



MediaLawLetter

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NY Times Attorney Adam Liptak Joins The Times News Staff

Adam Liptak, Senior Counsel in The New York Times Law Department, member of the LDRC Board of Directors, and Chair of the LDRC *LibelLetter* (now *MediaLawLetter*) Committee, has joined the news side staff of *The New York Times* as its national legal reporter. Adam had been with The Times legal staff for 10 years, and with Cahill Gordon & Reindel for 4 years before that.

But Adam was also a copyperson at The Times in his pre-law days, and has been writing articles and book reviews for the paper and other publications for many years now. We have all come to expect to see Adam's byline on articles much as we have on briefs. He is, as anyone who works with him knows, an excellent writer and editor.

While we will miss Adam enormously at LDRC, and everywhere in the media bar, we will all benefit from his skills and abilities on The New York Times news side. He started his new post on April 8. Best to Adam – we will be cheering you on to all success in your new role.

UK Court of Appeals Reverses Controversial Privacy Ruling That Enjoined Publication of "Kiss and Tell" Articles

In a significant decision that may rein in privacy claims against the British press, the UK Court of Appeal this month reversed an order enjoining a newspaper from publishing true articles reporting on the adulterous affairs of a professional soccer player *A v. B. & C.*, [2002] EWCA Civ 337 (Mar. 11, 2002) (LCJ Woolf, LJ Laws, LJ Dyson). The lower court enjoined the newspaper on the ground that publication would be a breach of confidence and violate the player's right of privacy. Reversing, the Court of Appeal held that the injunction improperly restricted the freedom of the press and was based on an expansive notion of privacy not recognized in UK law. A law report on the decision is available in the archive of www.thetimes.co.uk; the full decision should be posted shortly on the official Court Service site www.courtservice.gov.uk/.

In the proceedings below the parties and even their solicitors were not identified to protect the plaintiff's privacy. After the Court of Appeal decision the newspaper defendant was identified as the *Sunday People*, published by Trinity Mirror. The paper's editor, Neil Wallis, hailed the decision as a "historic victory." Publication of the articles, though, was stayed for three weeks pending the plaintiff's application to the House of Lords for a discretionary appeal.

Articles About Soccer Player's Extramarital Affairs

At issue in the case was a so-called "kiss and tell" series. Two women — a lap dancer and a teacher — who had affairs with the still-unnamed, married Premier League soccer player, sold their stories to the *Sunday People*
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tabloid. On learning of the forthcoming articles, the plaintiff obtained an injunction on publication in April 2001. In a written decision released in September 2001, High Court Justice Jack found that publication would be breach of confidence and invasive of the player’s privacy. Most notably, he found that the law of confidence could apply to protect any disclosure of plaintiff’s extramarital affairs — the law of confidence had previously only applied to intimate marital information — and that there was no public interest in the publication of the articles.

Court of Appeals Rejects Privacy and Confidence Findings

The Court of Appeal squarely rejected both grounds for the injunction. First, it held that the law of confidence did not apply to plaintiff’s extramarital affairs, finding that “relationships of the sort which [plaintiff] had with C and D are not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential.” *Id.* at ¶ 45. Second, the Court of Appeal found that the plaintiff’s behavior was a matter of public interest since “footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example.”

Significantly, the Court of Appeal also faulted the standard under which the lower court issued the injunction. The Court held it was wrong to assume, as the lower court did, that once a privacy interest was recognized an injunction should issue unless the press could prove that publication served the public interest. The Court emphasizes that an injunction on the press constitutes a serious interference with free expression and the burden must be on the plaintiff to “justify” it. Indeed, the Court found that once it is determined that the free press interests outweigh a plaintiff’s privacy concern, “then the form of reporting in the press is not a matter for the courts but for the Press Commission and the customers of the newspaper concerned.” *Id.* at ¶ 48. The Court of Appeal admonished courts not to engage in ad hoc decision making on the public interest of newspaper reports, recognizing that the existence of the press in and of itself serves the public interest.

Court Issues Guidelines for Future Cases

The Court of Appeal’s decision also sets forth legal guidelines for courts and lawyers facing similar claims. The Court offered the guidelines to avoid excessive and costly litigation, as it thought had occurred in the present case. However, the guidelines seem as much intended to clarify the law surrounding privacy. The guidelines address a number of important substantive issues on the balance between press and privacy interests and might provide significant authority for future cases.

First, the court noted that prepublication injunctions interfere with a free press “irrespective of whether a particular publication is desirable in the public interest” and that “the existence of a free press is in itself desirable and so any interference with it has to be justified,” quoting with approval Lord Justice Hoffman that “freedom which is restricted to what Judges think to be responsible or in the public interest is no freedom.” *Id.* at Para. 11 (iv), citing *R v Central Independent Television PLC* [1994] Fam 192 at p.201-204.

Judges Need Not Determine if New Privacy Tort Exists

As to the existence of a new tort of privacy following the incorporation into UK law of the European Convention on Human Rights, the court observed that:

It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy. In the great majority of situations, if not all situations, where the protection of privacy is justified, relating to events after the Human Rights Act came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection. This means that at first instance it can be readily accepted that it is not necessary to tackle the vexed question of whether there is a separate cause of action based upon a new tort involving the infringement of privacy.

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Id. at ¶11 (vi).

Directing courts to look to the law of confidence rather than developing any new law on privacy, the Court of Appeal addressed the proper balance between free press and privacy interests within this extant body of law. Among the significant guidelines:

- 1) The determination of whether a privacy interest exists “should not be the subject of detailed argument” because “usually the answer to the question whether there exists a private interest worthy of protection will be obvious. In those cases in which the answer is not obvious, an answer will often be unnecessary. *Id.* at ¶11 (vii).
- 2) The existence of a public interest in publication strengthens the case for not granting an injunction though even absent a public interest the interference with freedom of expression has to be justified. *Id.* at ¶11 (viii).
- 3) In most instances whether a publication is a matter of public interest will be obvious. “In the grey area cases the public interest, if it exists, is unlikely to be decisive. Judges should therefore be reluctant in the difficult borderline cases to become involved in detailed argument as to whether the public interest is involved.” *Id.*
- 4) An intrusion into a situation where a person can reasonably expect his privacy to be respected will be capable of giving rise to liability in an action for breach of confidence unless the intrusion can be justified. For example:

The bugging of someone's home or the use of other surveillance techniques are obvious examples of such an intrusion. But the fact that the information is obtained as a result of unlawful activities does not mean that its publication should necessarily be restrained by injunction on the grounds of breach of confidence. Dependent on the nature of the unlawful activity there may be other remedies. On the other hand, the fact that unlawful means have been used to obtain the

information could well be a compelling factor when it comes to exercising discretion.

Id. at ¶11 (x).

- 5) A more difficult question is presented where one party to an allegedly private sexual relationship speaks to the press. In this situation, the “conflict between one party’s right to privacy and the other party’s right of freedom of expression is especially acute.” The law of confidence applies to legal marriages but courts also “have to recognize and give appropriate weight to the extensive range of relationships which now exist. Obviously, the more stable the relationship the greater will be the significance which is attached to it.” The fact that one of the parties to the relationship wants to disclose information does not extinguish the other party’s right to have the confidence respected, but it does undermine that right. *Id.* at ¶11 (xi).
- 6) A public figure is entitled to a private life, but a public figure:

should recognize that because of his public position he must expect and accept that his actions will be more closely scrutinized by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position.

Id. at ¶11 (xii).

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- 7) Whether a person has courted publicity or not, he or she may be a legitimate subject of public attention. If they have courted public attention they have less ground to object to the media coverage. *Id.*
- 8) In many of these situations “the public have an understandable and so a legitimate interest in being told the information. . . . The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media.” *Id.*
- 9) In balancing free press and privacy interests “courts should not act as censors or arbiters of taste. This is the task of others. If there is not a sufficient case for restraining publication the fact that a more lurid approach will be adopted by the publication than the court would regard as acceptable is not relevant. If the contents of the publication are untrue the law of defamation provides prohibition. Whether the publication will be attractive or unattractive should not affect the result of an application if the information is otherwise not the proper subject of restraint. *Id.* at ¶11 (xiii).
- 10) Courts may take into account, as one factor, the Press Complaints Commission Code of Practice,
- 11) “however, the court should discourage advocates seeking to rely on individual decisions of the Press Commission which at best are no more than illustrative of how the Press Commission performs its different responsibilities.” *Id.* at ¶11 (xiv).
- 12) Summing up the Court of Appeal noted that “frequently what is required is not a technical approach to the law but a balancing of the facts. . . . *In many situations the balance may not point clearly in either direction. If this is the position, interim relief should be refused.* *Id.* at ¶12 (emphasis added).

Conclusion

The significance of the decision and the guidelines remain to be determined in future cases, but in the near term at least the decision should put some brakes on what had been a haphazard development of privacy rights at the expense of the press.

Sunday People was represented on appeal by Richard Spearman QC and Solicitor Marcus Partington; the plaintiff, by barristers Alastair Wilson QC, Stephen Bate, Jeremy Reed and George Davis Solicitors.

¹ The Code provides in relevant portion that: “The use of long lens photography to take pictures of people in private places without their consent is unacceptable. Note – Private places are public or private property where there is a reasonable expectation of privacy. Harassment – They must not photograph individuals in private places (as defined by the note to clause 3) without their consent; must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist; must not remain on their property after having been asked to leave and must not follow them. The public interest – 1. The public interest includes: (i) Detecting or exposing crime or a serious misdemeanor. (ii) Protecting public health and safety. (iii) Preventing the public from being misled by some statement or action of an individual or organization.”

Naomi Campbell Wins Privacy Case Against *Mirror* Newspaper

In a surprising decision, the judge who presided over the bench trial of model Naomi Campbell’s breach of confidence and data protection claims against the *Mirror* newspaper, ruled in her favor, awarding her the modest sum of £3,500 for both claims, but entitling her to recovery of legal fees estimated at £200,000, and arguably throwing British privacy law into further confusion. *Campbell v. Mirror Group Newspapers*, [2002] EWHC 499 (QB) (March 27, 2002) (Morland J.) (available online at www.courtservice.co.uk).

Article Revealed Campbell’s Drug Addiction

At issue in the case was a *Mirror* article published on February 1, 2000 entitled “Naomi: I am Drug Addict,” which revealed that the model – contrary to her public denials – was addicted to drugs and was regularly attending meetings of Narcotics Anonymous (“NA”). The article was accompanied by a photograph of Campbell leaving an NA meeting in London. Subsequent articles and editorials in the

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Mirror that criticized Campbell for bringing the lawsuit were found to have caused aggravated damages amounting to £1,000 of the total award.

Disclosure of Details of Treatment is Actionable

Justice Morland presided over a one week bench trial in February 2002 during which he referred to Campbell as “a most unreliable witness,” seemingly signaling that he viewed her claims skeptically. But to the surprise of many, he ruled in her favor this month. The decision holds quite oddly that while “the *Mirror* was entitled to reveal, and to reveal in strong terms, that Miss Naomi Campbell was a drug addict” and “was receiving therapy” she still had a “residual area of privacy” to make actionable the disclosure of details regarding her NA meetings. *Campbell v. Mirror* at ¶ 10, 68-70.

Justice Morland found these “details” to be an “obvious” privacy interest, although the “details” revealed are hardly the sort of medical or personal information that ordinarily would be considered private under U.S. law. In addition to publishing a photo of Campbell leaving an NA meeting, the *Mirror* reported that “the 30-year-old has been a regular at [NA] counseling sessions for three months, often attending twice a day”; that she attended a lunchtime meeting and later that same day attended a women’s only NA session. It described how she was dressed for the meetings – “in jeans and a baseball hat.” And concluded that “despite her £14 million fortune Naomi is treated as just another addict trying to put her life back together.” *Id.* at ¶ 10.

Privacy Interest Is “Obvious”

The legal distinction between merely reporting that Campbell was receiving therapy and these additional details is not analyzed beyond Justice Morland’s apparent gut reaction that these facts are “obviously” private, citing Lord Justice Woolf’s guideline from the Court of

Appeal decision last month in *A. v. B. & C.*, [2002] EWCA Civ 337 (Mar. 11, 2002) (LCJ Woolf, LJ Laws, LJ Dyson). In that case, involving a professional soccer player’s efforts to restrain publication of articles revealing his extramarital affairs, Lord Woolf noted that “usually the answer to the question whether there exists a private interest worthy of protection will be obvious. In those cases in which the answer is not obvious, an answer will often be unnecessary.” *A. v. B. & C.* at ¶11 (vii). While this guideline could reasonably be interpreted as requiring an objective consensus as to what is or is not private, Justice Morland apparently found it sufficient to rely on his own instincts in this area – an

approach that leads to the sort of ad hoc decision making Lord Woolf’s decision seemed designed to reign in.

Breach of Confidence

Having found a privacy interest, Justice Morland concluded that Campbell proved her breach of confidence claim on the ground that the source for the *Mirror*’s article must have been one of her employees or a fellow NA attendee obliged to keep the information private. The court specifically rejected the testimony of the *Mirror*’s editor Piers Morgan that the newspaper stumbled onto the story by accident when a photographer noticed Campbell leaving an NA meeting. Justice Morland also found that Campbell was damaged by the *Mirror*’s disclosure, at least so far as it might “adversely effect her participation in NA.” Campbell at ¶ 40.3.

As to whether Campbell’s pervasive fame narrowed her right of privacy, Justice Morland accepted that Campbell is an international celebrity who has frequently discussed her personal life with reporters and who acknowledged problems with “behavioral unpredictability,” and a notoriety for “tantrums,” but Morland goes on to hold that “it does not follow that even with self-publicists every aspect and detail of their private lives are legitimate quarry for the journalist.

“[I]t does not follow that even with self-publicists every aspect and detail of their private lives are legitimate quarry for the journalist. They are entitled to some space of privacy.”

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They are entitled to some space of privacy.” *Id.* at ¶ 66.

Morland quotes at length from Lord Woolf’s press-friendly pronouncements in *A v. B & C*, including the admonishment that “courts should not act as censors or arbiters of taste” and concludes that his decision passes muster under this test. *Id.* at ¶ 49. But overall his fine line drawing between reporting that Campbell was receiving therapy (protected) and attending NA (actionable) appears to be exactly the sort of judicial editing condemned by Lord Woolf. For example, Justice Morland comments in the nature of an editor that “it was not necessary to publish the therapy details complained of. . . .All that needed to be published in pursuit of the defendant’s legitimate interests were the facts of drug addiction and therapy – fullstop.” *Id.* at ¶112.

Data Protection Violation

Also troubling, despite the relatively small damage award, is the court’s application of the Data Protection Act against a newspaper – the first time the Act has been construed in a claim against the press. The decision holds that the *Mirror* is a “data controller” and its “obtaining, preparation and publication” of the facts about Campbell amounted to data “processing” – a sweeping conclusion that subjects every aspect of newsgathering and publishing to Data Protection law. *Id.* at ¶ 80. Analyzing the law in a technical and narrow way and showing no special regard for the press, Justice Morland held that the press can be liable for damages under the Act for news reports that disclose sensitive personal data – in this case the “details” of Campbell’s NA therapy meetings.

Press Exemption Applies Only Prior to Publication

Justice Morland further ruled that Section 32 of the Act which exempts data processing when “the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic

material did not apply.” Justice Morland interpreted the words “with a view to the publication” to mean only prepublication processing *Id.* at ¶ 95. The press exemption, he reasoned, “is aimed at limiting a disproportionate restraint on freedom of expression by publication such as granting of injunctions to stop publication.... [It] was not intended to whittle down Article 8” and bars claims for post-publication damages. *Id.*

Moreover, Justice Morland also held that two catch-all exemptions in the Act either do not apply to the press at all or not under the facts of the case. A “public interest” exemption (Schedule 2 Condition 5 (d)) was held not to apply because “the commercial publications of newspapers is not the exercise of a function of a public nature.” *Id.* at ¶ 110. A “legitimate interests” exemption (Schedule 2 Condition 6) did not apply – assuming it could apply to the media – where the information was obtained by intruding into the data subject’s privacy. *Id.* at ¶ 112.

Justice Morland rejected the *Mirror*’s sensible argument that the Data Protection Act violated Article 10 of the European Convention “because instead of starting from the pre-eminent premise of freedom of expression, one starts with a whole series of restrictions which then in order to justify not being in breach of the Act, one has to demonstrate one comes within exceptional cases.” The Data Protection Act 1998 is available at: www.legislation.hmso.gov.uk/acts/acts1998/19980029.htm

The newspaper will appeal the decision.

The Mirror was represented by Barristers Desmond Brown Q.C., Mark Warby and Anna Coppola and the *Mirror*’s legal department. Naomi Campbell was represented by barristers Andrew Caldecott Q.C. and Antony White Q.C. and the solicitors firm Schilling & Lom and Partners.

Also troubling, despite the relatively small damage award, is the court’s application of the Data Protection Act against a newspaper – the first time the Act has been construed in a claim against the press.

London Judge Finds No Privacy In Print Article of Celeb's Visit to Brothel

In the middle of the *Campbell* trial another High Court judge released a decision in a privacy action by a prominent BBC television and radio music host, Jamie Theakston, — also represented by solicitors Schilling & Lom — against the *Sunday People* tabloid. *Theakston v. Sunday People*. Last month, Justice Ouseley refused to enjoin the publication of an article detailing Theakston's visit to a London brothel, although the judge did ban the newspaper from publishing photos of the plaintiff taken in the brothel.

According to news reports, in an unpublished decision the judge found that a breach of confidence claim should not be judged only from the point of view of one participant and that here “the prostitutes clearly took a different view of the confidentiality of what they had seen and done.” See “Kiss and tell blow for Theakston,” *The Guardian*, Feb. 15, 2002 on line at www.guardian.co.uk.

With regard to plaintiff's broad breach of privacy claim under the ECHR, the judge reportedly found that since the plaintiff had previously publicly discussed aspects of his sex life — including his relationships with other celebrities — he should not be heard to complain about less flattering reports about his sexual activities. News reports of the decision do not address any findings regarding banning the use of photographs with the article.

The *Sunday People* article is available on line — apparently none the worse for being published without photographs — at www.people.co.uk under the headline “Theakston exposed: the naked truth: Jamie was in a sexual trance, writhing naked on pink satin sheets as a porn film flickered in the corner. He was like an excited kid in a kinky sweet shop”

The first issues of the 2002 LDRC BULLETIN are now available.

2002 LDRC QUARTERLY BULLETIN

REPORT ON TRIALS & DAMAGES, a report on the media trials of 2002; **CRIMINAL PROSECUTIONS OF THE PRESS**, with articles on criminal libel, the current Espionage Act and the proposed Official Secrets Acts, and defense of criminal charges based upon newsgathering activities.

In 2002, LDRC also will update its **COMPLAINT STUDY**, a look at the characteristics of the plaintiffs who sue, which media they sue, and the claims they make.

The LDRC BULLETIN is written and edited by LDRC staff and by other noted First Amendment lawyers and scholars. It is often cited by lawyers, jurists, and academics, and helps set the agenda for First Amendment activists throughout the country.

Visit www.ldrc.com for more info.

The Status of English Privacy Law After *A v. B and C* and *Campbell*

By Martin Cruddace and Amber Melville-Brown

As many are aware the UK Parliament has, through the Human Rights Act 1998, incorporated the European Convention on Human Rights into UK Law. Those with publishing or broadcasting interests in the UK have waited with baited breath to see how the courts will interpret the potential conflict between Article 8 (an individual's right to privacy) and Article 10 (the right of freedom of expression – subject to certain restrictions which are set out in the Article) of the Convention.

Many commentators came to the conclusion that a right to privacy was inevitable and, indeed, many practitioners proceeded on that assumption. Recently, there have been two significant cases in which these points have been argued but not settled. The first is the Court of Appeal's March 2002 Judgment in *A v. B and C* [2002] EWCA Civ 337 (Mar. 11, 2002) (LCJ Woolf, LJ Laws, LJ Dyson); the second, this month's bench trial decision in *Naomi Campbell -v- MGN Limited* (*The Daily Mirror*) (Morland J.).

While the Court of Appeal decision was a significant boost for the press the *Campbell* decision involved an unexpected but none the less significant development in the interpretation of the Data Protection Act 1998, highlighting a new area of potential media liability regarding the "processing" of "sensitive personal data."

Court of Appeal Weighs In on Emerging Right of Privacy

The facts of *A v B and C* can be easily summarized as follows: The plaintiff "A" is a married professional footballer with two children. Not too cryptically, he is described as having a "responsible" position in the club. He liked to take out fellow members of his team to bars (including lap-dancing clubs) "with the object of improving team spirit" (of course). There he met and had an adulterous affair with D (not a party to the proceedings). He then met another woman (C) and began a relationship with her. Both relationships ended

and the *Sunday People* (B) decided to run two articles which, not surprisingly, were concerned with "salacious description of sexual activity."

The plaintiff obtained from the trial court a pre-publication injunction arguing that a right of privacy attached to the facts of his extra-marital affairs under a theory of breach of confidence and the emerging right of privacy under Article 8. The Court of Appeal reversed the injunction, finding that the law of confidentiality was sufficient to protect privacy interest, that no new tort of privacy need be recognized and that under the facts of the case the law of confidentiality did not apply. Moreover the Court of Appeal issued guidelines for future cases which address the balance between free expression and privacy, including the role of the press and coverage of public figures.

The definition of what constitutes a public figure is now far wider than any editor could have either guessed or hoped for.

Key Aspects of the Decision

The most important aspects of the Judgment of the Court of Appeal appear to us to be as

follows:

1. The definition of what constitutes a public figure is now far wider than any editor could have either guessed or hoped for. Indeed it is probably wider than even the Press Complaints Commission would understand it to be. Lord Justice Woolf quoted, with apparent approval, paragraph 7 of the Council of Europe's resolution 1165 of 1998, in which public figures are defined as "all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain." It is also worth quoting him when he says: "The public figure may be a role model whose conduct will well be emulated by others. He may set the fashion." So look out, actors, singers, sports stars and other "personalities."
2. A newspaper will be allowed to comment on or disclose conduct of a public figure which in the case of a private individual would not be appropriate.
3. The definition of what is in the public interest has

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been considerably widened (indeed it now goes further than the Press Complaints Commission's own definition). In many cases (such as this one) Lord Justice Woolf says that: "It would be overstating the position to say there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information." In an astonishingly press friendly observation, he also says that courts should take into account that if newspapers do not publish information in which the public are interested, fewer newspapers will be sold, which will not be in the public interest.

4. The more public figures voluntarily put their private lives into the public domain, the "less ground [they have] to object to the intrusion".
5. There is no need to analyze the path of a new tort of privacy because the tort of confidence is now wide enough to cover all those parts of an individual's private life that need protecting.
6. Adulterous relationships (such as the ones engaged in by A) constitute conduct that is on the outer limits of what needs protection.

Private Lives of Public Figures More Open to Press Scrutiny

The Court of Appeal Judgment radically affects the application of the law in respect of the private lives of individuals and also greatly widens the definition of what constitutes a public figure.

The decision may be most helpful in protecting serious news and investigative reports about public figures. However, we do not think that tabloid newspapers have as much cause for celebration as some appear to suggest. Tabloid newspapers rarely have similar "kiss and tell" stories which rely on individuals who have had a sexual relationship with married "public figures." Frequently these type of stories can be simply a jilted girlfriend or

boyfriend. Depending on the length and character of the relationship, the Court of Appeal Judgment makes clear that the facts surrounding the relationship may be covered by the law of confidentiality and thus newspapers will still be under threat of an injunction or an action for damages.

Further, Lord Woolf makes the obvious point that conduct being carried out in private does not necessarily characterize it as conduct that is capable of protection. The logical extension of this reasoning is that conduct being carried out in public does not mean it can, ipso facto, be plastered across pages 1, 4 and 5 – the reasoning followed in part by Justice Morland in the *Naomi Campbell* case.

Thus while there is no new tort of privacy, confidence has been extended so far as to conclude that there is a law of privacy in everything but name.

We wait to see whether or not this extension of what constitutes a public figure, is adopted by the courts in libel actions when they consider the defense of fair comment on a matter of public interest. Clearly one would expect

that the more likely the person on whom the comment is made is a public figure the more likely the defense will be available and successful.

Campbell Case

Justice Morland who recently decided the *Naomi Campbell* case agreed with Lord Justice Woolf's that there is no need to introduce a new law of privacy. The reason given was that it is possible to extend the law of confidence to protect all the private activity that ought to be protected. Justice Morland called the type of activity that needs protection, activity which has the necessary "badge of confidence." In this case it was accepted that Naomi Campbell did not complain of the revelation that she took drugs or that she was receiving treatment for the taking of those drugs. However, she did complain, and the Justice Morland said that she was right to complain, about the disclosure of the details of that treatment. Following Lord Woolf's guidelines, he found it

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“obvious” that the details of Campbell’s NA therapy bore a badge of confidence. Thus while there is no new tort of privacy, confidence has been extended so far as to conclude that there is a law of privacy in everything but name.

Celebrities Retain Some “Space for Privacy”

The task of determining the contours of the right of privacy under the rubric of confidence law will fall initially to the High Court Justices. The *Campbell* case is therefore clear authority for the proposition that even though various aspects of a celebrity’s private are in the public domain (either through choice or otherwise and either for financial reward or otherwise), he or she will still have, in Justice Morland’s words, “some space for privacy.” Clearly the extent celebrities seek out publicity will be a factor that will be taken into consideration by the court, but a newspaper cannot simply rely on that argument to defend against an application for an injunction or a claim for damages in relation to details of the private life of a celebrity.

Data Protection Act 1998

Justice Morland also ruled that the *Mirror* violated the Data Protection Act 1998. This particular part of the claim of Ms Campbell was not the focus of analysis after the judgment. It is not exactly a sexy topic. However, it is of extreme importance to those who have publishing interests in the United Kingdom and cannot be ignored. Indeed, the most significant part of the judgment may be the Data Protection Act ruling. The result suggests that the Data Protection Act is a new and powerful tool in the celebrity claimant’s armory to be used in the battle with the press.

The Data Protection Act 1998 was introduced to give effect to an EC Directive on data protection. The directive is intended to strike a balance between the fundamental rights of freedom of expression and respect

for private and family life (Article 8). Given the increasing importance and value of data information in today’s world, the Act was intended to provide a framework for the processing of personal data. It provides a number of obligations which must be satisfied where personal data is dealt with in any one of a number of ways.

First Case to Apply Act to the Press

The decision in *Campbell* is truly a landmark decision in that it is the first case in which an individual has succeeded in claiming compensation from a newspaper for the distress caused by the unlawful processing of data. Perhaps when compared with the layman’s view of a glamorous and exciting libel trial, an action under the DPA may not have the same audience pulling power (although in the case of *Campbell* the public gallery of the court of the Royal Courts of Justice in London was full to capacity). Rather than the thrust and parry of a George Carman-like cross-examination, an action under the DPA requires a thorough and detailed analysis of numerous factors, rather like putting together a very complex, three-dimensional jigsaw. A step by step process is required carefully to build the picture by reference detailed sections within the DPA and cross references to the Human Rights Act.

Under the Act, any information processed in a computer system or in any other systematically organized form, such as a filing system, which enables a living individual to be identified is classed as personal data. “Processing” includes obtaining, holding, adapting or disclosing data and basically extends to any operation which a journalist is likely to carry out in relation to any written information or digital image, from obtaining it to publishing it. The Act requires that all such processing is carried out in compliance with “the data protection principles.” These principles require the data to be processed fairly and lawfully and only permit processing if one of a series of complex conditions is met.

In addition, certain data is classed as “sensitive personal

In this case, it was successfully argued that details concerning the claimant’s treatment at Narcotics Anonymous would constitute sensitive personal data.

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data” and may only be processed if one of a further set of complex conditions is met. “Sensitive personal data” covers information relating to matters such as health, race, religion, trade union membership and sex life. In this case, it was successfully argued that details concerning the claimant’s treatment at Narcotics Anonymous would constitute sensitive personal data. If processing by journalists is not carried out in accordance with the data protection principles an individual who suffers distress has a right to compensation.

Mirror Article Revealed Sensitive Personal Data

Justice Morland decided that the article and the photograph contained “sensitive and personal data” about Ms Campbell. Quite simply, it conveyed information about her health. In its defense, the *Mirror* argued that its processing was undertaken with a view towards publication of journalistic material and therefore specifically exempt under Section 32 of the Act covering processing for journalistic, literary and artistic purposes. However, by reference to the Directive, and to the Report of a Working Party established under the Directive, and fortified by textbook writers’ views, the Judge held that this exemption applied only to pre-publication processing. It was there to prevent complaints about unlawful data processing leading to prior restraint of publication. It did not extend to protect a newspaper from a claim for compensation for unlawful processing which amounted to publication of the data.

The newspaper was also foreclosed from relying on a “public interest” exemption under the Act. Justice Morland held that the data had not been obtained fairly as the photograph had been taken surreptitiously and the other information obtained from a disloyal confidante. Since the obtaining of that information involved a breach of confidence it had also been obtained unlawfully.

Data Protection and Press Liability

The upholding of the Data Protection Act claim is of huge significance and potential liability for the press. It opens the way for claims by individuals who find private

information has been published about for example, their health or their sex lives without their consent even if the publication has not involved a breach of confidence. As with many such cases it will be difficult for the newspapers to show that the information was obtained fairly, so the processing will have been unlawful and compensation for distress will be available.

In the future plaintiffs may choose to sue only under the Data Protection Act, rather than also for breach of confidence. There is only a limited public interest exemption and no public domain defense for data processed in breach of the Act, and much of the intrusive questioning to which the newspaper subjected Ms Campbell might in future cases be disallowed by the court.

Some British commentators have dismissed the ruling, suggesting particularly and perhaps short-sightedly that it does not give rise to a right of privacy in the UK. In fact, one only has to look at the words of the judgment to see that the Act has protected the plaintiff’s privacy: “The therapy details complained of were an unwarranted intrusion into the claimant’s right of privacy.”

Conclusion

With the ever-increasing public thirst for celebrity scoops, goes hand in hand the need in some circumstances to protect those parties’ privacy. And through a combination of breach of confidence, data protection legislation and the principles guaranteed by the European Convention, that protection is now available meaning troubled times ahead for publishers.

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English Court of Appeal Decision on Qualified Privilege For Newspaper Article and Online Archive Rejects Single Publication Rule

By Meryl Evans

In the June 2001 edition of the LDRC *LibelLetter* I reported on the action brought by Russian businessman Grigori Loutchansky against Times Newspapers Limited, which came to trial at the High Court in London in March and April of 2001. At issue were articles in *The Times* that discussed Loutchansky's alleged links to the Russian Mafia. There were in fact two sets of libel proceedings – the first concerned the 'hard copies' of two articles, and the second was primarily concerned with the fact that electronic copies of the same articles were accessible in the archive section of *The Times*' website long after publication of the hard copies.

The trial Judge, Mr Justice Gray, rejected *The Times*' defense that the articles enjoyed a qualified privilege under the House of Lords' authority in *Reynolds -v- Times Newspapers Limited*. The Judge also decided that *The Times* had no defense to continuing publication, via its website, of electronic versions of the articles.¹ An appeal of these decisions was heard the week of November 12 and the Court of Appeal's Judgment was handed down December 5, 2001. *Loutchansky v. The Times Newspapers Ltd.*, [2001] EWCA Civ 1805 (Ct. App.) (copy available at <www.courtservice.gov.uk/>). The Court of Appeal held that the trial court applied too stringent a test for qualified privilege and remanded for a redetermination under a new guideline. But the Court of Appeal affirmed that a claim could be brought against *The Times*' Internet archives, declining to apply a single publication rule.

