a compelling basis for courts in other nations to feel similarly restrained when confronted with situations where the interests at stake are primarily American.

Harry Melkonian is a lawyer with Melkonian & Co, Solicitors, Sydney Australia. Kelli Sager, Davis Wright Tremaine LLP, represented Associated Newspapers, publisher of the Mail on Sunday.

Philip H. Stillman, Stillman and Associates, Cardiff, CA, represented plaintiff. Barry E. Mallen, Manatt, Phelps & Phillips, LLP, Los Angeles, CA; and Howard L. Weitzman, Kinsella Weitzman Iser Kump & Aldisert LLP, Santa Monica, CA, represented Sanctuary Records Group, Ltd. Neville L. Johnson, Johnson & Johnson LLP, Beverly Hills, CA, represented defendant BigTime.tv.

Fifth Circuit Affirms Dismissal of Roger Clemens' Libel Suit Against Trainer

Finds a Lack of Minimum Contacts with Texas

A divided Fifth Circuit panel recently affirmed dismissal of a defamation suit brought by Roger Clemens against his former athletic trainer, finding that the allegedly defamatory statements made by the defendant about steroid use had too tenuous a connection to the forum state of Texas to support personal jurisdiction. [*Clemens v. McNamee*](#), No. 09-20625, 2010 U.S. App. LEXIS 16718 (August 12, 2010) (Davis, Smith, Haynes, JJ.).

On appeal, the plaintiff argued simply that the defendant's defamatory statements were sufficient to confer specific personal jurisdiction. The Fifth Circuit disagreed, holding that the plaintiff had failed to establish minimum contacts because the statements giving rise to the cause of action were not "aimed at or directed to Texas."

Background

Plaintiff Roger Clemens resides in Houston, Texas, and is well-known as a Major League Baseball player. Defendant Brian McNamee trained Clemens for the Toronto Blue Jays, and later for the New York Yankees. During the course of this training, McNamee made numerous business trips to Texas to train Clemens.

In 2007, McNamee made statements to government investigators that he had injected Clemens with performance-enhancing drugs several times, and that these injections had occurred in Toronto and New York. McNamee later made similar statements to a Congressional Commission investigating the use of performance-enhancing drugs in Major League Baseball. These statements were published by newspapers and news services nationwide. McNamee also repeated these statements to a reporter in Queens, New York, who posted an article containing these statements to the website SI.com, in January 2008.

In 2008, Clemens sued for defamation in Texas state court. McNamee removed the action to federal court in Texas and then moved to dismiss for lack of personal jurisdiction. Since the Texas long-arm statute reaches to constitutional limits, the district court resolved the personal jurisdiction problem as a matter of constitutional due process. The court focused on 1) purposeful availment, 2) minimum contacts with the forum state, and 3) the satisfaction of traditional notions of fair play and substantial justice. Drawing from the Supreme Court's opinion in *Calder v. Jones*, 465 U.S. 783 (1984), the court held that a plaintiff in a defamation action must show that the statements in question were focused on the forum state, in order to satisfy a minimum contacts analysis. The district court granted the dismissal, holding that Clemens had failed to show that the defendant's statements were sufficiently focused on Texas. *Clemens v. McNamee*, 608 F. Supp. 2d 811, 820 (S.D. Tex. 2009).

Fifth Circuit Decision

On appeal, Clemens argued that sufficient contacts were established because the defendant knew that he lived in Texas, and could foresee that the brunt of the reputational harm would be felt in Texas. The Fifth Circuit disagreed.

The Fifth Circuit reiterated the district court's stance that plaintiffs in a defamation case must show that the forum state was the focus of the defamatory communication. *Clemens*, *10-12 (citing *Calder v. Jones*, 465 U.S. 783 (1984); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005); *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002)). The court noted that the defendant's statements were not made in Texas, and did not concern any activity that took place in Texas. Moreover, the plaintiff had not shown that the statements in question were "aimed at or directed to Texas" any more than to any other state.

Judge Haynes submitted a strongly-worded dissent. He claimed that since the "training relationship" between Clemens and McNamee developed in Texas, and since the statements arose in the context of that training relationship, that the statements were sufficiently connected to Texas to confer personal jurisdiction. But for the defendant's multiple business trips to Texas, the statements would never have arisen.

Nonetheless, the majority held, the plaintiff had not satisfied his prima facie burden, and personal jurisdiction could not be conferred over the defendant.

Roger Clemens was represented by Russell Hardin, Jr., Lara Hudgins Hollingsworth, and Joe Mac Roden, of Rusty Hardin & Associates, Houston, TX. Brian McNamee was represented by David Richard Miller, Houston, TX; Richard D. Emery and Debra L. Greenberger of Emery Celli Brinckerhoff & Abady, L.L.P., New York, NY; and Earl S. Ward, Law Offices of Earl S. Ward, New York, NY.

Judge Issues Prior Restraint Against Legal Newspaper

POM Wonderful Seeks – And Then Dismisses – Injunction Against Publication Of Information Lawfully Obtained From Public Court Files

By Bruce D. Brown and Laurie A. Babinski

The National Law Journal successfully fought off a prior restraint after a District of Columbia Superior Court judge decided to “throw 80 years of First Amendment jurisprudence out the window” in late July by enjoining the legal newspaper from publishing information lawfully obtained from public court files about a regulatory investigation into pomegranate juice maker POM Wonderful, LLC.

POM filed a complaint against The National Law Journal and its parent company, ALM Media, after it learned that the paper planned to publish the details of a fee dispute between the California-based company and its former counsel that were contained in court files a trial judge had sealed but which were left in the public file due to a clerical error. The details included the identity of the regulatory agency – later revealed to be the Federal Trade Commission – conducting an investigation into POM’s business practices.

The injunction was vacated at POM’s request eight days later after The National Law Journal filed an emergency appeal with the District of Columbia Court of Appeals. That appeal was followed by an amicus brief filed on behalf of nine media companies and organizations decrying the prior restraint as blatantly unconstitutional. The filings drew a firestorm of media attention, including an editorial in The Washington Post, that highlighted the existence of the very investigation that POM had sought to shield from public view.

Background

According to an affidavit filed in Superior Court, National Law Journal reporter Jeff Jeffries went to the clerk’s office on July 15 to review the public court file in a fee dispute case filed by Hogan & Hartson LLP, now Hogan Lovells, against its former client POM over \$666,000 in unpaid legal bills. Jeffries viewed the public docket on a computer terminal in the clerk’s office. He printed several of the pleadings on a printer located behind the clerk’s counter, and the court

official handed him the documents after he paid a \$61.00 fee.

None of the documents Jeffries printed was marked as sealed and no one working in the clerk’s office indicated that they had been placed under seal or were confidential. The documents contained the names of the lawyers involved in the Hogan-POM case and stated that the fee dispute arose from POM’s retention of Hogan to represent the company in an FTC inquiry.

On July 19, Jeffries telephoned Barry Coburn of Coburn & Coffman P.L.L.C. who was listed on the docket as POM’s lawyer. When Coburn returned the call, Jeffries told him that he was working on a story about the fee dispute and wanted to give POM the opportunity to comment. Jeffries also told Coburn that he knew that POM had hired Hogan to handle an FTC inquiry. Coburn indicated that he would contact his client and be back in touch.

On July 22, Coburn again called Jeffries and asked several questions about the article, including whether Jeffries planned to mention that the fee dispute was related to an FTC inquiry. When Jeffries responded in the affirmative, Coburn said he would see if he could respond on the record. At no time did Coburn tell Jeffries that the information was incorrect or inform him that it was subject to a sealing order. Jeffries never heard back from Coburn.

Several hours later, Coburn filed suit against The National Law Journal and ALM along with a motion for a temporary restraining order or preliminary injunction that sought to prohibit the newspaper from publishing the identity of the regulatory agency or any details about the investigation that Jeffries had legally obtained from the public court file.

Superior Court Judge Imposes Prior Restraint

Early the next afternoon, Superior Court Judge Judith Bartnoff – the same judge who had ordered the Hogan-POM

(Continued on page 16)

(Continued from page 15)

materials sealed – granted POM’s motion for a preliminary injunction against The National Law Journal.

