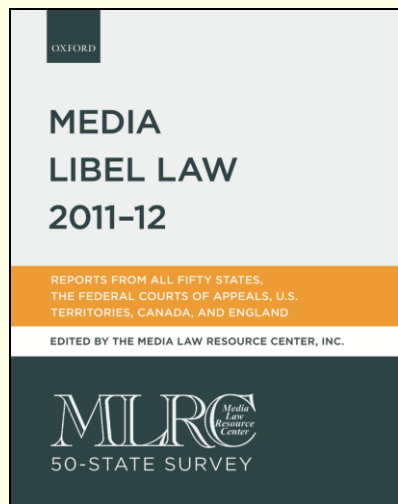


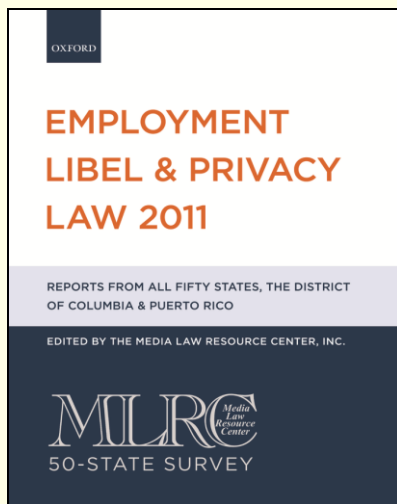
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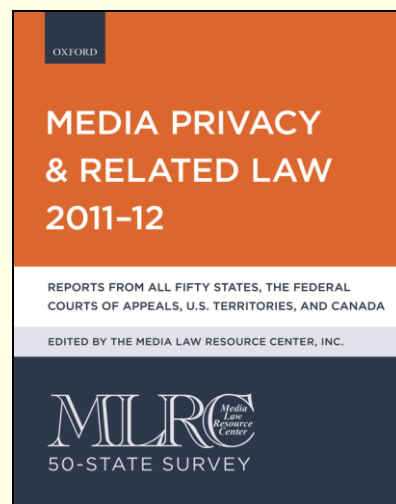
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Reporting Developments Through November 28, 2011

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**MLRC**

<b>Anthony Lewis Receives MLRC's William J. Brennan, Jr. Defense of Freedom Award.....</b>	<b>04</b>
<i>MLRC Annual Dinner 2011</i>	
<b>MLRC/Southwestern Media and Entertainment Law Conference Jan. 19, 2012.....</b>	<b>08</b>
<i>Angels and Demons: Navigating Tricky Entertainment and Media Issues to Reach Legal Nirvana</i>	
<b>MLRC Annual Meeting.....</b>	<b>45</b>
<b>DCS Annual Meeting.....</b>	<b>47</b>

**LIBEL & PRIVACY**

<b>Minn. Dist.</b>	<b>Minnesota Jury Hits Broadcaster With \$1 Million Defamation Damage Award.....</b>	<b>10</b>
<i>Report About Holistic Healer Found False and Negligent</i>		
<i>Wahl v. KSTP-TV, LLC</i>		
<b>N.D. Ill.</b>	<b>Court Grants Summary Judgment on Civil Rights Claims Based on Reality TV Program.....</b>	<b>12</b>
<i>Allows Claim for Violation of Federal Driver's Privacy Protection Act to Proceed</i>		
<i>Best v. Malec</i>		
<b>N.D. Cal.</b>	<b>Court Refuses to Dismiss Privacy and Emotional Distress Claims Over Predator" Sting.....</b>	<b>14</b>
<i>No Legitimate Law Enforcement Purpose; "Sensationalization" of News Could Be Outrageous</i>		
<i>Tiwari v. NBC Universal</i>		
<b>Ill. App.</b>	<b>Illinois Appellate Court Analyzes Protection for Anonymity in Online Libel Case.....</b>	<b>16</b>
<i>Burden on Plaintiff to Show Prima Facie Case</i>		
<i>Stone v. Paddock Publications, Inc.</i>		
<b>C.D. Cal.</b>	<b>Sergeant's Claims Against Makers, Distributor Of The Hurt Locker Stricken In Their Entirety.....</b>	<b>17</b>
<i>Film a "Transformative"; Full First Amendment Protection against Right of Publicity And Other Claims</i>		
<i>Sarver v. The Hurt Locker LLC, et al.</i>		
<b>Fla. App.</b>	<b>Traditional Minimum Contacts Analysis Applied to Online Libel Case.....</b>	<b>20</b>
<i>Court Finds Zippo's Sliding Scale Approach Flawed</i>		
<i>Caiazzo v. American Royal Arts Corp.</i>		
<b>Ore. App.</b>	<b>Court Reverses Wiretap Conviction for Videotaping Police Traffic Stop.....</b>	<b>23</b>
<i>Clarifies Ambiguity in Wiretapping Law</i>		
<i>Oregon v. Neff</i>		

## SUPREME COURT

<b>Constitutional Protection for False Statements of Fact?</b> .....	<b>24</b>
<i>Supreme Grants Cert. to Review the Stolen Valor Act</i>	
United States v. Alvarez	

## REPORTER'S PRIVILEGE

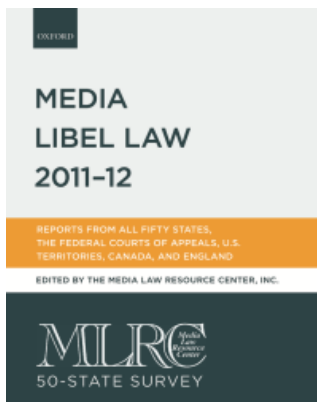
<b>Ill. Cir.</b>	<b>Court Quashes Subpoenas in "Cold Case"</b> .....	<b>26</b>
<i>Shield Law Applied in Prosecution of 50-year old Murder</i>		
People v. McCullough		

## COPYRIGHT

<b>N.D. Cal.</b>	<b>Defendant's Right to Speak Anonymously Trumps Copyright Plaintiff's Desire to Discover His Identity</b> ....	<b>29</b>
<i>Court Holds Plaintiff to a Rigorous "Balancing of Harms" Test</i>		
Art of Living Foundation v. Does		

## INTERNATIONAL

<b>Canada</b>	<b>Cyberlibel and Hyperlinks</b> .....	<b>33</b>
<i>A Victory For Freedom Of Internet Communication</i>		
Crookes v. Newton		
<b>UK &amp; Europe</b>	<b>Other Side of the Pond: Updates on UK and European Media Law</b> .....	<b>37</b>
<i>Libel Reform, Leveson Inquiry, Media Litigation, EU Assession and More</i>		
<b>ECJ</b>	<b>Infringement of Personality Rights on the Internet</b> .....	<b>41</b>
<i>Impact of ECJ Decision on French Law of Jurisdiction</i>		
	<b>European Internet Forum Shopping Bonanza</b> .....	<b>43</b>
Olivier Martinez v. MGN Ltd and eDate Advertising GmbH v. X		



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## MLRC Annual Dinner 2011

# **Anthony Lewis Receives MLRC's William J. Brennan, Jr. Defense of Freedom Award**



**Anthony Lewis, left, with MLRC Chairman Kenneth Richieri**

On November 9, MLRC honored Anthony Lewis, an author, former columnist and reporter with The New York Times, for his lifetime of invaluable contributions supporting the freedom of speech and the press. He received MLRC's William J. Brennan, Jr. Defense of Freedom Award, at MLRC's annual dinner held at the Marriott Marquis hotel in New York.

Anthony Lewis has been passionately dedicated to the values of free speech and justice throughout his long career as a journalist, op-ed columnist, author and professor. His career includes more than 40 years at The New York Times as a Supreme Court reporter, bureau chief and op-ed columnist. Mr. Lewis has illuminated the complexities of the First Amendment for journalists, lawyers and students with his thoughtful writings and teachings on the Constitution and the press, most famously in his extraordinary exploration of the Supreme Court's decision in *New York Times v. Sullivan* in his book "Make No Law: The Sullivan Case and the First Amendment."

As a legal scholar, he has taught a generation of students about the Constitution and the press at Harvard Law School, Columbia Journalism School and universities throughout the country. Mr. Lewis was twice awarded the Pulitzer Prize.

Jeffrey Toobin, a staff writer at The New Yorker and a senior analyst for CNN, as well as a former student of Mr. Lewis, delivered introductory remarks about Mr. Lewis. Terry Moran, a co-anchor of ABC News "Nightline," interviewed Mr. Lewis about the Supreme Court, the First Amendment and the values and challenges of a free press.





**MLRC Chairman Kenneth Richieri:** As a journalist and as a professor, he has enlightened and provoked us with his thinking about civil liberties. His writings have served the highest ideals of journalism, exposing the evils of McCarthyism by showing its impact on a single individual, explaining Supreme Court decisions in ways that made them meaningful to the general public, and illustrating time and again, the importance of the First Amendment and the essential role that freedom of speech and freedom of the press plays in an open society.



**Jeffrey Toobin:** When it comes to freedom of the press the battles of Tony's life have almost all ended in victory, and Tony's work, especially as a columnist, had a significant role in that victory. Week after week, year after year, decade after decade, in our most important newspaper, Tony explained the value of a free press. He explained what the press needed from the government mostly was to be left alone. People listened, government listened and Tony won.

**Terry Moran:** I wonder if they're afraid, Tony. This gets to the big issue that is confronting the business we've all been in. You, for many decades, and all of us now, it's this, isn't it? The Media Law Resource Center. Who is the media? And who is not? .... So, I want to hear your thoughts about the Court as it approaches this very radically changing media atmosphere and whether they are almost gun-shy of drawing lines because who counts and who doesn't count as being within the protective umbrella of that robust and wonderful First Amendment.



**Anthony Lewis:** .... I would say that the notion of freedom, freedom for the least of us or the most of us, is basic and you have to start with that premise. There has to be some very strong, carefully drawn exceptions to the rule. Gross invasions of privacy would be one thing that I would care a lot about. Because I think privacy is a terribly important aspect of life and it's lost a lot of its weight in recent years. Young people expose themselves on the web in ways that I just find horrifying. You know that some future employer when that person is 40 years old is going to look at all the websites for the last 40 years or 20 years and say, "Why did you do this when you were in college?" I just hate the thought of it. So I haven't got an answer for you. If you want me to give you a formula for it, I don't have it, but I just think privacy has to have some consideration. It should be right there on the list.



**Terry Moran:** Where does WikiLeaks fit in to a First Amendment written in the 18th century and developed as you've covered it really in large part, for the national scope in the technologies of the 20th century when we have a guy like Julian Assange who's a kind of vandal out there in the ether?

**Anthony Lewis:** It's not an easy question. WikiLeaks, I think, left many people rather torn, because specifically if the United States government were to prosecute Assange or do something to stop the publication, I would be against that.





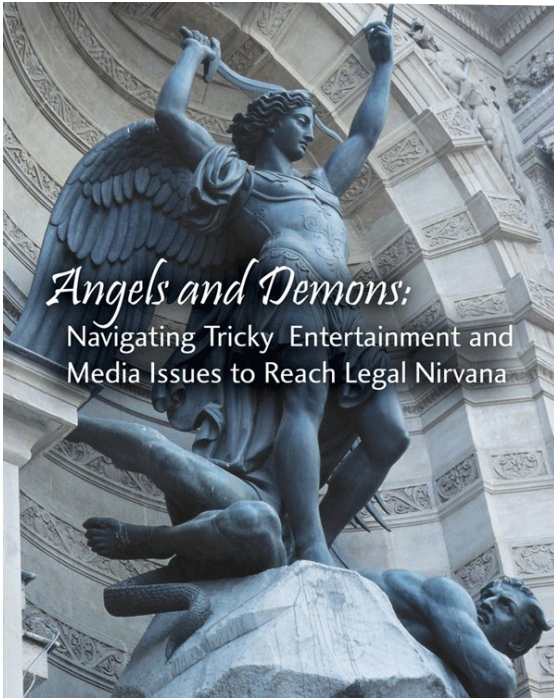
**Terry Moran:** What we should care about, what we should be doing?

**Anthony Lewis:** .... So what do I recommend? Be skeptical. Judges are just as imperfect as other people. Newspapers pride themselves on their imperfection, not that they want to be imperfect but they know from experience that they're going to be imperfect and they fought. This is what *New York Times v. Sullivan* is really about. They fought for the right to be wrong, as long as their wrongness was not a deliberate falsification; they fought for the right to make a mistake. Putting out a daily newspaper you make mistakes, it's inevitable. That's what the issue was and is. Just do your best.

A complete transcript of the discussion is [available online](#).



Students and colleagues of Anthony Lewis, left to right: Kenneth Richieri, Lynn Oberlander, Adam Liptak, John Zucker, George Freeman, Anthony Lewis, Prof. Vincent Blasi, Jeffrey Toobin, Itai Maytal, Eve Burton



## Join Us for the 2012 MLRC/Southwestern Media and Entertainment Law Conference

### Angels and Demons: Navigating Tricky Entertainment and Media Issues to Reach Legal Nirvana

January 19, 2012

Hollywood, California

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#### Exorcising Rights: Releasing the Demons in Reality Programming

The premise of most reality and mockumentary programming is simple: ubiquitous cameras capture eager participants engaged in “real” life activities, competitions, and romantic adventures. The reality of producing such programming, however, is not simple at all. Releases are the lifeblood of reality television and film, but have they gone too far or can they ever go far enough to cover this expanding genre? This panel will discuss:

- ◆ Provisions in reality programming releases that could make the devil blush.
- ◆ Common challenges to the enforceability of reality programming releases.
- ◆ Controversial provisions that have withstood judicial scrutiny.
- ◆ A hypothetical scenario reflecting the complexity of the reality/mockumentary genre.

**Moderator:** JP Jassy (Bostwick & Jassy)

**Panelists:** John Farrell (Endemol USA), Glen Kulik (Kulik, Gottesman, Mouton & Siegel) and Lou Petrich (Leopold, Petrich & Smith)

#### Social Media - Savior or Satan?

Social media has enabled news and entertainment companies to engage and communicate with their audiences in a variety of ways. But, with that interaction comes risk. This panel will examine the impact of both official and unofficial use of social media on the entertainment and news industries and how they are grappling with the legal issues that arise. Topics will include:

- ◆ How to manage employees' use of social media to mitigate risk of defamation, spoilers, and FTC endorsement regulation violations.
- ◆ How to manage data-security and privacy issues and protect your company's brand.
- ◆ How do the different terms of service for each social media website dictate what use your company can make of that platform.

**Moderator:** Dan Cooper (Paramount Pictures)

**Panelists:** Karlene Goller (Los Angeles Times), Paul Koenig (Paramount Pictures) and Jennifer Mardosz (Fox Entertainment Group)



### Sympathy for the Devil in Music

Media lawyers are generally well-versed in the day-to-day “clearance” issues that can arise. However, the dirty little secret is that most will have only a cursory knowledge when it comes to issues of music law. This panel gathers day-to-day experts and practitioners in the music law arena and will discuss some of the common issues that arise in the creation of music-centric media content, including:

- ◆ Putting together a “special” music-intensive episode of a show that otherwise does not usually contain musical performances.
- ◆ Capitalizing on ancillary revenue streams and how the deals work for such products (such as downloads, soundtracks, etc.).
- ◆ Music in the context of routine media content where music issues arise unexpectedly, such as in news broadcasts, interviews and impromptu music performances.

**Moderator:** Jeffrey Schneider (NBCUniversal)

**Panelists:** Jonathan Haft (Hollywood Records), Jeffrey Light (Myman Greenspan Fineman Fox Rosenberg & Light), panelist TBD

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# Minnesota Jury Hits Broadcaster With \$1 Million Defamation Damage Award

## *Report About Holistic Healer Found False and Negligent*

In what appears to be the largest damage award ever in a Minnesota media libel case, a Dakota County jury awarded \$1 million in damages to a naturopathy healer who was accused of improperly treating a patient. *Wahl v. KSTP-TV, LLC*, No. 19HA-CV-10-7322 (Minn. Dist. Jury verdict Oct. 31, 2011).

At issue was a March 2009 news report on KSTP-TV about plaintiff Susan Wahl (now Susan Anderson). Plaintiff is a Wisconsin-based practitioner of naturopathy, a form of alternative medicine which “honors the body’s innate wisdom to heal.” The broadcast featured the complaint of a former patient, Cheryl Blaha, who accused Wahl of improperly advising her to stop taking anti-anxiety medication which led Blaha to attempt suicide. Plaintiff was interviewed for the broadcast and denied the allegation.

Plaintiff was deemed to be a private figure and the case was tried under a negligence standard, though plaintiff sought to prove actual malice at trial to support her claim for \$15 million in punitive damages. Plaintiff’s main argument at trial was that KSTP had access to, but failed to review, Blaha’s medical records. Blaha’s medical doctor testified at trial that he, not the plaintiff, advised her to stop taking the anti-anxiety medication. Plaintiff also argued that Blaha’s medical records contained no evidence of a suicide attempt.

After five days of trial, the jury awarded plaintiff \$900,000 for injury to reputation and \$100,000 in lost earnings because of the broadcast. The jury found the broadcaster acted negligently and with constitutional malice, but it awarded no punitive damages.

Defense counsel is preparing post-trial motions and a more detailed article on the trial will be published later in the MediaLawLetter.