The Approach to Reynolds

The appeal concerning the hard copies of the articles concentrated on the nature and application of *Reynolds* qualified privilege, focusing on two main issues: 1) the test adopted by Mr Justice Gray to decide whether the newspaper was under a duty to publish the articles sued upon and 2) the nature of the test for *Reynolds* qualified privilege.

The test applied by Mr Justice Gray at first instance was that a duty to publish arises only where "a publisher would be open to legitimate criticism if he failed to publish the information in question." *The Times* contended that this test was far too narrow and failed to give sufficient weight to freedom of expression and the public's right to know. We also argued that *Reynolds* has not been properly understood by the lower Courts in subsequent cases and encouraged the Court of Appeal to grasp the opportunity to adopt what we said was the proper interpretation of the House of Lords opinions in that case. Alternatively, if *Reynolds* had been correctly interpreted in other cases, then *Reynolds* itself was wrong and breached the right to freedom of expression, enshrined in Article 10

of the European Convention on Human Rights. Accordingly, *Reynolds* ought not to bind the Court of Appeal.

The Chilling Effect of Reynolds

Our basic objection to *Reynolds* and the way it has been interpreted and applied by the lower courts in subsequent cases can be summed up by quoting from the judgment of the New Zealand Court of Appeal in *Lange v Atkinson*, where it considered that *Reynolds* "appeared to alter the structure of the law of qualified privilege in a way which adds to the uncertainty and chilling effect almost inevitably present in this area of the law."

The problem has been that although *Reynolds* set out the fundamental principles which must be taken into account when considering a defense of this type, little guidance is given as to the exact nature of the test. At first sight, *Reynolds* seems to be similar to the traditional defense of qualified privilege and depends on the media organization being under a duty to publish the information and the public having a corresponding interest in receiving it. *Reynolds* adheres to this formulation but adds in a third factor — the standard of the journalism.

We argued that a single test which conflates these three elements (a 'single composite test') fails to give proper weight to the importance of freedom of expression, and

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The Court of Appeal added that the journalist and/or editor "can have no duty to publish unless he is acting responsibly."

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that the proper test is a two-stage one where, put at its simplest, the first question is: 'is the subject matter of the article, assuming it to be true and leaving aside the quality of the journalism, something which the public has a right to know?' If the answer to this question is "no," the defense fails. If the answer is "yes," the occasion of publication is capable of being privileged. Only then should the Court go on to consider the second stage of the test, which involves an examination of the quality of the journalism to see whether it falls short of the standard of responsible journalism so as to displace the defense. This approach emphasizes the importance of the right to freedom of expression which had been accorded primacy in English law but arguably given no more prominence, post-*Reynolds*, than the right to reputation.

Court of Appeal's Decision

The Court of Appeal agreed with us that the test applied by Mr Justice Gray was too stringent. In its judgment, the Court of Appeal departed from traditional duty/interest formulations to be found in pre-*Reynolds* qualified privilege cases and examined *Reynolds* privilege as a breed apart. The Court of Appeal considered that it was bound by the precedent set in *Reynolds* and it was not therefore open to it to replace the single composite test with a two-stage test. They set out to "illuminate" the single composite test which *Reynolds* "clearly" dictated and identify certain of the crucial considerations likely to influence its application.

The Court formulated the following test to be applied in cases of *Reynolds* privilege:

the interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed. The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist.

The Court of Appeal added that the journalist and/or editor:

can have no duty to publish unless he is acting responsibly any more than the public has an interest

in reading whatever may be published irresponsibly...Unless the publisher is acting responsibly privilege cannot arise.

The Court of Appeal sent the case back for Mr Justice Gray to re-determine his "findings of fact" in light of their new test.

Illumination or Further Confusion?

The new test formulated by the Court of Appeal is, in legal terms, extremely wide. In effect, provided the journalism is responsible, then there is the potential for almost any article of any public interest to fall under the protection of *Reynolds* privilege. The judgment also went a long way to making it clear that there is little if any room

for a plea of malice in a *Reynolds* privilege case, emphasizing the Court of Appeal's view that *Reynolds* privilege has broken free from some of the principles which govern traditional qualified

privilege from which it evolved.

The practical problems to which *Reynolds* gives rise remain. There is, for example, no guidance in the Court of Appeal's judgment concerning how a trial judge is to assess whether or not the journalism is "responsible," so the success or failure of the defense can only be gauged by turning the trial into an issue of the journalist's professional negligence. Whether, in order to fulfil that role, the court should benefit from the evidence of other journalists as to how the conduct of the defendants measures up to that of an ordinary, competent journalist (if that is indeed the test), is not addressed in the Court of Appeal's judgment. It may be that judges will be left to form their own view of the standard of journalism in each case.

I should emphasize that *The Times* is more than happy to be measured against a standard of responsible journalism. The concern is that with a single composite test, anything which falls short of perfect journalism will mean that a *Reynolds* privilege defense fails. We want to change the emphasis so that the first consideration is the

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public's right to know. The Court of Appeal moved some distance in that direction, as can be seen from the test it formulated, but in our opinion there is still some way to go before the law gives proper recognition to the right to freedom of expression.

Publication on the Internet: No End to Liability

The Times also asked the Court of Appeal to reconsider whether it could argue that Loutchansky's claim was time barred on the grounds that there was no 'publication' of the articles by *The Times* after the date when the articles were first posted on its website.

This was, in effect, an attempt to have adopted in English law a 'single publication rule' (operating only in relation to limitation, and not to multi-jurisdictional cases) and American authorities on that point were considered at length. The question turned however, on the English case of *Duke of Brunswick*, decided in 1849. The net effect of that case is that the 12 month limitation period is triggered afresh, each time someone reads a defamatory article on the Internet, regardless of how long it has been there.

We argued that this placed a restriction on the maintenance and provision of access to both electronic and physical archives that was a disproportionate restriction on freedom of expression. Accordingly, the rule in *Duke of Brunswick* conflicted with the European Convention on Human Rights protection for freedom of expression and the Court of Appeal was therefore obliged under English law to overturn it. *The Times* also sought to argue that the rule defeated the whole purpose of the 12-month limitation period for libel (a limit introduced by the Defamation Act 1996, which cut the period down from three years).

The Court of Appeal disagreed that the rule in *Duke of Brunswick* conflicted with the right to freedom of expression and considered that *The Times* had not made out its case for such a radical change in the law. The court accepted that permitting an action based on a fresh publication of an article first published long ago conflicted with some of the reasons for the introduction of a shorter limitation period but this was not a cause for major concern as the scale of publication many years after the initial publication — and therefore the damages flowing from it — was likely to be small.

The dismissal of *The Times'* appeal on this issue means that newspaper publications on the Internet (and, for that matter, in database form or even those held in libraries) are vulnerable to libel actions long after the expiry of 12 months from the date of initial publication. While that risk may be manageable for libraries, the position of any newspaper which makes historical material available on its own website or through a database is extremely vulnerable.

Reynolds and the Internet

The Court of Appeal considered whether *The Times* had a defense of *Reynolds* privilege for the publication of the articles on the Internet. The Court of Appeal dismissed *The Times'* appeal and brought in a new requirement for those seeking the protection of *Reynolds* in a claim concerning Internet publication. It was held that *The Times* could not be under a duty to publish defamatory material day after day without publishing any qualification that the articles were being hotly contested. The failure to attach a qualification could not be described as responsible journalism.

The Court of Appeal separately considered what a notice or qualification should contain. They proposed that where it is known that archive material "is or may be defamatory," the attachment of an appropriate notice warning against treating it as the truth would normally remove any sting from the material.

The Court of Appeal's suggestion that an "appropriate notice" provides a solution is flawed. Firstly, Claimants' solicitors will demand the attachment of a notice to any article to which their clients take exception, thus having a chilling effect on freedom of expression. Secondly, taking the Judgment to its extreme, if such warnings are required to protect all material which "is or may be defamatory," the only practical solution for Internet publishers is to attach a notice to everything they publish. To attach a warning only to those articles which the publisher considers are or may be defamatory would be to signal to potential claimants which articles the publisher considers are vulnerable to suit. On the other hand, attaching a warning to everything that is published clearly devalues the effect of the warning, possibly to the point where it is of no actual assistance. If that is the

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case, the only real solution is not to continue publishing articles on the Internet after the day of hard copy publication.

An Alternative Approach

At trial, *The Times* had sought to raise a novel defense of qualified privilege which, it was argued, should be available for those maintaining an archive. Mr Justice Gray did not consider that such a defense was available to *The Times*. The Court of Appeal did not overturn Mr Justice Gray's ruling and was not persuaded by *The Times*' arguments in favor of archives. The Court of Appeal stated that the maintenance of archives has a social utility but this is a "comparatively insignificant" aspect of freedom of expression. It considered that it was stale news and could not rank in importance with the dissemination of contemporary material.

The decisions of the Court of Appeal on the Internet publications are not encouraging ones for the providers and the users of archives, in particular electronic ones. The Court of Appeal's Judgment will make it more difficult, if not impossible, for an electronic publisher to satisfy a court that it was under a duty to publish. At a time when the Internet is fast becoming an indispensable resource tool, these decisions place unnecessary burdens on editors and restrict the flow of information. The incorporation of an archive defense into English law would eliminate these unwelcome developments.

Next Stop: The House of Lords

The Times asked the Court of Appeal for permission to appeal the following points of law:

- 1) the rejection of the two stage test for *Reynolds* privilege;
- 2) the correct test for qualified privilege for archive records;
- 3) whether the rule in *Duke of Brunswick* should be displaced in the context of the Limitation Act so that a single publication rule is adopted for material on the Internet;
- 4) the correct interpretation of section 8 of the Defamation Act 1996 (this appeal addresses the occasions when a

claimant can have his claim disposed of summarily by a judge without a jury. It has not been considered in detail in this article as it concerns English legal procedure and does not relate to the defense of defamatory articles).

Permission was refused for all elements and *The Times* have petitioned the House of Lords for leave to appeal.

The claimant has lodged a cross appeal to argue that the Court of Appeal should have upheld Mr Justice Gray's Judgment on the grounds that the only real issue was responsible journalism. The claimants' position is that Mr Justice Gray's judgment was not tainted by use of the wrong test so that his criticisms of the journalism still held good.

It was held that *The Times* could not be under a duty to publish defamatory material day after day without publishing any qualification that the articles were being hotly contested.

The first stage of the appeal to the House of Lords is for a Committee to consider whether to give *The Times* leave to pursue the appeals. If provisional leave is given (as it was on the petition lodged last year) it is likely that the claimant will lodge objections.

An oral hearing to consider both petitions will probably follow.

The decision whether to give provisional leave to appeal is likely to be made soon. Although not wishing to tempt fate, I am optimistic as to *The Times*' prospects. The disparate application of the *Reynolds* test by the lower courts has devalued the potential use of the defense. The Court of Appeal has been inclined to hear appeals in several cases and recently it has displayed a more liberal approach than that of the lower courts. I hope that the House of Lords feels the time is ripe for a review and clarification of *Reynolds*. If this opportunity is not taken, it may be a long time before the next one emerges. If the House of Lords allow the appeals to proceed, they will be faced with some difficult questions on the hard copy articles and the Internet. The House of Lords will need to consider the following matters:

- is there sufficient certainty in the *Reynolds* test so as to conform with the European Convention on Human Rights?
- should a two stage test as propounded by *The Times* be

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adopted?

- at what stage should responsible journalism be considered?
- how is the test of responsible journalism to be measured?
- how do the ten factors propounded by Lord Nicholls in *Reynolds* tie in?
- should a newspaper be obliged to put a qualification or a notice on an article published on the Internet containing defamatory material?

These are not easy questions and we hope that the House of Lords decides that they should be tackled. If not, the resounding challenge created by the Court of Appeal's Judgment will be the practical application of the new test for *Reynolds*. The lower courts will have to grapple with the very wide test set out by the Court of Appeal while continuing to consider the ten factors set out by Lord Nicholls, with no guidance as to how they are to operate in tandem.

Of equal significance is the impact it will have on editors and media lawyers checking material prior to publication. They will have the unwelcome task of assessing whether the test may provide a particular article with a defense if a claim is brought relating to it. The judgment gives little practical assistance for those who are faced with making decisions daily about whether to publish an item.

The new test may allow a more liberal approach to be adopted with greater adherence to the right to freedom of expression. However, in the light of the post-*Reynolds* cases in which the right to reputation has been favored at the cost of the right to freedom of expression, the fear is that the Court of Appeal's new test is sufficiently wide to enable lower courts to apply *Reynolds* as strictly as they were prior to the *Loutchansky* appeal.

Life Beyond the House of Lords

Aside from the appeals, the case has more stages to go through before it is concluded. There is the re-determination of the defense of privilege in the light of the new test, although this is stayed pending the consideration of *The Times'* petition to the House of Lords on the test for *Reynolds* privilege. At some stage there may be a damages

trial. The one listed for 11 January has been postponed indefinitely. Whether this proceeds depends on *The Times'* fortunes before the House of Lords and the fresh analysis of the articles by Mr Justice Gray.

Conclusion

This case, which has provoked a thorough analysis of so many areas of English libel law, may well be concluded outside this jurisdiction. If *The Times* is not given leave to appeal to the House of Lords to review an area of the law it considers to conflict with the European Convention on Human Rights, then *The Times* will have exhausted all its domestic remedies. It would then be entitled to appeal to the European Court in Strasbourg. It may be that only at that stage will the cases of *Loutchansky* and *Reynolds* be viewed in a truly objective light, away from the cumbersome interpretation of *Reynolds* by the lower courts and the adherence to unsatisfactory and outdated precedents, decided in an age when man would not have contemplated the invention of the computer, far less the World Wide Web.

On appeal The Times was represented by solicitor Meryl Evans of Reynolds Porter Chamberlain and barristers Lord Lester of Herne Hill (Blackstone Chambers), Richard Spearman QC (4-5 Gray's Inn Square), Mr Richard Parkes (5 Raymond Buildings) and Mr Brian Kennelly (Blackstone Chambers). Loutchansky was represented at the appeals by solicitor Debbie Ashenhurst of Olswang and barristers Desmond Browne QC (5 Raymond Buildings) and Mr Hugh Tomlinson (Matrix Chambers).

¹ I touched in my last report upon a petition for leave to appeal to the House of Lords, following the rejection by the High Court and the Court of Appeal of our argument that "after-acquired information" should be taken into account in assessing whether the qualified privilege applies. The House of Lords has granted provisional leave to appeal and I expect there to be a hearing shortly when the House of Lords will consider the other side's objections to our Petition, before deciding whether leave should be granted.

Australian High Court Refuses to Enjoin Broadcast of Illegally Obtained Videotape

In November 2001, the High Court of Australia (the highest court in the Australian judicial system) issued a significant ruling on the media's liability for broadcasting illegally acquired material, holding that the press can publish material that has been obtained illegally by a source provided the press did not take part in the illegal acquisition and the material disclosed is not confidential. *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] HCA 63 (15 Nov. 2001) (Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ). A copy of the decision is available through www.austlii.edu.au/.

Secret Third Party Videotaping at Possum Slaughter House

At issue in the case was a 1999 Australian Broadcasting Corporation ("ABC") news report on the operations of Lenah Game Meats ("LGM"), a possum slaughter house in Tasmania. The ABC report used portions of a secretly made videotape showing the slaughter process that was made by unknown persons presumed to have been trespassing at the facility. The videotape was anonymously given to an animal rights group, Animal Liberation Limited, which supplied the tape to ABC with the intention that the ABC would broadcast it. The videotape graphically depicted the slaughtering process. Indeed, the High Court acknowledged that "like many other lawful animal slaughtering activities, the respondent's activities, if displayed to the public, would cause distress to some viewers. It is claimed that loss of business would result. That claim is not inherently improbable. A film of a vertically integrated process of production of pork sausages, or chicken pies, would be unlikely to be used for sales promotion." *Id.* at ¶ 25.

Proceedings Below

Prior to broadcast, the ABC informed LGM of its intention to use portions of the videotape in its "7:30 Report." LGM then sued seeking to obtain a preliminary and permanent injunction barring any broadcast. A Tasmania trial court refused to issue a preliminary injunction on the grounds that LGM had failed to state a cause of action since there was no breach of confidence

and no general invasion of privacy tort existed under Australian law to bar broadcast. LGM successfully appealed this ruling, on the ground that the use of the illegally made videotape was unconscionable. In the interim, though, ABC broadcast portions of the videotape. The appellate court, which found that LGM had at least an equitable cause of action against ABC, enjoined any further broadcast of the video. *See Lenah Game Meats Pty Limited v Australian Broadcasting Corporation* [1999] TASSC 114 (2 Nov. 1999).

High Court Ruling

On ABC's appeal of the injunction to the Australian High Court, LGM argued that broadcast of the illegally acquired tape would be a breach of confidence as well as unconscionable – a point seconded by the intervener Commonwealth Attorney General who argued that "the fact that the information was improperly obtained should weigh heavily against allowing the information to be used." *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] HCA 63 ¶ 31. More ambitiously, LGM argued that the court should explicitly recognize a general cause of action for invasion of privacy available to both individuals and corporations.

In dissolving the injunction, Chief Justice Gleeson – joined in result by three other justices – reasoned that if the activities depicted on the tape were private, the law of breach of confidence would be sufficient to stop publication. But here while the activities were carried out on private property, "they were not shown, or alleged, to be private in any other sense." *Id.* at ¶ 35.

He also urged caution in recognizing a tort for invasion of privacy, as requested by LGM, both because of the lack of precision in the concept of privacy itself as well as the tensions that exist between the interests in privacy and interests in free speech. *Id.* at ¶ 41.

Moreover, as to the claim that use of the videotape would be unconscionable, he found that the mere fact that the videotape had been illegally made by a source was not of itself reason to enjoin ABC from broadcasting it, quoting with approval U.S. Supreme Court Justice Stevens' words from *Bartnicki v Vopper* that:

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Australian High Court Refuses to Enjoin Broadcast of Illegally Obtained Videotape

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The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of [the statute] do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.

Id. at ¶ 48.

Justices Also Opine on Right of Privacy

The High Court decision also contains interesting and lengthy discussions by several justices working through the implications of plaintiff's request that the court recognize a tort of privacy. As noted, Chief Justice Gleeson urged caution. Other justices also expressed concern. Surveying Australian, English and American law authorities, including the Restatement of Torts, Justices Gummow, and Hayne noted that "however else it may develop, the common law in Australia upon corporate privacy should not depart from the course which has been worked out over a century in the United States." *Id.* at 129. Justice Callinan, who with Justice Kirby, would have upheld the injunction, noted that "the time is ripe" to consider whether a tort of invasion of privacy should be recognized in this country. *Id.* at ¶ 335. The court's discussion suggests that under a different set of facts – namely a case involving an individual rather than a corporate plaintiff – there is support on the court for the development of a privacy tort.

Conclusion

Whether a privacy tort develops under Australian common law remains to be determined in future cases. But while the result in this case is positive, the decision demonstrates — albeit indirectly — the extent to which privacy rights under Australian common law (as in English common law) already exist under the rubric of breach of confidence law. Here the right to broadcast the tape turned

on the nature of the slaughterhouse which was viewed as an open place of business. As the court noted, had the tape revealed any private activity, breach of confidence law would have been applicable and sufficient to enjoin broadcast. Thus while the Chief Justice Gleeson cited *Bartnicki* with approval, the result in *Bartnicki* would likely be untenable under Australian law.

ABC was represented by barristers T. K. Tobin QC, J. Gibson and R. Glasson and solicitor Judith Walker. LGM was represented by S. McElwaine and J. Bourke.

BBC Wins Agreement to Broadcast Lockerbie Appeal

By Rosalind M M McInnes

In a boost for open judicial proceedings, the BBC is currently broadcasting the criminal appeal of Mohamed Al Megrahi, a Libyan who was convicted last year of bombing Pan Am flight 103 in 1988. The criminal proceedings in the case are being heard by a panel of Scottish judges at Camp Zeist in the Netherlands pursuant to an extradition agreement with Libya which agreed to turn over Al Megrahi and another suspect (who was acquitted) for trial in a neutral country under Scottish law. BBC News Online at <<http://news.bbc.co.uk>> is providing live video coverage of the appeal on the web. The broadcasting of the appeal is the culmination of over a year's dedicated efforts to make justice truly open in the case of the 1988 bombing of Pan Am flight 103.

The Lockerbie Tragedy

Before considering the rightness of broadcasting this appeal live, or the broader questions of televising court proceedings, it is worth remembering the scale of the trag-

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BBC Wins Agreement to Broadcast Lockerbie Appeal

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edy. Two hundred and seventy people were killed in the bombing — all 259 passengers and crew en route from London to New York, together with 11 Scots who lived in Lockerbie, Scotland where the plane crashed. It was clear from an early stage that there was no question of accident or malfunction; the court at Camp Zeist is dealing with the largest mass murder in Scottish legal history. The Crown commenced its case with a sombre list of the dead and of the numbers of widows, widowers, orphans and bereft parents left in the wake of the Lockerbie disaster. Twenty-one countries lost nationals.

The Need for Open Justice

The Lockerbie trial and appeal proceedings have, therefore, the highest possible claim on the public interest from both the human and political perspective. They also are legally unique. This is the first time that a Scottish court has sat outside Scotland; the first time that those accused of so serious a crime have been tried without a jury; and the first time that three senior Scottish judges have sat together to consider fact and law in this way.

There is no doubt about it: the Lockerbie proceedings have the strongest and most legitimate claim to our scrutiny as global citizens. That is why the BBC made two strenuous attempts to televise the trial last year, by petitioning the Supreme Scottish Court on two occasions. Both attempts were unsuccessful. Whilst the court accepted the principle that the media were the eyes and the ears of the public, and indeed that televising the proceedings would be the most effective way of doing that job, nonetheless they held that it could not be done.

Primarily, their argument addressed the impact upon witnesses. Another peculiarity of the Lockerbie trial was that not all of the witnesses were compellable by the Scottish court. There were concerns about the safety of witnesses, given the issues of terrorism and espionage. More simply, it was argued that the presence of television cameras would make the witnesses shy, tense, self-conscious or inclined to “play to the gallery.” Finally, it was held that, whereas in Scotland non-expert witnesses are excluded from the court until after they have given

evidence by broadcasting the trial they would be “briefed” on what had happened in court in their absence.

The Refusal to Televise the Trial

In vain, the BBC protested that all media reporting of proceedings was capable of “briefing” witnesses. In vain, did we promise to protect the identity of any witnesses and accept any constraints which the court might deem necessary to protect a witness. In vain, we argued that the trial was already being broadcast to remote sites in New York, Washington, London and Dumfries for the benefit of the bereaved families. This was glossed over by the court as amounting to a mere “extension of the courtroom.” (By this profoundly unsatisfactory analogy, the Scottish court, already “extended” to the Netherlands, created four additional wholly private courtrooms, which the court itself could not see, still less control.)

Cameras in the Courts in Scotland

The final reason for refusing television was the refusal of the accused to consent. In the UK, television in court has traditionally been anathema. The Scottish judiciary is fact much more broad-minded here than its English, Welsh and Northern Irish counterparts. Televising of court proceedings has been legal in Scotland, under certain circumstances, since 1992.

Unfortunately, this bold and progressive development has been stymied, all too often, due to the criteria set out in the 1992 Guidelines issued by Lord President Hope. Filming of any trial or preliminary hearing was not permitted. It is necessary to get the consent of all concerned, including the lawyers. Curious as it may seem in a profession which still dresses up in wigs and gowns to orate for long stretches in an ostensibly public court - these unlikely candidates for camera-shyness tend to find performing on television a stage too far. The criminal fraternity, and their mothers, take a broadly similar view.

So in theory, Scots law permits the televising of legal proceedings, but in practice, it has not done so for years.

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BBC Wins Agreement to Broadcast Lockerbie Appeal

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Broadcasting the Appeal

How, then, did the BBC come to broadcast the Lockerbie appeal? In fact, this was achieved through a remarkable degree of consensus, although not without constraint. A protocol exists binding all the media. It states that “the court in its sole discretion may make available to broadcasters ... a feed of the audio-visual images of the appeal” and that “the court in its sole discretion may temporarily or permanently end” the access to the images. The simultaneous Arabic translation is also being made available to broadcasters. The court remains adamant on the question of not televising witnesses: no audio-visual images will be supplied to broadcasters of any evidence taken from witnesses during the appeal hearing. Broadcasters will be able to use excerpts, live or recorded, for the purposes of news programmes.

Puzzlingly, Al Megrahi, who previously apparently voiced an implacable resistance to having his trial televised, has made no murmur about the televising of the appeal.

The BBC is now in the position of broadcasting the first live footage of a Scottish appeal. This is a matter of pleasure and satisfaction to many interested people throughout the world, and especially to BBC Scotland, which has fought long, hard and expensively to advance the cause of open justice. Moreover, this broadcast will it is hoped encourage the Scottish judiciary to open other proceedings to public broadcast.

For at least this media lawyer, however, there is a slight sense of anti-climax. Viewers are being treated to appeal proceedings in one of the most complex, technical and significant murder trials ever mounted. For the viewer, this is roughly like coming in at the last chapter of “War And Peace.” Live broadcast is not exactly too little: it is a substantial and reassuring advance in the Scottish courts’ thinking about the media. But it is, perhaps, in this case a little late.

Rosalind M M McInnes is a Solicitor for BBC Scotland.

Canadian Supreme Court Decisions Ease Court Publication Bans

Latest Decisions Have Already Been Relied Upon By Judges Willing to Refuse Bans

By Paul B. Schabas

The law in Canada continues to move slowly towards more openness in court proceedings and away from common law restrictions that have historically led to publication bans where there was any risk to fair trial rights. Until recently, Canadian law routinely favored the interest in preventing any risk to fair trial caused by pre-trial publicity over freedom of the press and the right of the public to know and scrutinize court proceedings.

Now, 20 years after the passing of the Canadian Charter of Rights and Freedoms, which entrenched freedom of expression and the press as constitutional rights, the courts have departed from the position that a risk to fair trial trumps freedom of the press, and recognized that the two rights are at least of equal importance and must be balanced.

While publication bans are still commonplace for evidence presented at bail hearings and preliminary inquiries (often-lengthy pre-trial hearings to determine if there is enough evidence to go to trial), as they are authorized by statute and those provisions have not (yet) been challenged, they are becoming rare indeed at trials. Two recent Supreme Court of Canada decisions — *R. v. Mentuck* [2001] S.C.C. 76 and *R. v. O.N.E.* [2001] S.C.C. 77 — confirm this trend. For American media covering cases across the border, and for Internet news services, these cases reduce, but do not eliminate, the perils of publishing details of Canadian criminal cases.

R. v. Mentuck and *R. v. O.N.E.* arose from applications by the Crown to ban publication of a certain type of police investigative technique (the “crime boss scenario”) on the grounds that the reporting of it could have a detrimental impact on the ability of the police to use it, and would endanger undercover officers. (The “crime boss scenario” is a technique well-known to many defence lawyers, in

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which undercover police officers pose as leaders of crime rings that can offer protection to members of the ring, but usually requires the members [i.e. suspects], to confess their crimes to the boss in order to get protection.) The argument succeeded in British Columbia, but failed in Manitoba. Both cases went to the Supreme Court together.

The Supreme Court confirmed the approach to be taken in considering whether to impose publication bans set out in *Dagenais v. C.B.C.* (1994), 120 D.L.R. (4th) 12 (S.C.C.), and reframed it more broadly to allow consideration of the interests involved in *Mentuck* and *O.N.E.*, and other interests associated with the administration of justice. The general rule set out in *Dagenais* is that publication bans should only be imposed where there is a serious risk to a fair trial such that a publication ban is necessary, having regard to the fact that there are no other alternatives, and that imposing a ban itself is not desirable.

In *Mentuck*, Justice Iacobucci refined this stating:

A publication ban should only be ordered when:
 (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Mentuck [2001] S.C.C. 76 at para. 32.

The case clarifies and expands the *Dagenais* test in other ways. Iacobucci also emphasized that any “real and substantial risk” must be a “serious one which is well grounded in the evidence” and must “be a risk that poses a serious threat to the administration of justice.” Indeed, he stated explicitly that “it is a serious danger

sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.” *Id.* at para. 34.

On the facts of these cases, the Court found that the Crown did not adduce sufficient evidence to satisfy the Court that there was a serious risk to the administration of justice. As Iacobucci J. stated in *R. v. Mentuck*:

I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run. Criminals who are able to extrapolate from a newspaper story about one suspect that their own criminal involvement might well be a

police operation are likely able to suspect police involvement based on their common sense perceptions or on similar situations depicted in popular films and books. . . . I do not believe that media publication will seriously increase the rate of compromise.

Mentuck, at para. 43

The Court went on to emphasize many of the advantages of publicity, referring to the importance of public scrutiny of the administration of justice, which in addition to ensuring fair procedures can also be critical to exonerating an accused, not only in the eyes of the court but in the minds of the public. As Iacobucci stated:

Second, it [public scrutiny] can vindicate an accused person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public. In many cases it is not clear to the public, without the advantage of a full explanation, why an accused person is acquitted despite what a reasonable person might consider compelling evidence. Where a publication ban is in place, the accused has little public answer. . . .

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Judge Reverses Course, Rules Identity of E-Mailer Must Be Revealed

A California trial court denied a defendant's motion to quash a subpoena requiring Yahoo! to supply Ampex Corp. with records that would help identify the defendant, an anonymous former employee who posted messages to a Yahoo! bulletin board. The ruling without explanation also denies the defendant's ability to proceed anonymously. See *Ampex Corp., et. al., v. Doe I, aka "Exampex" on Yahoo!, et. al.*, Case No. C01-03627 (Cal. Super. Ct., Contra Costa Co., Jan. 15, 2002).

The ruling last month marked a stark departure from the December ruling that would have required Ampex executives to establish that they had been libeled in the messages posted by their former employee before they could learn the identity of the defendant.

The dispute between Ampex and its former employee began when the employee posted comments about the company and its president on a Yahoo! bulletin board, using the pseudonym "Exampex." The comments included claims that Ampex President Edward J. Bramson had said that a single mother with AIDS had gotten what she deserved, and that marijuana smokers should be "taken out and shot." The postings were also critical of Ampex's dealings with a failed Internet video subsidiary called INEXTV.

When Judge Sanders ruled in December that Ampex should first provide the court with a verified complaint with some factual explanation of actual damages alleged to have flowed from the comments posted on the message board, it was considered a major victory for free speech advocates because the ruling could have helped prevent "fishing expeditions" by plaintiffs seeking to silence anonymous critics.

Last month, however, Judge Sanders reversed course. The defense argued that revealing the identity of an anonymous poster would have a chilling effect for on-line discussions. Nevertheless, the court denied the defendant's motion to quash the subpoena for Yahoo!'s e-mail records.

The defendant has filed a special motion to strike under the California Anti-SLAPP statute. A hearing on that motion is scheduled for March 12.

The defendant is represented by Jennifer Granick and Mike Shapiro of Stanford's Center for Internet and Society. Ampex is represented by William C. Morison-Knox, Michael D. Prough, and Tuari N. Bigknife, of Morison-Knox Holden Melendez & Prough in Walnut Creek, Cal.

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On this basis the publication ban sought would have a deleterious effect on the accused's right to a public trial.