In a hearing lasting more than two hours, Judge Bartnoff acknowledged over 80 years of prior restraint precedent invalidating injunctions prohibiting the publication of truthful information even where interests such as national security or fair trial rights are at stake. But she rejected the application of that precedent to the facts at hand, holding that an oral sealing order she had entered in open court weeks earlier trumped the newspaper’s First Amendment right to publish information obtained in the documents.

“If I am throwing 80 years of First Amendment jurisprudence on its head, so be it,” Judge Bartnoff said. “None of that First Amendment jurisprudence, to my knowledge, is dealing with this issue – the integrity of the functioning of the court system.”

Judge Bartnoff’s order was entered just as The National Law Journal was coming up on its weekly deadline, forcing the publication to make last-minute edits to strike from the article any reference to the FTC. The newspaper went to press instead with a front-page note to readers informing them that it had been ordered not to publish information it had lawfully obtained from court files.

National Law Journal Files Emergency Appeal

In the early morning hours of July 28, The National Law Journal filed an emergency appeal in the District of Columbia Court of Appeals arguing that the prior restraint was both unprecedented and unconstitutional.

The newspaper’s brief traced the decades of Supreme Court precedent refusing to uphold prior restraints even when the issues at stake were of paramount national importance. The brief stated that the Supreme Court had “*never* upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial,” whereas “the prior restraint in this case was obtained by a

privately-held beverage manufacturer to prevent the public from learning the identity of the regulatory agency that is investigating the company.”

Moreover, The National Law Journal emphasized that any purported commercial interest asserted by POM was insufficient to support a prior restraint. For example, in *Procter & Gamble v. Bankers Trust Co.*, the Sixth Circuit reversed two temporary restraining orders and a permanent injunction against Business Week magazine after it obtained documents sealed pursuant to a protective order from a law firm representing the defendant in a business dispute.

Finally, the brief set forth precedent in the Supreme Court and other federal appellate courts steadfastly refusing to

punish the press for the publication of information inadvertently made available by courts or public officials. For example, in *Cox Broadcasting Corp. v. Cohn*, the Supreme Court refused to punish the publication of a rape victim’s name obtained from indictments inadvertently made available during the trial of her alleged rapist. Similarly, in *Florida Star v. B.J.F.*, the Supreme Court overturned award of damages to a sexual assault victim whose name was accidentally made public by a Florida sheriff’s department.

The holdings of these and other cases made clear that the accidental release of confidential information to the public does not permit a second mistake, one of constitutional magnitude, of imposing liability for publication of the information. It followed that if The National Law Journal could not be held liable for damages for publishing truthful

information, it could not be enjoined from publishing that same information.

Media Amicus Brief

On July 30, nine media companies and organizations across the country led by The Washington Post filed an amicus brief in support of The National Law Journal’s appeal. The amicus brief – also filed on behalf of The New

(Continued on page 17)

POM filed a complaint against The National Law Journal and its parent company, ALM Media, after it learned that the paper planned to publish the details of a fee dispute between the California-based company and its former counsel that were contained in court files a trial judge had sealed but which were left in the public file due to a clerical error.

(Continued from page 16)

York Times, The Reporters Committee for Freedom of the Press, The American Society of News Editors, The Society of Professional Journalists, The Associated Press, Dow Jones, Gannett and NPR – noted that “it is an extraordinary thing for a court to prohibit publication of information obtained from its files, and it is no excuse that the information should have been sealed in the first place.”

The amicus brief drew even more attention to the prior restraint, which had already gained significant traction in the national press. A Washington Post editorial headlined “Muzzling the Press” called the Judge Bartnoff’s decision “extraordinary – and extraordinarily bad.” It also asked court officials to examine why the files were left unsealed and at the same time admonished that “trampling on the First Amendment must never be the solution.”

An online post from The New Yorker titled “The Pomegranate Papers” noted that Judge Bartnoff had “apparently decided that different standards apply to pomegranate juice than to national security.” It also pointed out the “special irony” of the prior restraint because POM’s owner, Lynda Resnick, was an unindicted co-conspirator in the Pentagon Papers case.

POM Requests Withdrawal Of Injunction

Just hours after the amicus brief was filed, POM moved to withdraw the injunction as well as its complaint. Judge

Bartnoff granted the motion just as The National Law Journal was again approaching its weekly deadline, but not before stating that she stood by her decision to impose the preliminary injunction pending resolution of the case on its merits.

The National Law Journal immediately posted the identity of the regulatory investigating POM – the FTC – online. The same information appeared in its next weekly edition and all over the news media.

The fee dispute between Hogan and POM is still pending in the District of Columbia Superior Court. On September 15, POM sued the FTC in the U.S. District Court for the District of Columbia claiming the agency had created a new standard for the evaluation of deceptive advertising that infringed on the pomegranate juice maker’s free speech rights.

On September 27, the FTC filed an administrative complaint against POM alleging that the company made numerous false and unsubstantiated health claims in advertisements for its products.

Bruce D. Brown and Laurie A. Babinski of Baker & Hostetler LLP in Washington, D.C. represented The National Law Journal and its parent company, ALM Media, along with ALM Chief Legal Officer Allison Hoffman and deputy general counsel Fabio Bertoni. Kevin Baine and Carl Metz of Williams & Connolly represented the media amicus group. Barry Coburn of Coburn & Coffman P.L.L.C. represented POM Wonderful, LLC.

NFL Sacked by the Sherman Antitrust Act

Merchandise Licensing Subject to Antitrust Law

By Paul Riehle and Matthew G. Stein

In a ruling that is still sending tremors across professional sports leagues, the U.S. Supreme Court held that the licensing activity (e.g., selling branded merchandise items like jerseys, hats and t-shirts) of the National Football League, its 32 separately owned teams, and the teams’ jointly owned affiliate is concerted activity subject to antitrust scrutiny.

The U.S. Supreme Court’s unanimous decision in [*American Needle Inc. v. National Football League et al.*](#), No. 08-661, 2010 WL 2025207 (May 24, 2010), may change how professional sports leagues do business with outside vendors. The Supreme Court’s ruling struck a significant blow to the

long-standing joint venture between the NFL and its 32 member teams to license and market team-owned trademarks through a single entity. The Court’s rejection of the NFL’s request for a categorical exemption also means that other restrictions by the NFL and other sports leagues are subject to the purview of the antitrust law.

Background

The NFL is an unincorporated association of separately owned professional football teams. Each team owns its own

(Continued on page 18)

(Continued from page 17)

intellectual property and fights for publicity and a wide fan base. In order to develop, license, and market its intellectual property, in 1963 the league formed a distinct legal entity, known as the National Football League Properties (NFLP). For 37 years, the NFLP granted nonexclusive licenses to companies that manufacture and sell team apparel.

In 2000, the 32 NFL teams voted to authorize NFLP to grant exclusive licenses, and NFLP gave Reebok International Ltd., an exclusive 10-year license to produce and sell trademarked headwear for all of the NFL teams. American Needle, which had made and sold headwear under a nonexclusive license for 20 years, sued challenging the agreements under Section 1 of the Sherman Antitrust Act. Section 1 outlaws contracts, combination or conspiracies which unreasonably restrain trade.

In 2007, the district court granted the NFL entities summary judgment on the basis that the NFL member teams operated as a single entity through the NFLP to market and promote NFL football and so was immune from antitrust liability. In 2008, a unanimous three-judge panel of the 7th U.S. Circuit Court of Appeals, affirmed, ruling that the teams' concerted efforts were required to produce "NFL football," which competes against other forms of entertainment. The panel likened the legal issue to "a Zen riddle," asking, "Who wins when a football team plays itself?"

Petition for Certiorari

American Needle petitioned for Supreme Court review. The NFL defendants, joined by the NBA and the NHL, in hindsight committed a costly turnover by making the unusual request of urging review even though they had prevailed in the lower courts. The NFL defendants hoped to gain across-the-board immunity to antitrust law.

The NFL defendants argued that they were incapable of "conspiring" with respect to the exploitation of intellectual property rights because the NFL, its teams and the NFLP act as a "single entity." They contended that a decision otherwise "would convert every league of separately owned clubs into a

walking antitrust conspiracy," and bring a legal challenge to any decision that the teams make collectively, such as scheduling or marketing.