*KSTP-TV was represented by Paul Hannah, Kelly and Hannah, P.A., Minneapolis, MN. Plaintiff was represented by Patrick Tierney, Collins, Buckley, Sauntry & Haugh, P.L.L.P., Saint Paul, MN.*

## MLRC UPCOMING EVENTS

### MLRC/Southwestern Media and Entertainment Law Conference

January 19, 2012 | Hollywood, California

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Sept. 12-14, 2012 | Reston, Virginia

### MLRC Annual Dinner

November 14, 2012 | New York, NY

### Defense Counsel Section Annual Meeting and Lunch

November 15, 2012 | New York, NY

## MLRC's Report on Trials and Damages: *Have We Missed Any Trials?*

MLRC is now publishing its "Report on Trials and Damages" biennially, and the next update is scheduled for the first quarter of 2012. Below is the list of trials that we are aware of. We are asking members to review the list and let us know by December 23 if you know of any trials that we have missed, or that you anticipate going to trial in December 2011. Email Michael Norwick at MLRC: [mnorwick@medialaw.org](mailto:mnorwick@medialaw.org)

### 2010-11 TRIALS

Andrews v. Chiefland Citizen, (Ga. Sup. Ct., Levy County, jury verdict Oct. 14, 2010) (Defense Verdict).

Blassberg v. Amicone, No. 08-1506 (S.D.N.Y. jury verdict Oct. 13, 2010) (Seibel, J.) (Defense Verdict).

Bohl v. Hesperia Resorter, SCVSS 68052 (San Bernardino Sup. Ct. jury verdict rendered Oct. 4, 2010). (Plaintiff's Verdict).

Brady v. Klentzman, Docket No. 03-CV-129531 (Tex. Cir. Ct., West Bend County May 6, 2011) (Plaintiff's Verdict).

Doe v. Beasley Broadcasting Group, Inc., No. 05-CA-002417 (Fla. Cir. Ct., Monroe County, directed verdict granted on May 31, 2011).

Kendall v. The Daily News Publ'g Co., No. 517/2007 (V.I. Super. Ct. jury verdict Mar. 16, 2010), verdict as a matter of law on May 27, 2010 (Ross, J.), aff'd 39 Media L. Rep. 2353 (V.I. Sept. 21, 2011).

Kafouros v. CEGW, Inc., No. 09-1542 (D. Md. jury verdict Sept. 23, 2010). (Plaintiff's Verdict).

Mask v. Guetzloe, Docket No. 2007-CA-016024-O (Fla. Cir. Ct. Feb. 23, 2011) (Plaintiff's Verdict).

Raintree Homes, Inc. v. The Pocono Record, Nos. 3651 CIVIL 2001, 2358 CIVIL 2002 (Monroe City. C.C.P. jury verdict Oct. 22, 2010) (Defense Verdict).

Riley v. Enterprise Publ'g Co., No. 05-00841-A (Mass. Super. Ct. jury verdict Feb. 2010) (Defense Verdict).

Rudovsky v. West Publishing Corp., Docket No. 09-cv-00727 (E.D. Pa. jury verdict Dec. 16, 2010) (Plaintiff's Verdict).

Toffoloni v. LFP Publishing Group, LLC, Docket No. 08-16148 (D. Ga. jury verdict June 17, 2011). (Plaintiff's Verdict).

Wahl v. KSTP-TV, LLC, Case No. 19HA-CV-10-7322 (Minn. Dist. Jury verdict Oct. 31, 2011) (Plaintiff's Verdict).

Webb v. Virginian-Pilot, Docket No. CL10-451 (Va. Cir. Ct. Feb. 11, 2011) (Smith, J.) (Plaintiff's Verdict).

Yuin University v. Korean Broadcasting System, No. BC383449 (Superior Ct. of Los Angeles, Bench Verdict, dated April 30, 2010), aff'd 199 Cal. App. 4th 1098 (2d Dist. Oct. 5, 2011) (Defense Verdict).



# Illinois Court Grants Summary Judgment on Civil Rights Claims Based on Reality TV Program

## *Court Allows Claim for Violation of Federal Driver's Privacy Protection Act to Proceed*

By Steve Mandell, Steve Baron, and Shari Albrecht

The federal district court in Chicago recently granted summary judgment for defendants on plaintiff's claim that her constitutional rights were violated based on the filming of the reality television program *Female Forces*, a show that followed female police officers in Naperville, Illinois, while they carried out their duties. *Best v. Malec*, No. 09 C 7749 (N.D. Ill. Nov. 15, 2011) (Kennelly, J.).

The court previously had dismissed the plaintiff's claims of violation of her right of publicity, invasion of privacy by publication of private facts, and intentional infliction of emotional distress, holding that those claims were barred by the First Amendment because *Female Forces* is protected speech on a matter of public concern. After the court's November 15 decision, the only claim remaining is the plaintiff's claim for violation of the federal Driver's Privacy Protection Act (DPPA) against certain defendants, based on the brief appearance of the plaintiff's driver's license number in the episode.

### Background

Eran Best was arrested in Naperville, Illinois, in February 2008. She initially caught the eye of a police officer because her car's registration was expired. Before pulling her over, the officer learned that both her registration and her driver's license had been suspended. After a backup officer arrived, the police administered field sobriety tests, but they did not charge her with DUI. The officers found marijuana and drug

paraphernalia in a subsequent search of Best's car. Best's arrest was filmed and appeared in an episode of *Female Forces*.

The plaintiff's allegations concerning the facts of her arrest as pleaded in her complaint differed from the theory she put forward in opposing summary judgment. In her complaint, Best had alleged that she had been pulled over by a male police officer and had been held in the freezing cold for more than thirty minutes awaiting the arrival of a female police officer so that her arrest could be filmed for the television show. In fact, police department records directly contradicted that claim and showed that the female police officer had arrived promptly. (The female officer had arrived as backup both because the plaintiff was going to be arrested and because the male officer planned to administer sobriety tests.) The plaintiff also did not rebut the police officers' testimony that they had been instructed not to allow the filming to interfere with their work.

### Fourth Amendment Claim

In opposing summary judgment, the plaintiff completely abandoned her claim that there was some improper delay relating to the arrival of the female police officer and instead argued that the field sobriety tests were a violation of her constitutional rights. In response, the defendants argued that plaintiff had no support for her allegations of unreasonable delay and that any delay for sobriety tests was appropriate where she had been properly pulled over and properly arrested on other grounds.

(Continued on page 13)



**The court held that, even if the plaintiff were correct that the male officer had contacted the female officer directly and asked her to come as a back-up so that Best could be filmed for Female Forces, no constitutional right was implicated under the circumstances.**

(Continued from page 12)

The district court accepted the defendants' arguments and granted summary judgment on the plaintiff's Fourth Amendment theory. The court held that, even if the plaintiff were correct that the male officer had contacted the female officer directly and asked her to come as a back-up so that Best could be filmed for *Female Forces*, no constitutional right was implicated under the circumstances.

### **DPPA Claim**

However, the court denied the defendants' motion for summary judgment, in part, as it related to the brief appearance of Best's personal information in the episode. A police computer screen is visible in the episode for less than two seconds that displayed information about Best, including her name (misspelled) and driver's license number. Best claimed that this violated her constitutional right to privacy and the DPPA. The court easily rejected the constitutional argument, holding that the information that appears in the episode is not the sort of sensitive information that has previously been held to be constitutionally protected, like sensitive medical information.

The court denied the motion for summary judgment as to some of the defendants on the DPPA claim. The defendants had argued that the DPPA did not apply for two reasons. First, the information that appeared in the episode did not come from the state department of motor vehicles. Rather, the information on the screen differed from the DMV's information (such as the misspelled name and an old phone number). Second, the defendants had not "knowingly" disclosed the information, as the statute requires. Rather, the defendants who had reviewed the episode and might have identified the issue had reviewed a low-resolution rough cut of the episode in which the information was not visible.

The court rejected both arguments, holding that the facts were uncertain on both issues and also disagreeing with the defendants concerning the legal standards at issue. If the plaintiff ultimately prevails on the DPPA claim, she would be entitled to \$2,500 in statutory damages.

*Defendants are represented by Steve Mandell, Steve Baron, and Shari Albrecht of Mandell Menkes LLC. Plaintiff is represented by Thomas A. Zimmerman, Jr. and Adam M. Tamburelli of Zimmerman Law Offices, P.C.*



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# California Court Refuses to Dismiss Privacy and Emotional Distress Claims Over “Predator” Sting

## *No Legitimate Law Enforcement Purpose; “Sensationalization” of News Could Be Outrageous*

A California federal district court recently denied NBC Universal’s motion to dismiss and strike constitutional privacy and emotional distress claims brought by a man snared in an episode of Dateline’s hidden camera sting program “To Catch a Predator”. [\*Tiwari v. NBC Universal, Inc.\*](#), No. C-08-3988, 2011 U.S. Dist. LEXIS 123362 (N.D. Cal. Oct. 25, 2011) (Chen, J.).

The court held that plaintiff’s allegation that the media defendant directed and controlled his arrest was sufficient to state a §1983 claim for Fourth Amendment invasion of privacy and violation of his due process rights. The court also held that plaintiff showed a sufficient probability of success on his intentional infliction of emotional distress claim to overcome a motion to strike under the California anti-SLAPP law. The court, however, struck plaintiff’s defamation claim, holding that the description of plaintiff’s arrest and conviction was protected by the state’s fair report privilege.

The court also addressed the single publication rule with respect to the rebroadcast of television episodes. It concluded that rebroadcasts are separate publications intended for new audiences. Thus rebroadcasts restart the statute of limitations period.

### Background

Dateline’s “To Catch a Predator” program was an ongoing hidden camera investigation into computer sex predators – “grown men, trolling the Web for young

teenagers.” Working with a volunteer watchdog group and law enforcement, men seeking underage sex partners were lured to a sting house where they were confronted and exposed by Dateline correspondent Chris Hansen.

The plaintiff, a California software engineer, was caught in such a sting in 2006. The episode featuring plaintiff’s arrest was originally broadcast on October 6, 2006 and was rebroadcast each year through 2010. Plaintiff was originally charged with two felony counts, was tried and acquitted on a

reduced misdemeanor charge, and was later recharged and accepted a misdemeanor infraction plea deal and paid a \$30 court security fee. The 2010 rebroadcast of the episode included an epilogue stating that plaintiff had been convicted of attempted lewd and lascivious acts with a child, which is a felony under California law.

### Fourth Amendment and Due Process Claims

On the constitutional privacy and due process claims, the district court first rejected NBC Universal’s argument that plaintiff was seeking to recover “broadcast damages.” Plaintiff was not seeking damages for defendant’s “dissemination of information” but rather for the defendant’s “act of information gathering.” The court added, “[a]lthough there are legitimate reasons for publicizing arrests, the amended complaint plausibly asserts that many of the police officers’ actions were motivated not by a genuine law enforcement need, but by Dateline’s desire for more sensational footage.” Quoting with approval from [\*Conradt v.\*](#)

(Continued on page 15)



**The court held that plaintiff’s allegation that the media defendant directed and controlled his arrest was sufficient to state a §1983 claim for Fourth Amendment invasion of privacy and violation of due process rights.**



(Continued from page 14)

[NBC Universal, Inc., 536 F. Supp. 2d 380, 390 \(S.D.N.Y. 2008\).](#)

The court went on to reason that even though plaintiff had minimal privacy interests under the circumstances, he could still prevail if NBC's actions served no legitimate law enforcement purpose. Citing [Lauro v. Charles, 219 F.3d 202 \(2d Cir. 2000\)](#) (staged perp walk could constitute Fourth Amendment violation). Based on the allegations in the complaint, a reasonable jury could find: "that it was not necessary for law enforcement to wait until after Mr. Hansen confronted Mr. Tiwari before arresting him, that it was not necessary for law enforcement to arrest Mr. Tiwari in a sensational way, and that it was not necessary to film Mr. Tiwari physically restrained and in handcuffs during his detention and interview with the police."

Plaintiff's due process claim could similarly survive the motion to dismiss stage on the pleaded facts. The court noted that "the First Amendment does not set up 'a wall of immunity protecting newsmen from *any* liability for their conduct while gathering news." Citing [Galella v. Onassis, 487 F.2d 986, 995 \(2d Cir. 1973\).](#)

### Emotional Distress Claim

The court was sympathetic to NBC's argument that plaintiff had little or no expectation of privacy under the circumstances to support an emotional distress claim. But the court accepted that plaintiff's claim for intentional infliction of emotional distress was narrowed to rest on the alleged sensationalizing of the incident. Relying again on the decision in [Conradt, 536 F. Supp. 2d at 396](#), the court concluded that "the bottom line is that the alleged sensationalization of the news could be deemed outrageous — beyond the common bounds of decency — by a reasonable jury, particularly if this was done for no legitimate law enforcement purpose."

### Defamation Issues

Plaintiff's defamation claim was based on the 2010 epilogue stating he had been convicted of attempted lewd and lascivious acts with a child, which is a felony under California law. The court granted the motion to strike. The court held the statement was substantially true for purposes of the fair report privilege even where the felony charges were ultimately reduced to a misdemeanor infraction.

The difference between the two descriptions would not have a material difference on viewers because even if the actual truth had been reported, viewers would still have seen plaintiff's actual conduct attempting to meet a 13 year old girl for sex.

### Single Publication Rule

NBC Universal had argued that the defamation claim was untimely because the epilogue was first broadcast in January 2010 and plaintiff did not file suit until May 2011. However, the episode was rebroadcast on February 7, April 18, June 28, and October 25. The single publication rule was inapplicable here, the court concluded, because "the January 2010 broadcast and the October 2010 broadcast (as well as those in between) cannot be considered a single publication."

While courts outside of California have differed as to whether a rebroadcast should be deemed a separate publication, *see* [Christoff v. Nestle USA, Inc., 47 Cal. 4th 468, 484 \(2009\) \(Werdegar, J., concurring\)](#) (citing cases from, *e.g.*, Illinois and New York), there is no established law in California. Justice Werdegar of the California Supreme Court has suggested, however, in her concurrence in *Christoff* that treating a rebroadcast as a separate publication is "more consistent with [the] statutory language." *Id.* (stating that "[s]ection 3425.3's reference to 'any one broadcast' . . . appears to preclude a result like that in *Zoll v. Jordache Enterprises, Inc.* [a decision issued by a New York district court], where two broadcasts of the same advertisement, separated by 22 years, were deemed to be a single publication").

Moreover, the court found that the rebroadcasts were presumably intended to reach a new audience — just as a paperback edition of book is intended to reach a new group of readers.

*Plaintiff is represented by Elizabeth Cheryl Pritzker, Girard Gibbs LLP, San Francisco, CA. NBC Universal, Inc., is represented by Jeff Glasser, Thomas R. Burke, Davis Wright Tremaine LLP, San Francisco, CA.*

# Illinois Appellate Court Analyzes Protection for Anonymity in Online Libel Case

## *Burden on Plaintiff to Show Prima Facie Case*

An Illinois appellate court quashed a motion for pre-action discovery to obtain the identity of a pseudonymous online poster. *Stone v. Paddock Publications, Inc.*, No. 09L5636 (Ill. App. Nov. 17, 2011). The court held that plaintiff failed to make a prima facie showing to support a libel claim because the statement at issue was either not factual or subject to an innocent construction.

In ruling on the case, the court affirmed that Illinois follows a motion to dismiss standard and not a summary judgment standard in protecting anonymous online speech. See *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 711 (2010). The court here affirmed the approach in *Maxon*, adding that it provides adequate protection for anonymous speech because Illinois is a fact pleading state. Thus “[t]o survive a motion to dismiss, the plaintiff must allege specific facts supporting *each element of his cause of action* and the trial court will not admit conclusory allegations and conclusions of law that are not supported by specific facts.”

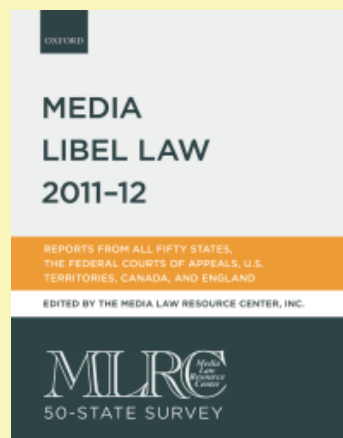
At issue in the case were comments posted on a suburban newspaper’s comment board in the context of a local election. Following several heated exchanges between two commenters, and an invitation to meet in person, one commenter wrote: “*Thanks for the invitation to visit you ... but I'll have to decline. Seems like you're very willing to invite a man you only know from the internet over to your house—have you done it before, or do they usually invite you to their house?*”

The petitioner alleged this implied he “solicits men for sex over the Internet.” The court found no reasonable person would understand the comment as a factual assertion. The comment would likewise be subject to an innocent construction.

Addressing the issue of anonymity, the court concluded:

Encouraging those easily offended by online commentary to sue to find the name of their “tormenters” would surely lead to unnecessary litigation and would also have a chilling effect on the many citizens who choose to post anonymously on the countless comment boards for newspapers, magazines, websites and other information portals. Putting publishers and website hosts in the position of being a “cyber-nanny” is a noxious concept that offends our country’s long history of protecting anonymous speech.

*Petitioner was represented by Stephen L. Tyma and William A. O'Connor, of Tyma O'Connor, P.C., Chicago, IL. Respondent was represented by Babowice & Associates LLC, Waukegan, IL and Mudd Law Offices, Chicago, IL.*



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# Army Sergeant's Claims Against Makers, Distributor of *Hurt Locker* Stricken In Entirety

## *Film a "Transformative" Work; Full First Amendment Protection Against Right of Publicity And Other Claims*

By David Halberstadter

On October 13, 2011, Judge Jacqueline H. Nguyen of the Central District of California granted the "special motion to strike" filed by the writer, director, producers and distributor of the Academy Award®-winning motion picture *The Hurt Locker*, finding that the plaintiff, an Iraq war veteran who claimed that the film was based on his experiences as a bomb disposal expert, could not overcome the defendants' First Amendment and other defenses. Each of the defendants was awarded its attorneys' fees, as well. [\*Sarver v. The Hurt Locker LLC, et al.\*](#), No. 2:10-cv-09034.