Id. at para. 54

The implications of *Mentuck* and *O.N.E.* are significant. The Court states, remarkably, that "Our country is not a police state." It makes clear that publication bans are not going to readily be granted and that there is a heavy evidentiary burden on police and the Crown to justify any ban at all.

Already, these decisions have been relied on by many judges to refuse bans that would have been readily granted previously such as bans on naming witness, accused persons in sensitive cases which might identify victims, and where it was alleged that police powers would be affected. This signals a new trend toward more openness in criminal justice proceedings.

Paul B. Schabas is a partner at Blake, Cassels & Graydon LLP, Toronto, Canada.

Ninth Circuit Develops New Public Display Right Analysis

The Court Also Held That Thumbnails Were a Fair Use

By Kurt B. Opsahl and Oscar S. Cisneros

The Ninth Circuit Court of Appeals has affirmed that the fair use doctrine provides immunity to image search engines for gathering and making thumbnail copies of online images. In *Kelly v. Arriba Soft Corp.*, 2002 U.S. App. LEXIS 1786 (Feb. 6, 2002), a three judge panel found that the fair use doctrine of copyright law allowed Ditto.com (formerly known as Arriba Soft) to temporarily copy images and create smaller thumbnail versions for its index. In the first appellate decision on deep-linking, however, the panel also found that Ditto's practice of linking directly to the original images on the plaintiff's server violated plaintiff's public display right. A petition for rehearing on this second issue _____ is pending.

Background

THE PARTIES

Ditto offers Internet users the latest in search technology: the image search engine. Ditto allows users to search the Internet by viewing web-based images rather than text, based on the idea that a picture often provides a more succinct representation of information available online.

Les Kelly is a professional photographer who publishes his photographs of the American West on the web and in books. While Kelly does not sell images directly on the web, he uses his site to promote his services. In early 1999, Ditto crawled Kelly's site and included thumbnail images of Kelly's photographs in its search engine database so that users searching for information relating to Kelly's photographs would be referred to his web site. Kelly complained about this use and Ditto promptly removed the images.

Kelly filed suit shortly thereafter. In December 1999, the District Court held that Ditto's creation and use of reduced-size thumbnails of Kelly's images and any subsequent link to the original images on his Web site was fair use under the Copyright Act. 77 F. Supp. 2d 1116 (C.D. Cal., Dec. 15, 1999). Kelly appealed.

THE TECHNOLOGY

Ditto's "thumbnail" image index is generated by a "crawler," a computer program that traverses the web looking for new images. Generally, the crawler automatically travels the web in a random fashion, following links to other web pages. Ditto can also target the crawler to specific online locations and, like most search engines, users can submit web sites for indexing. When the crawler finds images, it downloads temporary copies of the files and generates smaller, lower-resolution "thumbnails" of the images. Once the thumbnails are created, the program deletes the original images from the server.

After users search for the subject of their interest,

Ditto displays the search results as a list of thumbnails. In the first half of 1999, clicking on a thumbnail produced an "Images Attributes" page, containing the original image (directly from the web site, such as Kelly's), along with information about the image.

The appellate panel called this "inline linking."

Starting in July 1999, the search results page contained thumbnail images accompanied by two links called "Source" and "Details." "Details" linked to a page similar to the Images Attributes page but with a thumbnail rather than the original image. The "Source" link opened two new windows: one contained the original image (directly from the source web site) and the other contained the originating web page. The panel called this "framing."

Thumbnails are Fair Use

After quickly finding a prima facie case of infringement, the panel applied the four-factor test for "fair use" under Section 107 of the Copyright Act.

PURPOSE AND CHARACTER OF THE USE

Although the opinion found that Ditto's use of Kelly's images was commercial, it also found that such a

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Ninth Circuit Develops New Public Display Right Analysis

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use was not highly exploitative. Ditto did not use Kelly's images to promote its own site, but as part of a larger database of images. The panel found that Ditto's use of Kelly's images as thumbnails in a search engine was transformative because it served a different, non-superseding function. Where Kelly's images portrayed the American West in an artistic, illustrative manner, Ditto's use of the same images in thumbnails was unrelated to any esthetic purpose. The panel noted that the thumbnails were of a much lower resolution than the originals and that any enlargement would result in a significant loss of clarity. Because of this, the panel found, Ditto's thumbnails did not supplant the need for Kelly's originals.

The panel brushed aside Kelly's arguments that Ditto merely reproduced the exact photographs and added nothing to them. Ditto's use was transformative, the court said, because the thumbnails did not involve a mere change in medium, but served a different function — "use-improving access to information on the [I]nternet versus artistic expression." Citing to an analogous comparative advertising case, the panel found Ditto's use provided a public benefit without loss to the integrity of the copyrighted works.

The Nature of the Work

The panel found that this factor weighed only slightly in favor of Kelly because — although the images were creative in nature — they had appeared on the Internet prior to Ditto's use.

AMOUNT AND SUBSTANTIALITY

This factor did not weigh in favor of either party. The panel held that Ditto's use was reasonable because it was necessary to copy the whole image to show the thumbnail to the users.

MARKET HARM

The panel held that Ditto's use of Kelly's images would not impact their value or any potential market for their sale or license because they did not replace the original images

and because Ditto's site drove traffic to Kelly's site.

On balance, the panel found that the above factors weighed in favor of fair use.

Unique Public Display Analysis

Turning to Ditto's Image Attributes page and subsequent practice of opening a new browser window directly to the image file, the panel recognized that Ditto did not directly copy Kelly's images. Thus, Ditto did not infringe Kelly's right of reproduction. The panel's analysis did not end there, however.

Rather, the panel developed a new application of the public display right, finding that Ditto publicly displayed Kelly's images by "importing" the images into its web site.

The panel found that the display of Kelly's images in their original size superseded the function of Kelly's works, and was more use of the work than reasonable.

Focusing on the legislative history of the transmission prong of the Copyright Act's definition of public display, the panel held that whether or not anyone actually viewed the images was "irrelevant" to liability analysis, though could

be considered in determining damages.

Accordingly, the panel found that Ditto was liable for direct infringement, stating that the company became more than a "passive conduit" when it searched the web for Kelly's images and made them available for display.

The panel then looked at the "public display" under the fair use factors, finding no fair use. The panel found that the display of Kelly's images in their original size superseded the function of Kelly's works, and was more use of the work than reasonable. Furthermore, the panel held that Ditto's use of the images harmed all of Kelly's markets, reasoning that it would reduce the number of visitors to Kelly's site, impede his ability to license the works, and result in substantial adverse effects to his potential markets.

Clouded Opinion on Deep Linking

The panel characterized the public display portion of its analysis as relating to "framing," which is traditionally thought of as incorporating or importing the contents of

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Ninth Circuit Develops New Public Display Right Analysis

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another's site directly into one's own site. The process described by the panel is not what is traditionally thought of as "framing," however. Rather, the opinion describes opening a link in a new browser window, pointed towards an online location on a third-party's server. Explained from the user's perspective, a new browser window would pop up containing the stand-alone, full-sized image, and the corresponding Internet address for that image pointing to Kelly's web site as the source or location for the image. Thus, on its face, the opinion appears to implicitly hold that linking directly to an online location ("deep-linking") without the permission of the owner would violate the public display right.

Accordingly, without clarification from the panel or the Ninth Circuit sitting en banc, the opinion could be used to assert claims for deep-linking. If this is truly what the panel intended, it would be the first appellate decision on deep-linking, and mark a departure from current cases. Compare with *Ticketmaster v. Tickets.com*, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. 2000) ("hyperlinking does not itself involve a violation of the Copyright Act ... since no copying is involved.") and *Bernstein v. J.C. Penny*, 1998 U.S. Dist. Lexis 19048, 26 Media L. Rep. 2471 (C.D. Cal. 1998) (granting motion to dismiss claim for copyright liability for linking).

Ditto has petitioned for rehearing by the panel or before the Ninth Circuit sitting en banc, challenging the panel's decision on the public display right as contradictory with Ninth Circuit and Supreme Court precedent and contending that the panel misunderstood critical factual issues. The panel has ordered further briefing from Kelly, and the petition is currently pending.

Kurt B. Opsahl and Oscar S. Cisneros are associates with Perkins Coie LLP in San Francisco. Mr. Opsahl, along with Perkins Coie partners Judy Jennison and David Burman and associate David Saenz, represented Ditto in this appeal.

Internet Posters Found Liable and Enjoined From Future Postings

A California jury awarded \$775,000 in damages to a biotechnology company which sued former employees Michelangelo Delfino and Mary Day for libel over postings to various Internet message boards about the company and its executives. The judge presiding in the case also issued an injunction barring the former employees from posting additional messages, which they did throughout the trial on their own website and on various bulletin boards. See *Varian Medical Systems v. Delfino*, No. CV 780187 (Cal. Super. Ct. jury verdict Dec. 18, 2001).

The Saga Begins

Delfino was fired by Varian Medical Systems, Inc. in October 1998 after manager Susan Felch accused him of sexual harassment and he was suspected of sabotaging equipment in the company's laboratory. His co-worker Mary Day quit two months later.

Within a few weeks, messages began appearing on various message boards, primarily Yahoo! Finance's board devoted to Varian. Eventually, more than 13,000 postings regarding Varian showed up on 100 message boards, and on the defendants' site.

Among other things, the messages charged that various Varian executives discriminated against homosexuals and pregnant women and that the executives were having affairs.

Felch and Varian Vice President George Zdasiuk filed suit against Delfino in Santa Clara Superior Court in February 1999. The plaintiffs had the case removed to federal court, but that court later sent the case back to state court. See *Varian Associates v. Delfino*, No. 99-CV-20256 (N.D.Cal. remanded to state court April 5, 2000).

The Injunction

While the case was pending before the federal court, in June 1999 U.S. District Court Judge Ronald M. Whyte issued a preliminary injunction barring Delfino and Day from posting messages regarding Varian and its

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Internet Posters Found Liable

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employees. But they continued to post, and in November the defendants were held in contempt, after the plaintiffs presented evidence that the defendants had posted particular messages from a computer at Kinko's. The defendants were ordered to pay \$20,000 to cover the plaintiffs' costs of investigating the incident.

Judge Whyte held Delfino in contempt again in April 2000 for refusing to mediate the case, and fined him \$21,941.74. He then granted defendants' motion for partial summary judgment on the Lanham Act claims. This removed federal jurisdiction in the case, and Whyte remanded the case to the California Superior Court.

In the meantime, Delfino and Day appealed the preliminary injunction barring them from posting messages about Varian.

Without hearing argument in the case, in September 2000 the 9th Circuit reversed the injunction in an unpublished opinion, and ordered the district court to vacate the injunction. See *Felch v. Day*, 238 F.3d 428 (table), 2000 U.S. App. LEXIS 23925 (decision) (9th Cir.Sept. 11, 2000).

Subpoenaing Yahoo, Seeking SLAPP Dismissal

Back in state court, the defendants then filed a motion to subpoena Yahoo! in order to find out the identities of what the defendants said were posters other than them who had posted disparaging comments about Varian. The subpoena was eventually quashed in August 2001 for defendants' failure to show a compelling need.

In October 2000, the defendants moved to have the case against them dismissed under California's anti-SLAPP statute. The trial court rejected this motions, and the defendants appealed to the California Court of Appeals, which affirmed. The defense then sought review by the California Supreme Court, but it refused to hear the case. See *Varian Medical Systems, Inc. v.*

Delfino, 2000 Cal. LEXIS 9639 (Dec. 13, 2000) (denying petition for review).

Prior to trial, Judge Jamie Jacobs-May rejected the defendants' motion for summary judgment. The defendants filed an appeal of this decision, but the court of appeals dismissed the appeal after the defense failed to file a statement of the case as required by Cal. Ct. Rule 19.5.

Finally, a Trial

The case finally came to trial before Judge Jack Komar of the Santa Clara County Superior Court in October 2001. Delfino and Day continued to post messages throughout the eight-week trial — and the plaintiffs often introduced them as evidence, sometimes on the same day that they were posted. Their postings

argued that the lawsuit against them was a "SLAPP suit" — aimed a silencing their fair criticism of the Varian — and that it should be dismissed under California's anti-SLAPP provision, Calif. Civ. Proc. Code §425.16. In court, their motion to dismiss the

case on this basis was rejected, a decision which they have appealed.

The 12-member jury unanimously found on Dec. 13 that Delfino and Day had libeled two Varian executives, and awarded \$425,000 in compensatory damages. A few days later the jury award the plaintiffs an additional \$350,000 in punitive damages.

The New Gag Order

While the jury deliberated, Judge Komar enjoined Delfino and Day from making additional postings. "I certainly find that there has been a very serious defamation, a very serious harassment in this case by the defendants, by both of them," Komar said in a ruling from the bench. "It is without remorse or repentance. There's a promise and a commitment to do it until they're dead. ... And I take them at their word."

(Continued on page 30)

The 12-member jury unanimously found on Dec. 13 that Delfino and Day had libeled two Varian executives, and awarded \$425,000 in compensatory damages. A few days later the jury award the plaintiffs an additional \$350,000 in punitive damages.

Internet Posters Found Liable

(Continued from page 29)

Komar's order bars the defendants from referring to Felch, Zdasiuk and other witnesses as "homophobic" or "chronic liars," and from accusing them of having sexual affairs, videotaping company bathrooms, posing a danger to children, being mentally ill, having committed perjury, and creating pornography in the workplace. He also enjoined them from posting messages detailing Felch and Zdasiuk's financial affairs, and giving the names and addresses of their families. The injunction also bars Delfino and Day from posting messages using the names of other Varian employees.

Komar specifically refused to bar the defendants from describing Varian executives as "sick," saying that "when you start talking about the CEO or the vice president of a corporation, there may be some leeway to characterize decisions made by the CEO that do not relate to a fact which are expressed opinions."

But the Postings Continue

But after the injunction was issued, the defendant's web site stated, "Postings, postings, postings. Aliases, aliases, aliases. Day after day after day of message board postings and new aliases. Yes, the postings and their aliases continued in spite of [the plaintiff's victory]." Elsewhere on the site was the slogan "We'll post until we're dead!"

The defendants' web site, with considerable commentary and documents regarding the case, is www.geocities.com/mobeta_inc/slapp/slapp.html. A similarly exhaustive, plaintiff-oriented site, which purports to be more objective, is online at www.geocities.com/mdx2faq/.

Varian was represented by Lynne Hermle, Matthew Poppe and Robert Linton of Orrick, Herrington & Sutcliffe LLP in Palo Alto and by in-house counsel Mary Rotunno and Joseph Phair. The defendants were represented by Palo Alto attorney Randall Widmann.

Utah Court Denies Personal Jurisdiction Over Interactive Website

A district court in Utah recently held that an interactive website that was not targeting Utah residents did not have enough contacts with the state to establish personal jurisdiction. *iAccess, Inc. v. WEBcard Techs.*, 2002 U.S. Dist. LEXIS 1258 (D.Utah, Central Div., Jan. 24, 2002). The court held that no evidence existed that defendant WEBcard, through its website, had consummated any transaction or made any deliberate or repeated contacts with or purposefully directed activities in the state of Utah to support personal jurisdiction over the California-based company. The court granted WEBcard's motion to dismiss.

iAccess, a rival manufacturer of small, business-card sized compact discs that is incorporated in Utah, argued that WEBcard purposefully directed activity in Utah by constructing and operating an interactive website. Its suit against WEBcard, based apparently on a disputed patent, alleged, among other things, false advertising, unfair competition, and tortious interference with economic relations.

Personal Jurisdiction: Interactive Websites

In order to determine whether a website may form the basis of personal jurisdiction in some cases, the courts, with a few notable exceptions, have analyzed the level and type of activity conducted on the website in question.

The court in this case perceived defendant's site as occupying a middle ground between passive and fully interactive websites. WEBcard's website allowed users to e-mail WEBcard or to subscribe to mailing lists, and allowed its customers to log-in and view the progress of their order. But the site did not allow users to make purchases of defendant's products. WEBcard admitted to a single sale of \$20.00 to a Utah resident, but insisted that it had no place of business in Utah, no sales representatives, no distributors, no phone numbers, and no employees in Utah.

Indeed, iAccess did not allege that WEBcard targeted Utah residents, garnered Utah customers from its website, or even received hits on its website from Utah viewers. Rather it argued that a moderately interactive website such as WEBcard's was sufficient to support the exercise of

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Utah Court Denies Personal Jurisdiction Over Interactive Website

(Continued from page 30)

personal jurisdiction in a patent case, citing *Biometrics, LLC v. New Womyn, Inc.* 112 F. Supp. 2d 869, 873 (E.D. Mo. 2000), and *Multi-Tech Sys., Inc.* 122 F. Supp. 2d 1046, 1051 (D. Minn. 2000). iAccess found no support with this court for its argument from either case.

In *Biometrics*, the court found personal jurisdiction because “it is clear that defendants’ website is intended to generate interest in the accused product in Missouri, and therefore is an offer to sell under the patent statute.” The court found personal jurisdiction based on evidence that the defendants intentionally targeted Missouri residents for sales and did sell product to a Missouri resident who had previously viewed the website, not the mere existence of an interactive website.

In *Multi-Tech Sys.*, visitors to VocalTec Ltd’s website could register, download and use Internet Phone, the allegedly infringing software product. Based on this evidence, the court concluded that VocalTec Ltd’s commercial activities were sufficient to exercise personal jurisdiction.

The court in the present case, however, felt that iAccess did not show either that WEBcard intentionally targeted Utah users or that Utah users actually interacted with WEBcard’s website.

...[M]ere interactivity will not support jurisdiction. Rather, iAccess must allege a nexus between WEBcard’s web site and Utah residents....Here, WEBcard ‘has consummated no transaction’ and [has] made no ‘deliberate and repeated’ contacts with [Utah] through [its] Web site....Without such proof, this court may not exercise personal jurisdiction.”

*iAccess at *14.*

United States District Judge Tena Campbell presided. iAccess.com was represented by Robert B. Lochhead, of Parr Waddroups Brown Gee & Loveless in Salt Lake City, and Wesley M. Lang and Randall B. Bateman, of Morriss Bateman O’Bryant & Compagni, P.C. in Salt Lake City. WEBcard Technologies was represented by C. Kevin Speirs, Dianna M. Gibson, Kenneth E. Horton, of Parsons, Behle & Latimer in Salt Lake City, and Susan B. Meyer and John L. Haller, of Brown Martin Haller & McClain in San Diego.

District Court Dismisses Libel Claim Against Website Operator for Lack of Personal Jurisdiction

Plaintiff’s Residence in Jurisdiction Insufficient

By Edward D. Rogers

Adding to the growing body of case law on Internet jurisdiction, a federal judge in Philadelphia has held that a website operator cannot be sued in Pennsylvania for publishing allegedly defamatory news articles solely because the articles contained references to the Pennsylvania activities of a Pennsylvania resident. See *English Sports Betting, Inc. and Atiyeh v. Tostigan, et al.*, No. Civ. A. 01-2202, 2002 WL 461592 (E.D. Pa. March 15, 2002). In so ruling, Judge Jay C. Waldman of the United States District Court for the Eastern District of Pennsylvania emphasized the website operator’s lack of contacts with the forum and specifically rejected plaintiffs’ efforts to predicate jurisdiction on the so-called “effects test” based on the contentions that the articles caused harm in Pennsylvania and that, in publishing them, the website operator purposely targeted a Pennsylvania resident.

Article on Offshore Gambling

The action arose out of allegedly defamatory articles published on two websites about a business figure in the offshore gambling industry named Dennis Atiyeh, who owns a Jamaican-based and Jamaican-incorporated gambling enterprise known as English Sports Betting. Atiyeh claimed that he and English Sports Betting were defamed in an article written by defendant Christopher “Sting” Tostigan reporting on Atiyeh’s allegedly criminal activities. Atiyeh and English Sports Betting brought this suit against Tostigan and the operators of two websites — www.playersodds.com and www.theprescription.com — that posted the articles on their sites.

Theprescription.com moved to dismiss for lack of personal jurisdiction, contending that it lacked the necessary minimum contacts with Pennsylvania because Theprescription.com did not conduct business, sell advertising, or own property in Pennsylvania.

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District Court Dismisses Libel Claim Against Website Operator for Lack of Personal Jurisdiction

(Continued from page 31)

Theprescription.com also argued that specific jurisdiction could not be premised on the “effects tests” established in *Calder v. Jones*, 465 U.S. 783 (1998), that has been used as an alternative jurisdictional analysis in Internet defamation cases, because the website’s intended audience and thus the focus of any reputational harm was not in Pennsylvania.

In response, plaintiffs attempted to base jurisdiction exclusively on the “effects test,” contending that, by publishing the articles, Theprescription.com “purposefully targeted a Pennsylvania resident with defamatory comments.” Plaintiffs largely based this argument on references in the articles that discuss plaintiff Atiyeh’s past brushes with the law in Pennsylvania.

Residence Not Focus

G r a n t i n g Theprescription.com’s motion and dismissing the action, Judge Waldman accepted Theprescription.com’s arguments that Pennsylvania was not the focus of the website or its audience. Thus, the court ruled that “the recipient audience is not linked by geography but by a common interest in off-shore sports gambling.” 2002 WL 461592, at *3.

Further, the court continued, “[t]he brunt of any harm suffered by the plaintiff corporation would be in Jamaica.” Moreover, the court explained, “[e]ven assuming that the brunt of any harm suffered by the individual plaintiff would be in Pennsylvania, there is no showing that the defendant expressly aimed the tortious conduct at the forum.” *Id.* In this regard, the court explained, “[t]here is a difference between tortious conduct targeted at a forum resident and tortious conduct expressly aimed at the forum. Were the former sufficient, a Pennsylvania resident could hale into court in Pennsylvania anyone who injured him by an intentional tortious act committed anywhere.” *Id.*

In addition, the court held that Pennsylvania was not the “focal point of the tortious conduct” because the articles were “targeted at the international off-shore gambling community.” *Id.* This fact was significant, reasoned the court, because “[i]t is not sufficient that the brunt of the harm falls within plaintiff’s home forum, even when this was reasonably foreseeable [as] ‘[t]here is an important distinction between intentional activity which foreseeably causes injury in the forum, and intentional acts specifically targeted at the forum.’” *Id.* (quoting *Narco Avionics, Inc. v. Sportsman’s Market, Inc.*, 792 F. Supp. 398, 408 (E.D. Pa. 1992).

The decision is potentially significant for website operators and other Internet businesses because it underscores that jurisdiction in a defamation action may not be based simply on plaintiff’s residence, even when the allegedly defamatory

statements refer to plaintiff’s conduct within the forum.

Consistent with the “purposeful availment” ordinarily required for specific jurisdiction, the court focused on the conduct of the website operator itself, *i.e.*, whether it intended to reach a Pennsylvania audience or was otherwise aimed at the forum, as opposed to whether the content of the article related to the forum. Because the vast majority of websites are aimed at a national or, as in this case, an international audience, the court’s approach provides an important measure of protection for website operators that are sued in remote locations, and particularly in the home-state courts of the plaintiff.

Joseph Blum and Peter Baker of Frey Petrakis Deeb & Blum in Philadelphia represented the plaintiffs.

Edward D. Rogers of Ballard Spahr Andrews & Ingersoll, LLP represented Theprescription.com in this matter.

Plaintiffs attempted to base jurisdiction exclusively on the “effects test,” contending that, by publishing the articles, Theprescription.com “purposefully targeted a Pennsylvania resident with defamatory comments.”

California Supreme Court Rules Against Secretly Taping Conversations

Decision resolves conflict in lower courts

By Duffy Carolan

In a decision that may significantly impact investigative journalism in California, the state Supreme Court in March held that a conversation can be a “confidential communication” under the state penal code even if everyone knows the conversation might be repeated to someone else later. Thus, under the ruling in *Flanagan v. Flanagan*, 2002 WL 392917 (March 14, 2002), it might be a crime for reporters to secretly tape record an interview for later corroboration or simply to make sure they are getting the quotes right.

The court in *Flanagan* was confronted with a conflict in the courts of appeal as to the meaning of “confidential communication” under California’s Penal Code § 632. That section makes it a crime for anyone to intentionally record or electronically eavesdrop upon the “confidential communications” of others without the consent of all the parties to the communication. Cal. Penal Code § 632 (a).

A Split in Courts of Appeal

Courts that applied what is called the *Frio* rule held that the mere fact that a party does not reasonably expect a communication to be recorded or overheard renders it “confidential.” See *Frio v. Superior Court*, 203 Cal. App. 3d 1480 (1988); *Coulter v. Bank of America*, 28 Cal. App. 4th 923 (1994). Under these cases, even if a party knows a conversation will be repeated to others by someone in the conversation, anyone who records the conversation has committed a crime—as long as it was reasonable to expect that the conversation would not be overheard by a non-participant or recorded by anyone.

The other line of authority applied the *O’Laskey* rule and held that a communication is confidential if a party has an objectively reasonable expectation that the content of the conversation would be “confined to the parties” and not later divulged to others. See *O’Laskey v*

Sortino, 224 Cal. App. 3d 241 (1990); *Deteresa v. American Broadcasting Companies, Inc.*, 121 F.3d 460 (9th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998).

Under the *O’Laskey* rule, journalists were allowed to use hidden microphones or recording devices in gathering the news without the express consent of all the parties as long as what was said and the circumstances surrounding the conversation would lead a reasonable person to conclude that the content of the communication may later be disclosed to others.

For example, in *Deteresa*, a flight attendant on the plane that O.J. Simpson took from Los Angeles to Chicago the night Nicole Simpson and Ronald Goldman

What is called the Frio rule held that the mere fact that a party does not reasonably expect a communication to be recorded or overheard renders it “confidential.”

were murdered sued ABC for, among other things, allegedly violating § 632. ABC interviewed Deteresa at the door to her condominium about appearing on a television program. The interview was

secretly recorded and a cameraman videotaped it from an adjacent street. During the interview, Deteresa voluntarily disclosed that contrary to reported accounts Simpson did not keep his hand in a bag during the flight. When Deteresa later refused to appear on television, ABC played portions of the videotape, but not the audio. Predicting what the California Supreme Court would do, the Ninth Circuit applied the *O’Laskey* rule and concluded that the recorded conversation was not confidential under § 632 because “no one in Deteresa’s shoes could reasonably expect that a reporter would not divulge her account” *Deteresa*, 121 F.3d at 465.

The California Supreme Court Steps In

This conflict among the state courts of appeal about what “confidential” means reached the supreme court in *Flanagan* in the context of a dispute between the wife of a wealthy mortuary owner and his son from a prior marriage. The wife sued the stepson and her manicurist alleging that they had violated § 632 by recording telephone conversations in which she supposedly talked

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California Supreme Court Rules Against Secretly Taping Conversations

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to the manicurist about hiring someone to kill her husband. The stepson counter sued under § 632, accusing his stepmother of secretly recording conversations the son had with his father. Some of the son's calls, however, were as innocuous as calling the father to notify the gatekeeper that he was coming to visit.

Because the jury rejected the stepmother's claims in their entirety, the question for the supreme court was whether the son should have been allowed to claim a Section 632 violation when he knew his father might repeat the content of their conversations. After discussing both the *Frio* and *O'Laskey* lines of cases, the court turned to the statutory language of § 632 itself.

Quoting from the statute, the court noted that subsection (c), which defined confidential communications, had two clauses:

- The first clause states that “‘confidential communications’ includes any communication carried on in circumstances that may reasonably indicate that any party to the communication desires it to be confined to the parties thereto.”
- The second clause specifically “excludes a communication made in a public gathering . . . or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.”

In adopting the *Frio* test, the court reasoned that the *O'Laskey* conclusion that a conversation is confidential only if a party has an objectively reasonable expectation that its content will not be disseminated to others did not conform to the inclusive language of the first clause of subsection (c). In other words, under the *O'Laskey* test,

according to the court, confidential communications would not only *include* but would be *limited* to conversations whose content is to be kept secret.

Applying the Decision to Reporters

Setting aside the fact that the Court's interpretation of the statute transforms the exception to confidential communication into the rule and makes superfluous the express definition of confidential communication in the process, the decision is a step backwards for undercover, investigative journalism. Although the case did not involve reporters or the press' First Amendment rights to gather the news, the court's broad reading of the statute exposes a journalist to potential criminal liability for

recording a conversation, unless the journalist gets the consent of all parties to the communication or unless under the circumstances the person being interviewed may reasonably expect that the communication may be overheard or recorded.

While the ruling poses a challenge for journalism, undercover taping may still be defensible in some circumstances. *Flanagan* leaves intact the exceptions of § 632(c) for communications made in public gatherings or government proceedings open to the public, even if the reporter is using a hidden microphone. § 632(c) also leaves open the exception for circumstances in which the parties might expect to be “overheard.” If the recording occurs in a locale where others are present, the people involved would reasonably expect that they may be “overheard.” The “overheard” exception potentially covers many situations in which a reporter might surreptitiously tape. For example, if a reporter were standing in line recording at a supermarket while customers asked the butcher about the freshness of the meat, a reasonable person would expect that his or her reply might be overheard.

The supreme court could not have been unaware of

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California Supreme Court Rules Against Secretly Taping Conversations

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the effects of its ruling on journalists; several news organizations filed an *amicus* brief in *Flanagan* to warn of the implications for freedom of the press. That brief reviewed the importance of investigative journalism throughout history, beginning with Upton Sinclair's expose of unsanitary Chicago meatpacking plants in his 1906 novel, *The Jungle*. In response to the book, President Theodore Roosevelt ordered an investigation that led to the enactment of the Meat Inspection Act of 1906.

More recently, the *amici* noted, journalists used concealed cameras and recording devices "to uncover unsanitary food handling practices at a large supermarket chain (*Food Lion, Inc. v. American Broadcasting Company*, 194 F.3d 505 (4th Cir. 1999)); to capture the sales pitches of purveyors of fraudulent "800" telephone number businesses (*Wilkins v. National Broadcasting Company, Inc.*, 71 Cal. App. 4th 1066 (1999)); to report on unnecessary procedures prescribed by eye clinics (*Desnick v. American Broadcasting Companies*, 44 F.3d 1345 (7th Cir. 1995)); and to report on an animal trainer regularly abusing animals (*People For The Ethical Treatment Of Animals v. Bobby Berosini, Ltd.*, 110 Nev. 78, 867 P.2d at 1121 (Nev. 1994))."

By broadly defining confidential communications under § 632 in the manner that it has, the court has severely restricted the press' ability to gather the news. The situation could be rectified if the Legislature amended the statute to clarify that confidential communications include only those where it is reasonable to expect the content will not be divulged to others regardless of whether it is reasonable to believe it is not being recorded or overheard. Without such legislative action, investigative journalists who use hidden microphones to expose wrongdoing, or even criminal conduct, may find themselves facing criminal charges instead of praise for doing a public service.

Duffy Carolan is a partner in Davis Wright

Privacy of Bookstore Records Becomes Focal Point for ABFFE

Concerned with a growing number of subpoenas and search warrants issued to bookstores, the American Booksellers Foundation for Free Expression (ABFFE) last month expressed its support of legislation in Maryland that would protect privacy of bookstore records.

The privacy of bookstore records began receiving national attention in March 1998, when Independent Counsel Kenneth Starr issued a subpoena to a Washington, D.C. bookstore requesting "all documents and things referring or relating to any purchase by Monica Lewinsky," dating back to November 1995. A second subpoena was issued shortly thereafter to a second Washington, D.C. bookstore.