Supreme Court Decision

Justice John Paul Stevens, who grew up as a sports enthusiast and began his career as an antitrust lawyer, authored the Supreme Court decision rejecting the NFL's position. Justice Stevens focused on whether the NFL were "independent centers of decision making" for their intellectual property. He concluded that the NFLP is simply an "instrumentality of the teams" because the teams were "separately controlled, potential competitors with economic interests distinct from NFLP's."

Justice Stevens explained that NFL teams directly compete against each other on numerous levels. Identifying last year's Super Bowl competitors, the New Orleans Saints and the Indianapolis Colts, Justice Stevens noted that teams compete against each other "to attract fans, for gate receipts and for contracts with managerial and playing personnel." The teams compete in the market for intellectual property and, therefore, "[t]o a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks."

"Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that 'deprive the marketplace of independent centers of decision making ... and therefore of actual or potential competition.'" Just because NFL

teams may be members of an organization, the NFLP, to jointly market and license its brand and logos, it does not mean the NFL can escape antitrust scrutiny. "If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from" antitrust law, Justice Stevens wrote, "then any cartel could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products."

The Court also rejected the argument that NFL teams

(Continued on page 19)

The Court rejected the argument that NFL teams need each other to play an NFL season, analogizing "a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to" antitrust scrutiny.

need each other to play an NFL season, analogizing “a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to” antitrust scrutiny.

In *American Needle*, the Supreme Court ruled that the joint venture was not immune from the antitrust laws. There was no ruling about whether Section 1 had, in fact, been violated. Rather, the Court “punted” the case back to the lower court to consider whether the joint activity violates Section 1 under the “Rule of Reason.” The NFL can still argue that the pro-competitive benefits of joint NFLP licensing outweigh the anti-competitive harms. Moreover, to prevail on remand, *American Needle* will have to prove, among other things, that the NFL has market power in a relevant market, such as licensing the use of trademarks and other intellectual property.

Impact of Decision

The implications of the Court’s ruling are being widely speculated in the sports world and legal community. Had the NFL prevailed on its request for immunity in *American Needle*, the NFL might have sought to expand the immunity to areas such as ticket pricing and television viewing. As for the intellectual property licensing implications, the ruling may result in the lower court prohibiting the 32 NFL teams’ joint venture to license and market their individually owned teams through a single entity.

The decision appears unlikely to have a significant impact on the NFL’s press credential policies. The Court cited the NFL teams’ shared “interest in making the entire league successful and profitable” as providing “a perfectly sensible justification for making a host of collective decisions.”

The NBA, NHL, MLS, NASCAR and the NCAA publicly supported the NFL, hoping the high court would expand broad antitrust exemption to other sports. However, the Supreme Court’s decision sends the message to these professional sports leagues that their own goals for single entity immunity will not materialize.

Perhaps the answer to “who wins when a football team plays itself?” is “the fans.” In the end, by ruling against the most powerful sports league in the country, the country’s highest court may have been looking out for the fans.

Paul Riehle is a partner in Sedgwick, Detert, Moran & Arnold LLP’s San Francisco offices. Matthew G. Stein, an associate in Sedgwick, Detert, Moran & Arnold LLP’s Los Angeles office.



2010-11 UPCOMING EVENTS

MLRC Annual Dinner

November 10, 2010
Grand Hyatt, New York, NY

[For more, click here](#)

MLRC Forum

November 10, 2010
Grand Hyatt, New York, NY

[For more, click here](#)

DCS Annual Meeting

November 11, 2010
Proskauer Rose Conference Center
New York, NY

California Chapter Luncheon Meeting

December 15, 2010
Southwestern Law School
Los Angeles, CA

[For more, click here](#)

MLRC/Southwestern Entertainment Law Conference

January 20, 2011
Los Angeles, CA

MLRC/Stanford Digital Media Conference

May 19-20, 2011
Palo Alto, CA

London Conference

September 19-20, 2011
(In-house counsel breakfast Sep 21st)
London, England

Supreme Court Upholds Statute Prohibiting “Material Support” to Terrorist Organizations

Content Based Prohibition Upheld

In a 6-3 decision, the Supreme Court upheld the constitutionality of a federal statute that makes it a crime to provide material support to designated foreign terrorist organizations. *Holder, et al. v. Humanitarian Law Project, et al.*, No. 08-1498 (June 21, 2010). In a decision written by Chief Justice Roberts and joined by Justices Stevens, Scalia, Kennedy, Thomas and Alito, the Court held that the statute, as it would be applied to a group that intended to facilitate the lawful, nonviolent purposes of a foreign terrorist group, does not violate the Constitution because served serious national security interests and did not extend to criminalize independent advocacy.

Background

The statute at issue, 18 U.S.C. 2339B, makes it a federal crime to “knowingly provide material support or resources to a foreign terrorist organization.” “Material support or resources” is defined to include “training,” “expert advice or assistance,” “personnel,” and “service” as well as various other activities. An organization is designated to be a “foreign terrorist organization”, as determined by the Secretary of State.

The plaintiffs, U.S. citizens and domestic organizations, sought to provide support for the humanitarian and political activities of two groups that were designated as foreign terrorist organizations, the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).

The plaintiffs wished to provide support in the form of training and teaching members of PKK on “how to use humanitarian and international law to peacefully resolve disputes,” “how to petition various representative bodies such as the United Nation for relief,” and how to engage in political advocacy on behalf of both groups. Plaintiffs challenged the constitutionality of the statute under the Fifth Amendment Due Process Clause and the First Amendment

rights of freedom of speech and association.

The district court granted partial summary judgment to plaintiffs on vagueness grounds and the United States Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari to determine whether 18 U.S.C. 2339B is unconstitutionally vague under the Fifth Amendment Due Process Clause and whether the criminal prohibitions on the provision of “expert advice or assistance” are unconstitutional with respect to association and speech that furthers only lawful, nonviolent activities of proscribed organizations under the First Amendment.

Knowledge

Plaintiffs argued, as a threshold matter, that the statute was inapplicable to them because plaintiffs did not meet the knowledge requirement of the material-support statute. Plaintiffs contended that to “knowingly provide material support” meant that a defendant must have intended to further a foreign terrorist organization’s illegal activities to be guilty under the statute, as in *Scales v. United States*,

367 U.S. 203, 220-222 (1961).

In *Scales*, the Court held that a person could not be convicted under a statute prohibiting membership in a group advocating the violent overthrow of the government, unless he had knowledge of the group’s illegal advocacy and specific intent to facilitate violent overthrow. Since plaintiffs here never intended to further the group’s illegal activities, they argued that they should not be prosecuted under the statute. The Court dismissed this argument, distinguishing *Scales* by stating that §2339B, prohibits providing “material support” to a terrorist group and not mere membership in a terrorist group.

Therefore, the *Scales* specific intent requirement did not

(Continued on page 21)

(Continued from page 20)

apply to §2339B. The court held that the statutory language was clear that the knowledge requirement of the statute refers to whether the individual supplying the support, knew that the organization was connected to terrorism and not whether he specifically intended to further the organization's illegal aims.

Due Process

Plaintiffs argued that the statute was vague and provided no clear notice of what constituted prohibited conduct and thus violated the Fifth Amendment Due Process Clause. The Court however, found that the challenged statutory terms, "training," "expert advice or assistance," "service," and "personnel," were not open to any real subjective interpretation as applied to plaintiff's proposed conduct. The "dispositive point" was that plaintiff's proposed activities were clearly within the language of the statute and any person of ordinary intelligence would understand that the statute prohibits these activities.

Although the Court left open the possibility that a different fact pattern could lead to a determination that the statute violates due process by inhibiting legal activities, it dismissed the plaintiffs' hypothetical situations and held that the plaintiffs cannot receive relief for a problem that has not been presented in their case.

Freedom of Speech

Since the statute clearly prohibited speech giving "expert advice or assistance" to designated groups, the Court applied a heightened standard of review – and rejected the government's request that it apply intermediate scrutiny. Then Solicitor General Elena Kagan argued that the statute only regulated conduct and could be analyzed under the intermediate scrutiny standard of *US v. O'Brien*, 391 U.S. 367 (1968). Although the majority did not use the phrase "strict scrutiny" it appeared to measure it by whether it was narrowly tailored to serve a compelling government need. The dissenting opinion faulted the Court for not being clear on this point.