Applying California's "anti-SLAPP" statute, which requires an early examination of claims that have the potential to chill protected speech, the Court found that the film qualified for protection under the statute and that the plaintiff could neither meet his burden of demonstrating the probable validity of any of his claims.

### **Bombshells, *Playboy* and The Oscars®**

Plaintiff Sergeant Jeffrey Sarver is an active duty Explosive Ordnance Disposal (EOD) technician who has served a number of tours of duty in Iraq. In 2004, journalist Marc Boal was embedded with Sarver's unit, for the purpose of writing an article for *Playboy* magazine. The article was published in

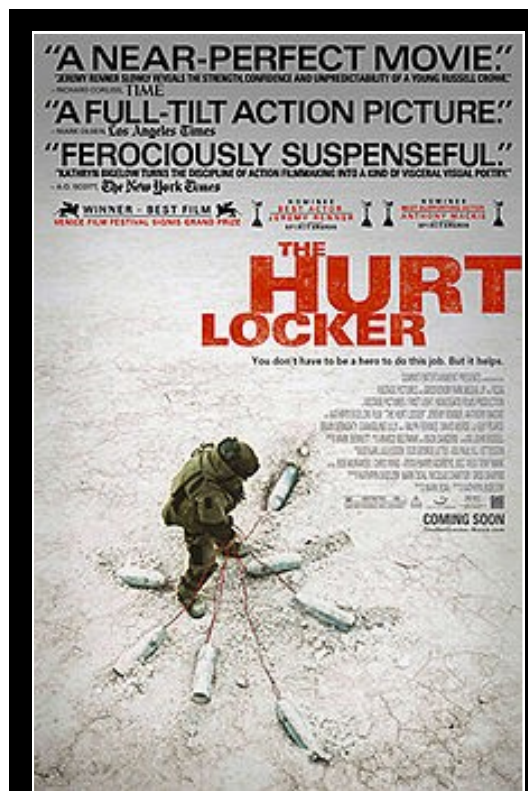
mid-2005, and focused largely upon Sarver's life and experiences in Iraq.

Boal subsequently wrote the fictional screenplay for *The Hurt Locker*. He drew upon many sources of inspiration for the screenplay, including interviews with numerous EOD technicians aside from Sarver, research materials, his imagination, and observations and experiences from his embedment with Sarver's unit. *The Hurt Locker* was a critical success, garnering nine Academy Award® nominations. On the eve of the awards presentation, however, Sarver announced with great fanfare and publicity – including a televised press conference -- that he had commenced a lawsuit against Boal, director Kathryn Bigelow, producer Nicolas Chartier and his Voltage Pictures, LLC and distributor Summit Entertainment, LLC, among others.

### **From the Garden State to the Golden State**

Sarver originally filed his action in New Jersey, for reasons that are not clear, but which may have included the avoidance of California law. He accused the defendants of improperly using and commercially exploiting his likeness, identity and personal experiences by basing the

film's main character (played by actor Jeremy Renner) and most of the film's storyline on Sarver and his own, real-life



"[T]he defendants argued that even if *The Hurt Locker* had intentionally and expressly told the story of Sarver's experiences and had used his name and all of his features and characteristics, the motion picture still would have been entitled to the full measure of First Amendment protection, and Sarver's right of publicity claim would fail as a matter of law."

(Continued on page 18)



(Continued from page 17)

experiences. Sarver also claimed, however, that the film inaccurately portrayed him, thereby defaming him and violating his right of privacy by placing him in a negative “false light.” Finally, Sarver asserted claims for breach of

contract (the terms and conditions of Boal’s embedment), intentional infliction of emotional distress, fraud and negligent misrepresentation.

The defendants responded to Sarver’s complaint with a motion challenging the propriety of Sarver’s venue selection, arguing alternatively that venue was improper in New Jersey, and even if that choice of venue were otherwise proper, the action should be transferred to California, where nearly all of the defendants resided and where the majority of the work on the film (other than location filming) had been performed. Approximately eight months after the action had been filed, the assigned federal judge in New Jersey ordered the action transferred to the Central District of California. Soon thereafter, all of the defendants filed their special motions to strike under California’s “anti-SLAPP” statute.

### Getting SLAPped

California’s “anti-SLAPP” statute “was enacted to allow early dismissal of meritless First Amendment cases that are aimed at chilling expression through costly, time-consuming litigation. (“SLAPP” is an acronym for “Strategic Litigation Against Public Participation.”) See *Price v. Stossel*, 620 F.3d 992 (9th Cir. 2010). California courts evaluate a defendant’s anti-SLAPP motion in two steps. First, the defendant must make a threshold showing that the act or acts of which the plaintiff complains were in furtherance of the right of petition or free speech, and in connection with a public issue or an issue of public interest. If the defendant meets that burden, the plaintiff must then demonstrate that his or her complaint is both legally sufficient and supported by a *prima facie* showing of facts that would be sufficient to sustain a favorable judgment if the evidence submitted by the plaintiff

**The Court:** ‘You’re basically saying that the court didn’t weigh it carefully enough; and upon further reflection, you’re going to win on the transformative use?’

**Counsel:** ‘I’m actually saying that I don’t see from the tentative that the court engaged in an evaluation of the work as a whole at all, as opposed to a comparison of the plaintiff to the fictional character; and I’m urging the court that under the Winters and Comedy III test that’s what it is supposed to do.’”

is credited. *Hilton v. Hallmark Cards*, 580 F.3d 874 (9th Cir. 2009).

The defendants argued that the challenged activities – the writing, producing and distribution of *The Hurt Locker* – fell easily into the category of free speech and/or acts in furtherance of free speech, and that film was directly connected to both a public issue and an issue of

public interest; namely, the war in Iraq, the importance of EOD technicians to the war effort, and the dangers that EOD technicians and others face. Having met their initial burden on the anti-SLAPP motion, defendants next asserted that Sarver was incapable of demonstrating the probable validity of any of his claims.

In particular, the defendants pointed out that the motion picture did not use Sarver’s name or his actual likeness; that there were substantial and significant differences between the film’s main character and Sarver, between the film’s other characters and Sarver’s team members, and between the fictional experiences portrayed in the film and Sarver’s actual experiences in Iraq; and that, therefore, the film was not about Sarver and did not misappropriate his likeness or identity as a matter of law.

Citing the “transformative use” test established by California’s Supreme Court for balancing between the right of publicity of celebrities and the First Amendment rights of creators of expressive works (see *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001) and *Winter v. DC Comics*, 30 Cal. 4th 881 (2003)), the defendants argued that even if *The Hurt Locker* had intentionally and expressly told the story of Sarver’s experiences and had used his name and all of his features and characteristics, the motion picture still would have been entitled to the full measure of First Amendment protection, and Sarver’s right of publicity claim would fail as a matter of law.

Sarver opposed the defendants’ anti-SLAPP motion on virtually every conceivable ground, including that California law was inapplicable to his claims, that the anti-SLAPP motion was improper and untimely filed, that the actions underlying Sarver’s claims were not in furtherance of free

(Continued on page 19)

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speech, that *The Hurt Locker* did not relate to any public issue or issue of public interest, and that Sarver satisfied his burden of establishing the probability of each of his claims.

### All Claims Defused . . . Eventually

The Court issued a tentative ruling prior to the hearing on the defendants' anti-SLAPP motion. It preliminarily concluded that the defendants had easily met their burden of demonstrating that the challenged activities were in furtherance of free speech and connected to a matter of public interest. The Court largely adopted the defendants' arguments that Sarver had failed to demonstrate the probable validity of his claims for defamation, false light invasion of privacy, breach of contract, intentional infliction of emotional distress, fraud, constructive fraud and negligent misrepresentation, indicating its intention to strike these claims. But the Court tentatively was inclined to deny the anti-SLAPP motion with respect to Sarver's right of publicity/misappropriation of likeness and identity claim.

With respect to this claim, the Court recognized that the defendants had raised a viable First Amendment defense, based on the argument that *The Hurt Locker* is a "transformative work" under the California Supreme Court's test. But the Court initially believed that the evidence that had been presented of arguable similarities between Sarver and the film's main character were sufficient to make a *prima facie* showing of a right of publicity violation that could overcome the defendants' First Amendment defense.

Not surprisingly, the hearing on the anti-SLAPP motion focused on Sarver's right of publicity claim and the proper application of the California Supreme Court's "transformative use" test. Even assuming that *The Hurt Locker's* main character was a portrayal of Sarver and that the film depicted Sarver's actual experiences, the defendants argued, the film was a prototypically "transformative" work that at most, combined elements of Sarver's likeness with many other new, creative elements. Sarver's likeness and experiences, even if they had been used in *The Hurt Locker*, were merely a few of the many raw materials from which the film was synthesized, and certainly were not the very sum and substance of the work itself.

During this portion of the hearing, the Court asked defense counsel: "You're basically saying that the court didn't weigh it carefully enough; and upon further reflection,

you're going to win on the transformative use?" Counsel replied, "I'm actually saying that I don't see from the tentative that the court engaged in an evaluation of the work as a whole *at all*, as opposed to a comparison of the plaintiff to the fictional character; and I'm urging the court that under the *Winters* and *Comedy III* test that's what it is supposed to do."

The court's formal Order reflects that it did, indeed, revisit its initial analysis of this claim and the defendants' "transformative use" defense. After summarizing the applicable test, the Court concluded that even if the film's main character was based on Sarver, "no reasonable trier of fact could conclude that the work was not transformative."

The Court observed:

Defendants unquestionably contributed significant distinctive and expressive content to the character of Will James. Even assuming that Plaintiff and Will James share similar physical characteristics and idiosyncrasies, a significant amount of original expressive content was inserted in the work through the writing of the screenplay, and the production and direction of the movie.

The Court focused first upon the many differences between Sarver's real life experience and the portrayal of film's main character, as well as the fictional interactions and dialogue between the main character and other fictional characters. In addition, the Court found that the fictional "dialogue between characters, the other fictional characters with whom Will James interacted, and the direction of the actor all added significant and distinctive expressive content. Thus, the character of Will James, even if modeled after Plaintiff, 'is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.'"

The Court then considered the secondary inquiry suggested by the California Supreme Court in *Comedy III* that focuses on whether the value of the work is mainly derived from the fame of the plaintiff. The Court concluded:

[T]he value of *The Hurt Locker* unquestionably derived from the creativity and skill of the writers, directors, and

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producers who conceived, wrote, directed, edited, and produced it. Whatever recognition or fame Plaintiff may have achieved, it had little to do with the success of the movie. Thus, Plaintiff's claim is barred by the First Amendment as a matter of law.

### On To The Ninth Circuit

On November 11, 2011, Sarver filed a Notice of Appeal. The Ninth Circuit – which Judge Nguyen will be joining once her nomination is confirmed by the Senate -- will therefore soon be review the district court's anti-SLAPP ruling. At least one other anti-SLAPP decision is currently pending in the Ninth Circuit in which the proper application of the

California Supreme Court's "transformative use" test is at issue. (*Keller v Electronic Arts* Case No. 10-15387). And still pending in the district court are motions by the defendants to set the amount of attorneys' fees to be awarded.

*David Halberstadter and Sally Wu of Katten Muchin Rosenman LLP in Los Angeles represented The Hurt Locker's distributor, Summit Entertainment, LLC. The film's producers and financiers were represented by Timothy J. Gorry, Jon-Jamison Hill and Jackie M. Joseph of Eisner, Kahan & Gorry (Los Angeles).*

*The film's writer and director were represented by Dale F. Kinsella and Jeremiah T. Reynolds of Kinsella Weitzman Iser Kump & Aldisert LLP (Los Angeles). Plaintiff Sarver was represented by Geoffrey N. Fieger and Todd J. Weglarz of Fieger, Fieger, Kenney, Johnson & Giroux, P.C (Michigan) and Erik L. Jackson of Cozen & O'Connor (Los Angeles).*

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## Traditional Minimum Contacts Analysis Applied to Online Libel Case *Court Finds Zippo's Sliding Scale Approach Flawed*

**By Jeffrey T. Cox and Melinda K. Burton**

On June 11, 2011, joining the recent trend of decisions throughout the country in the past year,\* a Florida appeals court, in [\*Caiazza v. American Royal Arts Corp.\*](#), No. 4D09-5152, 2011 Fla. App. LEXIS 8078 (Fla. App. 4th Dist., June 1, 2011), explicitly declined to adopt the sliding-scale approach to personal jurisdiction in cases involving the internet as set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), holding instead that the traditional minimum contacts analysis will apply, regardless of whether the internet is involved. In releasing its opinion, despite the fact that a voluntary notice of dismissal had been filed, the Florida appeals court stated "the issue presented in this case -- the role the internet plays in a specific and general jurisdiction analysis -- [is] of great public importance because it involves a confusing area of the law that is mainly scattered across the federal courts and has not been addressed head-on by a Florida court."

In *Caiazza*, the plaintiff, American Royal Arts Corporation ("ARA"), a seller of rock-n-roll memorabilia,

entered into an agreement to sell to a customer an autographed Beatles Revolver album. The customer sent a computerized scan of the cover of the album with the autographs on it to the defendant Caiazza, who operates a business that specializes in buying, selling, and authenticating Beatles memorabilia, for Caiazza's opinion on whether the autographs were real. Caiazza's opinion was that the signatures on the album were forgeries, resulting in the customer deciding not to purchase the album from ARA.

ARA then brought suit against Caiazza, alleging three claims: defamation, violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), and violation of Florida's unfair competition statute. Caiazza moved to dismiss for lack of personal jurisdiction. The trial court denied Caiazza's motion to dismiss, finding both specific and general jurisdiction over Caiazza. On appeal, the Fourth District Court of Appeals affirmed, concluding that the trial court had specific, but not general, personal jurisdiction over Caiazza for all three counts in the complaint.

(Continued on page 21)



(Continued from page 20)

### Personal Jurisdiction Analysis

In finding that the trial court had specific personal jurisdiction, but not general jurisdiction, over Caiazzo, the appeals court began with a review of the law regarding personal jurisdiction in Florida, reiterating that in Florida there is a two-step process to determine if personal jurisdiction exists. First, the court must determine if sufficient facts have been alleged to bring the action within the ambit of Florida's long-arm statute, which (1) provides a list of enumerated acts that allow the court to exercise specific personal jurisdiction over a defendant (including operating a business in the state and committing a tort in the state) and (2) also provides for general jurisdiction if the defendant engages in substantial and not isolated activity in the state. If the actions fall within Florida's long-arm statute, then the court moves to the second step, that is determining if there are sufficient minimum contacts on the part of the defendant to satisfy constitutional due process.

The Florida appeals court also explained that personal jurisdiction can exist in two forms: specific and general. Specific jurisdiction arises when the alleged activities or actions of the defendant are directly connected to the forum state, while general jurisdiction exists when defendant's contacts with the forum state are sufficiently substantial, that is continuous and systematic. The court emphasized that the due process second step "imposes a more restrictive requirement" than Florida's long-arm statute and "the required due process analysis differs depending on whether the personal jurisdiction being asserted is (1) specific (requiring minimum contacts showing purposeful availment) or (2) general (requiring substantial, continuous and systematic contacts). As the Florida appeals court stated, the minimum contacts rule set forth in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154 (1945) is the constitutional touchstone for determining personal jurisdiction.

After setting forth the traditional principles for determining personal jurisdiction, the court then moved into a discussion of how the internet affects the jurisdictional analysis, explaining *Zippo's* "sliding scale" approach that determines the jurisdictional issued based on whether an internet website is active or passive, but ultimately

concluding that "[n]o Florida court has actually adopted the *Zippo* factors and we are not inclined to do so either" due to the inherent flaws in the sliding scale approach.

The Florida appeals court discussed briefly the Florida Supreme Court's decision in *Internet Solutions Corp. v. Marshall*, 39 So.2d 1201 (Fla. 2010), in which the Florida Supreme Court addressed the type of internet activity that would fall under the Florida long-arm statute, "declin[ing] to utilize an active/passive distinction" and concluding: "by posting allegedly defamatory material on the Web about a Florida resident, the poster has directed the communication about a Florida resident to readers worldwide, including potential readers within Florida. When the posting is then accessed by a third party in Florida, the material has been 'published' in Florida and the poster has communicated the material 'into' Florida, thereby committing the tortious act of defamation within Florida." The Florida Supreme Court, however, emphasized that its holding did not address the due process minimum contacts requirement, only the long-arm statute

**The Florida appeals court found *Zippo's* sliding scale approach flawed because the United States Supreme Court "long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests."**

The Florida appeals court found *Zippo's* sliding scale approach flawed because the United States Supreme Court "long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests." Indeed, "[w]hile the internet's qualities are certainly unique, it is essentially a medium for communication and interaction, much like the telephone and the mail." In addition, the Florida court found *Zippo's* usefulness to be limited, because even a passive website may support jurisdiction if the website is used to intentionally harm the plaintiff, while an active one will not support jurisdiction if there is no nexus between the website and the cause of action or the contacts are not so substantial that they may be considered "systematic and continuous."

The court noted, however, that "while we do not adopt the sliding scale from *Zippo*, determining whether a website is active or passive may be part of a minimum contacts determination. . . . But to be clear, 'active' and 'passive' are not talismanic jurisdictional terms."

The Florida appeals court then applied its personal jurisdiction framework to the facts of the instant case, beginning with the specific jurisdiction analysis. In finding the trial court could properly exercise specific personal

(Continued on page 22)

(Continued from page 21)

jurisdiction over Caiazzo, the court held that the FDUTPA and unfair competition claims fell within Florida's long-arm statute because the alleged actions occurred in part while Caiazzo resided and conducted his business in Florida. The court further found sufficient minimum contacts to comport with due process. "Caiazzo's website account[ed] for a majority of his sales [and] [h]is overall sales delivered to Florida addresses from 2003-2007 were 4.35% of his total sales and amounted to approximately \$100,000."