More recently, the federal government agreed not to pursue the production of customer records relating to the purchases of U.S. Sen. Robert G. Torricelli and seven other people. The Torricelli case was just one of four cases over the last two years where bookstores have been subpoenaed for records, including a case involving the Tattered Cover Book Store in Denver, which is fighting a judge's order to surrender information. The Colorado Supreme Court heard oral arguments in the case in December.

ABFFE President Chris Finan spoke before a committee of the Maryland House of Delegates expressing the ABFFE's support of Maryland legislation that limits the circumstances in which police can request customer records from a bookstore. Maryland H.B. 897 provides a four-part test for granting a subpoena for bookstore records, including a requirement that "the purposes of the investigation cannot be achieved by alternative investigative methods or sources that do not require disclosure of the information sought."

Finan told the committee that "the growing number of subpoenas and search warrants issued to bookstores for the purpose of discovering what people are reading makes it imperative that we increase the protections for book purchase records. If bookstore customers fear that the police can easily discover what they are reading, they will not feel free to buy the books they want and need."

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Privacy of Bookstore Records Becomes Focal Point for ABFFE

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PATRIOT Act Raises Concerns

ABFEE's concern grew after President Bush signed the USA PATRIOT Act, which amended the Foreign Intelligence Surveillance Act ("FISA") and expanded the federal government's ability to search business records, including records of the book titles purchased by customers.

The law allows the FBI to seek an order "for tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities." The ABFFE was especially concerned with a provision that allowed a judge to make a ex parte decision on an FBI request, and a gag order provision that prevented bookstores from disclosing "to any other person" the fact that it had received the order to produce

the documents.

After President Bush signed the law, ABFFE sent a letter to all its members instructing them on how to properly respond when served with a court order for records under FISA. A copy of the letter is available at http://www.abffe.com/fisa_letter.html

The letter informed the bookstores that if they receive a subpoena for records, the gag order does not prevent contacting legal counsel. The letter says that booksellers may contact ABFFE for legal counsel, but "because of the gag order ... you should not tell ABFFE that you have received a court order under FISA. You can simply tell us that you need to contact ABFFE's legal counsel."

The ABFFE's website is <http://www.abffe.com>

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Federal Court Denies Camera Access to Trial of Alleged Terrorist Moussaoui

The United States District Court for the Eastern District of Virginia (Hon. Leonie M. Brinkema) has denied Court TV's and C-SPAN's motion to televise the proceedings in the trial of accused terrorist-conspirator, Zacarias Moussaoui. (The underlying case is *U.S. v. Moussaoui*, No. 01-CR-455-A.) The Court found that Federal Rule of Criminal Procedure 53 afforded the Court no discretion to allow camera coverage, and that the rule was constitutional.

Noting that the Sixth, Seventh and Eleventh Circuits have found the rule to be constitutional, Judge Brinkema rejected the media's efforts to rely on the *Richmond Newspapers v. Virginia* line of Supreme Court cases on the First Amendment guarantees to the public of access to criminal trials.

[T]here is a long leap ... between a public right

under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap not supported by history.

Slip op at 5, quoting from *Westmoreland v. Columbia Broadcasting Systems, Inc.*, 752 F.2d 16, 23 (2nd Cir. 1984).

That some members of the media and public could attend the proceedings, coupled with the electronic availability of transcripts within three hours of the close of each's court session, was sufficient access to render the rule constitutionally sufficient.

Contrary to what intervenors and amici have

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Federal Court Denies Camera Access to Trial of Alleged Terrorist Moussaoui

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argued, the inability of every interested person to attend the trial in person or observe it through the surrogate of the media does not raise a question of constitutional proportion. Rather, this is a question of social and political policy best left to the United States Congress and the Judicial Conference of the United States.

Slip op at 7.

The Court went on to hold that even if Rule 53 (and its local counterpart) were found to be unconstitutional, security concerns and the effect of camera coverage on this particular trial, including the enhanced potential for intimidation of witnesses, would override the right of access. The Court agreed that cameras were now unobtrusive, and that many of the concerns about cameras in courtrooms discussed in *Estes* in 1965 were no longer issues. In their place was the new threat posed by the ability of modern media to distribute images, including witness faces and voices, internationally and in ways that allow them to be preserved by the recipients, all of which was troubling to the Court.

Today, it is not so much the small, discrete cameras or microphones in the courtroom that are likely to intimidate witnesses, rather, it is the witness' knowledge that his or her face or voice may be forever publicly known and available to anyone in the world.

Slip op at 9.

The Court found that law enforcement witnesses would likely be compromised for similar reasons, and the safety of the court and its personnel might be compromised by broadcasting photographic images of the physical layout of the court and of court personnel.

The Court rejected as both burdensome and subject to error the media offer to mask the faces of those witnesses who did not want to be photographed.

Finally, the Court expressed its concern about showmanship by trial participants, particularly in light of Moussaoui's behavior at arraignment, which "suggests that the defendant's conduct in this case may be both

unorthodox and unpredictable."

With a nod to the substantial interest that the public has in this trial, and specifically those who experienced losses on September 11th, Judge Brinkema concluded that "the purpose of this trial is not to provide catharsis to the victims or to educate the world about the American legal system."

Lee Levine, Jay Brown, Cam Stracher, Amy Ledoux and Tom Curley of Levine Sullivan & Koch, Washington DC., and Doug Jacobs of Court TV and Bruce Collins of C-SPAN represented Court TV and CSPAN in this matter.

Closed Circuit Feed of Moussaoui Trial to Thousands Proposed

A bill passed by the Senate would allow cameras in the Arlington, Va. courtroom to cover the Moussaoui trial, but only to provide closed-circuit coverage to be viewed by victim's families. *See Terrorist Victims' Courtroom Access Act, S. 1858, 107th Cong. (2001).* The bill would provide an exception to federal rules which generally bar all cameras in federal courts, *see Fed. R. Crim. Proc. 53 (2001)*, and provides that the video provided by the cameras can only be used "for viewing by those victims the court determines have a compelling interest in doing so and are otherwise unable to do so by reason of the inconvenience and expense of traveling to the location of the trial."

A similar exception was made for the trial of Timothy McVeigh, who was convicted in the Oklahoma City bombing. *See Anti-Terrorism and Effective Death Penalty Act of 1996 § 235, Pub. L. No. 104-132 (1996); see also U.S. v. McVeigh, 931 F. Supp. 753 (D.Colo. 1996) (rejecting media's attempt to use video from camera used by court to record proceedings).*

UPDATE: Latest Development in *Boehner v. McDermott* ***Wiretap Dispute Between Congressman Back to District Court***

By Sonja R. West

Declining to rule on the “new-found importance” of the First Amendment questions, the D.C. Circuit recently took a pass on being one of the first lower courts to weigh in on the constitutional implications of the United States Supreme Court’s major decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

In a post-*Bartnicki* remand from the Supreme Court, the same Court of Appeals panel for the District of Columbia Circuit as heard the case previously — Judges Ginsburg, Sentelle, and Randolph — again refused to dismiss the complaint of Rep. John A. Boehner (R-Ohio) under the federal wiretap statute against Rep. Jim McDermott (D-Wash.). *Boehner v. McDermott*, 2001 U.S. App. LEXIS 27798 (D.C. Cir. Dec. 21, 2001) The

panel, which decided initially by a 2-1 vote to allow Congressman Boehner’s complaint to stand and thereby reversed a dismissal by the district court, ruled that Boehner can amend his complaint. The Court of Appeals explained its ruling by stating “[w]e think the constitutional issues now raised may more readily be decided if Boehner is given an opportunity to amend his complaint.”

In so doing, the panel refused to decide the issue before it: whether the First Amendment prohibits Boehner’s complaint in light of the Supreme Court’s decision in *Bartnicki*.

In *Bartnicki*, the Supreme Court held 6-3 that the First Amendment prohibits punishing an individual or the press for disclosing illegally intercepted information

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Latest Development in *Boehner v. McDermott*

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concerning an issue of “public importance,” so long as the publisher did not participate in the unlawful interception. Following its decision, the Supreme Court granted, vacated and remanded the related case of *Boehner v. McDermott* to the D.C. Circuit. *Boehner v. Mc Dermott*, 191 F.3d 463 (D.C. Cir. 1999), cert. granted, vacated and remanded, 121 S. Ct. 2190 (2001).

The facts of both *Bartnicki* and *Boehner* involve an attempted prosecution under the federal wire-tapping statute, 18 U.S.C. § 2511(1), following the publication of an illegally intercepted and recorded telephone conversation. In *Bartnicki*, the interception and recording was of a cellular telephone call between two union officials involved in contentious negotiations with the local school district. The majority opinion held that prosecution of the publishers was unconstitutional because “privacy concerns give way when balanced against the interest in publishing matters of public importance.” In his concurring opinion, however, Justice Breyer, who was joined by Justice O’Connor, referred to a threatening remark by one of the union official and explained that the illegally obtained information in *Bartnicki* was a “special kind” of information of “unusual public concern.”

In *Boehner*, the lawsuit stemmed from the public release of a December 1996 phone conversation involving Boehner, then-House Speaker Newt Gingrich (R-Ga.), and other House GOP leaders discussing how best to respond to an ethics committee ruling against Gingrich.. A Florida couple recorded the conversation off a police scanner and, ultimately, gave it to McDermott. At the time, McDermott was the top Democrat on the House ethics panel. Accounts of the conversation soon appeared in news articles. Boehner has alleged that McDermott confidentially leaked the tape’s contents to the press. Unlike *Bartnicki*, there were no threatening statements and the Rep. McDermott knew the identity of the persons who intercepted and recorded the conversation.

In supplemental briefing and oral argument to the Court of Appeals, the parties to the case and a group of media

amici argued about the influence of the Court’s *Bartnicki* decision and the proper balance to issues involving both publication of matters in the “public interest” and individual privacy.

On Dec. 21, 2001, the D.C. Circuit remanded the case “for further proceedings” to the district court in a *per curiam* decision. The Court of Appeals deferred ruling on the First Amendment questions in order to allow Boehner to amend his complaint and because the Court “conclude [d] that we would benefit from having the district court pass upon the [constitutional] arguments that have taken on new-found importance after *Bartnicki*.”

Boehner’s lawyer, Michael Carvin, was quoted in the press as saying that on remand to the district court he will argue that McDermott had an obligation to keep the ethics committee’s proceedings confidential. He will argue that there are “special duties of nondisclosure” placed on public officials that take this case out from under the protection that the Supreme Court afforded the *Bartnicki* defendants.

McDermott’s lawyer, Frank Cicero, also quoted in the press, disagreed, stating that “[i]f anything, public officials have greater First Amendment rights to speak out on issues like this than private citizens.”

McDermott has 30 days from the panel’s decision to ask for rehearing by the court of appeals *en banc*.

Michael A. Carvin and Louis K. Fisher of Jones, Day, Reavis & Pogue represented the plaintiff John A. Boehner and Frank Cicero, Jr., Christopher Landau, and Daryl Joseffer of Kirkland & Ellis represented the defendant James A. McDermott. Theodore J. Boutrous, Jr., Sonja R. West and Jack M. Weiss of Gibson, Dunn & Crutcher LLP represented the media amici curiae Dow Jones & Company, Inc., The New York Times Company, Time Inc., ABC, Inc., The Washington Post Company, the Tribune Company, and the Reporters Committee for Freedom of the Press.

[T]he Court of Appeals “conclude[d] that we would benefit from having the district court pass upon the [constitutional] arguments that have taken on new-found importance after Bartnicki.”

Ninth Circuit Holds That Privacy and Official Reputation Are Not Compelling Interests Justifying Sealing Presumptively Open Court Documents

A newspaper that is not a party to an underlying criminal case has no standing to appeal the closure of presumptively open court documents. Writ relief is appropriate, however, because interests in privacy and official reputation are insufficient to justify the closure of presumptively open documents.

By Rex S. Heinke and Cynthia E. Tobisman

In a case weighing an individual's interests in privacy and official reputation against a newspaper's right to explore a criminal's attempt to obtain a sentence reduction, the Ninth Circuit Court of Appeals, on December 3, 2001, granted *The Sacramento Bee's* writ of mandamus compelling the district court to unseal certain proffer letters. In *In Re: McClatchy Newspapers, Inc., dba The Sacramento Bee*, Nos. 01-70941, 01-10335, the Ninth Circuit vacated the district court's order and remanded the case with instructions to unseal the proffers and make them publicly available.

The case centered around the allegations of convicted felon Mark Nathanson. Nathanson was indicted in federal court on felony counts arising from federal offenses committed while a member of the

California Coastal Commission. He pled guilty to accepting bribes and filing false income tax returns. He later moved to reduce his sentence, attaching to the motion two proffer letters implicating a high public official and a prominent businessman (who had business before public agencies) in alleged wrongdoing. No action was taken on Nathanson's motion to reduce his sentence, but Nathanson's motion (including the proffer letters) was placed in the clerk's safe rather than the file. Two years later, the government moved under Rule 35 to reduce Nathanson's sentence. The motion was granted.

Petitioner McClatchy Newspapers, dba *The Sacramento Bee*, learned of the proffers at a hearing to revoke Nathanson's probation. *The Bee* noted that neither the Rule 35 motion nor the court's order reducing Nathanson's sentence contained information

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Grand Jury Investigation Ends; Leggett Set Free

Her Attorney Will Continue Her Appeal to the Supreme Court

On Jan. 4, after spending 168 days in jail for refusing to comply with a subpoena for her notes, Vanessa Leggett was set free when the grand jury investigation of a 1997 murder came to an end.

Leggett long surpassed the apparent previous record for incarceration of a journalist in America, set by a Los Angeles reporter almost 30 years ago. William Farr, then with the *Los Angeles Herald Examiner*, was jailed for 46 days in 1972 for refusing to reveal the source of leaked documents in the Charles Manson trial.

Leggett, a freelance writer from Houston, went to jail on July 20 because she refused to turn over her notes to a grand jury.

In August, the 5th Circuit Court of Appeals let stand the lower court decision that there was no applicable reporter's privilege that would protect Leggett's research. In November, the 5th Circuit Court of Appeals refused to rehear the case and rejected a request to release Leggett on bond — leaving Leggett's only hope with the United States Supreme Court.

After Leggett's release, Mike DeGeurin, Leggett's attorney, told reporters that they intended to pursue Leggett's Supreme Court petition. The Federal prosecutors have not ruled out a further subpoena.

Leggett is represented by Mike DeGeurin of Foreman, DeGeurin, Nugent & Gerger in Houston.

Ninth Circuit Holds That Privacy And Official Reputation Are Not Compelling Interests Justifying Sealing Presumptively Open Court Documents

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about the basis for the sentence reduction. *The Bee* requested the documents that did not appear in the file and were not referred to in the docket. The government moved to formally seal the documents sought by *The Bee*. The district court released the proffer letters in redacted form and *The Bee* sought a writ of mandamus to obtain the unredacted letters. The Ninth Circuit granted the writ and remanded to the district court to make factual findings in consideration of whether privacy interests alone justified the redactions.

On remand, the district court refused to release the unredacted letters, finding that doing so would adversely affect the public official and the businessman's reputations. The district court concluded that the redactions served the compelling interest of protecting both the privacy interests and the reputational interests of the official, the businessman and other innocent persons.

The Bee applied for a second writ of mandamus and appealed.

The Bee Had No Standing To Appeal The District Court's Closure Order

Because *The Bee* was not a party to the underlying criminal action, the Ninth Circuit held that *The Bee* had no standing to appeal. (citing *United States v. Sherman*, 581 F.2d 1358, 1360 [9th Cir. 1978].) (*The Bee* argued that there was a split in the Ninth Circuit authority on its standing to appeal [citing *San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1099 (9th Cir. 1999) and *CBS, Inc. v. United States Dist. Court*, 729 F.2d 1174 (9th Cir. 1984)], but the court did not discuss this split.) Thus, the Court analyzed *The Bee's* application for writ relief under the factors set out in *Bauman v. U.S. District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). The first *Bauman* factor was satisfied because *The Bee* had no other avenue for relief. The second factor (damage or prejudice to petitioner) was satisfied because *The Bee* was denied access to presumptively open documents.

The District Court's Order Sealing The Proffer Letters Was "Clear Error" Because There Were No "Compelling Privacy Interests" Present

The third "and most important" *Bauman* factor (clear error) was satisfied because the district court's findings "do not point to a compelling privacy interest." The Ninth Circuit held that the public official "has no privacy interest in freedom from accusations, baseless though they may be, that touch on his conduct in public office or in his campaign for public office." Likewise, the private individual, who did much business with public bodies, had "no privacy interest in allegations, baseless though they may be, bearing on the way he does business with public bodies."

Injury To Official Reputation Is An Insufficient Reason For Sealing The Proffer Letters

The Ninth Circuit also held that "injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 [1978].) The Ninth Circuit observed that "[s]ilence enforced upon the press to protect the reputation of judges [as in *Landmark*] is more likely to 'engender resentment, suspicion, and contempt much more than it would enhance respect'." It held that "[t]he same is true of public officials and of real estate developers engaged in projects requiring governmental approval."

The Ninth Circuit noted that a decent newspaper will not publish Nathanson's accusations without also noting the government's and the district court's skepticism about Nathanson's credibility. "If less scrupulous papers omit these significant doubts, these papers themselves will be of a character carrying little credibility."

The Press Must Be Free To Monitor The Courts By Access To Their Records

The Ninth Circuit held that the question of why Nathanson had obtained a significant reduction in his

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Ninth Circuit Holds That Privacy And Official Reputation Are Not Compelling Interests Justifying Sealing Presumptively Open Court Documents

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sentence was a subject of legitimate public interest. Accordingly, *The Bee* had a right to explore and to publish the relevance of the proffer letters to the reduction.

The fifth *Bauman* factor — the importance and newness of the issue — was also satisfied. Indeed, the Ninth Circuit held that the press must be free to monitor the courts by access to their records. The application of this principle to proffer letters is new.

Future Proceedings.

As four of the five *Bauman* factors were present, the Ninth Circuit granted *The Bee's* writ of mandamus, vacated the district court's closure order, and remanded the case with instructions to unseal the proffer letters and make them publicly available. At this time, it is unclear whether the public official and the private citizen will seek further appellate review.

Rex Heinke and Cynthia E. Tobisman of Greines, Martin, Stein & Richland, LLP in Beverly Hills and Charity Kenyon of Riegels, Campos & Kenyon in Sacramento represented petitioner McClatchy Newspapers, Inc., dba The Sacramento Bee. Mr. Heinke has now joined Akin, Gump, Strauss, Hauer & Feld, LLP in Los Angeles.

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Newspaper Gains Access to Sealed Settlement Agreement in 7th Circuit

Presumptive Right of Access Applied, Though Magistrate Retained No Jurisdiction Over Agreement

The Seventh Circuit Court of Appeals has cleared the way for a newspaper to gain access to a settlement document that was submitted to the district court for approval, even though the district court retained no jurisdiction to enforce the settlement agreement. See *Jessup v. Luther*, 2002 U.S. App. LEXIS 721 (7th Cir., Jan. 17, 2002). The opinion was written by Judge Richard Posner, joined by Judges Easterbrook and Kanne.

In 1998, David G. Bernthal, a magistrate judge, presided over the settlement discussions between Lake Land College, a public community college in Illinois, and Goble Jessup, a former vice president of the college. When the parties settled the suit, the magistrate approved the agreement, but did not retain jurisdiction to enforce the agreement in the event that either party violated the agreement's terms. Instead, he ordered the suit be dismissed with prejudice and sealed all documents.

Mid-Illinois Newspapers, Inc., intervened and made a motion to unseal the agreement, which was denied. The Seventh Circuit held that documents in judicial files are "presumptively open to the public and neither the magistrate judge nor any of the parties has given us any reason to think the presumption might be rebutted in this case."

The court's analysis began with the general rule that records of a judicial proceeding are public. Settlement agreements, however, are ordinarily private documents and not judicial records. It was only the magistrate's treatment of this settlement agreement that transformed it into a document that the Seventh Circuit considered subject to the presumption of access.

As the court explained, settlement agreements that contain "equitable terms, an injunction for example," will be agreements over which a court will retain jurisdiction via a consent decree. This allows the judge to enforce the terms of the agreement. Consent decrees are therefore judicial records subject to public access. When there are compelling interests in secrecy,

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Newspaper Gains Access to Sealed Settlement Agreement in 7th Circuit

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particular provisions may be concealed.

The magistrate who presided over this case, however, did not retain any jurisdiction over the enforcement of the agreement. The Seventh Circuit, in turn, placed great emphasis on what the magistrate did do: approve the settlement, seal the agreement, and place it in the court's files. According to the Seventh Circuit, the "fact and consequences" of the magistrate's participation are "public acts." The settlement agreement reflected input by a federal judge, according to the Seventh Circuit.

With no retention of jurisdiction by the magistrate, the settlement agreement was, in effect, "just another contract to be enforced in the usual way, that is, by a fresh suit." Thus, had the agreement not been placed in the court's files, it would have been a purely private agreement, and presumably, the newspaper would not have been able to gain access to it. However, Judge Posner concluded that by being placed in the court's files, the document was presumptively a public document. In the absence of any reason that rebutted that presumption, access was granted.

Donald M. Craven, of Craven & Thornton in Springfield, Ill., represented Mid-Illinois Newspapers, Inc. Goble Jessup appeared pro se. John Ewart, of Craig & Craig in Mattoon, Ill., represented the defendants from Land Lake College.

Any developments you think other LDRC members should know about?

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New York Judge Authorizes Cameras in Brooklyn Judicial Bribery Case

Holds NY Statute Barring All Camera Access Unconstitutional

A judge presiding over a trial in Brooklyn, New York of a judge accused of bribery has authorized the use of cameras at the trial despite a state statute barring use of cameras in New York courts. The trial is of Brooklyn judge Victor I Barron.

This is the first time in the five years since the various "experiments" in camera coverage in New York ended that a judge in New York City has allowed cameras in the courtroom. Several judges upstate, however, have agreed to camera coverage, finding the state's blanket rule against such coverage to be unconstitutional. In a short order, and, indeed, without asking for motion papers from the Daily News, Justice Nicholas Colabella, brought into Brooklyn from Westchester County to preside over Barron's trial, granted a request made by a New York Daily News photographer for access. Judge Colabella is of the view that Section 52 of the Civil Rights Law, a 50 year old statute that bars access by any cameras to New York courts, is unconstitutional under the New York State Constitution. It is unclear whether the defendant will appeal the ruling.

While the Appellate Divisions of New York have not agreed, and the Court of Appeals, New York's highest court, has not addressed the issue, several upstate trial judges presiding over criminal (and in some instances, high profile criminal) matters have taken the position that a blanket ban on cameras in New York's courtrooms violates constitutional requirements. Perhaps the most highly publicized incidence of this was in 2000 when a trial judge in Albany ruled that cameras would be permitted in the criminal trial of the New York City police officers for the death of a suspect, Amadou Diallo. The trial had been moved out of New York City because of concerns about the ability of the defendants to obtain a fair trial as a result of the pretrial publicity regarding the case.

Courtroom Television in 2001 brought suit against the State of New York seeking a declaration that Section 52 is unconstitutional.

Detroit Federal District Court Opens Immigration Proceedings

By Len Niehoff

On April 3, Judge Nancy Edmunds of the Federal District Court for the Eastern District of Michigan issued an Order and Opinion holding that the First Amendment creates a presumptive right of public access to immigration proceedings closed in the wake of the events of September 11.

On September 21, 2001, the Chief Immigration Judge of the United States, Michael Creppy, issued a memorandum to all United States immigration judges and court administrators outlining "additional security measures" to be immediately applied in certain cases designated by United States Attorney General John Ashcroft. These additional security measures required immigration judges to

hold . . . hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclos[e] any information about the case to anyone outside the Immigration Court." The Creppy directive specifically instructed that "[t]he courtroom must be closed for these cases – no visitors, no family, and no press.

On December 14, 2001, the Immigration and Naturalization Service arrested Rabih Haddad, a Muslim religious and community leader and resident of Ann Arbor, Michigan, for overstaying his immigration visa. Haddad had helped found the Global Relief Foundation, and on that same day the government froze the assets of the Foundation on the basis that it may have provided aid to terrorist organizations. Haddad was taken into custody and placed in solitary confinement.

Subsequent to his detention, three hearings were conducted as part of his immigration proceedings. Hundreds of Haddad's supporters, and numerous reporters representing local and national media, went to the Immigration Court and attempted to observe the proceedings. Pursuant to the Creppy directive, the Detroit Immigration Judge, Elizabeth Hacker, completely closed all of these hearings. This was done even though no secret, sensitive, or confidential information was apparently disclosed at any of these hearings.

Three lawsuits were filed seeking transcripts of the prior proceedings and access to any future proceedings: one

brought by *The Detroit News*, *The Metro Times*, and Congressman John Conyers; another brought by the *Detroit Free Press* and the *Ann Arbor News*; and a third brought by Haddad himself. The cases were consolidated before Judge Edmunds. These plaintiffs brought motions seeking injunctive and declaratory relief. The defendants, U.S. Attorney General John Ashcroft, Judge Creppy, and Judge Hacker, filed a Motion to Dismiss on the basis that the court lacked jurisdiction. A hearing on plaintiffs' and defendants' motions was conducted at the end of March.

On April 3, Judge Edmunds denied the motion of the defendants, and granted the plaintiffs' request for a preliminary injunction. Judge Edmunds applied the standards established by the United States Supreme Court in

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6th Circuit on Access to Immigration Proceedings

As Len Niehoff notes in the article on this page, the Sixth Circuit on April 18 lifted the stay it had imposed on the district court's which had enjoined the government from conducting closed immigration proceedings relating to Rabih Haddad and required the government to produce transcripts of previously held proceedings and documents related to his case. This is not a final determination of the merits of the matter before the Sixth Circuit, but the court was obviously unimpressed with the government's showing on the merits of its claim for closed proceedings.

Importantly, the Sixth Circuit stated in its April 18 order that in its view, "the justifications for access to criminal and civil proceedings, see *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 10-13 (1986); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), have comparable force when applied to the removal hearings at issue in this case."

The court also indicated that it simply did not buy the argument that the harm here was of a different magnitude than "the harm frequently presented in significant criminal investigations." The government was still free, as it would be in any criminal case, to seek matter-by-matter protective orders.

Federal District Court Opens Immigration Proceedings

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the *Gannett/Richmond Newspapers/Globe Newspaper/Press-Enterprise* line of cases. As Judge Edmunds recognized, pursuant to those cases courts consider two factors in determining openness: First, whether there has been a tradition of accessibility to such proceedings, and, second, whether public access plays a significant positive role in the functioning of the particular process in question.

With respect to the first factor, Judge Edmunds found that “the statutory and regulatory history of immigration law demonstrates a tradition of public and press accessibility to removal proceedings.” With respect to the second factor, she ruled that “it is important for the public, particularly individuals who feel they are being targeted by the government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the government is adhering to immigration procedures and respecting individuals’ rights.” She noted that “openness is necessary for the public to maintain confidence in the value and soundness of the government’s actions, as secrecy only breeds suspicion as to why the government is proceeding against Haddad and aliens like him.”

Having concluded that the First Amendment created a presumptive right of access to these proceedings, Judge Edmunds went on to consider whether the government had articulated a compelling interest that would justify closure, and had demonstrated that closure was a narrowly tailored way to achieve that compelling interest. In addressing this, Judge Edmunds carefully analyzed the interest claimed by the government. In essence, the government argued that disclosing *any* information with respect to these proceedings – even the identity of the detainee – would compromise national security.

Judge Edmunds found two fatal flaws with this argument. First, with respect to the specific case before her, Haddad’s identity (as well as other details such as the date and place of his arrest) had been public from the outset. Second, neither the Creppy directive, nor anything else, prohibited the detainees in special interest cases (or their

counsel or families) from revealing information about the proceedings to the press and public. In sum, Judge Edmunds found that it was impossible to justify the Creppy directive by reference to interests it could not possibly achieve.

Judge Edmunds accordingly issued an Order compelling defendants to produce transcripts of prior proceedings (and evidence offered at those proceedings), and enjoining defendants from closing proceedings pursuant to the Creppy directive. The government filed a motion asking her to reconsider her decision, which she denied, and to stay her decision, which she also denied.

The government sought an emergency stay from the Sixth Circuit Court of Appeals. On April 10, the Sixth Circuit issued a very narrow Order, staying the portion of Judge Edmunds’ decision that required the government to

Judge Edmunds noted that “openness is necessary for the public to maintain confidence in the value and soundness of the government’s actions, as secrecy only breeds suspicion as to why the government is proceeding against Haddad and aliens like him.”

produce transcripts of prior proceedings (and any attendant evidence) as of 4:00 that same day. The court also set an expedited briefing schedule, which anticipates the filing of all pleadings by May 7, 2002.

On April 18, the Sixth Circuit dissolved the narrow stay it had imposed, and in the course of

doing so expressly recognized a First Amendment right of access to immigration proceedings. On the day this article is being written, arrangements are being made to secure access to the transcripts of the prior proceedings.

The next hearing in Haddad’s case is scheduled for April 24. If the government does not adjourn that hearing pending the Sixth Circuit’s final decision on the merits, that proceeding will go forward on that day in open court.

Herschel P. Fink and Brian D. Wassom of Honigman, Miller in Detroit represent the Detroit Free Press; The Ann Arbor News is represented by Jonathan D. Rowe of Soble & Rowe in Ann Arbor; and Michael J. Steinberg of the American Civil Liberties Union in Detroit and Steven Shapiro of the ACLU’s New York headquarters represent the Metro News.

Len Niehoff is a shareholder with the Butzel Long law firm in Ann Arbor, Michigan, which represents The Detroit News in this matter.

Judicial Conference Revisits Remote Access Policy

Changes Allow Criminal Case Access In High Profile Cases, Begin Two-Year Trial to All Criminal Case Documents In Selected Courts

Six months after adopting guidelines for remote availability of federal court records which severely limited Internet access to documents from criminal cases, the Judicial Conference of the United States has stepped back somewhat from the restrictions.

On March 13, the Conference created a pilot program to allow certain courts to provide web access to all criminal case records, and decided to allow all federal district and appeals courts to provide such access in highly-publicized cases. (For a press release on the new policy, see www.uscourts.gov/Press_Releases/302jc.pdf.) In September, the Conference had adopted policies allowing web access to documents from civil cases (with "personal data identifiers," such as Social Security numbers, redacted), but barring such access to criminal case files.

The changes came in the face of a large volume of media and public requests for documents in the criminal prosecution of Zacarias Moussaoui, who is accused of being a conspirator in the terrorist attacks of Sept. 11. [A request to televise the trial was denied. The Conference had already approved a temporary exception to the access guidelines for the Moussaoui case.

The new policy for highly-publicized cases permits in Internet access in cases where demand for copies of documents places an unnecessary burden on the clerk's office. Both parties and the judge in the case must consent to such access.

The pilot program for criminal case file access was created pursuant to a provision in the original guidelines under which the policy on criminal access will be re-evaluated by September 2003. Under the program, a number of federal courts across the country will be selected to offer access to criminal case documents on a trial basis.

The Judicial Conference policies apply to district courts and the Courts of Appeal; the U.S. Supreme Court determines its own access rules. The access guidelines do not affect availability of docket

information through the federal courts' PACER service, although case documents are to be made available through the service. Several federal courts already offer access to civil case documents through PACER, which charges a per page fee.

Two Courts Come to Different Conclusions on 911 Tapes

In the last month, two courts have ruled on requests to release 911 tapes. One court, in Arizona, placed great weight on the family's privacy interests, while the other court, in New Jersey, came down on the side of openness.