The Court reasoned that the statute did not prohibit the plaintiffs from saying anything about terrorist organizations through independent advocacy. The statute only prohibited

speech that provides material support "coordinated with or under the control" of the terrorist group, which was acceptable because "the Government's interest in combating terrorism is an urgent objective of the highest order."

Plaintiffs also argued that application of the statute to their activities was unnecessary because banning their activities would not help fight terrorism and would prohibit legitimate legal activities. The Court disagreed, deferring to Congress' foreign policy judgment that, "All contributions to foreign terrorist organizations -- even those for seemingly benign purposes -- further those groups' terrorist activities."

Thus, the Court found that even material support that was intended to promote lawful conduct could still further terrorism. For example, plaintiff's advice and assistance could further terrorism by freeing up the group's resources, by adding legitimacy to their activities and by teaching them how to raise funds. The Court held that the specific activities that the plaintiffs intended to undertake, qualified as coordinated assistance to the terrorist group.

The Court did stress though, that its holding narrowly applied to the specific activities proposed by these plaintiffs and that it was possible that future applications of the statute could be found to violate the right to free speech.

Freedom of Association

Finally, the plaintiffs argued that the statute violates their First Amendment right of freedom of association because the statute makes it illegal for them to associate with certain organizations. Plaintiffs argued this case was similar to cases where the Court overturned sanctions against people who joined the Communist Party. The Court rejected this claim, stating that "the statute does not penalize mere association with a foreign terrorist organization." The Court emphasized the fact that here, the plaintiffs were not just attempting to associate with the terrorist groups, but were attempting to provide support to the terrorist groups, which was an activity beyond association.

Dissent

In dissent, Justice Breyer, joined by Justices Ginsburg and Sotomayor, argued that the statute violated the First

(Continued on page 22)

(Continued from page 21)

Amendment by failing to provide adequate justification for hindering the plaintiffs' rights under the proper level of strict scrutiny. The government, he argued, provided no empirical evidence showing that prohibiting plaintiffs' activities would help achieve the statute's goal of preventing terrorist attacks. The majority had instead, relied solely on some of Congress' concerns when it made their decision, which the dissent found to be an inadequate basis for inhibiting the plaintiff's freedom of speech.

The dissent also criticized the majority's argument that plaintiff's activities could add legitimacy to terrorist organizations stating, "Speech, association and related activities on behalf of a group will often, perhaps always, help to legitimate that group Once one accepts (the majority's) argument, there is no natural stopping place."

The dissent also found the majority's use of the term "coordinated" to distinguish between legal and illegal types of activities, to be weak and unclear, since such a classification is unreliably subjective. The dissent believed that the statute should instead be read to require a defendant's specific knowledge and intent to provide support for terrorist ends, in order to preserve plaintiff's constitutional rights of speech and association.

Holder is a rare case in which the Court has upheld a content-based restriction on speech. Whether it will have any impact beyond the war on terrorism remains to be seen.

The Humanitarian Law Project, et al. was represented by David D. Cole of the Georgetown University Law Center in Washington, D.C. Then Solicitor General Elena Kagan, argued the case on behalf of the Department of Justice.

GOT A SCOOP?

LET US KNOW!

medialaw@medialaw.org

212-337-0200



©2010

MEDIA LAW RESOURCE CENTER, INC.

**520 Eighth Ave., North Tower, 20 Fl.,
New York, NY 10018**

BOARD OF DIRECTORS

Kenneth A. Richieri, Chair

Marc Lawrence-Apfelbaum

Dale Cohen

Henry S. Hoberman

Ralph P. Huber

Eric N. Lieberman

Robert Nelon

Karole Morgan-Prager

Elisa Rivlin

Susan E. Weiner

Kurt Wimmer

STAFF

Executive Director

Sandra Baron

Staff Attorneys

Maherin Gangat

Katherine Vogeles Griffin

Robert Hawley

David Heller

MLRC Fellow

Janine Tien

MLRC Institute Fellow

Peter Ostrovski

MLRC Administrator

Debra Danis Seiden

Publications Assistant

Jacob Wunsch

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

Libel Reform, CFA's, Phone Hacking Scandal, Super Injunctions, ECHR Updates

By David Hooper

Underlining the fact the last few months in the United Kingdom has been largely about what is to happen rather than what has happened, one of the most significant developments was the statement on 9 July by Lord McNally, Minister of Justice in the new coalition government, about the government's plans for libel reform. This arose during the second reading of the Defamation Bill introduced by Lord Lester of Herne Hill QC on 9 July about which I have written earlier.

Lord McNally said that the Lord Lester's Bill had helped in formulating the government's thinking. He recognised the need to strike a balance between freedom of expression and the protection of reputation which he indicated was a difficult and sensitive exercise. However, Lord McNally stated that the government was committed to reforming the law on defamation. They wanted the investigative journalism and scientific research to be able to flourish without the fear of unfounded lengthy and costly libel actions. Hearing these words Lord Lester was moved to observe that he "*wondered if I'm alive at all or whether I'm in heaven, because I never thought to have a reply of that kind*".

The upshot is that the government will, in March 2011, publish a Defamation Bill. The government does not rule out the possibility of legislation including provisions relating to the law of privacy. The government, however, may take the view that the development of the law of privacy is something better left to the judges. There has not been the underlying research and debate regarding legislative changes to the law of privacy to the extent that there has been in relation to the law of libel. The government continues the consultation process prior to the publication of the new Defamation Bill in March 2011.

The likelihood is that the bill will not go as far as Lord Lester's bill, but it would probably include provisions for a

single publication rule and a restriction on actions being brought beyond the normal one year limitation period by virtue of continued publication on the Internet. It does seem that government thinking has been influenced by the Simon Singh case (see MediaLawLetter [April 2010](#) at 44) and by the passing of the [Speech Act](#) in the USA, whose raison d'être was the deficiencies in the English libel law.

The government certainly wishes to find a solution which prevents continuing academic research and discussion being suppressed by powerful corporations and it wants to address the discrediting of the British libel laws by allowing cases to

be brought against US publications which are not in any meaningful sense published in the UK and which have no real connection with events or people in this country. Precisely where it will strike the balance is difficult to predict. There is a lobby which argues that the number of cases of libel tourism is very small indeed, but that is to fail to take account of the cases which never come to court and those where the chilling effect of threatened libel litigation by foreigners with a distinctly controversial – or as English libel lawyers often like to say colourful – reputations can issue multiple lawyers' letters to ensure that criticism of them is muted and undeserved apologies are extracted.

It will be of interest to see how – if at all – the deterrent effect of such libel claims on investigative journalism and non-fiction books is addressed. I would certainly hope to see at least a higher threshold for being able to bring libel claims in this country and a change in the

procedure for challenging permission being granted to serve proceedings out of the jurisdiction so that defendants have a realistic prospect of stifling the claim at its inception rather than being in the invidious catch-up position of trying to get the permission to serve proceedings out of the jurisdiction overturned.

(Continued on page 24)

The likelihood is that the bill will not go as far as Lord Lester's , but it would probably include provisions for a single publication rule and a restriction on actions being brought beyond the normal one year limitation period by virtue of continued publication on the Internet.

(Continued from page 23)

Conditional Fees

The government is also seeking consultation on the recommendations made by Lord Justice Jackson in his "Review of Civil Litigation Costs." In defamation cases the key Jackson proposals were the radical reduction of the level of success fees and a trade-off for an increase in the level of damages which would offset the fact that success fees would no longer be recoverable from the defense, nor would the enormous premiums for After The Event insurance. Again it is unclear what the government will decide, but it may very well be that only a relatively modest success fee will be recoverable from defendants when they are found liable.

These success fees will be very significantly lower than the present 100% and the recoverable rates for the success fee are likely to start at a low figure and increase gradually as the case progressed to trial and the level of risk realistically assumed by the Claimant increases. To that extent the Jackson proposal may be modified with success fees still being recoverable from Defendants, but being much lower than at present and being graduated. The Jackson proposal of ATE insurance not being recoverable from Defendants is probably more likely to be adopted.

In the meantime, CFAs continue in place and cost judges still give the Claimants the 100% uplift that they seek and are reluctant to reduce the rates claimed by Plaintiffs. A recent example of this (on 30 July) was a decision of a costs judge Master Campbell in the case of *Peacock –v- Mirror Group Newspapers*. The libel claim was settled for £15,000 – a relatively modest sum. However, Peacock's lawyers, Carter-Ruck, had entered into a CFA after the initial exchanges over the article which was published in April 2008.