In addition, the allegations in the complaint included that Caiazzo made disparaging statements about ARA, which is headquartered in Florida. Thus, Caiazzo had sufficient minimum contacts with Florida to satisfy due process, and the exercise of specific personal jurisdiction over Caiazzo was reasonable.

With respect to the defamation claim brought against Caiazzo, the court also held that it fell within Florida's long-arm statute, explaining that to commit a tortious act in Florida does not require defendant's physical presence in the state. The court found that the barebones allegations in the complaint, that "Caiazzo directly or through agents made defamatory statements which were published and circulated in Florida, including telephone calls made directly to ARA's employees in South Florida," were sufficient to come within the long-arm statute. The court reiterated the minimum contacts analysis discussed above, stating the result was the same. Therefore, the trial court could properly exercise specific personal jurisdiction over Caiazzo on all three counts in the complaint.

The Florida appeals court, however, held that the trial court erred in finding general jurisdiction over Caiazzo. The necessary minimum contacts needed for general jurisdiction must be continuous and systematic and it is a "much higher threshold" than the minimum contacts required for specific personal jurisdiction. The appeals court rejected the trial court's finding that "Caiazzo's website conferred Florida with general jurisdiction." The appeals court stated "the mere existence of a website does not show that a defendant is directing his business activities towards every forum where the website is visible."

The court then looked at the particular facts concerning Caiazzo's website, emphasizing that it was not focusing on whether the website was "passive" or "active," but rather on the actual contacts to determine if they were substantial and continuous. In holding that such substantial and continuous contacts were not present, the appeals court set forth the

following facts: "the 'vast majority' of Caiazzo's business comes from his website," "Caiazzo lists his services and merchandise on his website," "there is no method for direct purchase of merchandise or services through [the] website," "from 2003 to 2007, 4.35% of Caiazzo's total sales came from Florida[; t]he actual amount is approximately \$100,00 of sales to Florida out of approximately \$2,300,00 total sales," and "no evidence was presented that Caiazzo specifically targeted Florida residents with his website." Given these contacts and the fact that the 4.35% Florida sales was de minimis, the court found the website insufficient to establish general personal jurisdiction.

It is interesting that the Florida appeals court went to such lengths to establish a clear cut position regarding how to determine both specific and general personal jurisdiction in cases involving the internet and what role, if any, *Zippo's* sliding scale approach should take in the analysis. The parties had voluntarily dismissed the case before the appeals court was to release the opinion.

Further, the question of specific personal jurisdiction appeared easily answered given the parties agreed that Caiazzo resided and ran his business in Florida during part of the time in question. Since the Florida appeals court could have affirmed the trial court's jurisdiction decision on that basis alone, it did not need to address at all the general jurisdiction question.

In any event, this case is but another example of the recent erosion of the *Zippo* sliding scale approach and the return to traditional principles of jurisdiction in internet-related cases, which will in all likelihood continue, given the internet is no longer seen as something new and its "ever-increasing role" in commerce.

*Jeffrey T. Cox is a partner and Melinda K. Burton is an associate with Faruki Ireland & Cox P.L.L., with offices in Cincinnati and Dayton, Ohio. Plaintiff was represented by Daniel J. Brams of Silver, Bass & Brams, P.A., West Palm Beach, FL. Defendant was represented by June Galkoski Hoffman of Fowler White Burnett P.A., Fort Lauderdale, FL.*

*\*For an overview of recent decisions trending toward returning to the traditional principles of personal jurisdiction as opposed to applying the sliding scale approach adopted in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), particularly in defamation cases involving the internet, see "Current Trends in Determining Personal Jurisdiction in Internet Defamation Cases" by Jeffrey T. Cox and Melinda K. Burton, MLRC Bulletin, 2011 Issue No. 1 (March 2011).*

# Oregon Appeals Court Reverses Wiretap Conviction for Videotaping Police Traffic Stop

The Oregon Court of Appeals clarified an ambiguity in its wiretapping law, which requires a party to ‘specifically inform’ another party when obtaining a recorded conversation. The Oregon court held that when one of the parties has already notified the other party that it will be recording a conversation, the second party is not required to provide its own notification if they, too, create their own recording. *Oregon v. Neff*, No. A141960 (Ore. App. Oct. 26, 2011) (en banc).

The case arose from an encounter during a traffic stop, in which a police officer had announced that he was recording the defendant after pulling him over. The defendant was himself secretly recording the officer with a cell phone held close to the driver’s side door. When the officer noticed this, he arrested the defendant and charged him under a violation of the Oregon wiretapping statute. The violation was for obtaining a conversation without all participants being ‘specifically informed’, as required by [ORS 165.540\(1\)\(c\)](#). This section makes it a misdemeanor to:

Obtain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained.

The question then arose, what does the term ‘specifically informed’ mean in the context of Oregon’s wiretapping statute? Does it require notice for each separate recording, or does one notice of a conversation’s being recorded satisfy the requirement? It is on this issue that the majority opinion and dissent disagreed.

The majority opinion, in finding that ‘specifically inform’ did not require a separate notice for each separate recording of the same conversation once all participants know a recording is taking place, concluded that ordinary canons of construction alone could not answer the question. First, they demonstrated that the statute’s language, being in the passive voice, was ambiguous. Then, they demonstrated that looking to the context of the statute no definitive answer could be

found as to the term’s meaning, other than to say that the legislature intended to protect all participants in a conversation. They next found that neither case law nor legislative history could resolve the meaning of the term ‘specifically inform.’

Instead, the court relied on the maxim that where a statutory term is ambiguous, the court should attempt to determine how the legislature would have intended the statute be applied. The court concluded that the construction which avoided criminalizing the taking of a second recording without notice, when one noticed had already been provided, would be most consonant with the purpose of protecting all parties to a conversation.

To illustrate the point, the court posed a hypothetical abuse of power that would arise under the opposite construction. Imagine a conference room, the court said. It is fitted with a microphone and a sign which says “Warning: Your Conversation is Being Obtained.” Yet in that scenario, under the dissent’s construction of ‘specifically inform,’ anyone entering the room and making a recording would be guilty of a crime.

The dissent held that there was no statutory ambiguity, and that ‘specifically inform’ could only mean notice is required for each separate recording; that the word ‘specific’ refers to each particular recording, and that only this interpretation would be consistent with the meaning of ‘obtain’ as used throughout the statute. A second dissent effectively emphasized that the statute required that no secret recordings be made.

The majority had a pithy reply to the dissenting opinions positions (which included that *who* is recording a conversation may make a crucial difference in how one behaves). The majority reply may illustrate its main difference in perspective:

“[W]e perceive [no explanation] why a participant in a conversation who has specifically informed the other participants that he or she is obtaining a record of the conversation would have a *legitimate* motive to change his or her mind about participating in the conversation ....”

# Constitutional Protection for False Statements of Fact?

## *Supreme Grants Cert. to Review the Stolen Valor Act*

By Tom Clyde

The United States Supreme Court has accepted certiorari in a case that will likely require the Court to decide what, if any, constitutional protection is afforded to speech that is knowingly false.

As several commentators predicted, the U.S. Supreme Court issued a writ of certiorari in late October to review the Ninth Circuit's decision that struck down the Stolen Valor Act. [\*United States v. Alvarez\*, 638 F.3d 666 \(9<sup>th</sup> Cir. 2011\)](#), cert. granted, No. 11-210 (Oct. 17, 2011).

Although the case arises from a federal criminal prosecution, the Ninth Circuit arrived at its decision by examining the constitutional value that is afforded to false speech in such familiar cases as *Sullivan*, *Gertz* and *Hepps*.

There is a strong possibility that the Supreme Court's decision in *Alvarez*, which is expected by next summer, will refine the Court's past jurisprudence exploring the importance of protecting false speech to create the "breathing space" needed for other expression.

### Constitutional Value of Knowing Falsehoods?

In 2007, Xavier Alvarez was an official on his regional water district board of directors who had a "hobby" of telling outrageous – and untrue – tales about himself. At a meeting with a neighboring district water board, Alvarez introduced himself by stating that he was a "retired marine of 25 years" and that "back in 1987 I was awarded the Congressional Medal of Honor."

In fact, these statements were, in the words of the Court, "a series of bizarre lies." Alvarez had never been in the military and the accolade he awarded himself was the nation's most prestigious military decoration.

Alvarez was indicted and thereafter pled guilty to a violation of the Stolen Valor Act, [18 U.S.C. § 704\(b\)](#), which makes it a crime for a person to "falsely represent[] himself or herself" as having "been awarded any decoration or medal

authorized by Congress for the Armed Forces of the United States . . ." In entering his plea, Alvarez reserved his right to appeal on First Amendment grounds.

On appeal, a divided panel reversed Alvarez's conviction and struck down the Act. Judges Thomas G. Nelson and Milan D. Smith, Jr., found that the speech criminalized by the Act was not "sufficiently proscribed to fit among the narrow categories of false speech previously held to be beyond the First Amendment's protective sweep." Applying strict scrutiny, the majority found that the Act was not narrowly tailored.

Judge Jay S. Bybee, however, dissented, arguing that a litany of Supreme Court decisions had stated in various linguistic formulations that false statements of fact have "no constitutional value," so are unworthy of strict scrutiny.

Under a less demanding scrutiny, Judge Bybee asserted that the Stolen Valor Act was not unconstitutionally overbroad.

In response to a petition rehearing en banc, additional Ninth Circuit judges joined the constitutional debate. Most notably, Chief Judge Alex Kozinski made rhetorical points in his separate opinion concurring in the denial of rehearing en banc by asserting that upholding the law

would mean even "the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis." Judge Kozinski elaborated with every day examples: "Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost \$10 at poker") . . . to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain innocence ("There are eight tiny reindeer on the rooftop").

(Continued on page 25)

**Judge Kozinski elaborated with every day examples: "Saints may always tell the truth, but for mortals living means lying."**



(Continued from page 24)

### Directions the Supreme Court Could Take

In deciding the case, there are a number of directions that the Supreme Court could take. Professor Eugene Volokh of UCLA School of Law has [examined a variety of permutations](#).

For example, the Court could conclude knowingly false speech lacks any constitutional value and, as such, could find the Stolen Valor Act as a defensible law under the rational basis test. There is rhetorical support for this in several cases, including *Gertz*. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”).

Alternatively, the court could strike down the law under a strict scrutiny analysis on the grounds that knowingly false speech does not fit within the small group of historically established exceptions to First Amendment protection for speech. The Court relied heavily on this list of historical exceptions in striking down a law punishing “crush” videos in *United States v. Stevens*, 130 S. Ct. 1577 (2010) (“Our Constitution forecloses any attempt to revise [the historical exceptions] simply on the basis that some speech is not worth it.”)

Professor Volokh suggests that there is a possible middle course that would uphold the law and coherently tie together the Court’s protection of knowing falsehoods in some

contexts (seditious libel), but not others (perjury, fraud, defamation). This would be to permit review of a law restricting speech under a rational basis test if the punishment of that speech would not itself create an unacceptable risk of deterring debate on matters of public concern.

### Implications for State Laws Banning Knowing Lies in Elections

*Alvarez* has the potential to influence a brewing debate on state statutes that have been enacted to restrict political advertising that contain knowingly false statements of fact.

In the past five years, the Eighth Circuit and the Washington Supreme Court have each upheld challenges to such laws on the grounds that they strike too deeply into core political speech. See *281 Care Committee v. Arneson*, 638 F.3d 621 (8<sup>th</sup> Cir. April 28, 2011); *Rickert v. State Public Disclosure Comm’n*, 161 Wash.2d 843 (Wash. 2007).

If the Supreme Court gives greater latitude to punishing knowing falsehoods in *Alvarez*, such state laws restricting political advertising may gain a new legal foothold. In an environment where voters are increasingly frustrated with the tenor of political discourse, enacting laws requiring that politicians speak “the truth” may be a popular, albeit constitutionally dangerous, political direction for local legislatures.

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## MLRC UPCOMING EVENTS

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Sept. 12-14, 2012 | Reston, Virginia

### MLRC Annual Dinner

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### Defense Counsel Section Annual Meeting and Lunch

November 15, 2012 | New York, NY

# Illinois Court Quashes Subpoenas in “Cold Case” Shield Law Applied in Prosecution of 50-year old Murder

By Samuel Fifer

Jack Daniel McCullough was living a normal, semi-retired, life in the Seattle, Washington area. A military veteran and Illinois native, Jack and his wife were living in a retirement community; Jack worked part time as a security guard and he and his wife were both stunned when Jack was arrested and charged with the commission of a horrifying crime, the 1957 murder of 6-year old Maria Ridulph, of Sycamore, Illinois. Remote not only in space from Seattle, but in time as well – December, 1957 is nearly 54 years from the summer of 2011 – the prosecution of Jack McCullough was going to be difficult under the best of circumstances.

The search for Maria Ridulph and her killer was a subject of intense national interest. [Folklore says](#) FBI Director J. Edgar Hoover and President Eisenhower demanded daily updates on the search for the lost girl and the girl's body was found in the Spring of 1958 but the killer was never caught. The case lay dormant for decades until investigators closed in on and arrested McCullough in Seattle on July 1, 2011.

Pending his extradition to Illinois, AP reporter Eugene Johnson and Chicago Tribune reporter Isolde Raftery interviewed McCullough, back-to-back, on July 7, 2011; the AP and Tribune both published stories that appeared in late July and the DeKalb County State's Attorney quickly thereafter issued subpoenas to the AP and Tribune seeking their reporters' notes. Both AP and Tribune immediately moved to quash the subpoenas.

## Background

The Illinois Shield Law is one of the oldest reporters' privilege laws in the country, dating back to 1971, prior to the Watergate explosion and prior even to the watershed decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Upon signing the measure establishing the privilege, Illinois Governor Richard Ogilvie observed the importance of protecting the newsgathering process:

[“This] Act is more than a declaration of fair play for newsmen. It also assures a better-informed public, for it

allows reporters to seek the truth wherever it is to be found, without fear that their sources of information will be cut off by unnecessary disclosures.”] (Editor & Publisher, October 10, 1971, [at] 14, col. 2, cited in: [Baker v. F & F Investment](#) (2d Cir. 1972), 470 F.2d 778, 782 n.7.)

The Illinois Reporters Privilege Act (known occasionally as the Illinois Shield Law, or the Shield Law), 735 ILCS 5/801, et seq., has been used frequently in litigation, civil and criminal both, in all three levels of Illinois courts, trial, Appellate and Supreme, since it was enacted 40 years ago. Frequently used defensively to resist law enforcement and litigant attempts to use evidence generated by the media (usually reporters and publishers or disseminators of news and information, whether in print, by broadcast, or digitally), the Shield Law's original design and intent was to act as a true “shield,” or procedural hurdle that those seeking such evidence would have to overcome by, in the first instance, persuading a court even to issue a subpoena either for materials or testimony. And while some courts respect the approach, most frequently, the process is initiated by lawyers representing public or private parties, who either do not know much about the procedure or who find it inconvenient, leading to “motions to quash” subpoenas, and this is the path that was taken in [People of the State of Illinois v. Jack D. McCullough](#), Circuit Court for the Sixteenth Judicial District, DeKalb County, Illinois, Case No. 2011 CF 454 (Hon. Robin Stuckert).

The AP and Tribune moved to quash and the parties then exchanged briefs, with the movants filing the final brief prior to oral argument on September 29, 2011. The Movants advanced several points: (1) the reporters' newsgathering materials were in fact covered by the Shield Law, despite the fact there was no involvement of “confidential sources,” (2) although the State failed to follow the appropriate procedure by seeking to divest the movants of their statutory privilege and (3) even if the State had done so, it could not sustain its burden of divesting the movants' asserted privilege, which

(Continued on page 27)

(Continued from page 26)

required a showing of (a) the specific information sought is relevant to a claim or defense at issue in the case, (b) disclosure of the requested information is essential to the protection of a specific public interest (not just generally “the public interest” which is arguably always going to be involved) and, what turned out to be the most hotly contested and decisive issue (c) all other available sources of information have been exhausted.

The State responded by initially contesting the movants’ broad definition of source as the “person or means from or through which the news or information was obtained.” (They retreated from this position at oral argument, however, and also filed, at the September 29, 2011 hearing, a “bare bones” petition for divestiture of the privilege, which the parties folded into their arguments.) They also argued that (1) what the State sought was relevant enough, (2) that the requested information served the broader “public interest” standard and (3) that the State had been exceedingly thorough in their lengthy investigation, having pursued numerous leads and being stymied by the fact that in the case of each movant, the only person present at the interview with the defendant – whom all conceded could not be compelled to testify as to what he did or did not say – was that movant’s reporter. The State argued that, unlike what typically happens with jailhouse interviews, there was in the current case no recording of the interview and no monitor watching or listening to the interview in the King County, Washington jail who could be called as an alternative to combing through the reporters’ notes. Interestingly, the State was not pursuing live testimony of the reporters, possibly because to do so would require invocation of the Material Witness Procedure – both reporters were at the time residents of Washington State.

In a highly interactive hearing, the important issues that emerged were: (1) what exactly does the State need that it cannot obtain in other ways and, to what issue in the case does this information relate and (2) what does “exhaustion” really mean?