Belo v. Mesa Police Department (Arizona)

In Arizona, the state court of appeals held that a family's privacy interests were sufficient to deny access to audiotapes of a 911 call, and that the transcript of a 911 call was an adequate alternative to the actual tapes. The decision reversed the trial court's decision requiring the release of the tapes to television station KTVK. See *A.H. Belo Corp. v. Mesa Police Dept.*, 42 P.3d 615 (Ariz. Ct. App. March 26, 2002).

KTVK was seeking the 911 tapes of a call placed by a babysitter, Nancy Walsh, on February 9, 2000. Walsh called 911 and said the sixteen-month-old boy, Dominic, that she was taking care of had fallen out of his crib. During the call, Walsh frantically described the boy's condition, pleaded for help and screamed that the boy might die. In the background, the boy's cries could be heard. Walsh was later indicted on four counts of child abuse and attempted child abuse and pleaded guilty to two of the counts.

The television station requested the tapes and transcripts, but the Mesa Police Department refused to provide the tapes. The trial court ordered the police department to release the tapes, holding that the state

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Two Courts Come to Different Conclusions on 911 Tapes

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legislature had not determined whether minimizing the emotional impact on a family was an interest sufficient to overcome the presumption favoring the disclosure of public records. On appeal, however, Judge Fidel held that the family's privacy concerns did outweigh the presumption favoring disclosure of the tapes.

Family Privacy v. Public Records

There is a presumption in favor of disclosure under Arizona's Public Records Act, A.R.S. § 39-121. According to the court, the government, in order to prevent the release of public records, "must demonstrate that the policy in favor of public disclosure and access is outweighed by considerations of 'confidentiality, privacy, or the best interests of the state.'"

The police department, in seeking to prevent disclosure, argued that the family's privacy rights outweighed the policy in favor of disclosure. To make this argument, the police department noted that the mother of the baby testified that broadcasting the tape "would interfere with her family's healing process and 'remind [her] of that painful day.'" The police department also noted a letter written by the mother, in which she expresses her concern that the tape would "torment" her son.

Even though the trial court held that the question of whether privacy interests could overcome the presumption of disclosure was an unanswered question, the court cited an Arizona Supreme Court case that held just the opposite. According to the court, *Carlson v. Pima Co.*, 687 P.2d 1242 (Ariz. 1984), stands for the proposition that privacy interests can overcome the presumption of access.

The court went on to accept the police department's arguments against disclosure. The court concluded that it could not imagine "a more fundamental concern or one

more directly associated with 'the intimate aspects of identity' and family autonomy than the desire to withhold from public display the recorded suffering of one's child." Consequently, the court held that the government had sustained its burden by demonstrating a privacy interest that outweighed the policy in favor of public disclosure.

Other Factors

According to the court, there were other factors that, once the government put forward a justification for non-disclosure, helped tilt the scales in favor of non-disclosure – the purpose that would be served by access and the availability of alternative sources of the public information.

First, the court noted that the transcript – and an alternative to the tape – would adequately serve the purpose of Arizona's Public Records Act, which the court identified as informing citizens of what their government is up to. But when considering the purposes of releasing the tape, the court became suspicious of the television station.

"Tellingly, however, KTVK-TV does not contend that the tape would assist our citizens 'to be informed about what their government is up to' in any manner that the transcript does not achieve."

The broadcast of the tape, the court concluded, would "excite some voyeuristic element," but was not necessary to inform the citizens on governmental operations in a way not adequately preserved in the transcript.

KTVK argued that it was not obligated under the Public Records Act to demonstrate a legitimate purpose in requesting the records. The court agreed in part. It said:

The court concluded that it could not imagine "a more fundamental concern or one more directly associated with 'the intimate aspects of identity' and family autonomy than the desire to withhold from public display the recorded suffering of one's child."

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Two Courts Come to Different Conclusions on 911 Tapes

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We agree that unless the government puts forward an interest that justifies withholding access to a public record, a person or entity seeking access to the record need not demonstrate what purpose such access would serve. We agree as well that, unless the government puts forward an interest that justifies withholding access to a public record, it does not matter that the information contained within the record is available by alternative means.

Once the court, however, accepted the government's arguments for non-disclosure, more importance was attached to the availability of the transcript and the court's arch view of KTVK's purposes in broadcasting the tapes.

The Dissent

Judge Timmer dissented from the court's opinion. Most importantly, Judge Timmer argued that under the majority's view "Mesa and other cities can shield every 911 tape from inspection if its release would be emotionally upsetting to someone involved in the call." Judge Timmer also said that "such a sweeping exemption would contravene the strong policy favoring open disclosure and access to public records."

Also of importance to Judge Timmer was the fact that the tapes did not reveal "any graphic details concerning the crime" and the police department did not direct the court to "any private or confidential information on the tape that, if revealed, would subject Dominic or his family to retaliation, humiliation, public ridicule, or other substantial and irreparable harm."

Asbury Park Press v. Lakewood Township Police Department (New Jersey)

When confronted with a similar request for 911 tapes, the Ocean County (N.J.) Superior Court balanced similar competing interests and came to the opposite conclusion, ordering the release of the tapes. *See Asbury Park Press*

v. Lakewood Township Police Dept., Case No. OCN-L-2777-01-PW (N.J. Super. Ct. April 11, 2002).

In this case, the *Asbury Park Press* had requested the 911 tapes and the transcripts from a call placed by Thomas Jacobs on July 6, 2001. Jacobs was involved in a low-speed chase with undercover Lakewood police officers. During the chase, he called 911 and said he was being followed by "kids in a van" and that he feared for his safety. Jacobs was ultimately stopped and forcibly removed from his vehicle. Jacobs claimed that the police threw him to the ground, kicked and punched him. Three Lakewood police officers were subsequently indicted.

In holding that the tapes and transcripts should be released, Judge Serpentelli relied on New Jersey's Right to Know Law, N.J.S.A. 47:1A-1 *et. seq.*, and the principles of the common law. However, Judge Serpentelli denied the *Asbury Park Press's* request for the accompanying police reports.

Release of the Tapes

According to the court, the New Jersey Right to Know Law requires the disclosure of all public records unless they are specifically exempted. Since the court held that the tapes were public records for the purposes of the statute, the police department argued that they were exempted from release.

First, the police department argued that the tapes were exempted under an executive order that excluded "fingerprint cards, plates and photographs and similar criminal investigation records" from the definition of a public record. The court rejected this argument, saying that the tapes were not produced for investigatory purposes in the same sense as the other documents specifically listed.

Next, the police department argued that the tapes

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Two Courts Come to Different Conclusions on 911 Tapes

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were excluded under a provision of the Right to Know Law that excludes from the definition of a public record those documents that “pertain to an investigation in progress” and whose release would be “inimical to the public interest.” That argument, too, was rejected by the court. Here, though, the court considered any negative impact that releasing the tapes may have. Unlike the Arizona Court of Appeals, the New Jersey Superior Court did not concern itself with the caller’s right to privacy.

The court’s releasing of the tapes was slowed somewhat by the New Jersey Attorney General’s assertion that the press was entitled to only the transcripts. Citing a 1995 case in which the New Jersey Supreme Court held that an amendment to the Right to Know Law prevented the release of computer tapes. See *Higg-A-Rella, Inc. v. County of Essex*, 660 A.2d 1153 (N.J. 1995).

Unable to determine whether *Higg-A-Rella* prevented the release of 911 tapes, the court turned to the common law, where the court concluded that “there is little doubt that the tapes should be disclosed under the common law right to know.” The court considered many factors under the common law, and concluded that none of them weighed against disclosure of the tapes. For instance, the court noted that it did not believe that citizens calling 911 expect that their identities will be protected. Also, the court said there was a need for release because there was a “public need unrelated to any disciplinary or investigatory process regarding alleged police officer misconduct.”

Preventing Release of Police Reports

The New Jersey Superior Court, however, did not release the police reports of the incident. Foremost, the court held that the police reports were not public records under the definition used in the Right to Know Law.

Then turning to the common law, the court held that the plaintiff’s right to see the records was outweighed by the fact that the reports were part of an on-going investigation. The court concluded that the plaintiff could wait until the completion of the trial to access the police records pursuant to the common law. The court cited the “importance our courts have placed on confidentiality while investigations are ongoing and criminal matters are pending” as reason

for delaying the release of the police records.

In *Belo v. Mesa Police Department*, Daniel C. Barr and John L. Blanchard, of Brown & Bain in Phoenix, represented the Belo Corp. Catherine M. Shovlin, the Mesa Deputy City Attorney, represented the police department.

In *Asbury Park Press v. Lakewood Township Police Department*, John C. Connell, of Archer & Greiner in Haddonfield, N.J., represented the *Asbury Park Press*.

Philadelphia Reporter Fined \$1,000 for Speaking to Juror

A reporter for *Philadelphia Magazine* was fined \$1,000 and given a suspended 30-day sentence after a judge found her in contempt of court for speaking with a juror during a much-publicized murder trial.

In November, during the murder trial of Rabbi Fred J. Neulander, New Jersey Superior Court Judge Linda G. Baxter issued an order forbidding media contact with the jury. Carol Saline, who works for *Philadelphia Magazine* but does not have any forthcoming articles about the trial, admitted to asking a juror whether he thought his fellow jurors would be willing to talk at the conclusion of the case.

After the juror reported the incident, Judge Baxter denied Neulander’s motion for a mistrial. A few days later, the trial ended with a deadlocked jury.

On January 22, New Jersey Superior Court Judge Theodore Z. Davis found Saline in contempt, ruling that the contact was not a mistake and that it placed the trial “at risk.” Davis imposed the maximum fine allowed. Saline could have also received as much as a six-month sentence.

Four *Philadelphia Inquirer* reporters are also accused of violating Baxter’s order. They will face a contempt hearing before Davis, but no date is set. The four *Inquirer* reporters are accused of violating the order by naming a juror in an article that was published after the trial.

Saline was represented by Mike Pinsky, New Jersey.

**UPDATE: Second Circuit Decides *Morris v. Business Concepts* Petition for Rehearing
Confirms that Magazine's Notice Does Not Protect Free-Lancer's Copyright Claim**

By **Bruce E. H. Johnson**

In a case that may have special significance for several *Tasini*-related class actions pending in federal court in New York, the Second Circuit on March 18 reaffirmed its original holding in *Morris v. Business Concepts, Inc.* – that the author of an unregistered magazine article cannot use the publisher's collective work registration to satisfy the registration requirement of Section 411(a) for bringing an infringement lawsuit.

Background

The *Morris* case grew out of a claim by journalist Lois Morris who wrote articles for the "Mood News" column in *Allure*, a monthly magazine published by Condé Nast. Condé Nast obtained collective work registrations for each issue of its magazine but Morris, who retained ownership of the copyright in her articles, never obtained any registrations of her own.

Between 1994 and 1998, another company, Business Concepts, Inc. (BCI), copied 24 of the "Mood News" articles written by Morris, and published them in its newsletter, entitled *Psychology and Health Update*. In January 1999, Morris sued BCI for copyright infringement and for violations of Section 43(a) of the Lanham Act.

BCI moved for summary judgment, which was granted by Judge Casey of the United States District Court for the Southern District of New York. The court dismissed the *Morris* lawsuit for lack of subject matter jurisdiction because the Copyright Act, 17 U.S.C. § 411(a), requires registration as a condition precedent for commencing an infringement action.

On July 26, 2001, a panel of the Second Circuit (Judges Oakes, Kearse, and Cabranes) affirmed this decision. In doing so, the court rejected the plaintiff's effort to rely on BCI's collective work registration to satisfy her own registration requirement.

The Rehearing

Morris sought rehearing, which was granted in part and denied in part by the panel. The decision stated: "In the earlier opinion, the panel concluded that there could be only

a single copyright in each of the appellant's works and that therefore the appellant's licensee was not a copyright owner. Because this portion of the opinion is not necessary to support the ultimate holding in the case, and because our reasoning in it might affect future cases, we narrow our ruling by eliminating this portion. Otherwise, the petition for rehearing is denied."

Judge Oakes reaffirmed the panel's holding that Condé Nast's copyright registrations for its collective works were not sufficient to cover the rights of the owners of copyright in each of the individual articles. "The distinction between those constituent parts of a collective work in which the author of the collective work owns all rights and those constituent parts in which the author does not own all rights is critical in determining whether a copyright registration in a collective work also registers a copyright claim in a particular constituent work." Recognizing that its interpretation of the Copyright Act was entitled to significant weight, the court noted that the Copyright Office's position was "that if all rights in a constituent work have not been transferred to the claimant, a collective work registration will not apply to the constituent work."

Rehearing En Banc Denied

On April 5, 2002, the Second Circuit denied plaintiff's petition for rehearing en banc and the court's mandate issued shortly thereafter. Assuming that no petition for certiorari is filed and granted, the *Morris* case is now over.

The immediate impact of *Morris* will likely be felt in the consolidated class actions that were filed in the Southern District of New York last year by several writers and writers' organizations (including the National Writers Union and the Authors Guild, Inc.) against various database owners (LEXIS-NEXIS, Dow Jones, West Group, and others) in the wake of the United States Supreme Court's decision in *Tasini v. New York Times*. Although a motion for class certification has not yet been presented in those cases, *Morris* is likely to affect the viability of claims by class members who failed to obtain copyright registrations for their individual works.

Bruce Johnson is a partner at Davis Wright Tremaine, LLP in Seattle

Court Enjoins Mass E-Mails as a Trespass to Chattels

Former Employee Sent Six Messages to as Many as 29,000 Intel Employees Complaining About Intel

Last month, a California Court of Appeals issued an injunction prohibiting a former Intel employee from e-mailing thousands of Intel employees under the legal doctrine of trespass to chattels. See *Intel Corp. v. Hamidi*, 2001 Cal. App. LEXIS 3107 (Cal. 3d App. Div. Dec. 10, 2001).

Over a period of two years following his firing, Kourosh Kenneth Hamidi sent out six mass e-mails to as many as 29,000 employees at the Santa Clara, Cal.-based Intel Corporation. Hamidi's e-mails voiced his complaints about the employment conditions at Intel. Hamidi later claimed that he was providing "an extremely important forum for employees within an international corporation to communicate via a web page on the Internet and via electronic mail, on common labor issues, that, due to geographical and other limitations would not otherwise be possible."

On March 17, 1998, Intel sent a letter to Hamidi demanding that he stop e-mailing its employees. When Hamidi refused, Intel sought to enjoin Hamidi under, among other things, the arcane legal theory of trespass to chattels.

The Legal Doctrine

Trespass to chattels, in its earlier forms, was a tort that included any "direct and immediate intentional interference with a chattel in the possession of another." Quoting from the Restatement, the California Court of Appeals noted that trespass to chattel "may be committed by intentionally ... (b) using or intermeddling with a chattel in the possession of another." Liability for trespass to chattel, according to the Restatement, was established if the "intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest [is harmed.]"

The court, in an opinion written by Judge Morrison and joined by Judge Scotland, found that the nature of the remedy that Intel sought — an injunction versus damages — was key to the analysis. The court found that relief for trespass, in a civil action, had historically been granted to the plaintiff "where he was not actually damaged, partly, at least, as a means of discouraging disruptive influences in the community." Quoting from an English law text, *Salmond on Torts* (21st ed. 1996), the court found that a trespass to chattels was "actionable per se without any proof of actual damage. Any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues."

Quoting from an English law text, Salmond on Torts, the court found that a trespass to chattels was "actionable per se without any proof of actual damage."

Injunction Without Proof of Damage

Quite bluntly, the court held that Hamidi's "conduct was trespassory," and the fact that an "intrusion occurs supports a claim for trespass to chattels." In upholding the injunction, the court held that even though Intel had not demonstrated sufficient harm to "trigger entitlement to nominal damages for past breaches of decorum by Hamidi," Intel had demonstrated that Hamidi "was disrupting its business by using its [Intel's] property and therefore is entitled to injunctive relief based on a theory of trespass to chattels."

The court held that Intel proved it was hurt by the "loss of productivity caused by the thousands of employees distracted from their work and by the time its security department spent trying to halt the distractions after Hamidi refused to respect Intel's request to stop invading its internal, proprietary e-mail system by sending unwanted e-mails to thousands of Intel's employees on its system."

Other Arguments Rejected

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Court Enjoins Mass E-Mails as a Trespass to Chattels

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The court rejected an argument made by the ACLU in an amicus brief that six e-mails over the course of two years did not place a tremendous burden on Intel's computer system nor seriously disrupt business. The court said that the ACLU had discounted the disruption, given the fact that thousands of employees were involved.

Similarly, the court rejected — almost without discussion — an argument made by the Electronic Frontier Foundation that unwanted e-mail was analogous to unwanted first-class mail, which is not considered a trespass. The court simply stated that the issue is “one of degree,” noting that Hamidi “impliedly conceded that he could not lawfully cause Intel's computers to crash or overwhelm the system so that Intel's employees were unable to use the computer system.”

The court also rejected Hamidi's free speech arguments. The court held that a private e-mail server is not a traditional public forum, nor is a private company which chooses to use e-mail a public forum. The court also held that Intel's workers do not have “core” First Amendment right to spend company time communicating with outsiders and each other to air grievances.

The Dissent

Judge Kolkey, in dissent, was critical of the majority accepting Intel's trespass to chattels argument without demonstrating some sort of concrete harm done by Hamidi's mass e-mails. According to the dissent's argument, California has “consistently required actual injury as an element of the tort of trespass to chattel.” The only possible exception, according to the dissent, was when there has been a loss of possession. The dissent pointed out that Intel was “not dispossessed, even temporarily, of its e-mail system by reason of receipt of e-mails; the e-mail system was not impaired as to its condition, quality, or value; and no actual harm was caused to a person or thing in which Intel had a legally protected interest.”

The dissent went on to criticize the acceptance of

Intel's theory that it was harmed by a loss of productivity, and the loss of the time devoted to trying to prevent Hamidi from e-mailing the company. The dissent went so far as to say that if receipt of an unsolicited e-mail constituted trespass to chattel, so did unsolicited telephone calls, unsolicited faxes, unwelcome radio waves and television signals.

The dissent also criticized the majority's reliance on English treatises, including Salmond on Torts (as quoted above, “trespass to chattels is actionable per se without any proof of actual damages.”) The dissent maintained that these treatises are the minority view.

Philip H. Weber of Placerville, Cal., represented Hamidi. The ACLU and the Electronic Frontier Foundation filed amicus briefs on behalf of Hamidi. Linda E. Shostak, Michael A. Jacobs and Kurt E. Springmann of Morrison & Foerster in San Francisco represented Intel.

Tennessee Supreme Court Recognizes Intrusion Privacy Claim

In a case in which it did not need to reach the issue, the Tennessee Supreme Court expressly adopted the claim of unreasonable intrusion upon seclusion as defined in the Restatement (Second) of Torts, § 652B. *Givens v. Mullikin* (March 25, 2002). This was a non-media case, and the court ultimately concludes that the plaintiff has not pled an invasion of privacy claim.

But after noting that it had not recognized expressly any cause of action for privacy — other than the recent recognition of false light invasion of privacy in *West v. Media General Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) — the court makes it clear that intrusion is now a viable claim under Tennessee law.

UPDATE: Supreme Court Passes on Three Stooges Case

The United States Supreme Court denied a California artist's petition for certiorari, ending the artist's fight over his use of the likeness of The Three Stooges. See *Saderup v. Comedy III Productions, Inc.*, No. 01-368 (U.S. Jan. 7, 2001). Gary Saderup was seeking a reversal of the California Supreme Court's decision that upheld the publicity rights claims brought by the owners of the rights to The Three Stooges.

When the California Supreme Court decided the case in April, it announced a new balancing test designed to reconcile the First Amendment and publicity rights in California. Under California Civil Code § 3344.1, any person who uses a deceased personality's name, voice, signature, photograph, or likeness on or to sell products, merchandise, goods or services must first obtain proper consent from the right-of-publicity holder. The statute excepts uses in connection with certain media, including original works of art. Saderup, without prior consent, created an original drawing of the Stooges, from which he created and sold lithographs and t-shirts bearing the image he created.

In announcing a new balancing test, the California Supreme Court made clear its understanding of the importance of and its due deference to First Amendment rights. However, the court also equated the publicity right with the accepted social utility of copyrights. Thus, the court deemed a balancing test to be the appropriate means by which to reconcile the competing rights. In defining the new balancing test, the court borrowed from the fair use test, asking whether the work adds something new. By way of example, the works of Andy Warhol, through the added elements of "distortion and careful manipulation of context," convey a message beyond the commercial exploitation of celebrity images, and are instead "form[s] of ironic social comment on the dehumanization of celebrity itself." Under the court's balancing test, however, Saderup, lost because his drawing failed to add "significant transformative or creative contribution."

In denying Saderup's petition for certiorari, the Supreme Court issued no comment on the case. Stephen Barnett, of Berkeley, Cal., represented Saderup. Robert Benjamin, of Glendale, Cal., represented Comedy III Productions.

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Court Refuses to Issue Prior Restraint of Report on Religious Sect

Possibility of 'Future Emotional Trauma' Was Not Enough to Justify a Prior Restraint

By Paul Hannah

A United States District Court Judge has refused a request by a victim of sexual abuse to restrain a television station from broadcasting a report on alleged abuse of some children whose parents were members of a religious sect. In *A.M.P., et al. v. Hubbard Broadcasting, Inc., et al.*, Civil No. 01-2097 (D. Minn. Nov. 16, 2001), the court held that allegations of irreparable emotional harm did not justify a prior restraint of the proposed broadcast.

Early in 2001, members of the KSTP-TV (Minneapolis/St. Paul) investigative unit began to interview former members of a conservative, fundamentalist religious sect headed by Brother Rama Behera. The former members told stories of abusive behavior toward some children in the sect, including punishment with a cattle prod. One former member, Gaeland Priebe, said he had told Shawano County, Wisc. authorities of these abusive acts, and also confessed to sexual abuse of a member of his family. He faces a criminal trial in 2002. As a part of its investigation, KSTP-TV attempted, without success, to interview Brother Rama Behera.

First Complaint Dismissed on Jurisdictional Grounds

A two-part report was scheduled to run on Nov. 15 and 16, 2001. On Thursday, Nov. 15, KSTP-TV received notice that a complaint had been filed in U.S. District Court on behalf of A.M.P., Gaeland Priebe's daughter and the victim of his criminal sexual conduct. The complaint also named "John and Jane Doe(s)" as plaintiffs. A court clerk informed KSTP-TV by telephone that a motion for a temporary restraining order had been scheduled before U.S. District Judge Michael Davis that afternoon. Judge Davis dismissed A.M.P.'s complaint on jurisdictional

grounds, and did not reach the prior restraint question.

A.M.P. was not put off by Judge Davis' decision. A.M.P. filed, and then dismissed, a state court lawsuit. On Friday, Nov. 16, she filed a second complaint in U.S. District Court, and sought an order restraining KSTP-TV from broadcasting the second night of its report. Her motion was set to be heard by Chief Judge Paul A. Magnuson late that same afternoon.

A.M.P.'s second complaint named as defendants Hubbard Broadcasting, Inc., "KSTP-5" and "any other Defendant Does." It included causes of action for defamation, intrusion upon seclusion, publication of private facts, and intentional and negligent infliction of emotional distress.

The former members told stories of abusive behavior toward some children in the sect, including punishment with a cattle prod.

In support of her motion for a temporary restraining order, A.M.P. argued that her father, Gaeland Priebe, was conspiring with others to use the KSTP-TV reports "as a ploy to create a defense in his criminal case."

She argued that the report, if broadcast, "will only cause further irreparable harm to me and further compound the injuries I have sustained."

Court Relies on *Near v. Minnesota* and *New York Times v. U.S.*

In an order dated November 16, 2001, Judge Magnuson denied A.M.P.'s motion for a temporary restraining order, recognizing that such an order would constitute a prior restraint upon a news agency.

Citing *Near v. Minnesota*, 283 U.S. 697 (1931) and *New York Times Co. v. United States*, 403 U.S. 713 (1971), Judge Magnuson characterized the reaction of courts to such a request:

Courts take a dim view of the prior restraint of expression, and exceptions to the general rule against such prior restraints are recognized only in extraordinary circumstances.

He described the exceptionally high standard set by courts in prior restraint cases with citations to *Ford Motor*

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Court Refuses to Issue Prior Restraint of Report on Religious Sect

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Company v. Lane, 67 F.Supp.2d 745, 752 (“To justify a prior restraint on pure speech, ‘publication must threaten an interest more fundamental than the First Amendment itself.’” (quoting *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1966)), and to *C.B.S., Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (prior restraint is justified “only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.”)

Judge Magnuson rejected A.M.P.’s argument that the harm which would befall her would justify a prior restraint. “[W]ith respect to A.M.P., without knowing the substance of the news broadcast at issue, the Court cannot determine with any certainty” whether A.M.P. would suffer harm. “[T]he possibility of future emotional trauma for A.M.P. cannot justify a prior restraint of expression.”

Judge Magnuson gave the claims of the John and Jane Doe plaintiffs even shorter shrift. “[T]he Court does not even know whether they exist, and the Court certainly cannot justify prior restraint of the news media on the grounds that these potential plaintiffs might exist and might suffer some nebulous harm.”

Although her motion for a restraining order was denied, A.M.P. has now filed an amended complaint, in which she adds causes of action for alleged assault, “terroristic threats,” and civil rights violations. Defendants plan to vigorously defend against these claims.

Paul Hannah is a media attorney in St. Paul, Minnesota and represents the named defendants in the case.

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L.A. Church Fails to Stop Publication of E-Mails

Sister Judith Ann Murphy v. KFI et al.

By Kelli Sager

It was shortly past 10:00 p.m. on Thursday, April 4.

Karlene Goller, counsel for the Los Angeles Times, got an emergency call from a night editor at The Times, who had just been notified that attorneys for the Archdiocese of Los Angeles and Cardinal Roger Mahoney intended to go to court seeking an emergency temporary restraining order to stop The Times and a local radio station from publishing emails sent by Cardinal Mahoney to others in the Church hierarchy. We all assumed that the notice was for the next morning. But within minutes, Karlene confirmed that the hearing actually was going to take place at 10:30 p.m. that night.

Church Suit Confirms Authenticity

The emails apparently had been given to on-air personalities at Los Angeles radio station KFI, and had been the subject of its programming for much of the afternoon. KFI had given emails to The Times, which was in the process of verifying their authenticity when the Church's attorneys – by running into Court in an attempt to stop the publication of what they characterized as “stolen” emails – eliminated any remaining doubts about whether the emails were authentic. Indeed, the Church's attorneys confirmed at the outset that their motivation for the sudden hearing was that the emails were “real.”

Church Contact Opens Night Court

The behind-the-scenes maneuvering that lead to the late-night hearing was as intriguing as the content of the emails themselves. Although the Church's attorneys had talked to the Court's presiding judge earlier in the day, and had been given the names of the two judges who are assigned to hear emergency writs, they chose instead to contact a retired judge who was well-connected to the Catholic Church, who made his own telephone calls to assist the Church in setting up the extraordinary late-

night hearing. A bailiff, court reporter, and clerk were summoned, and were joined by Judge David Yaffe in the empty court building. A security guard in the lobby opened the locked doors to the attorneys, who converged on the courthouse dressed in various stages of casual or business-casual attire.

At the hearing, which lasted more than an hour, Judge Yaffe dismissed The Times' objections to the lack of notice, noting that there appeared to be “exigent circumstances” that warranted the short amount of notice to The Times. (KFI later said that it never received notice of the TRO hearing, and no one appeared on behalf of KFI.)

In Support of a TRO: No Case Law

In response to Judge Yaffe's inquiry about the merits of the Church's TRO request, its counsel claimed that emails had been stolen by someone who had “hacked” into the computer system.

Two arguments were offered to justify a restraining order. First, they argued that because the emails included communications between Cardinal Mahoney and the Church's attorneys, the need to protect the attorney-client privilege outweighed the First Amendment rights of the media companies. Second, the Church's counsel relied on California Penal Code § 502 (c)(2), which provides remedies (including injunctive relief) for owners of computer systems that are accessed without permission. Counsel for the Archdiocese acknowledged, however, that he had no case authority to support issuance of such an extraordinary order, commenting ruefully at one point that he “wished he had” some cases to cite to the Court.

U.S. And California Law Oppose Injunction

In response, The Times' counsel pointed to the myriad of United States Supreme Court and lower court cases that have found prior restraints to be “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass'n v. Stuart*,

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L.A. Church Fails to Stop Publication of E-Mails

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427 U.S. 539, 559 (1976). Even in cases where national security interests were invoked, the Supreme Court rejected issuance of a prior restraint. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

The California Supreme Court has been even more definitive in outlining the state's protection of speech and press rights under the California Constitution:

The wording of [Article I, section 2(a)] is terse and vigorous, and its meaning so plain that construction is not needed. *The right of the citizen to freely . . . publish his sentiments is unlimited[.] . . . He shall have no censor over him . . . , but he shall be held accountable to the law for . . . what he publishes.*

Daily v. Superior Court, 112 Cal. 94, 97 (1896) (emphasis added).

Applying these principles, the Court of Appeal for the Second Appellate District recently held that a restraining order could not be issued to prevent disclosure of information about a plastic surgeon's patients, notwithstanding claims that the information was protected by privacy concerns and by the physician-patient privilege. In *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232 (2000), the appellate court was unequivocal, noting that

"respondent can point to no case where any court in the nation has held that a threatened violation of the physician-patient privilege, or any other privilege, justifies a prior restraint of speech." *Id.* at 1243.

Indeed, less than a year before, The Times had used these authorities in fending off an unsuccessful attempt by the American Humane Association to restrain publication of material that AHA claimed was protected by the attorney-client privilege. *Los Angeles Times Communications v. American Humane Association*, 92 Cal. App. 4th 1095 (2001).

Cal Penal Law Runs Into Bartnicki

The Church's reliance on the California Penal Code similarly was unavailing. The Times' counsel argued, because even if the statute could be interpreted as allowing a prior restraint on publication – which The

Times disputed – such an interpretation would be unconstitutional. There was no allegation that The Times had obtained the emails unlawfully, and the content clearly involved a matter of public interest; thus, under recent authority from the United States Supreme Court, application of the Penal Code to prevent or punish the "use" of the emails would violate the First Amendment. *Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001).

Shortly before midnight, Judge Yaffee ended the hearing, finding that the Church's request would be an unconstitutional prior restraint. As we left the courthouse, Times editor Jim Newton called ahead to "stop the presses," so that a story about the extraordinary events of that evening could be inserted into the editions that had not yet been printed. Instead of preventing an article about the emails, the Archdiocese effectively had facilitated its publication, by demonstrating their authenticity and by providing even more fodder for a discussion about the use – and abuse – of the Church's immense power.

Kelli Sager, Alonzo Wickers, Jean-Paul Jassy, and Susan Seager of Davis Wright Tremaine, Los Angeles, represented The Los Angeles Times in this matter.

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UPDATE: California Supreme Court to Review Mass E-Mail Injunction Case

In December, appellate court issued injunction under the legal doctrine of trespass to chattels

On March 27, the California Supreme Court agreed to hear the appeal of a former Intel Corp. employee who was prohibited from sending out mass e-mails to current Intel employees under the legal doctrine of trespass to chattels. See *Intel Corp. v. Hamidi*, 2001 Cal. App. LEXIS 3107, review granted, No. S103781 (Cal. March 27, 2002).