If the claim was settled before proceedings were issued the success fee would have been 25%, if it was settled after proceedings had been issued, the success fee would have been 50%. A success fee would, however, rise to 100% if the case extended beyond the period of 28 days after the service of the defence. The newspaper had published a number of disobliging references to the Claimant who was the former husband of a model who was said to have made allegations about the shortcomings of her previous husband. In the latter part of October 2009, the newspaper had put in a robust defense which included some particulars of justification.

In November 2009 the claim was settled, but unfortunately just outside the 28 day period after which the success fee became 100%. It is possible – and in the nature

of things is unlikely to know the thinking of the Claimant and his advisers – that the matters raised in the defense encouraged the Claimant to settle for the relatively modest sum of £15,000. The issue, however, was whether the Carter-Ruck Conditional Fee Agreement would be upheld by the court and whether the newspaper would be ordered to pay a 100% success fee.

The newspaper had argued that the success fee should be 53% to take account of the fact that the Claimant had a 70% prospect of success in the action. However, the costs judge took the view that the newspaper failed to take the opportunity to settle the case at an earlier stage and that the Claimant stood a better prospect of having the agreed success fee of 100% approved by the court if the matter had gone a long distance towards trial.

The case underscores the fact that where there are Conditional Fee Agreements, unless a case is definitely going to be taken to court, it is important to settle at a very early stage. The problem that media Defendants face is that by robustly defending cases they run the risk of providing grist to the mill of the Claimant's advisers who can then argue that there was a significant level of risk in the case for the Claimant thereby justifying their claim for an uplift.

And the amount of the costs in the Peacock case, where it will be recollected the damages were £15,000? With the 100% uplift (but subject to detailed assessment by the court) an eye-watering £380,271.24.

Hacks Hacking

Since the royal correspondent of the News of the World, Clive Goodman and an investigator, Glen Mulcaire were jailed for six months and four months respectively for hacking in to the voicemail system of members of the Royal Family, there has been a vigorous debate as to how extensive this practice was and the extent to which politicians and celebrities were routinely hacked into. The question was also did the editor know how his newspaper was obtaining the scoops.

The issue gained an added piquancy by the fact that the then editor who resigned in the wake of the scandal protesting that he had not know the unknown has become the director of communications for the new British Prime Minister David Cameron. In recent months the Guardian have published

(Continued on page 25)

(Continued from page 24)

revelations that a number of journalists knew that the practice of such hacking was widespread and have claimed that Andy Coulson did indeed know how the scoops were backed up and what the source of the information was.

The task was not immensely difficult for an experienced hacker as most mobile telephone owners were either too lazy or too stupid to change the manufacturers' security code for their text messages or alternatively the telephone companies regularly gave out the pin numbers to the hackers who claimed that they had lost a note of the code, as they pretended to be the phone owner. As 91 such pin numbers were found during the search of the hackers' personal effects, the allegation was that this practice was very widespread.

The newspaper, and Coulson in particular, deny involvement in the wrongdoing which is attributed to a rogue reporter and they make the point that some of the informants of the Guardian and of the New York Times, who have also taken up the story, left the newspaper in less than happy circumstances. Some privacy claims have been settled by the News of the World for substantial six-figure sums, such claims are brought by a well-known publicity agent and purveyor of stories to the News of the World, Max Clifford, and by a former England football manager, and there must be a risk that other claims are in the pipeline.

The Culture Media and Sport Select Committee in the House of Commons commented on the "*collective amnesia*" of News of the World journalists in their recollections of the period. The matter was debated in Parliament on 9 September and has been referred to the Standards and Privileges Committee and is also the subject of an inquiry by the Home Affairs Select Committee. The reality is that to a lesser or greater extent there has been a whole scale disregard of data protection legislation by the English press, both tabloid and broadsheet.

However, whether the Select Committees will ever get to the truth of the matter in what is a distinctly shady and undocumented area of activity is very open to question. The solution appears to be in strengthening the data protection laws and rigorously enforcing them by significant prison sentences. A number of claims have been brought by politicians, who it seems are to be joined in this litigation by

some of the celebrities, claiming that the Metropolitan Police have breached their human rights seeking an order compelling the police to disclose the information they have about information concerning them in their possession. It seems unlikely that that litigation will get far as the courts do tend to fight shy of interfering with the exercise of discretion by the police in the investigation of crime. Raw politics – perhaps more than the law – will keep this alive.

Fair Comment

On 26 and 27 July the case of *Joseph –v- Spiller* was argued in the Supreme Court. A decision is expected in October. This was the first defamation case of the Supreme Court (previously the House of Lords) since the *Jameel* case in 2006. Media organisations were allowed to intervene. The

case should define the extent to which an opinion article needs to establish the facts upon which the comment is based and the extent to which one can look outside the terms of the article in forming a view as to whether this was a matter of comment or an allegation of fact.

Here the issue was whether comments made by the former agent of a group who used to manage the group when they repudiated their agreement with him could be viewed as a comment notwithstanding

the fact that a somewhat convoluted factual background was not set out in the comment, it had been viewed by Mr Justice Eady as an allegation of fact. The Court of Appeal had held that it was comment but it was not based on facts which were truly stated. The case is a good indication of the need to define the boundaries of fair comment and to reduce its complexity.

Another Supreme Court Decision on Reynolds?

A petition for permission to appeal has been lodged in the case of [Flood –v- Times Newspapers](#) on the basis that the decision of the Court of Appeal was retrograde and an impermissible departure from principle and that it overlooked the findings at first instance of Mr Justice Tugendhat. The Court of Appeal was strongly of the view that although the allegations were of public interest, they were very damaging

(Continued on page 26)

The reality is that to a lesser or greater extent there has been a whole scale disregard of data protection legislation by the English press, both tabloid and broadsheet.

(Continued from page 25)

to the police officer Flood's reputation – they concerned allegations of receiving corrupt payments from Russian oligarchs – and that there was a failure to verify the allegations.

The issue was the extent to which the paper should have published the leaked detail of the allegations but which subsequently were not upheld by the Independent Police Complaints Commission as opposed to merely reporting the fact of the allegation. The mere fact that allegations were made to the police and were being investigated did not in the Court of Appeal's view, give a licence to repeat those allegations. The extent of a positive obligation to verify the facts is the potential to weaken the extension of the Reynolds Defence in the *Jameel* case and is a worrying development for the media.

Super Injunctions

In April 2010 the Master of the Rolls (Head of the Court of Appeal) Lord Neuberger announced that he was establishing a committee to review the operation of super injunctions. These relate primarily to privacy claims. The case of the footballer, John Terry, where an injunction was ultimately refused by Mr Justice Tugendhat suggested that they were hitherto being granted too easily on evidence which fell short of what was required for such draconian remedies, which meant that not only would the identities of the parties and the evidence relied upon kept secret, but the fact of the proceedings could not be reported.

The Terry case also showed that Claimants were not giving sufficient notice to the relevant sections of the media who might be considering publication because as they would have an opportunity of making representations to the court at the initial proceedings rather than having to try and get the order which would by then have been obtained, set aside. It appears that Lord Neuberger's committee may be considering producing a template for the procedure to be followed and the form of the order which will be welcomed by all concerned. Statistics as to the number of super injunctions are very difficult to obtain but from the experience of in-house lawyers it looks as if there is on average about one super injunction per month.

Interlocutory injunctions are not normally granted in libel actions under the rule in *Bonnard –v- Perryman* where a Defendant indicates an intention to defend the claim.

However, on rare occasions a court can form the view that the defence has no prospect of success. This was the decision of Mr Justice Edwards-Stewart in the case of *Anna Mazola –v- Rich Kordowski* who ran the delightfully named site www.solicitorsfromhell.co.uk. In that case there was no attempt to justify what was alleged against the much maligned solicitor.