As to the first issue, the State allowed that since the published reports dealt with the issue of McCullough’s “alibi” defense, their concern focused directly on what McCullough might have said that could have undermined that defense. McCullough had made no secret about, and had spoken freely of, his alibi defense. The victim had

disappeared on December 3, 1957, the day McCullough claimed he had gone to Chicago for his pre-induction military physical. How he traveled to and from his home, about 90 miles from Chicago, had been an issue and one of the pieces of physical evidence that led to McCullough’s arrest, more than 50 years later, was an unused train ticket from Rockford to Chicago that allegedly had belonged to McCullough and that he had given to his high school girlfriend (and who had kept it for all those years).

The fact that McCullough claimed to have gotten to and from Rockford by means other than the train called into question his assertion that he was in Chicago, not Sycamore, on the day the victim disappeared, was itself a curious point. Equally baffling was the fact – confirmed by other means – that military records that might have proven that McCullough had in fact been present for the physical in Chicago went up in smoke in a fire at the military records archive in the 1970s. With this background, the State argued that McCullough might have said something to undermine that alibi defense in his interview that did not appear in print.

As to the second issue, that of “exhaustion” of alternative sources, the argument centered on the meaning of that word. The State argued that the circumstances were so unique – the one-on-one nature of the reporters’ interviews with McCullough – made the need to show any kind of “exhaustion” of other sources pointless since there were no other sources as to what McCullough may have said. The movants argued that the question had to be framed differently – had the State exhausted other “means” of proving what they sought to prove – i.e., that McCullough’s alibi was shaky or otherwise unreliable – not simply had they spoken to everyone in the room. Otherwise, the movants argued, the exhaustion part of the test would vanish in one-on-one interviews, surely not what the Legislature intended when they enacted the Shield Law.

### **The Court’s November 8, 2011 Ruling**

In the Court’s ruling on November 8, 2011, Judge Stuckert recognized that the Reporters’ Privilege applied in the case, as defined in 735 ILCS 5/8-901-909 and further ruled that “source” would be defined broadly, citing *People v. Pawlaczuk*, 189 Ill. 2d 177 (2000): “Illinois allows a qualified

(Continued on page 28)

*(Continued from page 27)*

privilege of confidentiality for any source of information obtained by a reporter,” and that “the defendant Jack McCullough is a source contemplated by the Act.”

As to the material being sought, the Court noted that the State’s interest centered on “the content of the reporters’ notes in their entirety concerning the defendant’s ‘whereabouts around the time of the disappearance and murder of Maria Ridulph.’” While noting that the material sought could be relevant, the Court was troubled by the indistinct and general nature of what the State sought and why; in particular it seemed to the Court that the information could only be useful, if at all, in the remote event that the defendant testified at trial and even then only as impeachment material. “The movant correctly argues that the State can only speculate as to what information is contained in the reporters’ notes and how that information may impact the case against the defendant. The Act requires more,” according to the Court. Further, the Court declined to fashion a special rule for criminal cases:

[T]he rights of the criminally accused do not necessarily trump the rights afforded to other protected individuals. The Court finds that the potential relevance of the protected information is speculative and any public interest asserted by the State does not outweigh the public’s interest in the news media’s First Amendment protections or right to freely gather and disseminate information.

As to the component of “exhaustion,” the Court found:

The State’s interpretation of the exhaustion requirement is misguided. Under the scenario all reports’ notes regarding interviews with the defendant conducted without the benefit of a third-party witness or recording would be obtainable under the Act. According to the State the information sought is statements made by the defendant regarding his whereabouts at the time the alleged offenses were committed. Therefore, the Act requires that all other sources of information, non-journalistic sources

of information, having information regarding the defendant’s whereabouts around the time of the disappearance and murder of Maria Ridulph be exhausted including all other individuals to whom the defendants made statements such as family, friends, ex-girlfriend, jail inmates, military personnel, et cetera.”

The Court gave the term “exhaustion” a broad but realistic reading further noting that the State’s strategy of “leaving no stone unturned”:

does not allow them to divest the media of their qualified privilege without meeting the requirement set forth by statute. It is apparent that the State through available investigative tools has the ability to obtain through other sources the whereabouts of the defendant and must demonstrate that they have exhausted those measures before seeking of this Court to divest the reporters of their qualified privilege.

### **Implications for the Journalist’s Privilege**

The value of the Court’s ruling is, thus, two-fold in terms of the vitality of the reporters’ privilege: (1) there is no “lowered bar” for criminal cases – not even for “cold” murder cases where clues and evidence are likely in short supply and (2) the “exhaustion” component to the motion to divest calculus is not satisfied by a mere showing of “inconvenience.” To quote the Court: “no stone should be left unturned.” Since most state Shield Laws contain these inquiries as part of the tests employed, this decision, although from a trial court, can be used in future cases where it might appear at first that the “exhaustion” component has been fulfilled.

*Samuel Fifer is a partner at SNR Denton U.S. LLP. Together with Kristin Rodriguez, they represented the Associated Press and Chicago Tribune Company in support of their Motion to Quash. The State’s Attorney of DeKalb County was represented by State’s Attorney Clay Campbell and Assistant State’s Attorneys Victor Escarcida and Julie Trevarthen. Defendant Jack D. McCullough was represented by DeKalb County Public Defender Regina Harris.*



# Doe Defendant's Right to Speak Anonymously Trumps Copyright Plaintiff's Desire to Discover His Identity

## *Court Holds Plaintiff to a Rigorous "Balancing of Harms" Test*

By Joshua Koltun

### Procedural Background

In a recent decision, the Hon. Lucy Koh of the Northern District of California, set a stringent standard for plaintiffs to meet before they can obtain the identity of an anonymous blogger who had been speaking about an issue of public interest. [\*Art of Living Foundation v. Does\*](#), 2011 US Dist Lexis 129836 (N.D. Cal. Nov. 9, 2011). Plaintiff, the American chapter of an international organization, had sued a number of anonymous speakers who had characterized the organization as a cult. Defamation claims were dismissed before the motion to quash was heard, however, so the issue of anonymity arose with respect to a claim of copyright infringement only.

Significantly, the Court assumed, without deciding, that the Plaintiff had presented a *prima facie* case of copyright infringement but nevertheless ruled that plaintiffs had failed to show a need to discover the Doe Defendant's identity, at least at this juncture in the litigation. The Court ruled that the Defendant's posting of the copyrighted document had constituted speech on an issue of public interest, and thus the speaker's anonymity warranted significant First Amendment protection. Because the Defendant had appeared through counsel and made himself available, at least to some extent, to respond to discovery, Plaintiffs had failed to show that the harm of stripping the Doe Defendant of his anonymity was outweighed by any immediate need to know his identity.

Thus the case points to new strategies in defending anonymous speakers. The decision suggests that the right to anonymity might develop in ways that may complement the Reporter's Privilege.

**"Disclosure of Skywalker's identity here could discourage other bloggers from engaging in lawful, critical speech," and therefore the Court must apply the most stringent standard before stripping Skywalker of his anonymity.**

The Art of Living Foundation (AOLF) is an international "educational and humanitarian" organization, headquartered in India, dedicated to promoting the teachings of "His Holiness Ravi Shankar" (no relation to the musician). Plaintiff Art of Living Foundation (AOLFUS), a California corporation, is the American chapter of the international organization. Defendants "Klim" and "Skywalker" are allegedly "disgruntled former student-teachers and students of Plaintiff" who operate two blogs ("Blogs") that provide a forum for criticism of Plaintiff, AOLF, and Shankar. The general tenor of the postings on these blogs is that AOLF is a cult and Shankar a charlatan.

In November 2010, AOLFUS filed a Doe complaint alleging defamation, trade libel, misappropriation of trade secrets and copyright infringement arising from various postings on the Blogs. Plaintiff cited numerous allegedly false disparaging remarks about Plaintiff, AOLF, and Shankar. Plaintiff also cited the posting of a number of AOLF documents, which Plaintiff contended contained AOLF trade secrets. The copyright infringement action stemmed from the posting of a document called the *Breath Water Sound Manual* ("BWSM"), as to which AOLFUS applied for U.S. copyright registration shortly before filing the lawsuit.

Because the postings were anonymous, Plaintiff also sought leave to take expedited discovery for the purpose of identifying and serving process on Defendants. In December 2010, Magistrate Judge Laurel Beeler granted the request, and Plaintiff subpoenaed Google and Automattic, Inc., which host Blogger and Wordpress respectively, the software platforms used by the two Blogs.

(Continued on page 30)

(Continued from page 29)

In January 2011, before Google or Automattic had responded to the subpoenas, Defendants Klim and Skywalker (the creators of the two Blogs) specially appeared through counsel. They moved (i) to dismiss the defamation and trade libel claims (ii) to strike those claims and the trade secret claim under California's anti-SLAPP provision, and (iii) to quash the order allowing discovery of Google and Automattic.

Skywalker and Klim contended that they had standing to assert the First Amendment rights of the various (unknown) Doe Defendants other than themselves who had posted some of the comments at issue on the defamation claims. Skywalker admitted that he (but not Klim or any of the other Doe defendants) had posted the BWSM and the allegedly trade secret documents on his Blog. Skywalker argued that his posting of these documents to “debunk the notion that Ravi Shankar is an enlightened being in possession of mystical ‘secret knowledge.’” In other words, the alleged infringement / misappropriation was part of his larger argument that AOL is a cult and Shankar a charlatan.

On the motion to quash, Defendants argued that permitting discovery of their identities would violate their First Amendment right to speak anonymously. They argued that Plaintiff's claims had been manufactured solely for the purpose of identifying them, and were part of an effort to chill them from freely expressing their criticisms of Shankar and the organizations that surround him. They argued that Plaintiffs had not shown any “evidentiary basis” for believing that Defendants had “engaged in wrongful conduct that has caused real harm to the interests of [Plaintiff].”

In June, 2011, while the motion to quash was still pending before a magistrate judge, the District Court dismissed the defamation and trade libel claims, on the grounds that the statements at issue were “constitutionally protected opinions.” (2011 U.S. Dist. LEXIS 63507). The Court denied the motion to strike the trade secret claim, but did so without prejudice. At the same time, however, the Court ruled that Plaintiff had failed to identify the trade secret with

particularity, and applying California Code of Civil Procedure section 2019.210, stayed Plaintiff from obtaining discovery as to the trade secret claim. Plaintiff later filed a First Amended Complaint that alleged only trade secret and copyright causes of action. Because of the Court's stay of discovery on the trade secret claim, the motion to quash was effectively determined with respect to the copyright claim alone.

In August, 2011, Magistrate Judge Harold Lloyd denied the motion to Quash as to Skywalker, but granted it as to Klim. (2011 U.S. Dist. LEXIS 129836 ). Judge Lloyd purported to apply the test stated in *Sony Music Entm't Inc. v. Does I-40*, 326 F.Supp.2d 556 (SDNY 2004). Applying the factors of that test, Judge Lloyd concluded that (1) Plaintiff had alleged a *prima facie* case of copyright infringement because Skywalker had admitted posting the BWSM, (2) the subpoenas were targeted to obtain information to identify Skywalker, (3) Plaintiff had no other means to obtain Skywalker's identity, (4) without having Skywalker's identity, it would be prohibitively difficult for Plaintiff to conduct discovery, and (5) even if Skywalker had engaged in protected speech, he had not expectation of privacy because “the First Amendment does not shield copyright infringement” (citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555-56 (1985)). Skywalker moved the District Court for relief, and amici curiae Public Citizen, the American Civil Liberties Union and Electronic Frontier Foundation filed a brief supporting Skywalker's position.

**“This case appears to be unique among the relevant body of case law in that Skywalker has not only appeared through counsel and filed numerous dispositive motions, but also propounded and responded to interrogatories and requests for production. Skywalker's engagement in the litigation, albeit under a pseudonym, diminishes Plaintiff's need to obtain his true name at this time.”**

### Court Determines Most Stringent Standard Applies

The District Court reasoned that since the case involved the application of constitutional standards to particular facts, and thus the Magistrate Judge's ruling was to be reviewed under a *de novo* standard.

The Court then began its analysis by noting that “the many federal district and state courts that have dealt with this issue have employed a variety of standards to benchmark

(Continued on page 31)

(Continued from page 30)

whether an anonymous speaker's identity should be revealed." (citing *In re Anonymous Online Speakers*, 2011 WL 61635, at \* 5. At the less stringent end of the spectrum, some courts have accepted a "legitimate, good faith basis" for the plaintiff's allegations, see *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372, at \*8 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds by America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Va. 2001). Other courts have announced a more exacting standard in which plaintiff must produce admissible evidence establishing each essential element of a claim. See, e.g., *John Doe I v. Cahill*, 884 A.2d 451, (Del. 2005).

At the most exacting end of the spectrum, Courts have announced a standard whereby (in addition to making a *prima facie* showing) the court also must balance "the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." *Highfields Capital Mgmt LP v Doe*, 385 F. Supp. 2d 969, 980 (N.D. Cal.2005); *Dendrite v.Intern. Inc. v. Doe No. 3*, 775 A.2d 756, 760 (NJ Super. 2001). The Court noted that this most stringent test resembles the preliminary injunction inquiry, "requir[ing] the court to 'balance the competing claims of injury and ... consider the effect on each party of granting or withholding the requested relief.'" *Winter v. Natural Resources Defence Council, Inc.* 555 U.S. 7, 24 (2008).

The court reasoned that in choosing the proper standard to apply, "the court should focus on the 'nature' of the speech conducted by the defendant, rather than the cause of action alleged by the plaintiff." *In re Anonymous Online Speakers*, 2011 WL 61635 at \* 6. The Court rejected the argument by Plaintiff that cases such as *Sony Music*, which involved the downloading of copyrighted music, were controlling. The Court noted that in that case the court had found that a person illegally downloading speech is "not seeking to communicate

a thought or convey an idea. Instead the individual's real purpose is to obtain music for free."

By contrast, the Court found that Skywalker's speech "raises substantial First Amendment concerns." The Court noted that in its previous opinion it had found that Skywalker's criticisms were constitutionally protected opinion, and that his contention that AOL is a cult and a sham were "speech on a public issue," and that his posting of the BWSM had been part of this "larger effort to debunk the notion that the Art of Living Foundation and Ravi Shankar possess some 'secret higher knowledge.'" The Court rejected the argument that "evidence of copyright infringement

...automatically remove[s] the speech at issue from the scope of First Amendment protection," noting, for example, that the doctrine of fair use constitutes a built-in First Amendment accommodation.

Significantly, the Court expressly declined to rule on the merits of the fair use defense, which is pending before the Court on a motion for summary judgment. The Court ruled that for purposes of the determining the motion to quash, it was sufficient that "the circumstances here create a substantial question as to whether the doctrine applies."

Noting that there is a "paucity of appellate precedent" on this issue (citing *In re Anonymous Online Speakers*), the Court determined that under the circumstances, the most stringent standard of *Highfields* applied to the dispute. The Court cited *Perry v. Schwarzenegger*, 591 F.3d 1147 (9<sup>th</sup> Cir. 2010), which involved the First Amendment right of association, as suggesting that "where substantial First Amendment concerns are at stake, courts should determine whether a discovery request is likely to result in chilling protected activity." The Court reasoned that "disclosure of Skywalker's identity here could discourage other bloggers from engaging in lawful, critical speech," and thus that "the *Highfields/Perry* analysis is more likely than *Sony Music* to



(Continued on page 32)

(Continued from page 31)

focus the Court on striking the proper balance between competing interests.”

### Rigorous Application of the Balancing of Harms Test

What distinguishes the *Art of Living* decision is the Court’s rigorous application of the balancing of harms test. Although the Court correctly noted that there are several decisions, such as *Highfields*, which recognized that the First Amendment requires a balancing of the harms, few such cases have actually had occasion to apply that test. In *Highfields*, for example, the Court found that the statements at issue were constitutionally protected opinion under the “first prong” of the test (*prima facie* evidence) and thus never reached the “second prong” balancing of harms. Other cases, such as *Sony Music*, recognized that some form of balancing was required, but under the circumstances of the cases had resolved the balancing against defendants, determining that any First Amendment interest was minimal or nonexistent.

By contrast, in this case, the Court assumed, without deciding, that Plaintiff would be able to make out a *prima facie* showing of copyright infringement, resolving the case *solely* under the *Highfields* “second prong” – balancing of harms.

Turning to the harm to Skywalker, the Court reasoned that “[i]nsofar as Skywalker may communicate his message more openly or garner a larger audience by employing a pseudonym, unveiling his true identity diminishes the free exchange of ideas guaranteed by the Constitution.” Thus “the disclosure of his identity is itself an irreparable harm.” The Court also considered a declaration pseudonymously submitted by Skywalker expressing concern that he and his family would be exposed to harassment from loyal AOL adherents and that stripping him of anonymity would make others fear honestly expressing their opinions concerning Shankar and AOL. The Court noted that the evidence may not be “particularly

reliable,” but reasoned that it was “consistent with the self-evident conclusion that important First Amendment interests are implicated by [Plaintiff’s] discovery request.” *Perry*, 591 F.3d at 1163. The Court found that Skywalker has “raised a reasonable inference that unveiling his identity will both subject him to harm and chill others from engaging in protected speech.” (The Court’s consideration of a pseudonymous declaration may itself be unprecedented).

On the other side of the balance, the Court found that denying Plaintiff’s discovery request at this time would not cause “comparable injury to Plaintiff’s interests.” The Court

found that Plaintiff had not demonstrated that it had a need to discover any information that could not be obtained by interrogatories or “means other than a traditional in-person deposition,” citing the possibility under Fed.R. Civ.P. 30 or 31 that the Court might order deposition taken by some remote means or by written questions. The Court also noted that some information Plaintiff sought could be obtained from third parties such as Automattic. The Court also reasoned that Plaintiff had failed to show that it had a need to discover Skywalker’s identity prior to determination of the pending dispositive motions. The Court indicated that Plaintiffs would be free to move to renew their request in the event that those motions were not granted, and the appropriate scope of discovery could be determined at that time.