In December, the California Court of Appeals held that Intel was entitled to an injunction because Kourosh Kenneth Hamidi's six mass e-mails to as many as 29,000 employees was a trespass and caused a loss of productivity at Intel. The court of appeals held that Intel was entitled to the injunction despite no demonstration of sufficient harm to "trigger entitlement to nominal damages for past breaches of decorum by Hamidi." Instead, the court based its decision on the seldom-used legal doctrine of trespass to chattels, saying that Hamidi "was disrupting [Intel's] business by using it's property."

According to the Restatement, trespass to chattels "may be committed by intentionally ... (b) using or intermeddling with a chattel in the possession of another." Liability is established if the "intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest [is harmed]."

Hamidi's mass e-mails were sent out over a period of two years following his firing from Intel. In his e-mails he voiced his complaints about the employment conditions at the company. He later claimed that he was providing "an extremely important forum for employees within an international corporation to communicate via a web page on the Internet and via electronic mail, on common labor issues, that, due to geographical and other limitations would not otherwise be possible.

The ACLU, on behalf of Hamidi, argued that six e-mails over the course of two years did not place a tremendous burden on Intel's computer system nor seriously disrupt business. The court of appeals rejected arguments made by the ACLU, saying that the ACLU had discounted the disruption, given the fact that thousands of employees were involved. The court of appeals also rejected Hamidi's free speech arguments and arguments

that unsolicited e-mails were analogous to unwanted first-class mail.

In dissent, Judge Kolkey was critical of the majority for, among other things, accepting Intel's trespass to chattels argument without demonstrating some sort of concrete harm was done by Hamidi's mass e-mails.

The California Supreme Court is awaiting briefs for the case. No date has been set for oral arguments.

Hamidi is represented by Karl Olson and Erica Craven, of Levy Ram, Olson & Rossi, in San Francisco, and William M. McSwain, Richard Berkman, and F. Gregory Lastowka, of Dechert, in Philadelphia. Intel is represented by Michael A. Jacobs, of Morrison & Foerster in San Francisco, and Abner R. Neff, of Los Angeles.

***Universal City Studios Inc. v. Corly:*
Further Consideration*****The Second Circuit Has Put the
First Amendment in the Analysis***

By Rick Kurnit

The movie studios may be too quick to celebrate their victory in the Second Circuit in upholding the constitutionality of the Digital Millennium Copyright Act's provisions prohibiting trafficking in technology designed to circumvent technological protection measures. The Second Circuit very significantly held in this case that computer code is speech and as such is entitled to protection under the First Amendment.

The Court went on to hold that any restrictions on publishing code must meet the test the Supreme Court laid down in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and it further clarified that the test would be whether the governmental action or statute does not "burden substantially more speech than is necessary to further the government's legitimate interests" *Id.* at 662.

These holdings lay the ground rules for what will be an ongoing battle between those seeking to protect the

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property interests in intellectual property and those championing the public domain and maximum scope for fair use.

Balancing Property & Speech

At issue in *Corly* was an injunction prohibiting posting of DCSS code by an on-line hacker-oriented magazine and additionally prohibiting the site from providing links to other sites which provide DCSS. (DCSS in the code that de-encrypts DVDs that are protected from copying by CSS encryption code.)

The Second Circuit's level of concern about protection of property interests justifying enjoining speech is indicated by the extraordinary order of the Court following the oral argument requiring responses to fourteen questions. They focused on the available technology that might permit access for fair use and still preclude piracy.

The Court's decision suggests that the absence of evidence that the injunction at issue was sought in order to suppress fair use or otherwise inhibit commentary relieved the Court of the need to determine whether the statute itself fails the *Turner Broadcasting* test, but the implication is strong that such evidence would require renewed scrutiny of the DMCA's prohibition on publishing DCSS or other computer code.

The Second Circuit ultimately concluded that the DMCA posed substantial First Amendment issues. The Court stated that it was forced to "choose between two unattractive alternatives: either tolerate some impairment of communication in order to permit Congress to prohibit decryption that may lawfully be prevented, or tolerate some decryption in order to avoid some impairment of communication." Thus, in upholding the injunction against posting of DCSS the Second Circuit left for a later case whether it is technologically practical to impose a requirement, similar to the Audio Home Recording Act's requirement, that encryption technology for DVD's provide for single copy or initial copying to accommodate fair use.

Judge Kaplan, in the District Court, was clearly troubled by the injunction against linking to any site that contained DCSS. In an effort to minimize the infringement on First Amendment rights, he imposed the highest possible standards of proving improper intent — *the New York Times v. Sullivan* standard for imposing liability for libel. Thus, he recognized that the Court's grant of injunctive relief to bar linking to certain content in order to protect property interests constitutes generally prohibited state action against speech based on the content of the speech.

Instead of addressing Judge Kaplan's concerns, the Second Circuit indulged in the whimsical notion that the author or editor of site's content could create a second site purged of DCSS to which Corley could then link.

The movie studios may be too quick to celebrate their victory in the Second Circuit

Quite apart from the practicality of this notion, the Court ignores the significance of a court order that determines the editorial content of a site as a condition to avoiding a government blockade

on interested adults obtaining access to information. It should be sufficient that code itself is speech, but certainly inhibiting discussions of CSS and DCSS constitutes a substantial burden on free speech.

The danger of the DMCA's prohibition on "trafficking" in information thus becomes clear. Linking is essential to the flow of information on the internet. The injunction against linking is truly an injunction against speaking.

In upholding the injunction against linking to sites that provide DCSS the Second Circuit side-stepped the First Amendment issues. In glibly arguing that any site that wanted to link to Corley's site could separate the DCSS from the other content of its site, the Court satisfied itself that legitimate content could still be published.

Here again, the Court recognized that the result of its decision to apply *Turner* to code is that there must be a means by which an accommodation can be achieved between legitimate First Amendment interests and protection of property interests.

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Linking

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Again, the significance is that the Court did not reject the validity of the constitutional challenge based upon the encryption restricting legitimate fair use. What the Court said was that the current injunction did not bar fair use because of the continuing availability of earlier technologies that permit copying off a monitor. The Court relied on its finding that there was insufficient evidence that the First Amendment interest were impermissibly burdened at this point in time. But significantly the Court rejected plaintiffs' contention that those concerns were frivolous.

Potential Impact on Fair Use

The impositions on fair use or use of material in the Public Domain caused by digital encryption of intellectual property range from the obvious inhibition of discussion by computer science scholars conducting research on protection techniques and consumer buffs discussing hacking solutions and the inadequacies of software codes such as CSS to, at the extreme, the potential problem that large media conglomerates will attempt to remove material from the public domain by including some new material and then locking the material up. Then as old technologies fade away and access is otherwise not available the public domain will be practically foreclosed. In the same vein, as increasing percentages of material protected by copyright are distributed only on new, protected formats, the ability as a practical matter to make fair use of that material will decrease.

The Supreme Court's decision in *Campbell v. Acuff-Rose, Inc.*, 510 U.S. 591 (1994) which embraced Pierre Laval's seminal article, 103 *Harv. L. Rev.* 1105 (1990), urging that injunctions against copyright infringement should not be automatic has made the analysis of copyright infringement and fair use more complicated. While "slavish copying" or pure piracy may be an easy matter for injunctive relief, the distinguishing transformative use from piracy is not so simple. Courts

are becoming increasingly sensitive to striking a First Amendment balance between copyright interests and competing interests of the public domain and fair use, and efforts to protect against piracy are required to give maximum breathing space to fair use.

Technology May Give the Answer

Ultimately, the limited duration of copyright and fair use could be defeated by the fact that the only publication of the new copyrighted material is in a protected format that could not be reproduced in a technologically acceptable fashion upon the expiration of copyright. The suggestion by the court that scholars

The Court relied on its finding that there was insufficient evidence that the First Amendment interest were impermissibly burdened at this point in time.

can set up a camcorder and videotape off a monitor the image coming from a DVD is at best a stop gap. For fair use to flourish there must be an ability to use material in a technologically relevant

fashion.

Although the Court concluded that we have not yet advanced technologically to an entirely digital format, it cannot be doubted that old technologies which are more cumbersome, less efficient, less competent will disappear and ultimately other opportunities to access digital material will be unavailable. When that occurs, the Second Circuit's decision suggests the courts would have to revisit the DMCA and give less deference to the legislative determination to restrict access as a means of protecting against piracy.

At the end of the day the Second Circuit recognized that cases like this pose a difficult balancing of First Amendment interests against protection of the copyright interests. But the court recognized that technological solutions will result in requiring exceptions to the heavy handed solution of the DMCA. The First Amendment mandates that where feasible, protection of copyright through encryption must provide reasonable access to legitimate fair use.

As a middle level Appeals Court in California clearly

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held, First Amendment interests must be protected against total suppression in service of property rights. *DVD CCA v. Bunner CAL. APP. LEXIS 1179* (CAL. CT. APP. 6th Dist. November 1, 2001). In that case the court was asked to apply California's trade secret law to preclude publication of DCSS. The Court concluded that the "statutory right to protect its economically viable trade secret is not an interest that is "more fundamental" than the First Amendment..." The Second Circuit was similarly uncomfortable with holding that any legitimate First Amendment interest would be sacrificed to mere convenience of the property interest seeking an injunction but the Second Circuit dodged the issue... for now.

The future will present the courts with technology that will permit greater accommodation for fair use and greater sensitivity to First Amendment interests. That technology will limit the right of copyright owners to prevent access and bar totally the ability to copy their material for constitutionally protected purposes. The Second Circuit's analysis does no more than hold that the technology has not yet arrived.

There can be little doubt that upon showing that DMCA's protections serve to inhibit commentary, criticism, fair use and transformative use that is otherwise protected the Court's will deny injunctive relief. In time, owners of copyrighted material must allow for limited copying or the DMCA's prohibitions on communicating code and discussing encryption technology will be unconstitutional. The protection of property interest in copyright must accommodate First Amendment interests, and technology will provide the means for a finer balance.

Rick Kurnit is a partner at Frankfurt Garbus Kurnit Klein & Selz, New York, New York, which represented defendants in this matter.

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Delaware Ethics Committee Issues Opinion on Lawyers' Use of E-Mail and Cell Phones

The Delaware bar's ethics committee has concluded that a lawyer's use of cell phones and e-mail to communicate with and about clients does not violate the lawyer's duty of confidentiality, barring extraordinary circumstances. *See* Delaware State Bar Ass'n Comm. on Professional Ethics, Op. 2001-2. In coming to its decision, the committee followed the American Bar Association ethics committee's opinion on the use of e-mail and relied on the federal statutes that are intended to protect cell phone conversations.

In 1999, the ABA issued its opinion advising that a lawyer may transmit confidential client information via e-mail without violating Rule 1.6. *See* ABA Formal Ethics Op. 99-413. The Delaware committee endorsed the ABA opinion, which concluded that the minimal risk of disclosing confidences via e-mail was offset by federal laws that criminalize hacking and that limit the authority of Internet service providers to inspect a user's e-mail. The Delaware committee also noted the ABA's point that modes of communications like land-line telephones and commercial mail were also vulnerable to interception, but presumed to protect confidentiality.

The Delaware committee did acknowledge that some use of e-mail was inappropriate, such as when a lawyer represents a client who shares an e-mail account with others. For instance, it would be inappropriate for a lawyer to communicate via e-mail with one spouse in a matrimonial proceeding when the other spouse shares access to the e-mail.

As to cell phones, the Delaware committee found a split of authority among the state bars, and no opinion from the ABA. Massachusetts and New Hampshire have advised against any use of cellular or cordless phones by lawyers discussing client information. Arizona, however, concluded that mere use of a cellular or cordless phone does not constitute a violation of confidence. The majority of jurisdictions have approached the middle ground.

Jurisdictions such as Illinois, Iowa, North Carolina, Washington, and New York City have advised lawyers to proceed with caution when using cell phones, disclosing that fact to the client. These jurisdictions

recommend that lawyers obtain their clients' informed consent prior to using cell phones or cordless phones to discuss client matters.

The Delaware committee cited the 1986 Electronic Communications Privacy Act, which has been interpreted as applying to cell phones, as a law that alleviates the major risks associated with the use of cell phones. The Delaware committee, however, recommended that lawyers avoid discussing confidential matters in public places, as being overheard on a cell phone is a much larger problem than the interception of the cell phone conversation.

Cussing Canoeist's Conviction Overturned by Michigan Court of Appeals

Court holds that the 105-year-old statute is unconstitutionally vague

A 105-year-old law that prohibited the use of "indecent, immoral, obscene, vulgar or insulting language" in front of women and children has been held to be unconstitutional by the Michigan Court of Appeals. *See People v. Boomer*, 2002 WL 481153 (Mich. Ct. App. March 29, 2002). In striking down the statute, the court overturned the conviction of Timothy Joseph Boomer, who was convicted in June 1999 for violating M.C.L. § 750.337 after he fell out of his canoe and into the Rifle River. *See LDRC LibelLetter*, June 1999 at 16.

In an opinion written by Judge William Murphy, and joined by Judges David Sawyer and Joel Hoekstra, the court said that "the fact that a statute may appear undesirable, unfair, unjust, or inhumane does not of itself render a statute unconstitutional and empower a court to override the Legislature." However, the court concluded that the statute was unconstitutionally vague.

Citing a 1994 case handed down by the Michigan

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Cussing Canoeist's Conviction Overturned by Michigan Court of Appeals

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Supreme Court, *People v. Lino*, 527 N.W.2d 434, the court noted that a penal statute "must define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'"

The court concluded that the statute was unconstitutionally vague because there was no "restrictive language" that would "limit or guide a prosecution for indecent, immoral, obscene, vulgar or insulting language." The court went on to say that allowing a prosecution for "insulting" language "could possibly subject a vast percentage of the populace to a misdemeanor conviction." Thus, the court concluded that the statute "fails to provide fair notice of what conduct is prohibited, and it encourages arbitrary and discriminatory enforcement."

On August 15, 1998, Boomer was on a canoe trip when he fell out of his canoe and into the river. He proceeded to express his displeasure with falling into the river with a three-minute outburst that included splashing water on a particular group of canoers and yelling at them. A sheriff's deputy and a family of four testified that they witnessed the tirade.

The prosecutor handling the case conceded that the statute violated equal protection, but the court accepted the prosecutor's argument that the court could sever the references to women without affecting the remainder of the statute. *See LDRC LibelLetter*, February 1999 at 18. Boomer was found guilty of violating the law, and was sentenced to four days of community service and a choice of three days in jail or a \$75 fine. *See LDRC LibelLetter*, September 1999 at 6.

Though the court of appeals found the statute to be unconstitutional, the court did remind the legislature that the First Amendment does not protect obscene speech, and noted that the legislature could enact a "properly drawn statute to protect minors from such exposure."

The ACLU represented Boomer in the matter.

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Federal Shield Law Proposed

By Lucy Dalglish

Rep. Sheila Jackson Lee (D-Texas) announced from the steps of the federal detention center in Houston on Jan. 4 that she planned to introduce legislation that would protect journalists like Vanessa Leggett from Justice Department attempts to discover the identities of confidential sources.

Jackson Lee accompanied Leggett as she left the detention center after serving 168 days for refusing to identify confidential sources used in writing a true crime book about a notorious Houston murder. The Congresswoman's announcement came as a surprise because Jackson Lee, who represents the district where Leggett lives, appeared to have come up with the idea for shield law legislation without consulting any journalists.

The Reporters Committee for Freedom of the Press contacted Jackson Lee's office to see where she was going with her proposed legislation. It became apparent that there had been very little work done on the issue and that her staff members were eager to discuss it with journalism groups. In fact, they were working under the false assumption that all that would be necessary would be an amendment to whatever federal law was out there to redefine "journalist" broadly so that book authors and freelancers like Leggett would be covered.

An ad hoc group of journalism organizations, including the Reporters Committee, Society of Professional Journalists, Radio-Television News Directors Association, the American Society of Newspaper Editors, the National Newspaper Association, the Newspaper Association of America and others met twice in Washington to discuss a strategy for dealing with the Congresswoman.

As a result, Reporters Committee Executive Director Lucy Dalglish and Legal Defense Director Gregg Leslie met with the Congresswoman on Feb. 7. She now understands that legislation creating a federal shield law would be required.

Past efforts to get a federal shield law (more than 100 bills since 1970) always broke down over basic issues, such as whether it would be an absolute or qualified privilege and whether journalists would be better off relying on common law protections where they exist. In the initial meeting with Jackson Lee, she asked that the members of the ad hoc group go to their constituencies to gauge whether a federal shield

law is desirable. If so, she wants to know whether journalists would insist on an absolute privilege or whether a qualified privilege would work. She also would only be interested in sponsoring the bill if it encompassed freelancers and book authors. She will not take action on the legislation until she hears back from the journalism groups about whether they want her to proceed.

To that end, the Reporters Committee is collecting input from all those interested in this issue to see whether the journalism groups can reach a consensus about reporters privilege legislation. You can make your thoughts known by e-mailing Lucy Dalglish at ldalglish@rcfp.org. Jackson Lee specifically asked that the groups not contact her office individually. She wants a coordinated response.

At this point, please confine your comments to the desirability of the legislation, rather than the capabilities of the proposed sponsor.

Lucy Dalglish is Executive Director of Reporters Committee for Freedom of the Press, Washington, D.C.

Media Must Consider Options on Federal Shield Proposal

As the article on this page states, media are being asked to indicate their views on a federal shield law proposal and such specifics as how to define who is covered by the bill. This is an issue that all of you really should attend to so that the trade associations in Washington, and those of you that lobby on your own, speak effectively and, ultimately, with a single voice.

What is the Definition of a Journalist?

Very Few Appellate Courts Have Weighed in on Who May Assert a Reporter's Privilege

Last summer, when Vanessa Leggett went to jail rather than reveal her confidential sources, the point of contention was whether the reporter's privilege could be asserted during a criminal investigation. The district court and the Fifth Circuit Court of Appeals held that the qualified First Amendment privilege did not apply.

Last August, the Fifth Circuit Court of Appeals

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sidestepped the issue of whether Leggett was a journalist for the purposes of asserting a reporter's privilege by deciding the case on other grounds, holding that the privilege was "far weaker in criminal cases" and Leggett could not assert the privilege because she had not shown any evidence of governmental harassment or oppression.

Lost in the wake of these holdings was an equally important question: Who may assert the privilege? Leggett does not have extensive experience as a journalist. Her collection of published work consists of a single article in an FBI publication and one fictional short story.

Extensive experience, however, is not necessary to have standing to assert the reporter's privilege. In *von Bulow v. von Bulow*, 811 F.2d 136, 13 Media L. Rptr. 2041 (2nd Cir. 1987), *cert. denied*, 481 U.S. 1015 (1987) (explained below), the court said that prior experience as a professional journalist is not the sine qua non proof that the reporter's privilege applies. According to the court, a novice journalist could carry the burden of proof and successfully assert the privilege.

Perhaps most importantly for Leggett's purposes in analyzing her status under the privilege, she began researching the murder of a Houston socialite with the intent to publish a book on the murder. Under the test used and explained below, Leggett could satisfy one of the crucial elements of the test used to define a journalist.

The Fifth Circuit, while not reaching the issue, said in a footnote that its "inquiry into this question [of who qualifies as a journalist for the purpose of asserting privilege] would be guided by the three-part test used in other circuits, which asks whether the person claiming the privilege (1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public."

What follows is a look at the test first devised by the Second Circuit.

von Bulow v. von Bulow

In 1987, the Second Circuit Court of Appeals laid the groundwork for the three-part test cited by the Fifth

Circuit last August when it decided *von Bulow v. von Bulow*. The underlying complaint involved an in-family dispute brought by two children who accused their step-father, Claus von Bulow of surreptitiously injecting their mother, who was in a permanent coma, with insulin and other drugs. Prior to the civil suit, Claus von Bulow was acquitted on charges of assault with the intent to murder his wife.

During the criminal trial, Andrea Reynolds, a friend of the step-father's and a "steady companion" during the trial, commissioned investigative reports into the lifestyles of the children. Reynolds initially conceded that when she commissioned the reports, "her primary concern was vindicating Claus von Bulow."

During the civil trial, Reynolds was ordered to produce the commissioned reports, her notes from the criminal trial, and the manuscript of her unpublished book about the criminal trial. Reynolds attempted to claim a reporter's privilege for the manuscript.

To bolster her claim to the reporter's privilege, Reynolds produced a press card from Polish Radio and Television, asserted that she was "acting as a writer" for the German magazine *Stern* and had "drafted" an article about von Bulow that had appeared in *Stern*, and claimed the *New York Post* had issued her a press pass for the trial (though she never covered the trial for the *Post*). That evidence, however, would not prove to be conclusive.

Prior to the *von Bulow* case, the typical struggle over a reporter's privilege was whether the privilege applied to a person who was not a member of the "institutionalized press." Prior case law made it clear that the privilege went beyond the "institutionalized press." The *von Bulow* court cited a Tenth Circuit decision which allowed a documentary film maker to assert the reporter's privilege, see *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), and a case in which a chief executive officer of a technical journal successfully asserted the privilege, see *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975).

The *von Bulow* court, however, was asked to define a

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journalist in much more generalized terms. Reynolds' standing as a reporter was challenged, not because she was writing a book as opposed to a newspaper article, but because she began gathering information initially for a "purpose other than traditional journalistic endeavors."

Turning to *Baker v. F&F Investment*, 470 F.2d 778, a 1972 Second Circuit decision that upheld a claim for a reporter's privilege, the *von Bulow* court found a central theme in that decision: compelled disclosure of a reporter's confidential source would have a deterrent effect on future "undercover" investigative reporting," and in turn that "threatens the freedom of the press and the public's need to be informed."

The von Bulow Test

From this central holding, the court fashioned a two-part test that was later extended to include a third step. According to the *von Bulow* court, the person asserting the reporter's privilege must first be engaged in a newsgathering process. Second, and most critically, at the inception of that newsgathering process, the person claiming the privilege must have had the intent to disseminate to the public the information obtained through the investigation.

Though Reynolds had clearly conducted an investigation, her intent at the time proved to be dispositive. According to the court, the individual claiming the reporter's privilege "must demonstrate, through competent evidence, the intent to use material — sought, gathered or received — to disseminate information to the public and that such intent existed at the inception of the newsgathering process." Reynolds' own admissions proved her original intent was not to disseminate her findings.

The *von Bulow* decision, however, included noteworthy dicta. The *von Bulow* court stated that the reporter's privilege could be successfully asserted by a "novice in the field" of journalism — so long as the person claiming the privilege could carry the burden of proving an

original intent to disseminate to the public the information obtained through her investigative work.

Shoen v. Shoen: Adopting von Bulow to Book

In 1993, the *von Bulow* test was adopted by the Ninth Circuit Court of Appeals in *Shoen v. Shoen*, 5 F.3d 1289, 21 Media L. Rptr. 1961 (9th Cir. 1993). Again in the context of an in-family dispute, the Ninth Circuit was forced to consider whether a non-party investigative author could assert the reporter's privilege and avoid producing his notes and tapes from interviews he conducted with one of the defendants in a defamation action.

The underlying claim arose out of a battle over control of the U-Haul corporation. Ronald Watkins, the author, entered into an agreement with Leonard Shoen, the founder of U-Haul, whereby Shoen would grant Watkins in-depth interviews in exchange for a percentage of the book royalties and an interest in any possible movie deal.

Prior to these interviews, Leonard Shoen made at least 29 statements to the press implicating his sons, Mark and Edward, in the murder of their sister-in-law Eva Berg Shoen.

After the brothers filed a defamation claim against their father, they served Watkins with a subpoena duces tecum, ordering him to appear with all documents and recordings in his possession regarding the interviews with the father. Watkins refused, asserting the reporter's privilege. The brothers argued that Watkins had no standing to invoke the reporter's privilege because a book author was not a member of the institutionalized print or broadcast media.

Intent is Key

Citing the Second Circuit's ruling in *von Bulow v. von Bulow*, the Ninth Circuit held that the reporter's privilege was "designed to protect investigative

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Reynolds' standing as a reporter was challenged, not because she was writing a book as opposed to a newspaper article, but because she began gathering information initially for a "purpose other than traditional journalistic endeavors."

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reporting, regardless of the medium used to report the news to the public.” The Ninth Circuit went on to say that it would be “unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of a book on the same topic.”

Quoting *von Bulow*, the Ninth Circuit said the test for invoking the reporter’s privilege was “whether the person seeking to invoke the privilege had ‘the intent to use material — sought, gathered or received - to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process. If both conditions are satisfied, then the privilege may be invoked.” Because Watkins possessed the intent to disseminate his findings to the public, the Ninth Circuit determined that the “critical question for deciding whether a person may invoke the journalist’s privilege is whether she is gathering news for dissemination to the public.”

In a footnote, the Ninth Circuit said that it left for another day the question of whether the reporter’s privilege may be invoked by a “person writing a book about a recent historical figure, such as Harry Truman or Albert Einstein, where the intent, arguably, is not the dissemination of ‘news,’ but the writing of history.”

In re Madden: The Addition of a Third Step

In 1998, the Third Circuit used a three-part test when it decided that a World Championship Wrestling (“WCW”) commentator could not assert the reporter’s privilege. See *In re Madden*, 151 F.3d 125, 26 Media L. Rptr. 2014 (3d Cir. 1998).

The underlying case was brought by Titan Sports, Inc. against Turner Broadcasting Systems, Inc. Titan and TBS were both “prominent professional wrestling promoters.” TBS, carried the WCW, while Titan controlled the World Wrestling Federation (“WWF”). Titan sued TBS alleging unfair trade practices, copyright infringement and other pendent state law claims. As part of its case, Titan

subpoenaed Mark Madden, a WCW commentator.

As part of his duties, Madden produced tape-recorded commentaries on the WCW that were available via a 900-number hotline. The commentaries promoted upcoming WCW events and pay-per-view television programs. In the course of preparing his taped commentaries, Madden would receive confidential information from people within the WCW. When Madden was asked to identify the sources of allegedly false and misleading statements contained in his commentaries, he claimed a reporter’s privilege.

Using *von Bulow* and *Shoen*, the Third Circuit concluded that to have standing to assert a reporter’s privilege, a three-pronged test must be satisfied. The

Third Circuit explained:

[T]he Ninth Circuit held that the reporter’s privilege was “designed to protect investigative reporting, regardless of the medium used to report the news to the public.”

As we have indicated previously, we agree with *von Bulow* that the person claiming privilege must be engaged in the process of “investigative reporting” or “newsgathering.” Moreover,

we agree with *Shoen*, which held that the critical question for deciding whether a person may invoke the journalist’s privilege is “whether she is gathering news for dissemination to the public.” We hold that individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the newsgathering process to disseminate this information to the public.

Applying this test, the Third Circuit concluded that Madden did not satisfy any prong of the three-part test.

“Entertainment” Won’t Fit

Madden’s claim failed because, according to the court, his activities could not be considered “‘reporting,’ let alone ‘investigative reporting.’” The court considered Madden to be more of an entertainer than a reporter. Second, the court concluded that Madden was not gathering “news.” Finally, Madden did not have the

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requisite intent to disseminate the information when he began to gather it.

The court was skeptical about Madden's position with the WCW as it related to his original intent for gathering the information. The court concluded that "even if Madden's efforts could be considered 'newsgathering,' his claim of privilege would still fail because, as an author of entertaining fiction, he lacked the intent at the beginning of the research process to disseminate information to the public. He, like other creators of fictional works, intends at the beginning of the process to create a piece of art or entertainment." Thus, the Third Circuit made a distinction between entertainment and news, and therefore required that the investigative process be aimed at gathering news. What resulted was a new three-step test that was quoted by the Fifth Circuit last summer.

According to the footnote included in the Fifth Circuit's decision in the Leggett case, a person is a reporter for the purpose of asserting the reporter's privilege if she "(1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public."

Other Cases

Despite the test, recent decisions have indicated that it still may be difficult to know who may assert the reporter's privilege. Recently, three courts limited or denied assertions of the reporter's privilege based on standing.

On February 4, Los Angeles Superior Court Judge David S. Wesley ordered Mary Fischer, who was a reporter for *GQ*, to testify before a DeKalb County (Ga.) grand jury. See *In re Mary Fischer*, No. 001806 (L.A. Sup. Ct., Feb. 5, 2002). Jeanne M. Canavan, the district attorney for DeKalb County, claimed that Fischer had "stepped outside the bounds of journalistic privilege" and became a material witness to an alleged assassination plot. According to Canavan, Fischer was no longer acting as a journalist when she helped arrange a meeting between two men who allegedly discussed the assassination of a sheriff.

DeKalb County prosecutors are trying to convict former Sheriff Sidney Dorsey of murdering the Sheriff-elect who defeated Dorsey. According to District Attorney Canavan, three months after the Sheriff-elect was

assassinated in a plot that involved Dorsey's former deputy Patrick Cuffey, Fischer helped arrange a meeting between Dorsey and Cuffey. Canavan claims that in doing so, Fischer went beyond her duties as a journalist and became a material witness.

In January, a federal judge narrowed a Rhode Island radio host's ability to assert the reporter's privilege. U.S. District Judge Ernest C. Torres ruled that talk-show host John DePetro could assert the privilege only to questions involving information he obtained while "acting in his journalistic capacity."

DePetro, who has covered an FBI investigation into corruption allegations, obtained a videotape purportedly showing a top aide in the mayor's office accepting a bribe. The videotape was later aired on a local television station. Special Prosecutor Marc DeSistro, however, claimed that DePetro came into possession of the videotape because of a personal relationship and not as a result of newsgathering efforts.

In October 2000, a New Jersey Superior Court judge held that a public relations firm did not meet the definition of a newsperson, and therefore could not claim a reporter's privilege. The court held that "the public relations firm is in effect [a] spokesperson. As such, the public relations

Defining a Journalist: State Shield Statutes

One of the key issues for a federal shield law will be the definition of who is covered by it. There is no uniformity on the issue in the state shield laws. Thirty-one states have shield laws and they reflect a continuum in terms of how broadly they define who will be within the protected category.

More Formality Required

Some statutes, for example, seem to impose stricter requirements on the existence of a relationship between the individual seeking to be protected and an institutional media organization.

- **Nevada** has one of the most narrow of defining terms when it speaks in terms of "employee[s]." Nev. Rev.

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Defining a Journalist: State Shield Statutes

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Stat. Ann. §§ 49.275, 49.385.

- **Colorado** defines “newsperson” to mean “any member of the mass media *and any employee or independent contractor* of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write or edit news information for dissemination to the public through the mass media.” Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101 - 06 (emphasis added).
- **Florida** too, talks in terms of someone “who obtained the information sought while working as a *salaried employee of, or independent contractor for,*” and then listing a wide range of news institutions. The statute specifically excepts “book authors and others who are not professional journalists, as defined in this paragraph.” Fla. Stat. §90.5015 (1)(a) (emphasis added).

And a number of statutes use the term “*employed by*” without further definition. See, e.g., Maryland, Md. Code Ann. [Cts. & Jud. Proc.] §9-1112(b); District of Columbia, D.C. Code Ann. §16-4701 (“any person who is or has been employed by the news media [also defined, see below]...”).

And More Flexible Terms

Other state provisions suggest less formality about the relationship.

- **Indiana**, for example, includes
any person connected with, or any person who has been connected with or employed by...as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news...
Ind. Code § 34-3-5-1. See also Montana, Mont. Code Ann. §§ 26-1-901 - 03.
- **New York** provides that a “professional journalist” covered by its shield law is:
(6) “Professional journalist” shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which

has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

N.Y. Civ. Rights Law § 79-h.