Sanoma Uitgevers BV –v- The Netherlands The Grand Chamber of the European Court of Human Rights 14 September 2010

This case which is discussed in detail elsewhere in this month's MediaLawLetter is important in that it stresses the vital importance that the protection of sources affords to freedom of speech. Essentially the case followed the court's earlier decision on *Goodwin –v- The United Kingdom*, but it did emphasise the need for proper procedural safeguards to be in place before any disclosure order was made. Reading the case one gets the impression that the chance of the Dutch magazine taking photographs of illegal car racing – when they had blurred the identity of the participants – was seized upon by the police as a means of obtaining some evidence for an earlier use of one of the cars in a ram raid in order to identify the perpetrator.

The behaviour of the Dutch prosecutors was found to be unsatisfactory. There had been no balancing exercise between the need to protect sources and the prevention of crime. In consequence the court unanimously held that the requirement that the applicants provide their journalistic material to the prosecution was prescribed by law and therefore there was a breach of Article 10. It is an important and powerful statement of principle and one to be welcomed by those advising the media.

Polanco Torres -v- Spain Application 34147/06 21 September.

This is a potentially important decision in that it appears to hold at bay a line of argument that damage to reputation is part and parcel of a person's Article 8 privacy rights which would make claims that much easier to bring and lessen the scope of Article 10 arguments. In this case the Claimant was a judge in Cantabria who, with his wife, had unsuccessfully

(Continued on page 27)

(Continued from page 26)

sued a newspaper when accused of unlawful dealings with a company. The libel action had been dismissed and the Claimant asserted that the dismissal of his libel action was in breach of the state's obligation to protect his right to reputation under Article 8. The court rejected this argument and concluded that the journalist had been sufficiently diligent in his investigation of the story to fall within Article 10.

Readers should also keep an eye out for the hearing which starts on 13 October before the Grand Chamber by that perennial litigant *Von Hannover* (aka Princess Caroline of Monaco) and *Springer -v- Germany*. The first case as usual involved not overtly intrusive photographs of Princess Caroline. The Axel Springer case involved a ban on the publication of material about the arrest and conviction of an actor for possession of cocaine. They are cases in which [submissions](#) have been made by the British Media Lawyers' Association and should raise interesting questions about image rights, when publication of a photograph can be said to engage Article 8 and the need for balance between Article 8 and 10.

Judge in Charge of Jury List

With effect from 1 October, Mr Justice Tugendhat takes charge of the Jury List which effectively means that he is the judge who decides who hears which libel cases. In effect he also controls the issue of who resides over the substantive hearing of most privacy actions. Mr Justice Eady had held the position for eight years. He had brought to the job the specialist expertise of having been a libel lawyer, whereas previously the appointment had gone to a non-specialist senior judge nearing retirement.

It is essential a purely administrative appointment, but involving as it does, libel and privacy and defining their boundaries, tends to have a much higher profile than other corresponding judicial proceedings.

Mr Justice Eady has in recent years indicated a certain dismay at the criticisms that were levelled at him in the media. The law that Mr Justice Tugendhat will apply is, of course, the same one as that applied by Mr Justice Eady but there may be some difference in approach with a possible minor swing of the pendulum towards Article 10.

David Hooper is a partner at Reynolds Porter Chamberlain LLP.



MediaLawLetter Committee

Thomas M. Clyde (Chair)

Jon Epstein (Chair)

Dave Heller (Editor)

Robert D. Balin

Michael Berry

Katherine M. Bolger

Jay Ward Brown

Robert J. Dreps

Jon Epstein

Rachel E. Fugate

Michael A. Giudicessi

Charles J. Glasser

Richard M. Goehler

Karlene Goller

Shelley M. Hall

Russell T. Hickey

David Hooper

Leslie Machado

John Paterson

Deborah H. Patterson

Bruce S. Rosen

Indira Satyendra

David Tomlin

European Court of Human Rights Reaffirms Source Protection Materials May Not Be Seized Absent Prior Impartial Review

By Erik Bierbauer and Joseph D. Murphy

The European Court of Human Rights (ECHR) held in a unanimous Grand Chamber decision issued on September 14, 2010 that a Dutch law permitting law enforcement authorities to seize journalistic materials without first conducting a hearing before an independent, impartial, and non-executive body violated journalists' right to keep source identities confidential. [*Sanoma Uitgevers B.V. v. The Netherlands*](#), App. No. 38224/03 (14 Sept. 2010) ("*Sanoma*").

Background

In 2002, Dutch authorities detained for several hours the editor-in-chief of the Dutch motoring magazine *Autoweek* and threatened to shut down the publisher's newsrooms for a police search if the magazine did not hand over photographs of an illegal street race taken by journalists for *Autoweek*. Police (who had been present at the race and ultimately intervened to stop it) claimed that they had reason to believe that a car used in the race had also been used in a string of unrelated bank robberies, and that they needed the photos to attempt to identify the race participants linked with the car. Race participants had allowed the journalists to observe and photograph the race on the condition that *Autoweek* would publish the photos in a way that preserved participants' anonymity. *Sanoma*, ¶¶ 9-14.

The magazine resisted handing over the photos but eventually did so under threat of the shutdown of *Sanoma's* newsrooms, which would have impeded other *Sanoma* publications from covering the wedding of the Dutch crown prince that weekend. *Sanoma*, ¶¶ 15-22.

The Dutch Criminal Procedure Code (Article 96a) authorized the prosecutor to demand the photos. After *Autoweek* resisted, the prosecutor arranged a conference with the investigating judge assigned to the criminal matter, who acknowledged that it was not within his competence to review the prosecutor's order, but noted that he would have approved the seizure if it had been. A Dutch regional court subsequently found the seizure lawful, the Dutch Supreme Court declined to hear a full appeal, and the magazine filed

an application against the Netherlands with the ECHR.

In a 4-3 decision issued on March 31, 2009, a chamber of the Third Section of the ECHR ruled that the seizure had not violated the magazine's freedom of expression as protected under Article 10 of the European Convention on Human Rights. *Sanoma Uitgevers B.V. v. The Netherlands*, App. No. 38224/03, Eur. Ct. H.R. (Mar. 31, 2009) ("*Third Section*"). The majority downplayed the sources' interest in confidentiality, cited no evidence that the Dutch police had tried alternative means to obtain the information they sought, and characterized the detainment and threats of newsroom shutdowns as merely "a regrettable lack of moderation." *Third Section*, at ¶ 63. Many media observers feared that this decision signaled a shift in ECHR case law toward a less rigorous defense of source confidentiality in the context of law enforcement investigations, and the petitioners filed for appeal to the ECHR's Grand Chamber, which comprises seventeen judges, accepts only a small percentage of cases appealed to it, and whose decisions are not further appealable.

The ECHR has applied what amounts to a qualified reporter's privilege in confidential source cases since 1996, when the court recognized a right under Article 10 for journalists to keep sources confidential. *Goodwin v. United Kingdom*, App. No. 17488/90, 1996-II Eur. Ct. H.R. To overcome this right, any effort to compel disclosure of a source must be "prescribed by law," pursue a legitimate aim, and be "necessary in a democratic society." Since the *Goodwin* decision, the ECHR has emphasized the importance of source confidentiality to the "indispensable" watchdog role played by the press and found Article 10 violations where authorities have searched journalists' offices or homes or detained them in an attempt to identify the sources of leaked information. See *Tillack v. Belgium*, App. No. 20477/05, Eur. Ct. H.R. (Nov. 27, 2007); *Voskuil v. the Netherlands*, App. No. 64752/01, Eur. Ct. H.R. (Nov. 22, 2007); *Ernst and Others v. Belgium*, App. No. 33400/96, 39 Eur. H.R. Rep. 35, ¶¶ 11, 14 (2004); *Roemen and Schmit v. Luxembourg*, App. No. 51772/99, 2003-IV Eur. Ct. H.R.

Last December, while *Sanoma* was pending before the

(Continued on page 29)

(Continued from page 28)

Grand Chamber, an ECHR panel upheld source protection in a case related to reporting based on leaks of a takeover bid by an international brewing company. The ECHR found that interests in disclosing the source and preventing future leaks were outweighed by the chilling effect disclosure would have on the press and its ability to work with anonymous sources. *Financial Times Ltd and Others v United Kingdom* [2009] ECHR 2065 (15 Dec. 2009).