The Court recognized that the circumstances of the case “differs significantly from those in which discovery as to an anonymous defendant’s identity was necessary in

order to effect service.” Indeed, the Court noted that “this case appears to be unique among the relevant body of case law in that Skywalker has not only appeared through counsel and filed numerous dispositive motions, but also propounded and responded to interrogatories and requests for production. Skywalker’s engagement in the litigation, albeit under a pseudonym, diminishes Plaintiff’s need to obtain his true name at this time.”

(Continued on page 33)

The decision suggests that at least in some circumstances a defendant may be well advised to waive service, appear in the case, and (at least in some circumstances) make himself available for discovery on a limited basis. In such circumstances the Court may allow the Doe Defendant to maintain anonymity for some preliminary period. The situation is analogous to that in which a Court allows bifurcating discovery, staying discovery on actual malice until defendant has had an opportunity to take discovery on the issue of falsity, and potentially to obtain summary judgment on that issue.



### Implications

The Court's robust application of the "balancing of harms" inquiry suggest that, if the speaker appears in the action to defend the case and is able to make an initial showing that disclosure of his identity is likely to chill speech -- certainly if that speech is on a matter of public concern -- the Court's task is similar to that under Rule 56(d). In other words, it becomes Plaintiff's burden to show that discovery of the speaker's identity is an "essential" fact necessary for it to overcome defects in its own case or affirmative defenses that may be raised by the Doe Defendant.

The decision suggests that at least in some circumstances a defendant may be well advised to waive service, appear in the case, and (at least in some circumstances) make himself available for discovery on a limited basis. In such circumstances the Court may allow the Doe Defendant to maintain anonymity for some preliminary period. The situation is analogous to that in which a Court allows bifurcating discovery, staying discovery on actual malice until defendant has had an opportunity to take discovery on the issue of falsity, and potentially to obtain summary judgment on that issue. *See, e.g., Weyrich v. New Republic, Inc.*, 235 F.3d 617, 628 (D.C. Cir. 2001); *McBride v. Merrell Dow*, 255 U.S. App. D.C. 183, 800 F.2d 1208, 1214 (D.C. Cir. 1986).

An interesting aspect of this case is that that both Skywalker and Klim -- and presumably many of the other pseudonymous critics of AOL who have posted comments on the Blogs -- reside abroad. If Skywalker were stripped of his anonymity, the (international) Art of Living organization could sue him in his home country, or in London, or in India. All of the protections of the First Amendment, upon which the Court relied in dismissing the defamation/trade libel causes of action, would then be lost.

Skywalker is protected by the First Amendment solely because he chose to use a blogging platform hosted by a company located in the United States. Automattic (Wordpress) is located in the Northern District of California (as is Google, Facebook, Twitter, etc.). Thus this case may have important implications for other foreigners using these media and/or social media to disseminate messages critical of their governments and/or powerful members of their societies.

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# Cyberlibel and Hyperlinks: A Victory for Freedom of Internet Communication

By Richard G. Dearden and Wendy J. Wagner

Is a hyperlinker who creates a hyperlink to a website containing defamatory statements liable for “publishing” the defamatory statements in the site? The answer is no.

In the seminal cyberlibel decision of [Crookes v. Newton](#), the Supreme Court of Canada recognized that the traditional common law rules of defamation cannot be applied to hyperlinks. The Court imposed a different standard of defamation law regarding the publication rule for hyperlinks than that which applies to print and broadcast media.

## Hyperlinks Do Not Publish Defamatory Statements Found in the Linked Site

The traditional publication rule requires only that the libel plaintiff prove that the defendant has, by any act, conveyed defamatory meaning to a single third party who has received it: any act that has the effect of transferring the defamatory information to a third person constitutes a publication. The majority of the Court recognized that applying the traditional publication rule to hyperlinks would chill and devastate Internet communications:

The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential “chill” in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.

Although the Supreme Court unanimously dismissed the

appeal, there was a divergence of opinion on the test to be applied to determine who was a “publisher” of the defamatory statements in the linked site. The majority of the Court held that making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content. It held that “referencing on its own does not involve exerting *control* over the content. Communicating something is very different from merely communicating that something exists or where it exists ... Hyperlinks are, in essence, references.”

## The “Without More” Proviso

Hyperlinkers should take note of the “without more” proviso of the majority’s decision as it applies to circumstances that could give rise to liability. The majority provides some guidance on what “without more” may mean. Only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be “published” by the hyperlinker.

In addition, where a defendant uses a reference in a manner that *in itself* conveys defamatory meaning about the plaintiff, the defendant will be considered the publisher of those defamatory statements. The majority held that: “Individuals may attract liability for hyperlinking if the manner in which they have referred to content conveys defamatory meaning; not because they have created a reference, but because, understood in context, they have actually *expressed* something defamatory ... This might be found to occur, for example, where a person places a reference in a text that repeats defamatory content from a secondary source. ...”

In their concurring judgment, Chief Justice McLachlin and Justice Fish proposed an “adoption or endorsement” test, holding that:

(Continued on page 35)

**Is a hyperlinker who creates a hyperlink to a website containing defamatory statements liable for “publishing” the defamatory statements in the site?  
The answer is no.**

(Continued from page 34)

In sum, in our view, a hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to.

It is true that the traditional publication rule does not require the publisher to approve of the material published; he or she must merely communicate that material to a third party. However, the proposed adoption or endorsement standard for references is conceptually different. A mere reference without any adoption or endorsement remains that — a content neutral reference. Adoption or endorsement of the content accessible by a link in the text can be understood to actually incorporate the defamatory content into the text.

Thus the content of the text comes to include the defamatory content accessed via hyperlink. The hyperlink, combined with the surrounding words and context, ceases to be a mere reference and the content to which it refers becomes part of the published text itself.

Given that the majority of the Court did not find publication where a hyperlinker “adopts or endorses” defamatory content in hyperlinked text, there is no liability if a hyperlinker adopts or endorses the linked site without repeating the defamatory statements or conveying a defamatory meaning through the words that adopt or endorse the linked site, e.g., “For the truth about Mr. X, click HERE.” Nevertheless, hyperlinkers must be careful in how they word a Tweet, blog or any other primary article that includes a hyperlink to avoid falling into the “without more” proviso. As is always the case in defamation actions, the publication is considered in its entirety.

The Supreme Court of Canada’s decision is clear — a hyperlinker is not liable for the mere creation of a hyperlink to a site that contains defamatory statements. However, a libel

defendant subsequently posting hyperlinks to defamatory statements about a plaintiff will be evidence the plaintiff can rely upon to prove malice, as well as aggravated and punitive damages.

### The Deliberate Act Test

In her concurring judgment, Justice Deschamps proposed the “deliberate act” test:

... In my view, the proper approach is (1) to explicitly recognize the requirement of a deliberate act as part of the Canadian common law publication rule, and (2) to continue developing the rule incrementally in order to circumscribe the manner in which a deliberate act must make defamatory information available if it is to result in a finding of publication.

**The majority of the Court held that making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content.**

More specifically, only where the plaintiff can establish on a balance of probabilities that the defendant performed a deliberate act that made defamatory information *readily available* to a third party in a comprehensible form will the requirements of the first component of publication be satisfied. Of course, before the court will make a finding of publication, the plaintiff must also satisfy the requirements of the second component of publication on a balance of probabilities, namely, that the “defamatory matter [was] brought by the defendant or his agent to the knowledge and understanding of some person other than the plaintiff”

The majority of the Supreme Court rejected the deliberate act test because:

“... it avoids the formalistic application of the traditional publication rule and

(Continued on page 36)

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recognizes the importance of the communicative and expressive function in referring to other sources. Applying such a rule to hyperlinks, as the reasons of Justice Deschamps demonstrate, has the effect of creating a presumption of liability for all hyperlinkers, an untenable situation. ...”

### **The Internet Is A Powerful Medium That Can Ruin Reputations**

The majority decision emphasized that the Supreme Court of Canada does not resile from the importance of the protection of reputation and the harm that can be caused by Internet publications:

I do not for a moment wish to minimize the potentially harmful impacts of defamatory speech on the Internet. Nor do I resile from asserting that individuals’ reputations are entitled to vigorous protection from defamatory comments. It is clear that “the right to free expression does not confer a licence to ruin reputations ... Because the Internet is a powerful medium for all kinds of expression, it is also a potentially powerful vehicle for expression that is defamatory. ...

New activities on the Internet and the greater potential for anonymity amplify even further the ease with which a reputation can be harmed online:

But I am not persuaded that exposing mere hyperlinks to the traditional publication rule ultimately protects reputation.

### **A Victory for Freedom of Internet Expression**

Once again, the Supreme Court of Canada has recognized the need to change the common law of defamation to accord with freedom of expression constitutionally guaranteed by section 2(b) of the *Canadian Charter of Rights and*

*Freedoms*. Notably, the Supreme Court of Canada recognized that the Internet is a different medium from print and broadcast.

What implications does the hyperlinks decision have for Internet service providers? Because an ISP plays a passive role in the content of Internet communication, it should not be liable for any defamatory statements published by its users. Likewise, it could be argued that Google and other search engines should not be liable for providing automatic search results that hyperlink to websites that contain the defamatory statements. This issue remains to be decided.

The Supreme Court of Canada’s decision is a major victory for freedom of Internet expression. However, the majority cautioned that the Internet is an environment of evolving technologies:

I am aware that distinctions can be drawn between hyperlinks, such as the deep and shallow hyperlinks at issue in this case, and links that automatically display other content. The reality of the Internet means that we are dealing with the inherent and inexorable fluidity of evolving technologies. As a result, it strikes me as unwise in these reasons to attempt to anticipate, let alone comprehensively address, the legal implications of the varieties of links that are or may become available. Embedded or automatic links, for example, may well prove to be of consequence in future cases, but these differences were not argued in this case or addressed in the courts below, and therefore need not be addressed here.

In other words, we have entered the new frontier of cyberlibel. The hyperlinks decision is the first of many cyberlibel cases the Courts will have to decide in the ever-changing, fast-paced world of Internet technologies.

*Richard G. Dearden and Wendy J. Wagner are partners Gowlings in Ottawa, Canada. They represented intervenor the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic. The defendant in the case was represented by Daniel Burnett, Owen Bird, Vancouver, Canada.*



# Other Side of the Pond:

## Updates on UK and European Media Law

### *Libel Reform, Leveson Inquiry, Media Litigation, EU Assession and More*

By David Hooper

The Parliamentary Joint Committee on the draft Defamation Bill [published its report](#) on 12 October 2011 and the government has now produced its [summary of the responses](#) to the consultation process in regard to the first draft of the Defamation Bill. The consultation process had closed on 12 June 2011. Over one hundred parties filed comments on the bill, including MLRC.

Interestingly the Parliamentary Joint Committee felt that the Defamation Bill did not go far enough in striking a fair balance between the protection of reputation and freedom of speech. It wanted the original test for libel to contain a requirement that there should be substantial harm as a result of the libel to be strengthened into a need to establish serious and substantial harm. Bearing in mind the buffeting that the press is receiving in this country as a result of the hacking scandal and the evidence emerging at the Leveson Inquiry, that, it seems, is likely to prove optimistic.

Broadly speaking the Joint Committee supported the proposals of the draft Defamation Bill particularly in relation to limiting jury trial, setting out in statutory form the responsible journalism test and extending qualified privilege to peer-reviewed articles in scientific and academic fields and generally in restricting liable tourism so that there is a careful scrutiny of the damage that is said to be done in the United Kingdom as a result of the publication as opposed to the much greater publication elsewhere.

What was perhaps the most interesting about the Joint Committee was that it grappled with a number of issues which the draft Bill had left open for further discussion. Foremost among these was the question of whether corporations could sue. The Joint Committee felt that there should be a higher threshold before corporations could bring

actions for libel, namely whether there had been or was likely to be a substantial loss of custom directly caused by the defamatory statements. That would still leave corporations able to sue, which seems to be the general consensus of opinion in the United Kingdom, but corporations are however likely to find that proving such damages will prove difficult. The Committee also considered the question of the extent to which ISPs should be required to take down allegedly defamatory material upon the receipt of a complaint.

At present it is a brave ISP who does not take material down on receipt of a complaint from a claimant's lawyer. Here the Committee has proved to be somewhat cautious. They appear sympathetic to the idea that ISPs should in general take down anonymously posted material but they envisaged, for example, in the case of whistleblowers, that ISPs could apply to a Judge for an exemption from the take down procedure and secure a "Leave Up Order." It is open to question whether ISPs would except in the most extreme cases bother to incur such an expense.

The next step is for the government's conclusions on the consultation process to be published in the New Year with a revised draft Bill where one will want to look for the nature of government responses on the matters which they did not deal with in the original draft Defamation Bill such as for example, the ability of corporations to sue for libel and the protection of ISPs.

**The next step is for the government's conclusions on the consultation process to be published in the New Year with a revised draft Bill where one will want to look for the nature of government responses on the matters which they did not deal with in the original draft Defamation Bill.**

#### The Leveson Inquiry

Witnesses – often with harrowing tales of how they were harassed by the tabloid press have been giving evidence in front of Lord Justice Leveson and his committee. The

*(Continued on page 38)*

(Continued from page 37)

political appetite for liberalising the libel laws and curtailing the ability of Claimants to bring continental-style privacy claims may well weaken in the face of this onslaught.

As I mentioned in an earlier article, the scandal has done little for the professional standing of those it has touched whether they be lawyers, policeman or senior newspaper executives. One of the latest sufferers has been the well-known lawyers, Farrer & Co. One of their partners and a leading media lawyer at the firm, Julian Pike, cannot have enjoyed having his privileged communications with his clients dissected by a hostile Parliamentary Committee. Amongst his less happy moments must surely have been the moment when he was asked about his discussions when he appeared to have considered hiring a private investigator to see if two of the leading Claimant lawyers in phone hacking cases were – to use his rather quaint and coy language "*an item*." This apparently was to see if there was any breach of confidentiality relating to the settlement of the Taylor privacy claim where a claim which was admitted by Pike be worth probably only in the order of £30 -40,000 damages was in fact settled for £425,000, but with an all-important confidentiality clause. This case which related to the alleged love life of the head of the Professional Footballer's Association ultimately caused the whole phone hacking scandal to unravel and emerge.

Mr Pike found himself accused of oppressive tactics and it was at first blush a little difficult to see what private investigators would have discovered, unless they had retrieved some distinctly unamorous pillow talk. What does seem to be emerging is that the allegations are that phone hacking was done on an industrial scale. The opening remarks of Counsel to the Inquiry suggested that the jailed private investigator had notes running to some 11,000 pages involving 2,266 tasks of which 1,453 were attributed to one individual, but that the investigator allegedly had dealt with 28 different journalists and that enquiries had been made relating to 5,795 persons with 690 audible recordings and 586 voicemail messages allegedly intercepted. The Leveson

Inquiry will endeavour to form a view as to the extent of press misbehaviour, whether this all is a matter of history or whether it continues in such a fashion as to require radical regulation.

The likelihood is that there will be stronger regulation with a preference for self-regulation with more teeth than the existing Press Complaints Commission and borrowing quite possibly from the powers of Ofcom or the Advertising Standards Authority. One of the difficulties that Leveson may have is the time that the probable prosecutions of various individuals related to the phone hacking scandal and payments to the police is taking. Charges may well not be levelled until early 2012 with trials not taking place much before the end of 2012. Leveson is likely to feel restricted in what he can say about actual misconduct in particular incidents because of fear of prejudicing criminal trials. It will also be interesting to see the extent to which political parties are willing to place curbs on the press in the run up to elections in 2015.

### Winners and Losers in Media Litigation

There is perhaps an element of schadenfreude in seeing the case brought by Sheldon Adelson CEO of the Las Vegas Sands Casino Corporation in [\*Adelson and Las Vegas Sands Corporation v Anderson\*](#) (2011) EWHC 2497 being struck out as a result of his failure to

pursue the matter. This dated way back to September 2004 and related to critical remarks made by Trade Union activists at the Labour Party Conference. Adelson had vigorously pursued a claim against Associated Newspapers but after the trial had been set for October 2007, this particular matter appears not to have been pursued for a number of years and the Court felt that no useful purpose would be served by this matter being litigated and the claim was struck out.

The Solicitors from Hell Litigation, seems finally to have bitten the dust. It had spawned no less than seventeen claims. Mr Justice Tugendhat on 15 November 2011 issued an injunction which closed down the website on a number of

(Continued on page 39)



(Continued from page 38)

grounds which included harassment and unlawful data processing. It seems that this may have lead to various imitators setting up similar sites out of the jurisdiction, but the likelihood is that they will have less media exposure and although the problem will not disappear completely, it is likely to diminish. It is an interesting example of how the Courts will ultimately order a persistently defamatory website to be taken down, although it does pre-suppose the existence of a Defendant within the jurisdiction.

Malicious falsehood is often something of a long stop for weak defamation claims. In [\*Tesla Motors Limited v BBC\*](#) (2011) EWHC 2760, Mr Justice Tugendhat struck out the claim on the basis that the Claimant could not establish that it was probable that damage would result from the broadcast. Exactly why it had ever been felt appropriate to litigate the matter was far from clear. The programme concerned a road test of a Roadstar electric car and some rather unkind comments about its performance when the car ran out of charge after fifty five miles.