The statute also includes, however, “newscaster[s]” who are defined as: “a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.”

- **Ohio** includes encompassing terms such as “*engaged in the work of, or connected with*” in addition to “*employed by*” in its defining terms:

No person engaged in the work of, or connected with, or employed by any noncommercial educational or commercial radio broadcasting station, or any noncommercial educational or commercial television broadcasting station or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, or broadcasting news...

Ohio Rev. Code Ann. §§ 2739.04, 2739.12.

And similarly, with respect to the print side:

No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news ...

Ohio Rev. Code Ann. §§ 2739.04, 2739.12.

See also Oregon, Or. Rev. Stat. §44.520(1), (2); Pennsylvania, Pa. Stat. Ann. tit 42, §5942 (a); Kentucky, Ky. Rev. Stat. Ann. §421.100.

- **Oklahoma:** any person “*regularly engaged in,*” with those employed by included news organizations as being deemed to be “regularly engaged.” Okla. Stat. tit. 12 §2506 (A)(7). See also Georgia, Ga. Code Ann. §24-9-30 (“Any person, company, or other entity engaged in the gathering and dissemination of news for the

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Defining a Journalist: State Shield Statutes

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public..."); Arizona, Ariz. Rev Stat. §12-2214 ("person engaged in gathering, reporting, writing, editing, publishing or broadcasting news to the public" and which is related to those activities).

- **Michigan:** A reporter or other person *who is involved in the gathering or preparation of news for broadcast or publication...* Mich. Comp. Laws Ann. §767.5a.
 - **Alaska:** "reporter means a person *regularly engaged in the business of collecting or writing news for publication, or presentation to the public, through a news organization; it includes persons who were reporters at the time of the communication, though not at the time of the claim of privilege.*" Alaska Stat. §§ 09.25.300 - .390.
 - Also **New Jersey:** " a person *engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting compiling editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated...*" N.J. Stat. Ann. §§ 2A:84A-21-21.9, 2A:84A-29.
 - And **Nebraska**, which includes any person "*engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public,*" including individuals, partnerships, and other entities. See also, Minnesota, Minn. Stat. §595.023 ("directly engaged in").
 - And **Tennessee:** "A person *engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast...*" Tenn. Code Ann. §24.1.208 (a).
 - **Delaware** presents perhaps the broadest and least rigid formula for defining who is covered by its shield law and specifically includes "scholar[s], educator[s]" and "polemicist[s]":
- (2) "Information" means any oral, written or pictorial material and includes, but is not limited to, documents, electronic impulses, expressions of opinion, films, photographs, sounds records, and statistical data.
 - (3) "Reporter" means any journalist, scholar, educator, polemicist, or other individual who either:

a. At the time he obtained the information that is sought was earning his principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the patience of, obtaining or preparing information for dissemination with the aid of facilities for the mass production of words, sounds, or images in a form available to the general public; or

b. Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.

- (4) "Person" means individual, corporation, business trust, estate, trust, partnership or association, governmental body, or any other legal entity....
- (7) "Within the scope of his professional activities" means any situation, including a social gathering, in which the reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which the reporter intentionally conceals from the source the fact that he is a reporter and does not include any situation in which the reporter is an eyewitness to or participant in an act involving physical violence or property damage.
Del. Code Ann. tit. 10, §§ 4320 - 26

- **Illinois** includes part-timers, defining "reporter" under its statute to mean "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis ..." Ill. Ann. Stat. ch. 110, para. 8-901 - 09.

What Media Are Included

What is equally varied is the definition of the media by which the reporter is defined.

- Along with Delaware, quoted above, the **District of Columbia** provision is one of the broader ones. The District of Columbia provides:

For the purpose of this chapter, the term "news

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Defining a Journalist: State Shield Statutes

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media” means:

- (1) Newspapers;
- (2) Magazines
- (3) Journals;
- (4) Press associations;
- (5) News agencies;
- (6) Wire services;
- (7) Radio;
- (8) Television; or

(9) Any printed, photographic, mechanical, or electronic means of disseminating news and information, to the public.

D.C. Code Ann. §§16-4701.

- Also **Maryland**, which, like the D.C. definition above, includes “any printed, photographic, mechanical, or electronic means of disseminating news and information to the public,” is one of the broader definitions of media encompassed by the shield laws.
- **Illinois’** definition is somewhat eclectic, perhaps reflecting what was on the minds of the legislators when they last looked at the provision:

735 Ill. Comp. Stat.

5/8-902 (b) “news medium” means any newspaper or other periodical issued at regular intervals and having a general circulation; a news service; a radio station; a television station; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing.”

- **Georgia** recognizes the traditional media by limiting the reach of their provision to those publishing through “a newspaper, book, magazine, or radio or television broadcast.”

Press associations are often, however, included even when the definition is a relatively limited one, weighted to traditional media (see, e.g., Indiana, Ind. Code §34-46-4-1; Louisiana, La. Rev. Stat. Ann tit. 45 §1451; Maryland Md. Code Ann. §9-112(a), Nevada Nev. Rev. Stat. §49.275).

While this note does not provide all of the terms or variations encompassed by the state shield laws, it is sufficient to show that the defining terms are different, and sometimes in important ways and certainly as between the

State Shield Statutes

Alabama – Ala. Code § 12-21-142

Alaska- Alaska Stat. §§ 09.25.300 - .390

Arizona - Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237

Arkansas - Ark. Stat. Ann. § 16-85-510

California - Cal. Const. Art 1, § 2; Cal. Evid. Code § 1070

Colorado - Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101 - 06

Delaware - Del. Code Ann. tit. 10, §§ 4320 - 26

District of Columbia - D.C. Cod Ann. §§16-4701 - 04

Florida - Fla. Stat. ch. 90.5015

Georgia - Ga. Code Ann. §24-9-30

Illinois – Ill. Ann. Stat. ch. 110, para. 8-901 - 09

Indiana - Ind. Code § 34-3-5-1

Kentucky - Ky. Rev. Stat. § 421.100

Louisiana - La. Rev. Stat. Ann. §§ 45:1451 - 59

Maryland - Md. Cts. & Jud. Proc. Code Ann. § 9-112

Michigan - Mich. Comp. Laws Ann. § 767.5a

Minnesota - Minn. Stat. Ann. §§ 595.021 - .025

Montana - Mont. Code Ann. §§ 26-1-901 - 03

Nebraska - Neb. Rev. Stat. Ann. §§ 20-144 - 47

Nevada - Nev. Rev. Stat. Ann. §§ 49.275, 49.385

New Mexico - N.M. Sup. Ct. R. of Evid. 11-514; N.M. Stat. Ann. § 38-6-7

New Jersey - N.J. Stat. Ann. §§ 2A:84A_21 _ 21.9, 2A:84A-29

New York - N.Y. Civ. Rights Law § 79_h

North Dakota - N.D. Cent. Code §31-01-06.2

Ohio - Ohio Rev. Code Ann. §§ 2739.04, 2739.12

Oklahoma - Okla. Stat. tit. 12, § 2506

Oregon - Or. Rev. Stat. §§ 44.510 - .540

Pennsylvania - 42 Pa. Cons. Stat. Ann. § 5942

Rhode Island – R.I. Gen. Laws §§ 9-19.1-1 - .1-3

South Carolina - S.C. Code Ann. § 19-11-100

Tennessee - Tenn. Code Ann. § 24-1-208

California Supreme Court Strikes Down Portion of State's "Son of Sam" Law

By Jonathan Bloom

In a long-awaited decision, the Supreme Court of California unanimously struck down California Civil Code section 2225(b)(1), a portion of California's "Son of Sam" law, as facially violative of the First Amendment and the liberty of speech clause of the California Constitution. *Keenan v. Superior Ct. of Los Angeles Cty.*, Slip Op. S080284 (Feb. 21, 2002). The Court held that section 2225(b)(1), which imposes an involuntary trust on proceeds from the sale of expressive materials that "include or are based on the story of a felony for which a convicted felon was convicted," was a content-based restriction of speech and not narrowly tailored to advance the state's compelling interest in assuring that the fruits of crime are used to compensate crime victims. While the Court found the statute constitutionally defective for its burdening of expression that is not related to exploitation of crime, it made clear that its ruling did not preclude crime victims from reaching assets derived from expressive materials that describe crime by means of generally applicable civil remedies.

Sinatra Jr. v. Kidnapper

The constitutional challenge to section 2225(b)(1) was mounted by Barry Keenan, who, in 1963, along with two co-conspirators, kidnapped Frank Sinatra, Jr. from a Nevada hotel room and held him captive in Los Angeles until his father paid a \$240,000 ransom. Keenan and his co-conspirators were subsequently apprehended, tried, convicted of felony offenses under California law, and Keenan spent five years in prison.

Sinatra, Jr.'s complaint, filed in July 1998, alleged that in January 1998 Keenan arranged to be interviewed by Peter Gilstrap for an article about the kidnapping that was published as "Snatching Sinatra" in a January 1998 issue of *New Times Los Angeles*. It was reported thereafter that Columbia Pictures had bought for up to \$1.5 million the rights to make a motion picture based on the *New Times* story and on the firsthand recollections of Keenan and others regarding their role

in the kidnapping.

In February 1998, Sinatra, Jr. made a demand of Columbia Pictures, pursuant to section 2225 of the California Civil Code, to withhold from the kidnappers, Gilstrap, and *New Times* any monies owing to them for the motion picture rights. Columbia Pictures refused to do so without a court order. The complaint alleged that all such monies were "proceeds", as defined by section 2225(a)(9), and "profits", as defined by section 2225(a)(10), and that they therefore were subject to being held by Columbia Pictures and *New Times* in an involuntary trust for Sinatra, Jr. as beneficiary.

In July 1998, Sinatra, Jr. moved for an injunction preventing Columbia Pictures and *New Times* (Keenan was not served with the motion) from paying "proceeds" and "profits" to any other defendant and requiring that all such payments instead be made to Sinatra, Jr. or to the Superior Court for distribution for the benefit of the victims of the kidnapping.

What "Proceeds" Were Covered

Under section 2225, "proceeds" paid or owing to a "convicted felon" from the sale of "books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind" are subject to an involuntary trust for the benefit of "beneficiaries" if the materials "include or are based on the story" of the felony for which the felon was convicted.

Covered felonies are those defined by "any California or United States statute" which were committed in California. "Story" is defined as "a depiction, portrayal, or reenactment of a felony" but does not include "a passing mention of the felony, as in a footnote or bibliography." The trust lasts for five years from the date of the conviction or from the payment of any "proceeds" to the felon, whichever is later. During the five-year period, beneficiaries can bring actions to recover against the funds remaining in the trust after restitution, penalty fines, and crime-related attorney's fees have been paid. After five years, any

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profits remaining in the trust that have not been claimed by a beneficiary are to be transferred to the Controller for allocation to a general Restitution Fund. Thus, the trust funds are not necessarily used solely to compensate victims of the convicted felon.

Preliminary Injunction in 1998

In August 1998, the trial court preliminarily enjoined Columbia Pictures from paying any monies to any of the kidnapers or their representatives in connection with the motion pictures rights to the story of the kidnapping. Keenan first appeared in the action in November 1998, when he filed a demurrer to the complaint and moved to dissolve the injunction on the grounds that it violated his federal and state free speech rights. Relying on *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), in which the U.S. Supreme Court struck down New York's original "Son of Sam" law, Keenan argued that section 2225 was both underinclusive, because it reached only expression-related income, and overinclusive, because it reached all expressive works by convicted felons that included anything more than "passing mention" of a crime for which the felon had been convicted.

(Keenan also contended that section 2225, which was passed 23 years after the kidnapping, violated the constitutional prohibition against *ex post facto* laws. The Supreme Court did not reach this issue.)

The trial court summarily concluded that section 2225 was not unconstitutional, overruled the demurrer, and denied the motion to dissolve the injunction.

OK'd by Appellate Court

In December 1998, Keenan filed a petition for a writ of mandate in the Court of Appeal, which stayed proceedings in the trial court. In May 1999, the Court of Appeal denied the petition, finding section 2225 to be constitutional.

Unlike the New York law considered in *Simon & Schuster*, the Court of Appeal held that section 2225 was not overly broad because it was limited to convicted

felons (the New York law also applied to persons who were accused of a crime or who had admitted crimes for which they were not prosecuted) and because it excluded materials that contained only a "passing mention" of the felony (the *Simon & Schuster* Court had identified as a flaw in the New York law its application to works in which a crime was mentioned only "tangentially or incidentally").

Reversed: Simon & Schuster Ruling's Key

The California Supreme Court granted Keenan's petition for review and reversed. The Court, in an opinion by Justice Baxter, began with a careful analysis of *Simon & Schuster*, in which the U.S. Supreme Court struck down New York Executive Law § 632-a.

That law required payment to the New York State Crime Victims Board of monies due under contracts relating to a "reenactment" of a covered crime or the expression of the thoughts or feelings about the crime. The Court held that the New York statute was a content-based regulation of speech, and hence presumptively invalid, because it singled out and burdened income derived from expressive activity based on its content.

Applying strict scrutiny review, the Court found that although New York did have a compelling interest in "ensuring that crime victims are compensated by those who harm them" and in "ensuring that criminals do not profit from their crimes," the state could not show that it had a greater interest in compensating victims with the profits of storytelling than with other assets. The Court concluded that the statute was not narrowly tailored to advance the state's interest in compensating victims from the fruits of the crime because it applied to "works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally" and because the statute applied even if the author was never accused or

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convicted of the crime.

To illustrate this overinclusiveness, the majority cited *The Autobiography of Malcolm X* and Thoreau's *Civil Disobedience* as examples of works involving discussion of criminal acts by the author that would be covered by the law but that do not "enable a criminal to profit from his crime while a victim remains uncompensated." Although Justice Blackmun, concurring, would have found the statute underinclusive for its limitation to speech-related income, the majority declined to so hold.

Following *Simon & Schuster*

The California court, following *Simon & Schuster*, rejected Sinatra, Jr.'s argument that section 2225(b)(1) was not a content-based regulation of speech because it merely imposed a financial penalty on speech. The Court then noted, and accepted as compelling, the state's interest in assuring that the fruits of crime be used to compensate crime victims.

With respect to narrow tailoring, the Court, like the majority in *Simon & Schuster*, declined to rule on whether the statute was underinclusive in focusing on speech-related income as distinguished from all other assets of the convicted felon. In this regard, the Court noted that, unlike the New York law, section 2225(b)(2) of the California law, relating to "profits" from the crime, applies to profits from sales of memorabilia, property, things or rights the value of which is enhanced by the notoriety of the crime — in other words, to non-storytelling income. The Court pointed out, however, that the fact that the law reached fruits of crime beyond those derived from storytelling would bear upon whether the law was underinclusive, not on whether it was overinclusive. The Court further stated that it did not

read *Simon & Schuster* "to mean that a statute can escape examination as a content-based regulation of speech merely by targeting, in separate provisions, nonspeech income as well."

Law Found Overinclusive

With respect to 2225(b)(1) — the "proceeds" provision — the Court concluded that, like the original New York law, it was overinclusive in that it

penalizes the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. Even if the fruits of crime may include royalties from exploiting the story of one's crimes, section 2225(b)(1) does not confine itself

to such income. Instead, it confiscates *all* a convicted felon's proceeds from speech or expression on *any* theme or subject which includes the story of the felony, except by mere

passing mention. By this financial disincentive, section 2225(b)(1), like its New York counterpart, discourages the creation and dissemination of a wide range of ideas and expressive works which have little or not relationship to the exploitation of one's criminal misdeeds.

The court rejected Sinatra, Jr.'s arguments that section 2225(b)(1) was narrower than the New York law and thus not overinclusive. In this respect, Sinatra, Jr. argued that section 2225(b)(1) only applies to persons actually found guilty of felonies committed in the state. He also relied upon the exemption for works that contain only "passing mention of the felony, as in a footnote or bibliography."

In response, the Court observed that the *Simon & Schuster* Court had merely *illustrated* the overbreadth of

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The court rejected Sinatra, Jr.'s arguments that section 2225(b)(1) was narrower than the New York law [in *Simon & Schuster v. Members of N.Y. Crime Victims BD.*] and thus not overinclusive.

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the New York law by noting its application to works by those who had never been convicted of a crime and to works containing only tangential or incidental mention of past crimes; the Court did not suggest, the *Keenan* court explained, that a statute narrowed in these two respects necessarily would pass constitutional muster.

Instead, the Court posited that the Supreme Court was concerned with the fact that in order to serve the "relatively narrow interest" of compensating crime victims from the fruits of crime, the New York statute targeted, and confiscated all income from (and thus "unduly discouraged"), "a wide range of expressive works containing protected speech on themes and subjects of legitimate interest" simply because reference to past crimes was included.

The *Keenan* court pointed out the many contexts, not directly related to exploitation of the crime, in which one might mention past felonies, such as critically evaluating one's encounter with the criminal justice system; documenting scandal and corruption in government and business; describing the conditions of prison life, or providing an inside look at the criminal underworld. (As *amici curiae* Association of American Publishers, Inc. et al. pointed out, there is a compelling public interest in access to information and perspectives about the criminal justice system, including accounts by convicted criminals.) Mention of crime in these contexts, the Court noted, has "little or nothing to do with exploiting one's crime for profit."

In rejecting the argument that the "passing mention" exemption cured the overbreadth problem, the Court observed that *Simon & Schuster* did not suggest that a statute that confiscates all profits from works that make *substantial* mention of the author's past crimes would be constitutional. Such a statute, the *Keenan* court stated, "still sweeps within its ambit a wide range of protected speech, discourages the

discussion of crime in nonexploitative contexts, and does so by means not narrowly focused on recouping profits from the *fruits of crime*" (emphasis in original). Accordingly, the Court concluded that section 2225(b) (1) was not narrowly tailored and hence was facially invalid under both the First Amendment to the U.S. Constitution and the liberty of speech clause of the California Constitution.

Limits on Cal. Ruling

In a footnote, the Court stressed the limitations of its holding.

- First, it stated that it was not passing on whether a more narrowly drafted statute could cure the constitutional overbreadth problem.
- Second, it stated that nothing in its opinion "precludes a crime victim, as a judgment creditor, from reaching a convicted felon's assets, including those derived from expressive materials that describe the crime, by generally applicable remedies for the enforcement and satisfaction of judgments."
- Third, it stated that it did not intend to preclude legislative efforts, not directly related to the content of speech, to ensure that a convicted felon's income and assets — "including those derived from storytelling about the crimes" — remain available to compensate victims of the felon's crimes.

Indeed, victim's rights groups have already indicated that they will push for legislation along those lines. They will likely be encouraged in that effort by Justice Brown's concurring opinion, which observes that "[a] properly drafted statute can separate criminals from profits derived from their crimes while complying with the First Amendment."

As Justice Brown put it:

Mr. Keenan has every right to tell his story. That does not mean the First Amendment guarantees

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The Court stated that it was not passing on whether a more narrowly drafted statute could cure the constitutional overbreadth problem.

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he can keep the money.

The concurrence points out that there is no constitutional bar to seizing a criminal's assets to compensate his victims and that a law not limited to "storytelling" assets would "likely survive review" because it would not be content-based. Limiting a law's scope to storytelling is "the Achilles' heel of a Son of Sam provision," Justice Brown wrote, because while there is "a compelling interest in depriving criminals of their profits," there is "little if any interest in limiting such deprivation to the proceeds of the wrongdoer's storytelling."

Issues Left Open

As noted, *Keenan* leaves open the question of whether section 2225(b)(2), which authorizes seizure of "all income from anything sold or transferred by the felon . . . including any right, the value of which thing or right is enhanced by the notoriety gained from the commission of a felony," is constitutional. The concurring opinion observes that section 2225(b)(2) — which, the majority opinion notes, is severable — is "arguably" content-neutral and might therefore be subject to, and survive, intermediate scrutiny.

Because many existing and proposed state Son of Sam laws are closer to section 2225(b)(2) than to section 2225(b)(1), it will be interesting to see how influential *Keenan* is when constitutional challenges to those laws are presented. It can be (and has been) argued, certainly, that another "Son of Sam" variant, in which profits derived from "unique knowledge" of a covered crime are confiscated (as in Senate Bill No. 1939 currently being considered in Massachusetts), is still content-based and thus should not be subject to the more deferential review applicable to content-neutral laws. Moreover, it may well be that even in cases where the applicable "Son of Sam" law is not vulnerable to a facial challenge, as-applied challenges will be mounted that will rely upon many of the same free speech principles articulated in *Simon & Schuster* and *Keenan*.

Court Rules That Proposed Son of Sam Law Would Violate the First Amendment

Massachusetts High Court Finds Bill is a Content-Based Regulation of Speech

By Joseph D. Steinfield and Zick Rubin

For the second time in two months the highest court of a state has held a "Son of Sam" law unconstitutional. On February 21, 2002, the California Supreme Court held that that state's "Son of Sam" statute "facially violates constitutional protections of speech by appropriating, as compensation for crime victims, all monies due to a convicted felon from expressive materials that include the story of the crime." *Keenan v. Superior Court*, 27 Cal.4th 413, 40 P.3d 718 (2002). Now, a proposed Massachusetts version of such a law has bit the dust under the unusual Massachusetts advisory opinion procedure.

The Massachusetts Constitution (Part 2, c. 3, Art. 2) authorizes the legislature, as well as the governor, to require the justices of the Supreme Judicial Court (SJC) to render advisory opinions "upon important questions or law." In September 2001, the state senate asked the SJC to review Senate Bill 1939, entitled "An Act Relative to Profits From Crime" — legislation which, if enacted, would have obligated a "contracting party" to pay over to the Commonwealth, for the benefit of "victims," any "proceeds related to a crime."

The court solicited amicus briefs from interested parties. A group of media organizations — the Association of American Publishers, the Authors Guild, Magazine Publishers of America, the Motion Picture Association of America, and the Newspaper Association of America — submitted a brief in opposition to the bill. Among the organizations supporting the bill was the Matty Eappen Foundation, named for the victim of Louise Woodward, the Massachusetts nanny convicted of involuntary manslaughter in 1997. In an opinion sensitive to the interests of authors and publishers, the SJC has advised that the proposed law would violate the First Amendment and the Massachusetts Constitution. *Opinion of the Justices to the Senate*, SJC-08634 (March 14, 2002).

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Court Rules That Proposed Son of Sam Law Would Violate the First Amendment

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This was not the first “Son of Sam” effort in Massachusetts. The Commonwealth’s earlier Son of Sam law was repealed in the wake of *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991), which struck down the New York Son of Sam law. The Massachusetts bill, filed and reported favorably out of committee following reports that Louise Woodward intended to sell her story, was cast in ways that attempted to circumvent the constitutional problems identified in *Simon & Schuster*. Among its key provisions were the following:

- The bill applied to any “defendant,” defined as “a person who is the subject of pending criminal charges or has been convicted of a crime or has voluntarily admitted the commission of a crime.” A “contracting party” was a person or entity that agrees to pay a defendant consideration which constitute “proceeds related to a crime.” Such “proceeds” are defined as any assets “obtained through the use of unique knowledge or notoriety acquired by means and in consequence of the commission of a crime.” (The drafters of the Massachusetts bill hoped that this broad definition, avoiding words like “movie,” “book,” or “expression,” would insulate the bill from First Amendment attack.)
- Any “contracting party” would have been required to submit a copy of the contract to the Attorney General’s “division of victim compensation” if the consideration to be paid, presumably including advances and royalties on a book or movie contract, would constitute “proceeds related to a crime.”
- The Attorney General would then determine whether the proceeds under the contract were “substantially related to a crime.” If so, the contracting party would be required to turn the money over to the state, to be held in escrow for the benefit of the victims, or post a bond. (The drafters hoped that this “substantially related” test would address the overbreadth attack that was successfully made against the original New York law.) Even if

no one made a claim to the escrowed money, only half would be returned; the other half would be kept in the victim compensation fund.

The absence of words like “speech” or “expression” did not deter the SJC, which recognized that the bill was a content-based regulation of speech, burdening “works that describe, reenact, or otherwise are related to the commission of a crime.” Because the bill calls for the escrowing of author advances, the author might not be able to support him or herself while preparing the work. And “the prospect of having all proceeds held in escrow ... with at best uncertain prospects as to how much of it (if any) will ever be paid, makes it very unlikely that a defendant-author would ever agree to undertake such a project,” the court ruled.

The statutory burden would fall not only on authors and publishers but on society as a whole, the court said. “Although it is impossible to measure the cost of works that would never come to fruition because of the multiple deterrent effects of the bill, ‘we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne.’” (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 470 (1995)).

The First Amendment would not be implicated by regulation of nonexpressive activity such as the sale of “memorabilia” related to crime – an amicus brief in support of the bill cited “voodoo dolls woven by Charles Manson” as an example. The court concluded, however, that the proposed regulation of expression could not be severed from the statute without undermining the bill’s integrity. “The proposed bill, sweeping broadly across the publishing and entertainment industries and interfering with an entire category of speech, is not narrowly tailored,” the court wrote. “There are other less cumbersome and more precise methods of compensating victims and preventing notorious criminals from obtaining a financial windfall from their notoriety.”

The court did not limit its decision to the problem of overbreadth. It also held that “in its practical effect, [the

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Court Rules That Proposed Son of Sam Law Would Violate the First Amendment

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bill] would operate as a prior restraint on speech, while lacking the procedural protections required” under *Freedman v. Maryland*, 380 U.S. 51 (1965). On this alternative ground the court cited with approval the decision of the Maryland Court of Appeals in *Curran v. Price*, 334 Md. 149, 167-70 (1994).

In a final footnote, quoting the California Supreme Court’s recent opinion in *Keenan v. Superior Court*, the court left open the possibility of dealing with this subject in some other way. “We do not suggest that legislation on this subject is automatically violative of the First Amendment.” This may encourage Massachusetts legislators to try yet again, but such legislation would probably have to target convicted felons, rather than “contracting parties” such as media and film companies. Legislation regarding restitution orders and conditions of probation in criminal cases, procedures already upheld in Massachusetts, would likely be much less objectionable to authors, publishers, and filmmakers.

Joseph D. Steinfield and Zick Rubin are members of the Media and Entertainment Group at Hill & Barlow in Boston. Together with their colleagues John Taylor Williams, Kristen Carpenter, and Rebecca Hulse, they authored the amicus brief on behalf of the Association of American Publishers, et al.

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Media on Trial in Criminal Court

Porn Publisher Convicted, Shock Jock Acquitted in Criminal Trials

In separate criminal trials, a Florida radio host was acquitted of animal cruelty after he broadcast the killing of a boar, while in New York the publisher of a pornographic magazine was convicted on misdemeanor charges of harassment after he insulted his former secretary in his magazine, on his cable television access program, and in phone calls and mailings to her home.

Screw Publisher Faces Sentence

In the New York case, *Screw* magazine publisher Alvin Goldstein was convicted on six of 12 counts of second-degree harassment stemming from his treatment of his former secretary, Jennifer Lozinski. Several of the harassment counts involved content of Goldstein’s magazine and cable show. *People v. Goldstein*, No. 2001-KN-052112 (N.Y. Crim. Ct., Kings County jury verdict Feb. 27, 2002).

Lozinski testified that Goldstein became upset with her after she reserved a rental car for him, but did not arrange for him to receive VIP treatment. Goldstein claimed that Lozinski stole petty cash and damaged computer files when she quit after 11 weeks at the job.

During the three-day trial, Goldstein presented character witnesses including comedian Gilbert Gottfried, porn star Ron Jeremy, and “Munsters” star and erstwhile political candidate “Grandpa” Al Lewis. He also testified in his own defense – reportedly against his lawyer’s advice – and admitted making vulgar and threatening comments in phone calls to Lozinski. He also mailed to Lozinski’s home a videotape of his public access cable program and a *Screw* editorial, both of which insulted her by name and gave her home address.

Lozinski was not the only target of Goldstein’s vitriol; after he was indicted, *Screw* published an photograph of a naked woman with the head of Brooklyn District Attorney Joe Hynes, along with an article urging terrorists to fly a plane into D.A.’s office. When asked whether he had written the article during trial, Goldstein shouted that the

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Media on Trial in Criminal Court

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editorial was “protected speech.” “That’s words, not actions!” he yelled. “This is speech! This is speech!” As the tirade continued, Supreme Court Judge Daniel Chin held Goldstein in contempt and ordered that he be handcuffed until he calmed down, after which the judge rescinded the contempt citation.

After two days of deliberation, the six-member jury announced that it was deadlocked and Judge Chin prepared to declare a mistrial. After the prosecutor objected, the jury was told to continue and then convicted Goldstein on charges stemming from the phone calls, the mailed editorial, and the cable show.

He could be face up to a year imprisonment when he is sentenced on April 16.

After the verdict, Goldstein said that he would appeal on the grounds that New York’s harassment statute was unconstitutionally overbroad.

“If I called [Osama] bin Laden and said, ‘You’re low-life scum and I wish you die from cancer,’ I would be guilty under this statute,” Goldstein said. “New Yorkers are the most nasty, miserable SOBs in the world. Based on this statute, all we can say is, ‘Have a nice day.’”

The case was prosecuted by Assistant District Attorney David Cetron. Solo practitioners Charles C. DeStafano of Staten Island and Fredy H. Kaplan of Brooklyn represented Goldstein.

Goldstein is also reportedly facing a civil suit from another former secretary, Kelly Hogan. In her \$45 million suit alleging libel and intentional infliction of emotional distress, Hogan alleges that Goldstein ridiculed her and mocked her miscarriage in his magazine and on his cable show, and sent the magazine article to her parents.

Hogan’s suit apparently claims that Goldstein became upset with her when she quit her job with Goldstein and took one with Goldstein’s friend Lyle Stuart, publisher of Barricade Books. Barricade Books has had its own First Amendment battles; last year, the company won a reversal of a \$3.1 libel verdict in a suit brought by casino mogul Steven Wynn. *See Wynn v.*

Smith, 16 P.3d 424, 29 Media L. Rep. 1361 (Nev. 2001), *reh’g denied* (Nev. Sept. 20, 2001). A new trial has not yet been scheduled. *Wynn v. Smith*, No. 95-A-348109-C (hearing on plaintiff’s motion to set trial held Feb. 10, 2002).

Alan Rich of Manhattan is representing the former secretary in the civil case.

Boar Killing No Crime, Jury Holds

The charges against radio host Todd A. Clem, who goes by the name “Bubba the Love Sponge,” stemmed from a Feb. 27, 2001 broadcast on WXTB-FM in St. Petersburg, Fla. which featured a “Road Kill Barbeque,” in which he invited listeners to bring animal carcasses. *State v. Brooks*, No 01-04900 (Fla. Cir. Ct., 13th Jud. Cir. jury verdict Feb. 28, 2002).

Listener Paul Lauterberg brought a wild boar in cage. After three hours, listener Daniel Brooks held down the boar as Lauterberg castrated and slit the throat of the animal in the parking lot, and as program producer Brent Hatley described the events via a cell phone to Clem in the station’s studios. Clem broadcast Hatley’s descriptions while playing recorded sounds of pigs squealing, implying that the broadcast was coming directly from the parking lot.

The broadcast led animal rights groups to call for an advertiser boycott of the station, and to demand Clem’s firing. They also filed complaints with the Tampa police and the Federal Communications Commission.

In response, the station suspended Clem for 15 days without pay in mid-March 2001.