The *Goodwin* line of cases is part of a wider, emerging recognition that sources of international law provide for a reporter's privilege. Rulings of international criminal tribunals, for example, have been supportive of a vigorous and broad reporter's privilege for journalists working in conflict zones. See *Prosecutor v. Brđanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal (Dec. 11, 2002), known as the "Randal" decision for the name of the reporter involved, in which the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia broke ground by holding that war correspondents have a qualified privilege to refuse to testify; and *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355 (Mar. 6, 2009), in which the Special Court for Sierra Leone applied a qualified reporter's privilege test to reject a motion by defendant Charles Taylor, former president of Liberia, to compel a journalist to identify people who had helped him to report on the civil war in Sierra Leone.

In addition, source protection principles are increasingly recognized and analyzed by national courts and legislatures in Europe. In the United Kingdom, appeals arising out of the Saville Inquiry (the "Bloody Sunday" Inquiry) have confirmed the press's ability to maintain the confidentiality of source identities, and new laws in several Eastern European countries, including the Media Act in Croatia and the Law on Radio and Television Broadcasting in Romania, require special judicial proceedings before a journalist may be ordered to disclose a source.

ECHR Grand Chamber Decision

In *Sanoma*, the ECHR's Grand Chamber reversed the Third Section, reaffirmed *Goodwin*, and added an important new procedural safeguard for protecting source identities. The opinion observed that Article 10 protects the source's interest in remaining anonymous, the media's ability to

encourage anonymous sources to come forward in the future, and the public's interest in receiving information. *Sanoma*, ¶ 89. The Grand Chamber held that these interests could be adequately protected only by formal proceedings before the execution of a search warrant or disclosure order.

The proceeding must occur before an impartial body charged with a full balancing of interests and capable of rejecting police applications or limiting them so as to avoid compromising confidentiality. Subsequent judicial review does not suffice. *Id.*, ¶ 91. Without such prior review, the compelled disclosure of a confidential source could not be considered "prescribed by law" under *Goodwin* and therefore would violate Article 10. *Id.*, ¶100.

The Grand Chamber found that in *Sanoma*, neither the prosecutor's status as an officer of the court nor the informal consultation with the investigating judge was sufficient to protect *Autoweek's* and its sources' rights. The Grand Chamber held that a reviewing body must be independent, impartial, and non-executive to comply with Article 10. *Id.*, ¶ 90. There was no definitive ruling on whether a formal proceeding before an investigating judge, whose primary task generally is to gather as much information as possible, could ever satisfy the court's requirements.

In requiring impartial prior review of efforts to compel source disclosure, the ECHR endorsed procedural protections similar to those generally enjoyed by journalists in the United States, where the federal Privacy Protection Act, 42 U.S.C. § 2000aa, and some state shield laws, see, e.g. Cal. Pen. Code §1524(g); Or. Rev. Stat., Title 4, Ch. 44, §§ 44.510-.540 (1995), limit search and seizure of journalistic materials. (The seizure of materials from a *Gizmodo* reporter in California last spring notwithstanding.) Substantively, the ECHR's *Goodwin* test provides stronger protection for confidential source identities than journalists have in many U.S. jurisdictions.

The level of protection Article 10 provides for unpublished, non-confidential journalistic material remains unsettled. In 2005, in *Nordisk Film & TV A/S v. Denmark*, App. No. 40485/02, 2005-XIII Eur. Ct. H.R., the ECHR indicated that non-confidential journalistic work product is entitled to some degree of protection, without stating what that degree might be. In *Sanoma*, the Dutch government disputed whether *Autoweek* truly promised confidentiality to the street race participants. The Grand Chamber sided with the magazine, holding that there was "no need to require evidence of the existence of a confidentiality agreement

(Continued on page 30)

(Continued from page 29)

beyond [*Autweek's*] claim that such an agreement existed.” *Sanoma*, ¶ 64.

The Grand Chamber’s decision sets an important precedent for the 47 member states of the ECHR, which include not only Western European countries but Russia and many other former members of the Soviet bloc. The member states are bound by ECHR decisions, although national authorities do not always adapt quickly to ECHR precedents. Still, the *Sanoma* decision is excellent news for journalists in the Netherlands and other ECHR member states. Jens van den Brink of Kennedy Van der Laan, the firm representing *Sanoma*, commented: “With the *Voskuil* verdict this is the second time in three years the ECHR finds the Dutch government violated Article 10 in a reporter’s privilege case. This ruling comes at a particularly good point in time for our country, as a draft statute on the protection of journalistic sources is currently before the Dutch Parliament.”

The decision may also be particularly important in those member states without strong traditions of press freedom, where the authorities all too often display “a regrettable lack of moderation” in their dealings with journalists. The Dutch judge on the Grand Chamber panel, who had been part of the lower chamber majority finding no violation, wrote a separate concurrence explaining that he now had been persuaded to find a violation of Article 10 by a colleague who asked, “What would your answer have been if a similar case, with a comparable show of force by the police and the prosecution service, had been brought before us from one of the new democracies?” *Id.*, ¶ 5 (concurrence).

The Grand Chamber’s decision should make it less likely

for such cases to occur. As Geoffrey Robertson, QC, counsel to a coalition of media organizations and NGOs that intervened in the Grand Chamber proceedings, said, “This ruling was an acid test for the Court and for media freedom across Europe. It sets a high benchmark for protection of journalistic materials and will force police and prosecutors across Europe, from Russia to France, to change their practices.”

Mark Stephens of Finers Stephens Innocent, who helped lead the intervention effort, said, “In this respect, if no other, Europe has a firmer protection for free speech than the US and so today’s decision is very much to be celebrated. The judgment firmly demonstrates that European governments cannot use clumsy police work to make journalists the surrogates for law enforcement.”

Erik Bierbauer is a counsel and Joseph D. Murphy is an associate at Debevoise & Plimpton LLP, which represented CPJ as an intervener. Sanoma Uitgevers B.V. was represented in the Grand Chamber proceedings by Ilan de Vré and Otto Volgenant, of Kennedy Van der Laan in Amsterdam. The Kingdom of the Netherlands was represented by Mr R.A.A. Böcker and Ms. J. Jarigsmá, of the Ministry for Foreign Affairs, and Ms. T. Dopheide, of the Ministry of Justice. The Media Legal Defence Initiative and Guardian News Media Ltd, represented by Geoffrey Robertson, QC, of Doughty Chambers, and Mark Stephens of Finers, Stephens, Innocent LLP in London, as well as the Committee to Protect Journalists (“CPJ”), ARTICLE 19, and the Open Society Justice Initiative, intervened in the ECHR Grand Chamber proceedings. A number of media organizations supported the intervention.

Turkey Violated European Convention By Failing to Protect Journalist’s Life and Freedom of Expression

States Have Positive Obligation to Protect Journalists

On September 14, 2010, the European Court of Human Rights ruled that Turkish authorities failed in their duty to protect the life and freedom of expression of murdered journalist Firat (Hrant) Dink, in violation of Articles 2, 10 and 13 of the European Convention of Human Rights. [Dink v. Turkey](#) (applications no. 2668/07, 6102/08, 30079/08,

7072/09 and 7124/09) (judgment available in French). A detailed ECHR Press Release in English discussing the judgment is available [here](#).

The judgment creates a positive obligation on states to protect journalists and may provide persuasive authority

(Continued on page 31)

(Continued from page 30)

worldwide for state's to provide better protection for journalists who are threatened because of the content of their expression.

Background

Firat Dink was a Turkish journalist of Armenian origin and editor-in-chief of a Turkish-Armenian newspaper, Argos. Between 2003 and 2004, Dink published a series of articles expressing his views on the identity of Turkish citizens of Armenian origin, arguing that the traumas suffered by the Armenians remained unresolved because the Turkish people ignored Armenians' need to have their status as victims of genocide recognized.

Dink described the Turkish element in Armenian identity as both a poison and an antidote. He extended the metaphor when explaining how Armenian identity could come to terms with its Turkish elements in his statement "the purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia, provided that the former are aware of it." Extremist national groups protested Dink's articles with demonstrations and threatening letters.

In February 2004, a national extremist filed a complaint against Dink for insulting Turkish people with his "blood poisoned by the 'Turk'" statement and the Istanbul public prosecutor charged Dink with violating the Turkish Criminal Code, which made it an offense to denigrate "Turkishness." Though an expert report concluded that Dink's statement did not denigrate Turkishness because the "poison" in his statement referred not to Turkish blood, but instead to the Armenian obsession with obtaining national recognition of their genocide, Dink was nevertheless found guilty. The Turkish court held that the public could not be expected to read the whole series of articles to grasp the real meaning of Dink's statements.