By chance the man who had made those unkind comments had been the Claimant in a previously anonymised privacy action [\*AMH v HXW\*](#) where his ex-wife was said to have claimed that she had had an affair with Jeremy Clarkson after he had married another woman. Clarkson had obtained an anonymised privacy injunction. He is a very well-known television personality and the Blogosphere and Twitter were alive with rumours that he had obtained such an order. Eventually Clarkson announced that the injunction seemed pointless and that such privacy injunctions did not work - a conclusion which had been earlier reached by the political commentator and broadcaster Andrew Marr who had likewise obtained but then abandoned an injunction in respect of his improbably adventurous social life. Clarkson's case does raise questions as to whether such injunctions obtained by celebrities are necessarily productive in cases which are not perhaps of the greatest importance. All Clarkson seemed to do was to obtain more publicity for the allegations and a platform for by his then re-estranged former wife, who by that stage had hired a leading publicist to tell her tale.

There has been a particularly disastrous outcome, it would seem, in Ireland where the main television company, RTE, had ended up paying huge damages for naming and shaming one of the few catholic priests who was not, in fact, abusing a child, having expressed exactly the opposite in the *Prime Time Investigates* programme. The managing director of

their news service and their current affairs editor have agreed to step aside from their roles during an enquiry into how these allegations came to be made. The libel settlement and Court costs are said to be not less than €2 million.

It is perhaps small consolation that things are even worse in India where a television news programme reporting a fraud allegedly involving a High Court Judge in Calcutta showed for fifteen seconds the picture of a blameless and retired Supreme Court Judge who was no doubt identifiable to a significant number of people, despite being photographed in his dark glasses. Amazingly, the District Court of Puna decided that this libel, for which there had some thirteen days later been an apology, was worth £12.5m (100 Crore Rupees). [\*Sawant v Times Global Broadcasting Co Ltd\*](#) (April 15, 2011). An appeal to the High Court of Bombay on the part of the broadcaster "Times Now" floundered when the Court indicated that it would only hear the appeal if £2.5m was deposited and a guarantee was lodged for £10m. The judge would have been lucky to obtain more than £25-30,000 if he had sued in the UK, bearing in mind the steps taken by the television station.

Amongst those who have been successful in Court is that evergreen litigant, Max Mosley, who on 8 November obtained from a Paris Court €7,000 damages, €15,000 costs and a fine of €10,000 against News Group Newspapers in respect of the fifteen hundred copies of the News of the World which were sold in France depicting what the newspaper had falsely alleged was a sick Nazi orgy, but which was undoubtedly a pseudo-masochistic gathering albeit of a moderately private nature conducted by a reasonably prominent public figure.

Very recently the girlfriend of the actor Hugh Grant and mother of his child obtained an injunction in [\*Ting Lan Hung v XYZ\*](#) (2011) EWHC 2995 preventing her harassment by the paparazzi who were said to have made her life unbearable. Attempts by the Press Complaints Commission to prevent these objectionable activities had been successful with the mainstream press, but not it appeared with the paparazzi, and a harassment injunction was obtained.

In [\*Morrissey v IPC Media Limited\*](#) (2010) EWHC 2738, the pop star was successful in preventing his claim being struck out for want of prosecution against the magazine New Musical Express. The matter will now come before trial. It dated back to an article in the New Musical Express of December 2007 which was said to accuse him of racism and

(Continued on page 40)

(Continued from page 39)

holding right-wing views on immigration. Although there had been some three years delay, the Judge concluded that he could not say that the explanation given on behalf of Morrissey that the matter had been delayed as a result of a dispute with his manager was other than credible and the Judge concluded that on balance he likewise could not say that a fair trial was no longer possible.

### Extension of Human Rights in the European Union

The [European Union has acceded](#) on 14 October 2011 to the European Convention of Human Rights which results in the European Union's legal system now recognising an obligation to respect the European Convention of Human Rights when applying or implementing the law of European Union by virtue of the European Union itself becoming a party to the Convention.

This arises by virtue of the draft Accession Agreement of 14 October 2011 and arises under the powers implemented under Article 6 Lisbon Treaty 2009. The Charter of European Human Rights becomes directly enforceable by the EU and National Courts.

Although the EU was founded on respect for fundamental rights, until its accession, it was not in fact a party to the European Convention of Human Rights, which meant that the European Convention of Human Rights was in practice a more subordinate body than the all-powerful European Union.

The purpose of the EU's accession is to strengthen the protection of human rights by submitting the EU's legal system to independent external control and to ensure that European citizens receive the same protection in relation to acts of the EU as they presently enjoy from member states. Exactly what effect this will have is not clear. The EU was always meant to respect ECHR principles, so this change may be ideological rather than practical. However, the hard-pressed European Court of Human Rights will receive even more cases and it may become a more important institution in terms of the wider European Union. Ironically

this happens at a time when senior English judges such as Lord Chief Justice, Lord Judge, are seeking to rein back on the rulings of the European Court of Human Rights which seek, by way of example, to change rules of admissibility of evidence from the deceased in criminal trials, which Strasberg wants to limit. The UK need only take account of but not necessarily follow Strasbourg judgements, it is however bound by Brussels judgements, so the accession of the EU may lead to the strengthening of the effect of Strasbourg judgements.

### The Patents County Court

There are a number of interesting developments taking place to streamline the bringing of smaller patents and intellectual property claims in England. The Patents County Court will have a jurisdiction of £500,000. Procedures had been streamlined for claims up to £50,000 with a scale of maximum costs and there is to be a small claims procedure with damages limited to £5,000 with fixed costs. Intellectual Property litigation in the United Kingdom had been found to be three times more expensive small to medium cases than in other European states. These changes are designed to address that point.



**The purpose of the EU's accession is to strengthen the protection of human rights by submitting the EU's legal system to independent external control and to ensure that European citizens receive the same protection in relation to acts of the EU as they presently enjoy from member states.**

### Google Not Bound to Take Down Blogs

Readers may wish to examine the judgement just handed down by Judge Parkes QC on 25 November 2011 in [Davison v Habeeb & Google Inc.](#) Google was not required to take down blogs despite being requested to do so, when it was in no position to adjudicate the matter and when it would appear to have a defence under Articles 14 and 19 of the Electronic Commerce Regulations 2000 and that it was held that there was no real or substantial tort within the jurisdiction.

*David Hooper is a partner at Reynolds Porter Chamberlain in London.*



In October the European Court of Justice issued an important decision affecting jurisdiction and choice of law in claims against online publishers. MLRC asked French and English counsel to analyze the impact of the decision.

# Infringement of Personality Rights on the Internet

## *Impact of ECJ Decision on French Law of Jurisdiction*

By Jean-Frédéric Gaultier and Emmanuelle Lévy

The European Court of Justice, the highest court to interpret EU law, recently ruled on the issues of jurisdiction of the Member States with respect to infringement of personality rights committed on the Internet and on the law applicable to e-commerce service providers, such as online newspapers. [\*eDate Advertising GmbH v. X and Olivier Martinez v. MGN Ltd\*](#) (October 25, 2011, Cases No. C-509/09 and C-161/10).

### Two Cases Referred to ECJ for Preliminary Ruling

In the first case, Mr. X, a German citizen domiciled in Germany, was sentenced in 1993 by a German court to life imprisonment for the murder of a well-known actor. Mr. X had been released on parole in January 2008. He considered that the publication on the Austrian Internet portal eDate Advertising GmbH of information about him dating back to 1999 was defamatory. German courts granted the applications of Mr. X by prohibiting eDate Advertising GmbH from publishing information about him throughout Germany. eDate Advertising GmbH filed an appeal on the grounds of lack of jurisdiction of German courts. This case was ultimately referred to the ECJ for a preliminary ruling on jurisdiction and applicable law.

In the second case, the French actor Olivier Martinez sued for damages on the grounds of invasion of privacy and infringement of the right to his image against the British newspaper Sunday Mirror, which published in its online edition an article written in English entitled "*Kylie Minogue is back with Olivier Martinez*," reporting the couple's meeting in Paris. The publisher of the newspaper challenged the jurisdiction of the French court. The EUCJ was asked for a preliminary ruling on this issue.

The EUCJ decided to consolidate both cases.

### Jurisdiction for Online Infringements of Personality Rights

As an exception to the principle of jurisdiction of the courts of the place of domicile of the defendant, Article 5.3 of EC Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides that: "*A person domiciled in a Member State may, in another Member State, be sued (...) 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*".

According to well-established case law, the place where the harmful event occurred covers both the place of the event giving rise to it and that where the damage occurred. Each of these places may constitute a special domestic connecting factor regarding jurisdiction.

As regards infringement of personality rights committed by means of print media, further to the well-known case *Shevill v. Presse Alliance* 1995 ECR I 415 (EUCJ, March 7, 1995, Case C-68/93), the victim of a defamation by a newspaper distributed in several Contracting States has the choice to bring an action for damages against the publisher either before the courts of the Contracting State of the place where said publisher is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his/her reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seized.

(Continued on page 42)

(Continued from page 41)

With respect to publication on the Internet, French case law has fluctuated on the question of whether the damage actually occurs in France: after having considered that French courts have jurisdiction when the website in question is accessible from France, the current dominant case law considers that French courts have jurisdiction only when there is a sufficient, substantial and significant link between the website at issue and French territory, the mere accessibility of the website from France not being sufficient. In order to establish this link, courts consider a body of evidence such as the language in which the contentious information is broadcasted, the targeted public, the nationality of the persons concerned, the importance of connections to the page in question, the country extension of the website, etc. Where such link exists, French courts consider they have jurisdiction only in respect of the damage suffered on French territory.

The ECJ's decision of 25 October 2011 implemented a new criteria of jurisdiction. The holder of a personality right which considers itself injured on the Internet may bring an action for liability, in respect of all his damage, before the courts of the Member State in which is located the "center of his interests." The State where a person has the center of his interests will correspond in general to his habitual residence, but other factors such as the place of pursuit of his professional activity, may also be taken into account.

According to the ECJ, this new criterion is justified by the nature of the Internet. While for print media, television or radio, the damage caused by the infringement of personal rights generally occur in a national context, on the Internet, the universal nature of the information may lead to a wider harm. When applying the criteria established for print media by *Shevill* to the Internet, the legal protection of the victim would be lower because of the coexistence of different national systems and the fragmentation of courts having jurisdiction to hear the case.

With this new rule of jurisdiction for infringements on the Internet, in most cases the courts of the domicile of the plaintiff are likely to have jurisdiction, which is quite contrary to usual legal principles. It may also have quite severe consequences for online publishers. A website in English language, published in the UK and intended for a local audience might be sued before French courts if it publishes an article about a French politician, before German courts if it writes about someone in jail in Germany (as in the first case referred to the ECJ), before a Swedish court if it reports news about a Swedish businessman, etc. Not only should online newspapers respect their domestic laws, but also those of the countries of the subject-matters of their articles. The second part of the EUCJ decision, though less clear, seems to be meant to balance these drastic consequences.

#### Choice of Law?

The ECJ was also asked whether Article 3 of Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce") requires a transposition in the form of a specific conflict-of-laws rule, under which information society providers - in this case the editors of online newspapers - would be subject to the laws of the Member State in which they are established, instead of the laws of the countries where they would be sued.

The ECJ responded negatively, reminding that only the rules of private international law of each Member State are applicable. However, the Court specified that in order to effectively guarantee freedom to provide services in the information society, the provider of an e-commerce service cannot be subject to stricter requirements than those provided for by his Member State of establishment.

In France, regarding infringement of personality rights, the conflict-of-laws rules generated by case law provide that the applicable law is that of the State where the harmful event occurred, the latter being understood as the place where the event resulting in damage occurred (for example the place of publication) as well as the place of occurrence of it (for example the places of distribution). The judge will choose the one with which the infringement has the closest connections. In a recent decision, a French court ruled that English laws were applicable to a claim on the grounds of right of response directed by an individual domiciled in France against the online edition of the English newspaper *The Observer*. The ECJ decision seems to accept this case law.

More generally, if the law applicable to the litigation may not subject the editor of the website in question to stricter requirements than those provided by the law of the Member State in which it is established, this rule may limit, on the side of website editors, the legal uncertainty resulting from the new rule of jurisdiction. It seems that this corrective on the merits will a priori be applied only to the editors of websites established in one of the Member States.

In any event, one should wait and see how national courts will apply these new principles.

*Jean-Frédéric Gaultier and Emmanuelle Lévy are lawyers with Clifford Chance in Paris.*

# European Internet Forum Shopping Bonanza

By David Hooper

The recent decisions in *Olivier Martinez v. MGN Ltd and eDate Advertising GmbH v. X* in the two cases (C509/09 and C161/10) decided by the European Court of Justice on 25 October 2011 raised the question of how individuals can sue internet publishers, when they believe that their image in terms of privacy and personality rights has been harmed as a result of content which has been posted online.

The cases laid down the principles which enable a Claimant to sue for all the damage that he has suffered as a result of publication on the Internet throughout the European Union. The decision now enables a Claimant to choose the jurisdiction of *his* choice and, for example, sue in France not only for the acts of downloading in France, but elsewhere throughout the European Union. It is a decision with alarming implications shifting from the defendant to the claimant the choice of the forum for the action to where he can establish where his *center of interests* are.

Once that is done he can obtain damages for breach of his rights across the European Union. The likely upshot will be that people will increasingly sue in countries such as France where the privacy laws are much stricter – albeit that the damages are not that great – and claimants will in effect obtain in the Paris Courts a judgment in respect of their privacy being infringed in England in respect of the article being downloaded not just in France but also in England. One of the other matters that will fall for consideration later is whether the European Court will extend the *Martinez* principles to defamation and breach of copyright claims.

## Background

Olivier Martinez is a French actor who had obtained judgment against the Sunday Mirror, the Daily Mail and the Evening Standard for €4,500 for each publication in respect of articles which suggested that he had resumed his relationship with Kylie Minogue the Australian actress and singer. Martinez sued not only in respect of his Article 8 privacy rights but also under a pernicious French right of

image law which entitles people to sue for the use of their image or photograph without their permission however public and non-intrusive that photograph might be.

The eDate case involved a claim by a convicted German murderer against an Austrian operator of an Internet portal. Under German law it was unlawful to name the murderer who had by that time been released. The question was whether he could sue in Germany an Austrian company for publishing this information on the Internet in Austria as a result of a breach of German but not Austrian law.

Until the *Martinez* case the general rule under Article 2 of Brussels 1 Regulation (EC) 44/2001 had been that a defendant could be sued in the Court of the member state in which it was domiciled for *all* the publication throughout the European Union. This meant that if a French man wanted to sue an English-based publication for the infringement throughout the European Union, he would have to have sued in England. This was sometimes described as giving home advantage to the defendant, but it did have the practical consequence that the English newspaper would prior to publication have considered the legal position under English law where the bulk of the publication would have taken place. It would therefore have had the opportunity of ensuring that the publication was lawful under English law and of

considering whether or not to publish in jurisdictions where there might have been a claim and even if it could not exclude all liability, it was in a much better position to limit the level of risk.

It was however, open to that notional French man under Article 5 (3) to sue the English newspaper in respect of but limited to the damage in a particular contracting state for the country where the harmful event had occurred or might occur. This would mean that the French man could for example sue for privacy under French law, but his claim would be limited only to the number of copies sold in French and the value of a claim tended to be low.

These principles were confirmed in the case of *Shevill v. Presse Alliance 1995 ECR I-415*. In that case ironically it

(Continued on page 44)

**It is a decision with alarming implications shifting from the defendant to the claimant the choice of the forum for the action to where he can establish where his *center of interests* are.**

(Continued from page 43)

was a lady living in Yorkshire who sued a French evening paper *France Soir* in respect of the 250 copies which circulated in England. The European Court of Justice upheld her entitlement to do so under the Brussels Convention. As the Claimant had found herself accused of involvement in alleged money laundering through a currency exchange agency, there was some justification for her contention that her reputation in England and particularly in Yorkshire where surprisingly 17 copies of this French evening newspaper were sold was likely to be affected by the publication in England.

### ECJ Decision

Until the *Martinez* decision people would most likely have concluded that Mr Martinez could only have sued the Sunday Mirror in respect of copies actually downloaded within the jurisdiction of the French Courts. That has now been changed where the Claimant considers that his rights have been infringed by means of content placed online on an internet website. He will now have the option of bringing an action in respect of *all* the damage caused either before the Courts of the member state in which the publisher of that content is established (the Article 2 liability) - the Defendant's home advantage - or before the Courts of the member state in which the centre of the Claimant's interest is based - the Claimant's choice of forum.

There is however an important limitation on this extension of jurisdiction in that the courts of the member state where the claimant has its centre of interests must apply the

law in a manner that complies with the law of the state in which the service provider is established. In other words if you have a service provider established in England and a claimant with his centre of interests based in France, the French court cannot apply the stricter French law in respect of damage caused by publication in England if that damage would not be actionable in England. There must be a degree of double actionability and a French court cannot impose its law of personality or image which would not be actionable in England, whereas it could in respect of a pure privacy right which would be actionable in both countries, albeit that the law of France in terms of privacy would be distinctly more favourable to a claimant than the law of England

The Claimant will also have the option of suing not in respect of all the damage caused, but in respect of damages in relation to a particular member state limited to the extent of the publication in that country (the Article 5(3)) liability). The centre of his interests is a widely defined concept and in effect gives the Claimant a wide choice as regards jurisdiction. The centre of his interests is the place where a person may have his habitual residence, but it also extends to a member state in which he may not habitually reside, but there may be other relevant factors such as the pursuit of a special activity which may be held to establish the existence of a particularly close link with that state.

The moral may be to beware of publishing things about people who have appeared in French movies. Readers should study this judgment of the European Court of Justice.