On January 19, 2007, Dink was shot and killed outside of his newspaper's offices in Istanbul. Criminal proceedings against 18 accused plotters, including the shooter, are still pending in Turkey.

ECHR Complaint

On December 18, 2007, Dink's family brought complaints alleging two violations of Article 2: that the State had failed in its obligation to protect Dink's life and failed to prosecute the local officials who should have protected him. The latter violation was also brought under Article 13 for a lack of effective remedy. They further alleged under Article 10, that Dink's conviction for denigrating Turkish identity had infringed his freedom of expression and made him a target for nationalist extremists.

Article 2 (Right to Life) / Article 13 (Lack of Effective Remedy)

The Court found that the Turkish security forces could reasonably be considered to have been aware of the intense hostility towards Dink in nationalist circles and the real and imminent threat of his assassination. Investigations had revealed that police in both Trabzon and Istanbul had been informed of the likelihood of an assassination attempt and of the identity of the plotters and yet police took no preventative actions. Therefore, there had been a violation of Dink's Article 2 right to life.

The Court also found a breaches of Article 2 in its "procedural aspect," and Article 13, as no effective investigation had been carried out into the failures to protect Dink's life. The Court cited the local officials' refusal to prosecute officers who took no protective action and those officers' subsequent lies to investigators, as manifest breaches of the duty to investigate and protect Dink.

Article 10 (Right of Freedom of Expression)

The Court concluded that the Turkish court had deliberately misinterpreted Dink's statements to indirectly punish him for criticizing the government's denial of the Armenian genocide, when it was clear that Dink's "poison" statement did not refer to Turkishness. Dink's conviction for denigrating Turkishness made him a target for extreme nationalists and the police, who had been informed of an

(Continued on page 32)

The court declared that States have a "positive obligation" to protect an individual's freedom of expression against attack, including by private individuals.

(Continued from page 31)

assassination plot, did not take steps to protect him.

Therefore, there had been interference with the exercise of Dink's right to freedom of expression. The Court found that Dink had been writing about an issue of significant public concern (pursuit of historical truth) and his right to expression should have been protected.

The Court declared that States have a "positive obligation" to protect an individual's freedom of expression against attack, including by private individuals, and that it was insufficient for a state to only refrain from interfering

with an individual's freedom of expression. The Court concluded that Turkey had failed to fulfill these "positive obligations" with regard to Dink's freedom of expression, in violation of Article 10.

Damages

The Court held, in respect of non-pecuniary damage, that Turkey was to pay 100,000 euros jointly to Dink's wife and children, 5,000 euros to his brother and 28,595 euros to the applicants jointly for costs and expenses.

Ninth Circuit Holds Tattooing Is Protected Expressive Activity

Tattooing is "purely expressive activity fully protected by the First Amendment," a Ninth Circuit panel ruled this month, striking down Hermosa Beach's complete ban on tattoo parlors. [*Anderson v. Hermosa Beach*](#), No. 08-56914 (Sept. 9, 2010) (Bybee, Noonan, Clifton, JJ.).

Departing from lower courts addressing the issue, the court found that the process of tattooing, along with the end product, deserves complete protection. The judges noted that tattooing is not just conduct with an expressive component, such as burning a draft card, which requires an additional interpretive step. Instead, the process of tattooing is more akin to writing a poem or creating a painting, which always take place for the purpose of expression. The judges listed numerous other media the Supreme Court has granted similar protection, including music without words, dance, topless dancing, paintings and their sale, movies, and parades.

Because Hermosa Beach had imposed a restriction on a means of expression, the ordinance could only be valid if it remained content-neutral, was narrowly tailored to serve a significant government interest, and left open other channels of communication. A complete ban on tattoo parlors was far too broad to achieve the government's goals of supporting public health and safety, and it completely foreclosed an avenue of expression. As a result, the court found it to be unconstitutional.

Throughout the decision, the judges favorably cited both the history of tattooing and its current prevalence, along with its symbolic and aesthetic underpinnings. "Tattoos can express a countless variety of messages and serve a wide variety of functions," Judge Bybee wrote "including: decorative; religious; magical; punitive; and as an indication of identity, status, occupation, or ownership... We do not profess to understand the work of tattoo artists to the same degree as we know the finely wrought sketches of Leonardo da Vinci or Albrecht Dürer, but we can take judicial notice of the skill, artistry, and care that modern tattooists have demonstrated."

Judge Noonan wrote a short concurrence, agreeing with the "robust defense of the values protected by the First Amendment," but adding some practical cautions. He noted that unlike newspapers, tattoos present health and safety issues that would justify some regulations. Moreover, "while we are bound to protect the First Amendment value at issue," he wrote, "we are not bound to recognize any special aesthetic, literary, or political value in the tattooist's toil and trade."

Robert C. Moest, Law Offices of Robert C. Moest, Santa Monica, CA, represented the plaintiff. John C. Cotti, Jenkins & Hugin, LLP, Manhattan Beach, CA, represented the defendant.

Under Pressure Craigslist Removes “Adult Services” Section

Seemingly acquiescing to the demands of state attorneys general, Craigslist, the online classified ads website, recently removed the “Adult Services” section of its website in the United States. Initially Craigslist kept the link on its site covered by a black bar reading “censored” – suggesting the removal was a temporary protest. However, Craigslist later removed the link and section entirely, a change it confirmed in recent Congressional testimony.

The move came two weeks after 17 attorneys general sent the site’s founder, CEO, and attorney a letter noting strong concerns that the page provided easy access to prostitution and child sex trafficking. Although the letter was phrased as a request and contained no legal threats, it carried force through its widespread dissemination. The letter was the latest in a two-year effort by state AGs to curtail the website’s alleged facilitation of illicit activities.

Craigslist had already restructured the portion of its page, previously entitled “Erotic Services,” in an effort to reign in the lascivious free-for-all. The site began screening each adult post and requiring an accompanying \$10 payment, credit card information, and a verifiable phone number.

Many saw these steps as a boost to public safety, as the increased transparency and high volume on the page allowed law enforcement to intervene when necessary. But AGs, aided by vocal advocacy groups found the steps inadequate. Even after the Adult Services section was removed in the United States, they continue to press for its elimination worldwide.

Notwithstanding the public pressure, the law surrounding this issue favors Craigslist. Section 230 of the Communications Decency Act, which provides that “No 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.”⁴⁷ U.S.C. § 230(c)(1), has been held to shield Craigslist on a variety of claims over third-party postings.

In a lawsuit brought by an Illinois sheriff against the company for creating a public nuisance by facilitating prostitution, an Illinois federal district court held that none of the site’s actions brought it outside of 230’s protective sphere. *See Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. Oct. 20, 2009). Craigslist has also successfully

invoked Section 230 immunity when sued for discriminatory postings in its housing section, *see Chicago Lawyers’ Committee For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), and for injuries caused by the sale of firearms on the site. *See Gibson v. Craigslist*, 2009 WL 1704355 (S.D.N.Y. June 15, 2009).

In reality, the AGs probably know their legal stance is a weak one; therefore, they have moved their case to the court of public opinion, where outrage can carry more weight than precedent.

Sponsor MLRC’s Annual Southwestern Conference

We would like to invite any MLRC member organization to sign on as a sponsor of our annual conference in Los Angeles, presented with Southwestern Law School’s Donald E. Biederman Entertainment and Media Law Institute. The Conference this year will be held at Southwestern Law School on Thursday, January 20, 2011. It will run from 2 p.m. to 7 p.m., with a reception following the end of the last session.

The Conference will have three sessions. The first will focus on clearance issues for motion pictures, TV programs and videogames. The second will examine libel in fiction cases and cover how to vet programs and advise clients in light of disparate court rulings. The third will focus on the development and distribution of video games, looking at the process from the perspective of all involved parties -- developers, publishers, rightsholders and distributors.

We are asking each sponsor to contribute \$1500, which will be used to underwrite the costs of the Conference. Sponsors will be acknowledged in the program brochure and at the Conference. If your company or law firm is interested in possibly being a sponsor, please let us know.

Thank you.

Sandy Baron
sbaron@medialaw.org
 212.337.0200 x206