*David Hooper is a partner at Reynolds Porter Chamberlain in London.*

## MLRC UPCOMING EVENTS

### MLRC/Southwestern Media and Entertainment Law Conference

January 19, 2012 | Hollywood, California

### MLRC/Stanford Digital Media Conference

May 21-22, 2012 | Stanford, California

### MLRC/NAA/NAB 2012 Media Law Conference

Sept. 12-14, 2012 | Reston, Virginia

### MLRC Annual Dinner

November 14, 2012 | New York, NY

### Defense Counsel Section Annual Meeting and Lunch

November 15, 2012 | New York, NY



# MLRC's Projects and Finances Reviewed at 2011 Annual Meeting

MLRC's annual meeting was held on November 9, 2011, at the New York Marriott Marquis. Director (and Chair of the Board-Elect) Elisa Rivlin of Simon & Schuster called the meeting to order in the absence of Kenneth Richieri, Chairman of the MLRC Board of Directors.

## Board of Directors Elections

The five nominees for election to two-year terms on the Board were all approved unanimously. The four nominees up for reelection to two-year terms were:

1. Marc Lawrence-Apfelbaum, Time Warner Cable;
2. Eric Lieberman, Washington Post Company;
3. Kenneth Richieri, New York Times Company; and
4. Kurt Wimmer, on behalf of LIN Television.

Mark H. Jackson, Dow Jones, was elected to his first term as director. Henry Hoberman, MPAA, did not stand for reelection.

The directors who were elected last year and will be entering the second year of their two-year terms were: David Bralow, Tribune Company; Karole Morgan-Prager, McClatchy; Mary Snapp, Microsoft; Susan Weiner, NBC Universal; and Elisa Rivlin, Simon & Schuster.

## Finance Committee's Report

Karole Morgan-Prager directed the members' attention to MLRC's 2011 Financial Report prepared by MLRC accountants pursuant to the requirements of New York law.

## Executive Director's Report

Sandy Baron thanked the Board of Directors for their extraordinary work on behalf of the organization, and she thanked Henry Hoberman, a longstanding director and former Chair of the MLRC Board of Directors, who is rotating off the board at the end of this year. Nathan Siegel, who serves as a director of MLRC as a result of his position in 2011 as Defense Counsel Section President, will also rotate off at the

end of the year when his term is complete. Elizabeth Ritvo will serve as the Defense Counsel Section President in 2012. Sandy also thanked Mark Jackson and Dow Jones for their support and involvement and welcomed Mark to the Board.

Sandy reviewed MLRC's 2011 activities. She highlighted the MLRC/Southwestern Media and Entertainment Law Conference, the MLRC/Stanford Digital Media Conference with Stanford Law School and its Center for Internet and Society, and the MLRC London Conference.

She reported on MLRC's 2011 publications, including the 50-state surveys. She directed members' attention to the book flyer from Oxford University Press, the publisher of MLRC's Survey books. MLRC also published the monthly MediaLawLetter and the MediaLawDaily.

She explained that the MediaDaily, introduced this year and drawn from sections of the MediaLawDaily, was designed to be distributed to the non-legal side of MLRC Media Members. Members are encouraged to distribute the MediaDaily across the board to their business, editorial and other non-legal clients and colleagues within their organizations, and asked to provide MLRC with feedback on the publication.

Sandy thanked the DCS Committees for their work, including the many articles and reports that they produce. Sandy directed the members' attention to the catalogue of recent DCS Committee reports and articles, as well as the summary, committee by committee, of their recent activities. (Both of these documents follow this article directly.)

Sandy also stated that the recent London Conference was very successful. MLRC is continuing its efforts to do more overseas. For instance, it has been filing comments wherever it can, including in South Africa and in connection with UK libel reform efforts. MLRC is in a unique position to comment on libel reform and other media law issues internationally and is the only organization representing U.S. media (and our international membership) in these matters. She requested that members contact MLRC about international projects and issues that they believe may benefit from our intervention.

*(Continued on page 46)*

*(Continued from page 45)*

MLRC is planning for the next Virginia Conference to be held September 2012.

The ninth MLRC/Southwestern Law Conference will take place on January 19. The focus of this year's conference is reality programming, including releases, social media issues, and music rights and licensing.

On May 20-21, 2012, the Legal Frontiers in Digital Media Conference will take place at Stanford University in Palo Alto, California. The conference will focus on the workings of social media, content monetization, Internet social responsibility, copyright, efforts to remove content from online, and the view of the future from some venture capitalists.

Sandy thanked all of the media corporations and law firms for their sponsorship and support of MLRC's conferences.

Sandy also noted that many committees meet regularly and talk about current and future issues, which is of great value to the membership. The State Legislative Affairs Committee is new and Sandy thanked Laura Prather for spearheading a committee that will track developments throughout the country.

Sandy then thanked the MLRC staff for their work.

### **London Conference and International Media Lawyers Project**

David Heller reported on the 2011 London Conference. It was the seventh biennial conference in London and the largest, with over 200 delegates. As in past years, the 2011 Conference had an array of speakers, including judges, government officials and editors. He thanked everybody who supported the London Conference.

Dave reported on the International Media Lawyers Project and directed attention to the prepared description of the initiative. The project is meant to increase the number of international members in developing countries where free expression rights are under threat. MLRC was able to identify four foreign lawyers and one media company and brought them into the membership. Through the project, MLRC will share its knowledge and experience and get the new members involved in future projects and events.

### **Defense Counsel Section**

DCS President Nathan Siegel reported on the DCS's

effort this year to jumpstart the process of getting committee leadership positions set. Sam Fifer has been nominated to join the DCS Executive Committee as Treasurer. DCS Committees continued to work throughout the year on creating resources, such as the forthcoming updated Jury Instruction Manual. The DCS has also been discussing possibly reaching out to smaller media companies to encourage their participation in MLRC activities, use of its publications, and potential membership.

### **MLRC Institute**

Maherin Gangat reported on MLRC Institute projects and began by thanking Dow Jones for funding for the Institute Fellow position. The main project of the MLRC Institute is the First Amendment Speaker's Bureau, which provides materials for public presentations on the topics of reporters' privilege, online publishing and censorship. The Institute coordinates presentations featuring MLRC members and outside speakers. Over 170 presentations have been given since the inception of the project, and the Institute hopes to meet the 200 mark by the end of the year.

The MLRC Institute also has a Facebook page, which is on its second year. There are now weekly postings that gather articles from MLRC's MediaLawDaily.

She also highlighted the First Amendment video series, which will work with high school students to produce videos that address general First Amendment issues like privacy, libel, and censorship to be posted on the Institute's Facebook page.

The Institute will help students arrange interviews with people in the media law field, while the students shoot and edit the video themselves. She thanked Stephanie Abrutyn of HBO, who has been on the Institute board for a number of years and has recently rotated off as Chair, for suggesting these projects. Stephanie stated that if there are any members who are willing to be interviewed about a specific subject, they should contact MLRC.

Jay Brown has assumed the position of Chair of the MLRC Institute Board, taking the helm from Stephanie Abrutyn last June.

### **New Business**

As there was no new business, Elisa Rivlin thanked everyone for attending, and the meeting was adjourned.

# Defense Counsel Section Reviews Projects and Goals at 2011 Annual Meeting

*Elizabeth Ritvo Incoming DCS President;  
Samuel Fifer Joins as Treasurer*

The Defense Counsel Section's Annual Meeting was held on November 10, 2011, in New York at the Proskauer Rose Conference Center, Eleven Times Square. DCS Executive Committee President Nathan Siegel called the Annual Meeting to order, welcomed everyone to lunch, and thanked them for attending.

## Welcome and President's Report

Nathan thanked everybody and stated that the work products, conferences, and ongoing meetings of the committees are extraordinary. He encouraged members who have not yet participated to listen to what has been happening this year and what is going to happen next year and think about how they would like to get involved, as it is a great way to get to know fellow colleagues. Nathan also mentioned that committee reports have been helpful resources and have been particularly useful in training young associates, since there are so many materials on the MLRC website that are valuable in practicing media law.

He reported that the committee structure for next year is in place and that Elizabeth Ritvo will be leading the DCS in 2012. He then introduced David Bralow, who was representing MLRC's Board of Directors.

## Welcome from MLRC Board of Directors

David Bralow thanked everybody for their hard work every year. He said that the committee structure and contributions were the core of the organization and thanked the members again for the energy and resources they put into MLRC. He stated that he is looking forward to the upcoming Virginia Conference at the new location.

## Election of DCS Treasurer

Nathan turned to the next item on the agenda, which was the election of Treasurer to the DCS Executive Committee. He

first thanked Elizabeth Ritvo, Bob Latham, Lou Petrich, and Bob Nelon for a tremendous year. The DCS Executive Committee nominated Samuel Fifer of SNR Denton US LLP to the position of Treasurer. No other nominees were received. By oral vote, the membership approved by acclamation Sam Fifer as Treasurer. In 2012, Liz Ritvo will serve as President, Bob Latham will serve as Vice President, Lou Petrich will serve as Secretary, and Nathan Siegel will hold emeritus status.

## Executive Director's Report

Sandy Baron thanked DCS members for a productive year. She highlighted the involvement of the DCS membership in various MLRC activities, including the Virginia Conference where nearly 100 members involved in planning for the conference.

Sandy also thanked the Executive Committee, which represented the DCS members extremely well. Nathan will be ending his one-year term as President and will be succeeded by Liz Ritvo. Liz thanked Nathan on behalf of the DCS for being a strong advocate for the DCS at the MLRC Board level. Liz stated that Nathan's contributions have been important to the development and growth of the organization.

Sandy reviewed MLRC accomplishments in 2011 and its plans for 2012. In 2011 MLRC went to Los Angeles and joined Southwestern Law School again for the MLRC/Southwestern Media and Entertainment Law Conference. MLRC also went to Stanford Law School and the Center for Internet and Society for the MLRC/Stanford Digital Media Conference. Most recently, the MLRC London Conference was successfully held. Many MLRC publications were released: annual surveys, committee publications, MLRC Bulletins, MediaLawLetters, and the MediaLawDaily. Sandy described the MediaLawDaily and stated that there were many ways the membership could help MLRC with the MediaLawDaily. She noticed that DCS members valued

*(Continued on page 48)*

*(Continued from page 47)*

actual opinions and briefs, based on the number of hits on those items. She requested that members send opinions and briefs that were not readily available to MLRC.

Sandy then reported on plans for 2012. She mentioned that the first planning session for the Virginia Conference was held that morning. She requested that members send in their suggestions soon. The dates for the Virginia Conference are Sept. 12-14, 2012. The Southwestern / MLRC Conference on Jan. 19, 2012, is going to revolve around releases, media and music rights, and licensing. MLRC is also going back to Stanford in 2012 and anticipated a schedule that examines the workings of social media, content monetization, Internet social responsibility, and the view of the future from some venture capitalists. Sandy thanked the many law firms and media member corporations for their sponsorship of the conferences.

Sandy thanked Laura Prather for volunteering to start a new State Legislative Committee. Sandy stated that MLRC is pleased to start committees and projects when members approach the organization with an idea. She then thanked the MLRC staff. She also thanked the Dow Jones Foundation for the grant that allowed MLRC to fund a MLRC Institute Fellow.

### **Committee Reports**

Nathan then asked for the committee reports. Committees presented their reports in alphabetical order.

#### **Advertising & Commercial Speech Committee**

Vice Chair Steve Baron reported that in 2011 the committee hosted substantive phone conferences and webinars on issues such as the challenges publishers face to prevent the skimming and theft of online audience data, behavioral advertising, and the use of social media to collect user-generated content. Going forward, the committee wants to spend some time on mobile advertising and mobile privacy issues. Steve invited members who were interested to join.

#### **ALI Task Force**

Chair Tom Leatherbury reported that ALI Task Force is waiting for the launch of the ALI's privacy project, which is not yet on the ALI website.

### **California Chapter**

Co-Chair Rachel Matteo-Boehm reported that the committee worked on integrating the Northern California members into the group. To do so, committee members have been working on linking via videoconference. Rachel mentioned the Southwestern/MLRC Media Law Conference as another vehicle for committee participation and networking.

### **Employment Law Committee**

New Co-Chair Tanya Menton reported that the committee published an article about GPS and other surveillance of employees. The current focus of the committee is on providing best practices to employers who are sending journalists into harm's way, such as war zones or areas affected by natural disasters. The committee is also looking into coming up with best practices for employers dealing with social media in the work place, specifically about whether it should be used as a recruiting tool.

### **Entertainment Law Committee**

Co-Chair Katherine Bolger reported that the committee holds monthly conference calls and 2011 was an exciting year. Calls included discussion of the Supreme Court's decision about video games and the Third Circuit's examination of the FCC indecency guidelines. Along with the Pre-Publication/Pre-Broadcast Review Committee, the Entertainment Committee published a best practices guide for the use of releases in news and entertainment.

### **Ethics Committee**

Bob Nelon spoke for the Chairs of the Ethics Committee. The committee has been publishing articles in the MediaLawLetter, including articles about when judges may be recused for exhibiting bias against a publisher. The Committee is also planning a compendium of articles from the past few years.

### **International Media Law Committee**

Co-Chair Brian MacLeod Rogers reported that the committee has conference calls every six weeks or so to keep



(Continued from page 48)

track of hot topics. One call focused on media law in the “Muslim World” and gathered insight into the use of the Internet in Egypt. In addition, the Committee discusses developments in UK and European law. And the committee assisted in development of sessions for the London and Virginia Conferences.

### **Internet Law Committee**

Chair John Greiner reported that the committee focused on updating and revising the Practically Pocket-Sized Internet Law Treatise. They consolidated and removed some topics. The treatise is broken up in broad categories: defamation, privacy, access, intellectual property, and wiki jurisprudence. The Committee plans to have an updated version by the end of the year.

### **Legislative Affairs Committee**

Co-Chair Laurie Babinski reported that the committee has been monitoring bills that would significantly impact the media. The Committee is working on preparing reports that will discuss the proposed federal anti-SLAPP bill and the history and potential amendments to the Espionage Act.

### **Litigation Committee**

Co-Chair Jim Hemphill explained that the litigation committee was formed by a merger of the trial and pre-trial committees. He reported that a final draft of the Jury Instruction Manual, which has not been updated since 2000, is currently circulating. The Committee worked on a paper titled “Defending Against a Defamation Claim: Post-Publication Considerations.” It has been working on a paper entitled “Reporting on a Controversy that has Already Generated Libel Litigation against the Reporting Entity.” The Committee has also discussed the possibility of creating a more immediate, interactive forum for discussion.

### **MediaLawLetter Committee**

Tom Clyde reported that the committee continues to assist Dave Heller in preparing content for the monthly MediaLawLetter. This year, one of its focuses was to revamp the MediaLawDaily, and it is now more sophisticated and

visually appealing. Going forward, the committee is focused on curating content related to cases so that the information is easily accessible.

### **Membership Committee**

Co-Chair Toby Butterfield reported that the committee holds quarterly conference calls and has instituted a system to list and identify potential targets for membership. DCS membership is over 200.

### **Model Shield Law Task Force**

Chuck Tobin reported that the task force published “Resource Materials for Defining ‘Journalist’ and ‘Media’ in Litigation and Legislation” last month. The project arose out of discussion about the role of bloggers. The publication is a comprehensive collection of cases involving privilege, ride-alongs, and defamation per se. Chuck thanked the people who contributed to the project: Rory Eastburg, Laura Handman, Micah Ratner, Katie Hirce, Kurt Wimmer, Drew Shenkman, Christine Walz, and Adam Shoemaker.

### **New Legal Developments Committee**

Co-Chair Jon Hart reported that Committee is meant to identify developments that MLRC should monitor. He explained that the committee tries to assess what is going on in the field.

### **Newsgathering Committee**

Chair Tom Williams reported on two projects. One of them deals with the issue of access to evidence admitted to trial, proceedings, and discovery. In 2012, the committee hopes to work on a study of access to electronic communications between courts and litigants.

### **Pre-Publication and Pre-Broadcast Committee**

Co-Chair Ashley Messenger reported on the committee. The committee discussed issues arising out of the *Snyder v. Washington City Paper* case in D.C. and issues of liability for third-party allegations under Texas law. In 2012, it will consider developing social media guides.

*(Continued from page 49)*

### **State Legislative Committee**

Chair Laura Prather reported that this was the one-year anniversary of the committee. The committee holds monthly calls to discuss state legislation that enhances First Amendment rights or encroach upon those rights. These examinations yield trends, which gives the committee notice about possible legislation in the future. The committee has also talked about building coalitions outside of the media that could help members pass or fight legislation. The committee also has a webpage on the MLRC website and is planning on expanding it in the future.

### **Report on the MLRC Institute**

Maherin Gangat introduced MLRC Institute Fellow Dorianne Van Dyke, a position funded by the Dow Jones Foundation. Dorianne has been working on the First Amendment Speaker's Bureau project, which consists of having speakers address First Amendment-related topics to educate the general public.

Maherin also discussed an ongoing project to improve the MLRC Institute Facebook Page. She stated that the Institute

has started posting articles. She then described the First Amendment video series, which encourages high students to create videos examining general topics like libel and privacy. Those videos are then posted to the Institute Facebook page.

### **New Business**

Dave Heller reported on the International Media Lawyers Project and directed the members' attention to the document that provided a short biography of the new international members. The goal of the project is to share MLRC's knowledge and practical experience with lawyers who are committed to defend free press rights and may be in developing countries and may be facing severe challenges. MLRC was able to bring four lawyers and one media company into the membership. Going forward, MLRC wants to get them involved in projects and events. Dave thanked Robert Balin and Brian Rogers of the International Media Law Committee for their support. He also thanked the law firms for their support. Dave requested that members contact him about their interest in getting involved in the project and getting the new members involved in the committee projects.

Nathan again thanked members for attending, and the meeting was adjourned.

## **MLRC UPCOMING EVENTS**

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