Local prosecutors charged Clem, Hatley, Lauterberg and Brooks with animal cruelty, a third degree felony with a maximum sentence of five years in prison and/or a fine of up to \$10,000. *See Fla. Stat. § 828.12* (2001). Wild boars are considered a nuisance in many parts of Florida, and it is legal to kill them.

Clem turned himself in to authorities on March 29, 2001, and was released on \$10,000 bond. Hatley and

“New Yorkers are the most nasty, miserable SOBs in the world. Based on this statute, all we can say is, ‘Have a nice day.’”

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Media on Trial in Criminal Court

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Brooks turned themselves in the previous evening.

During discovery, prosecutors obtained a videotape of the killing, made by Clem's production company with the intention of offering it on a pay-per-view web site. The video showed Lauterberg saying that he hoped that Clem would reward him for bringing the boar, so that he could buy a nice birthday gift for his wife; it also showed him eating parts of the animal raw.

The video also showed other antics, including a man drinking live goldfish and the crowd voting on whether to kill the boar, which they named Andy.

In response to media requests, and over defense objections, Hillsborough County Circuit Judge Herbert made the video public in June.

In January 2002, Circuit Judge Ronald Ficarrota ruled that prosecutors could use the video. But on the eve of trial the following months, Judge Ficarrota limited their use of an audiotape of the broadcast.

At trial, the prosecution's case consisted solely of playing the videotape and the authorized portions of the audiotape, and took less than an hour to present. The defense put Clem on the stand, who emphasized his charitable and community activities and said that the purpose behind the "Roadkill Barbeque" was "to display where we get our meat and how we get it." A veterinarian and a former state game official then both testified that the method used to kill the boar was routine. Video of the entire trial is available online at www.voyeurcourt.com.

The six-person jury acquitted Clem and the other defendants after an hour of deliberation. Jurors told reporters that they had not been given enough evidence to conclude that the killing was cruel or inflicted unnecessary pain.

After the verdict, Clem vowed to sponsor a voter registration drive to oust Thirteenth Judicial Circuit State Attorney Mark Ober.

Clem was represented by Norman Cannella Sr., of counsel to Rywant, Alvarez, Jones, Russo & Guyton, P.A. in Tampa; producer Hatley was represented by J. Kevin Hayslett of Carlson & Meissner in Clearwater, Fla. Prosecuting Attorney Darrell Dirks prosecuted the case.

The complaint to the Federal Communications Commission regarding the broadcast was denied. Letter to

Peter Wood, People for the Ethical Treatment of Animals, Re: EB-01-1H-0089 (March 21, 2002). John Burgett of Wiley, Rein & Fielding LLP in Washington, D.C. handled the complaint for WXTB licensee Citicasters Company, a division of Clear Channel Communications, Inc.

UPDATE: Troubles for Reporters

Allegations of trespass have been a recent problem for reporters and photographers in New York, Pennsylvania and Florida.

In February, a New York trial judge denied freelance photographer Stephen Ferry's request for the return 28 rolls of film confiscated when he was arrested for, among other things, trespass and criminal impersonation when he went to the site of World Trade Center collapse dressed in a firefighter's gear. When he was arrested, Ferry was on assignment for *Time*. *People v. Ferry*, No. 06373-2001 (N.Y. Sup. Ct., N.Y. County).

According to reports, Ferry put on the firefighter's gear to protect himself from the fire and smoke. Ferry has also said that he was unaware at the time that so many firefighters had died on Sept. 11, and that he would not have worn the gear had he known that.

On Feb. 13, New York Supreme Court Judge Micki A. Scherer ruled that the film was seized as arrest evidence. Moreover, because the photographs were not the subject of the criminal charges, Judge Scherer felt the First Amendment was not implicated. Ferry had argued that retention of the film by the prosecutor's office constituted a prior restraint.

Though Ferry's camera was also confiscated, it has been returned.

In addition to trespass and criminal impersonation, Ferry was also arrested for possession of a forged instrument after he gave police an altered New York driver's licence as identification. Ferry has said he lost

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UPDATE: Troubles for Reporters

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his license while on assignment in Colombia and had altered the expiration date on an old license so that he could use it as identification outside the country while waiting for a replacement license.

Ferry is represented by Jack Litman of Litman, Asche & Gioiella in New York.

In York, Pa., a reporter was charged with criminal trespass after he refused to leave a non-profit agency's building on March 5. Andrew Broman, a reporter for the *York Daily Record*, refused to leave the offices of the Housing Council of York County because workers would not answer his questions about the agency's spending habits with government money. Broman was arrested and later released on his own recognizance. A hearing is scheduled for April 10.

Finally, in Florida, the *Naples Daily News* filed a police complaint on March 14 accusing a man of assault after a reporter and photographer claimed they were accosted and verbally threatened while covering a post-election party.

On March 12, reporter Ilene Stackel and photographer Erik Kellar were covering the post-election party for Marco Island City Council candidate Jean Merritt. According to reports, a party guest blamed the press and "unfair press coverage" for Merritt's defeat. Several guests began yelling at Stackel, and Joseph Christy, the party's host, yelled at her, "I hope you get run over by a truck." When Christy began to approach the reporter, Kellar stepped in. Christy then shoved the photographer.

Both Stackel and Kellar had received prior permission from Merritt and another city councilman to cover the party. They had been at the party for approximately 90 minutes before the incident. They left the party immediately thereafter. Christy later denied inviting Stackel and Kellar, accusing them of trespass.

The State Attorney's office will determine if assault charges need to be filed against Christy.

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Court Grants Media Intervenors' Motion for Access to Deposition Transcripts, Videotapes in Microsoft Antitrust Case

By Audrey Billingsley and Jay Ward Brown

On Feb. 24, 2002, the United States District Court for the District of Columbia held that the press and public are entitled to redacted transcripts and videotape recordings of depositions of four former and current high-level executives of Microsoft and its competitors, notwithstanding that the deposition materials have not been filed with the court. The ruling leaves open the possibility that more transcripts and recordings may be made available upon specific request.

Background

The context of this decision stretches back to May 1998, when the United States and 20 states sued Microsoft for alleged antitrust violations in two separate actions. After the federal and state cases were consolidated, The New York Times Company and several other news organizations moved for leave to intervene to enforce a right of access to depositions pursuant to the Publicity in Taking Evidence Act, 15 U.S.C. § 30. That statute requires that depositions taken for use in civil antitrust actions brought by the United States be open to the public to the same extent as trials in a courtroom. Judge Thomas Penfield Jackson, who was then the trial judge, granted the motion, and, after Microsoft's unsuccessful appeal of his order, established ground rules for public and press attendance at depositions. In addition, consistent with the appellate court's ruling, Judge Jackson ordered the release of transcripts and videotapes of depositions taken while the access order was on appeal.

Judge Jackson thereafter ruled that Microsoft had violated federal and state antitrust laws and ordered its division into two distinct companies. The Court of Appeals affirmed the finding of liability, but remanded the cases for additional proceedings regarding an appropriate remedy. On remand, the case was assigned to Judge Kollar-Kotelly, who set an expedited discovery period for a remedy hearing. The United States and Microsoft, however, reached a tentative settlement, in which several of the plaintiff states soon joined.

In light of the proposed settlement, proceedings in the federal action were stayed, but the non-settling states and Microsoft were ordered to prepare for the remedy hearing on an expedited basis, which required the parties to schedule some 60 depositions in the states' case in late January and February. On Jan. 2, 2002, *The New York Times* and *Washington Post* notified the parties that their reporters planned to attend certain of the scheduled depositions. In response, Microsoft filed a motion to vacate the court's prior orders entered pursuant to 15 U.S.C. § 30 that required public and press access to depositions. Microsoft argued that, because the depositions to be taken were for use in the action brought by the states, and not an action brought by the United States, Section 30 did not apply.

Motion to Intervene

The Associated Press, Bloomberg News, CNN, Dow Jones & Company, Inc., the *Los Angeles Times*, The New York Times Company, the *Washington Post*, and *USA Today* intervened to oppose Microsoft's motion. They argued that Section 30 requires only that a deposition be one "for use" in a suit brought by the United States to fall within the terms of the statute. Because the two actions remained consolidated for all purposes, and because the court had not approved the settlement of the federal action, the media intervenors argued that the depositions could well be used in the federal action, if that action resumed.

The media intervenors also argued that, even if Section 30 technically did not apply, Microsoft was not entitled to an order excluding the public and the press from depositions except upon a showing of "good cause" pursuant to Fed. R. Civ. P. 26(c). In this case, they argued, the public policy of requiring openness in antitrust proceedings involving the United States, embodied in Section 30, weighed so heavily against a finding of good cause that Microsoft could not carry its burden of demonstrating that it was entitled to such an order. Moreover, intervenors noted, attendance of the

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Court Grants Media Intervenors' Motion for Access to Deposition Transcripts, Videotapes in Microsoft Antitrust Case

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public and press at depositions has been authorized in other newsworthy cases such as these. *See, e.g., Avirgan v. Hull*, 118 F.R.D. 252, 253 (D.D.C. 1987); *Estate of Rosenbaum v. New York City*, 21 Media L. Rep. (BNA) 1987, 1989 (E.D.N.Y. 1993); *In re Texaco Inc.*, 84 B.R. 14, 17-18 (S.D.N.Y. 1988); *United States v. Didrichsons*, 15 Media L. Rep. (BNA) 1869 (W.D. Wash. 1988); *Tyson v. Cayton*, 88 Civ. 8398 (S.D.N.Y. 1989).

On Jan. 28, 2002, the court granted Microsoft's motion, vacating the prior orders requiring access insofar as they applied to the action brought by the states. Although the court denied the media intervenors' motion to the extent it relied on a right of access under Section 30, it expressly questioned whether Microsoft would be entitled to a blanket order excluding the public and the press from all depositions to be taken in the case pursuant to Rule 26.

Under Rule 26(c), "where an individual or entity from whom discovery is sought wishes to exclude persons from a deposition, that individual or entity must obtain a protective order requiring such exclusion upon a finding of good cause." 01/28/02 Mem. Op. at 9. Microsoft, however, had not asked the court to exclude the public and the court declined to do so *sua sponte*, confirming instead that the existing protective order "provides for exclusion of the public . . . only when the answer to a question at deposition will result in the disclosure of 'Confidential Information' or 'Highly Confidential Information,'" as defined in the protective order. *Id.* at 9-10.

During a subsequent hearing, the court again emphasized that the parties "can't de facto exclude [reporters] by setting it up in such a way that the press can't be present without actually getting a court order to that effect." Transcript of 01/31/02 Hearing at 6:18-21.

On Feb. 11, 2002, in light of the court's recognition that the parties could not "de facto" exclude the press from depositions and after Microsoft had rejected all efforts at compromise, the media organizations filed an affirmative motion seeking an order requiring that a pool of three reporters be permitted to attend five specific depositions. To the extent that some or all of those depositions were

completed prior to the court's ruling on their motion, the media organizations requested copies of the videotapes of the depositions. In addition, they sought access to transcripts of all post-remand depositions, redacted to remove confidential information covered by the protective order.

Microsoft responded that the motion for live access was moot because, in the interval, four of the five depositions had been completed, while the fifth had not been noticed. Even if the motion were not moot, Microsoft argued, allowing the press to attend the depositions would eviscerate the protections embodied in the protective order. Microsoft dismissed as impractical any model for access based on Judge Jackson's orders under 15 U.S.C. § 30, because that statute, unlike Rule 26(c), required depositions to "be open to the public as freely as are trials in open court." Microsoft's Opp. at 4 (quoting 15 U.S.C. § 30).

Motion Granted

Judge Kollar-Kotelly granted the media intervenors' motion for access to transcripts and videotapes of the specific depositions to which they had sought live access, albeit in redacted form - notwithstanding that these discovery materials have not been filed with the court. Rule 26(c)'s good cause requirement "appears to balance the public's interest in open proceedings against an individual's private interest in avoiding 'annoyance, embarrassment, oppression, or undue burden or expense,'" 02/24/02 Mem. Op. at 6 (citation omitted), she noted.

Microsoft, however, had failed to "offer any explanation as to why provision of the transcripts and video recordings from these four depositions would be so troublesome or vexatious that the circumstances justify the denial of the Media's request," *id.* at 8, and, indeed, Microsoft had not even argued that their release "would in any way burden, oppress, or embarrass the parties to the litigation or third parties who were

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Court Grants Media Intervenors' Motion for Access to Deposition Transcripts, Videotapes in Microsoft Antitrust Case

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deposed," *id.* at 7-8. "Adhering to the balance established in Rule 26(c)," she ruled that Microsoft had failed to make the showing necessary to exclude the press from access to the specified deposition transcripts and videotapes.

By the same token, although the media intervenors' request to attend already-completed depositions was moot, as to the fifth, then-unnoticed deposition, Judge Kollar-Kotelly ruled "that such access would be annoying, oppressive, and unduly burdensome" because of the likelihood that confidential information would be disclosed throughout. *Id.* at 6-7 n.4. "[S]eparating confidential information from public information is not a simple task," she observed, "and consequently, 'information may be revealed inadvertently that should properly remain secret.'" *Id.* (citation omitted). The existing protective order did not provide a workable solution, she added, because

the procedure of requiring press representatives to leave when a particular question or line of questioning is likely to elicit confidential information comes 'at great cost to the continuity of questioning that counsel is entitled to maintain for effectiveness.'

Id. (citation omitted).

Finally, the court held that the media intervenors "are not entitled to access transcripts of *all* the depositions taken in this case," 02/24/02 Mem. Op. at 2 (emphasis added), at least where they "d[id] not attempt to differentiate among the deponents, nor to identify the particular need for the transcripts of each and every deposition taken in this case," *id.* at 9. Concluding that, "[b]eyond an assertion of general public interest in the litigation, the Media have not provided any argument to explain why access to the transcripts of dozens of depositions is appropriate," *id.* at 9, the court "decline[d] to create new law by granting the Media's extensive request for transcripts of all of the depositions taken in this case," *id.* at 10. This portion of the decision, however, does not appear to preclude news organizations from filing a renewed motion for access to additional deposition transcripts and videotapes if they can show such a "particular need" for the testimony of specific witnesses.

At bottom, although she professed not to be making new law, Judge Kollar-Kotelly joined a rather small group of federal judges who have ordered that the public be given access to unfiled deposition transcripts. And, while she rejected the argument that members of the press have a right of live access to depositions in particularly newsworthy cases where those depositions involve substantial testimony on matters properly subject to a Rule 26(c) protective order - in this case, because of the possible disclosure of trade secrets -- her ruling that there is, in effect, a qualified right of access to unfiled deposition transcripts at least in certain circumstances should prove helpful in the future. The parties have indicated that they do not intend to appeal the decision.

Lead counsel for the media intervenors were Lee Levine and Jay Ward Brown of Levine Sullivan & Koch, LLP. Microsoft's lead counsel is John Warden of Sullivan & Cromwell. The non-settling states are represented by Brendan Sullivan & Steven Kuney of Williams & Connolly. Audrey Billingsley is an associate at Levine Sullivan & Koch.

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UPDATE: Most Reagan Papers Released

More than 14 months after they were initially due to be released, on March 15 the Ronald Reagan Presidential Library and Museum in Simi Valley, Cal., released 58,850 pages of internal documents from the Reagan Administration after their release was approved by the current Bush Administration.

The latest release came 10 weeks after 8,000 pages were released on Jan. 3 and left 150 pages of material which has not been disclosed.

All of the material – which consists of confidential communications between Reagan and his advisors – were originally due to become public on Jan. 20, 2001, as provided for by the the Presidential Records Act of 1978, Pub. L. No. 95-961, 92 Stat. 2523-27, codified as amended at 44 U.S.C. §§ 2201-7.

Reagan, whose records were the first subject to the Act, issued an executive order two days before he left office giving a sitting president 30 days to either request a delay in the release of the records, or order that the records be withheld indefinitely under a claim of executive privilege. *See* Exec. Order 12667, 54 Fed. Reg. 3403 (1989). President George W. Bush requested such delays three times, before he issued his own executive order which gave both current and former presidents 90 days to review the material, and to block disclosure of the documents for indeterminate periods. *See* Exec. Order 13233, 66 Fed. Reg. 56025 (2001).

The released Reagan documents were all reviewed by Bush Administration officials and approved for disclosure under this process. The remaining 150 pages involve “deliberations about potential appointees to public office” and are still under review because of the “sensitive constitutional, legal and privacy ramifications” if disclosed, according to a letter from White House Counsel Alberto Gonzales to the library.

Besides the 150 remaining pages of Reagan documents, the White House is also reviewing tens of thousands of pages from the office of Vice President George H.W. Bush, the current president’s father.

Meanwhile, a bill has been proposed in Congress to reverse Bush’s order, and a lawsuit filed by coalition of historical associations and public interest groups challenging the order continues.

The bill, which has not yet been introduced, would still allow either the sitting or former president to claim executive

privilege as the basis for withholding documents of a past administration. But it would require that such claims be in writing and that they cite specific grounds. A request by a former president would have to be approved by a court within 20 days, or the papers would be released; a claim by the sitting president would prevent the records from being disclosed until the president or a court orders their release. Rep. Stephen Horn (R-Cal.), Chairman of the House Subcommittee on Government Efficiency and Financial Management, is currently seeking co-sponsors before introducing the bill.

In the civil suit, on March 12 Judge Colleen Kollar-Kotelly accepted an amicus brief filed on behalf of groups including the American Society of Newspapers, the Society of Professional Journalists, and the Authors Guild. *See American Historical Ass’n v. Nat’l Archives and Records Admin.*, No. 01-CV-02447 (D.D.C. filed Nov. 28, 2001). The plaintiffs are represented by Scott L. Nelson of the Public Citizen Litigation Group. The amicus brief was prepared by Adam P. Stochak of Weil, Gotshal & Manges, L.L.P. in Washington.

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California Congressman Quietly Rebuffs Ashcroft's FOIA Stance

Congressman Henry Waxman (D-Los Angeles) sought and got a rebuke to Attorney General John Ashcroft's Freedom of Information Act policy.

The action may have no legal effect, but represents a symbolic (and bipartisan) Congressional slap at Ashcroft's directive last fall encouraging federal agencies' FOIA officers to, in effect, search for and use any legal authority for denying access to records under the federal law.

Every few years the House Government Reform Committee, with oversight on FOIA issues, publishes an update of its popular "A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records" (current 1999 edition found at bottom of page at <http://www.access.gpo.gov/congress/house/house07cr106.html>).

On February 7, the committee marked up its draft for the next edition, which in the introduction currently states, "Above all, the statute requires Federal agencies to provide the fullest possible disclosure of information to the public."

Congressman Waxman offered, and Committee Chair Dan Burton (R-Indiana) approved, the addition of the following paragraphs immediately following that statement:

The history of the act reflects that it is a disclosure law. It presumes that requested records will be disclosed, and the agency must make its case for withholding in terms of the act's exemptions to the rule of disclosure. The application of the act's exemptions is generally permissive — to be done if information in the requested records requires protection — not mandatory. Thus, when determining whether a document or set of documents should be withheld under one of the FOIA exemptions, an agency should withhold those documents only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Similarly, when a requestor asks for a set of documents, the agency should release all documents, not a subset or

selection of those documents. Contrary to the instructions issued by the Department of Justice on October 12, 2001, the standard should not be to allow the withholding of information whenever there is merely a 'sound legal basis' for doing so.

Meanwhile in the other house, Senator Patrick Leahy (D-Vermont) has asked the General Accounting Office to look into a question several journalists and others have been wondering about: Just what if any real-world effect has the Ashcroft memorandum had?

According to a report from the Reporters Committee for Freedom of the Press, on February 28 Leahy asked the GAO to "assess the impact of the new policy on agency responses to FOI requests, agency backlogs of requests, litigation involving federal agencies for withholding records and fee waivers for requests from news media," and also "to ascertain whether agencies were accepting electronically filed FOI requests, particularly since the anthrax threat has compromised delivery of mail."

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Colorado Supreme Court Rules That State Constitution Protects Bookstore's Customer Records

By Steven D. Zansberg

On April 8, Colorado's Supreme Court ruled that law enforcement could not execute a particular search warrant against a bookstore seeking to determine which books a criminal suspect had purchased. *Tattered Cover, Inc. v. City of Thornton*, __ P.3d __, 2002 WL 519039 (Colo. 2002); <www.courts.states.co.us/supct/opinion/01SA205.doc> The court held that law enforcement had not demonstrated that its need for the information was sufficiently compelling to outweigh the harm that would be caused to the reader's constitutional interests if the search warrant were executed. Grounding its ruling on the free speech provision of Colorado's Constitution, the court held that before a private bookstore can be compelled to disclose a customer's book-purchasing record(s), the bookstore must be afforded an adversarial hearing before a magistrate, who must balance law enforcement's needs for the bookstore records against the harm caused to constitutional interests by execution of the search warrant.

Facts and Trial Court Litigation

While investigating a suspected methamphetamine lab in a trailer home, police found a mailing envelope, from Denver's The Tattered Cover bookstore, addressed to one of the four known inhabitants of the trailer. The label on the envelope contained the suspect's name and address, as well as an invoice number and order number, but no indication of which books had been purchased. Subsequently, police officers searched the trailer home, pursuant to a search warrant, and discovered a small methamphetamine lab and a small quantity of meth in the master bedroom. Also in the bedroom were several of Suspect A's personal belongings, including clothing, papers and his personal address book. Officers also found and confiscated two books, entitled *Advanced Techniques of Clandestine Psychedelic Amphetamine Manufacture* by Uncle Fester, and *The Construction and Operation of Clandestine Drug Laboratories* by Jack B. Nimble. Fingerprints were taken from the books and

from the glassware of the meth lab; no other items in the room, including firearms, were dusted for prints. No usable prints were obtained from the two books (and there were no prints found inside either book), and the police had not attempted to match any of the methamphetamine glassware prints.

The police believed they needed to determine whether the Tattered Cover envelope addressed to Suspect A contained the two books recovered from the master bedroom to establish that Suspect A was involved in setting up and running the meth lab, that he had access to the master bedroom, and that he had the *mens rea* necessary to be charged with having "intentionally or knowingly" operated a meth lab. After the bookstore refused to comply with an "administrative subpoena" for Suspect A's purchase records, the police obtained a search warrant for those records from a Denver County Court judge. When they attempted to execute the warrant, the owner of the Tattered Cover bookstore, Joyce Meskis, contacted her attorney, who negotiated an agreement to postpone execution of the warrant until after a ruling from a state district court judge.

After a full evidentiary hearing, the Chief Judge of the Denver District Court, Stephen Phillips, applying a four-part test he derived from the *In re Grand Jury Subpoena to Kramer Books & Afterwards, Inc.*, 26 Media L. Rep. 1599 (D.D.C. 1998) decision, ruled that the warrant's demand for production of Suspect A's purchases for a thirty-day period was overbroad and could not be enforced. However, he ordered the bookstore to produce the sales records that identified the books connected with the mailing envelope retrieved from Suspect A's trash. The Tattered Cover appealed that ruling and the Colorado State Supreme Court agreed to hear the direct appeal (in lieu of Colorado's Court of Appeals).

The Supreme Court's Decision

Writing for five other Justices (the seventh and most recently-appointed Justice recused himself after oral argument), Justice Michael Bender authored a lucid and

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thorough, 51-page opinion, reversing the District Court's ruling. As the court stated,

Bookstores are places where a citizen can explore ideas, receive information, and discover myriad perspectives on every topic imaginable. When a person buys a book at a bookstore, he engages in activity protected by the First Amendment, because he is exercising his right to read and receive ideas and information. Any governmental action that interferes with the willingness of customers to purchase books, or booksellers to sell books, thus implicates First Amendment concerns.

Moreover, the court held that the right to purchase books with anonymity, "without government intrusion or observation, is critical to the protection of the First Amendment rights of book-buyers and booksellers, precisely because of the chilling effects of such disclosures. . . . In sum, the First Amendment embraces the individual's right to purchase and read whatever books she wishes to, without fear that the government will take steps to discover which books she buys, reads, or intends to read."

Protections Based on Colorado Constitution

The opinion acknowledges that in *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), U.S. Supreme Court rejected the argument that the First Amendment required police to obtain a subpoena *duces tecum* instead of using a search warrant to obtain photographs in the newsroom (to help identify demonstrators who had assaulted police breaking up a demonstration). Finding that "the protections afforded to fundamental expressive rights by federal law . . . [are] inadequate," the Colorado Supreme Court grounds its holding on the Colorado Constitution, which affords greater protection than the First Amendment provides.

Expressly overturning *Zurcher* on state constitutional grounds, the Court holds that "an innocent, third-party

bookstore must be afforded an opportunity for a hearing prior to the execution of any search warrant that seeks to obtain its customers' book-purchasing records." At such a pre-enforcement adversarial hearing, "law enforcement must demonstrate a sufficiently compelling need for the specific customer purchase records sought." In addition, "officials must exhaust . . . alternatives before resorting to techniques that implicate fundamental expressive rights of bookstores and their customers." If the judge determines that the government's need for particular information is narrowly tailored (not overly broad) to a compelling interest in a particular investigation, "the ultimate question is whether the law enforcement need for the customer

purchase record is sufficiently compelling to outweigh the harms caused by execution of the search warrant."

Test Not Satisfied in the Case Before the Court

Applying its newly minted test to the facts of the immediate case, the court holds that law

enforcement did not establish that Suspect A's book-purchase records were necessary to make the case against him for operating the meth lab discovered in the bedroom of the trailer home. First, the fact that several items of Suspect A's personal possessions were found in the bedroom itself, along with the two "how-to" books, made the book purchase records unnecessary for purposes of establishing Suspect A's proximity to the lab or that whoever set up and ran the lab did so "intentionally or knowingly" (as opposed to "mistakenly").

Furthermore, the police had not exhausted the myriad alternative means available to connect Suspect A to the meth lab; they had not run the fingerprints taken from the lab glassware and did not interview several witnesses who could have established Suspect A's involvement in the operation of the meth lab.

Finally, even if the purchase records were to prove that Suspect A was the person who had purchased the two "how to" books confiscated from the bedroom, there are several

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Finding that "the protections afforded to fundamental expressive rights by federal law . . . [are] inadequate," the Colorado Supreme Court grounds its holding on the Colorado Constitution, which affords greater protection than the First Amendment provides.

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"innocent" reasons why someone would have purchased such books; therefore, it is not compelling evidence necessary to establish Suspect A's involvement in the crime. In sum, the Court concluded that "the City has failed to demonstrate that its need for this evidence is sufficiently compelling to outweigh the harmful effects of the search warrant."

Conflict with the USA PATRIOT Act

Because the Court's holding is explicitly grounded on the Colorado Constitution, it does not protect bookstores from the provisions of the recently enacted federal law, the "USA PATRIOT Act," which authorizes the F.B.I. to obtain from a secret tribunal an *ex parte* order requiring the production of any tangible things, (including books, records, papers, documents), in furtherance of "an investigation to protect against international terrorism or clandestine intelligence activities . . . provided that such investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment to the Constitution." (Moreover, any person who is served with such an *ex parte* order, for instance an "innocent, third-party bookstore owner," is prohibited by the federal law from disclosing to any other person that the F.B.I. has sought or obtained tangible things by means of the *ex parte* order.)

Thus, it appears that even in Colorado, the F.B.I., proceeding under the USA PATRIOT Act, (or any federal agency proceeding under existing federal law), can circumvent the holding of the *Tattered Cover* case simply by obtaining a search warrant from a federal judge upon an ordinary showing of probable cause. Presented with such a federal search warrant, a bookstore owner (or librarian) would be forced to comply, unless, as Joyce Meskis was able to do in the *Tattered Cover* case, she could obtain an agreement from law enforcement to have the issue litigated before a federal judge, and to challenge the execution of the warrant under the First Amendment.

Steven Zansberg is a partner in the Denver office of Faegre & Benson, LLP, and, along with Thomas Kelley of that office, served as local counsel to the American Booksellers Association and numerous other organizations

Eternally Vigilant: Free Speech in the Modern Era

edited by Lee C. Bollinger & Geoffrey R. Stone

Published by University of Chicago Press, this new text compiles essays by leading thinkers and academicians on the First Amendment. It begins from a premise the editors draw from Justice Oliver Wendell Holmes statement in the 1919 opinion in *Abrams v. United States*, that the constitutional guarantee of freedom of speech is "an experiment, as all life is an experiment," requiring each day that we "wager our salvation upon some prophecy based upon imperfect knowledge."

The editors see a "deep tension in that statement," the reality that an "experiment implies a tentativeness of commitment and a need for ongoing review and adjustment," while at the same time what is at core in that experiment is something both fundamental to the society and yet vulnerable.

Looking first at historical philosophical underpinnings and at early 20th Century First Amendment opinions, the essays move on to try to address the application of these earlier theories and new theories to modern free speech and free press issues. It is a relatively dense tome. This editor's vote for most accessible amid the academic theory was the essay by Richard Posner, who posits an economic cost-benefit model, complete with x's and y's, for analyzing free speech restrictions. While readable, however, and while suggesting a veneer of mathematical objectivity, it is in the end no more objective in approach than any other theory of analysis in this area.

That said, if one wants to get a feel for such truly notable First Amendment academics as Vince Blasi, Ken Greenawalt, Robert Post, Frederick Schauer, Stanley Fish, Lillian BeVier, Owen Fiss and Cass Sunstein, they are all represented along with the editors in this text.

Media Seek Access in Court and to Military

Court Says There May Be Right of Access to Military

Court Rejects Flynt's Move for Military Access

A federal judge has held that, in an appropriate situation, the media may have a First Amendment right of access of American military operations, "subject to reasonable regulations."

The statement came in a Jan. 8 ruling as Federal District Court Judge Paul Friedman rejected *Hustler* magazine publisher Larry Flynt's attempt to get a preliminary injunction in his lawsuit over restrictions on access to troops in Afghanistan. *Flynt v. Rumsfeld*, No. 01-CV-2399 (D.D.C. ruling Jan. 8, 2001) (denying preliminary injunction).

Prior to the ruling, Flynt insisted that his lawsuit was "not a publicity stunt." He is represented in this case by Washington, D.C. attorney John Perazich.

"People are naive," Flynt told *The Washington Post*. "They don't realize when they see these people (reporters) broadcasting from Afghanistan, they are in remote locations, isolated from the front lines."

Flynt sued after sending two letters to the Pentagon seeking to accompany American troops on ground combat operations. In response, the Pentagon offered access to humanitarian missions and airstrike flights.

In court, Justice Department lawyer John Griffiths argued that "the coverage in Afghanistan has been extensive. ... The First Amendment does not obligate the federal government to assist the media in its newsgathering."

"The court is persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable regulations," Judge Friedman wrote.

But, in Judge Friedman's opinion, this was not that case. Besides stating that it "is far from clear" that Flynt will prevail, Judge Friedman wrote that "(i)t does not appear that plaintiffs have in fact been denied they access they seek or that they would have been denied such access if they had pursued the matter fully through available military channels," noting that the Pentagon had not explicitly rejected Flynt's request, and had suggested that

Flynt contact a specific official to arrange access to the operations offered. Thus he denied plaintiff's motion for a preliminary injunction.

Nevertheless, Judge Friedman's statement that there may be a First Amendment right of access is a welcome perspective in a field where there are relatively few judicial precedents.

In a similar suit that Flynt filed over the invasion of Grenada in 1983, Judge Oliver Gasch of the Federal District Court for the District of Columbia dismissed the case as moot, writing that

The decision whether or not to impose a press ban during military operations and the nature and extent of such a ban if imposed are matters that necessarily must be left to the discretion of the commander in the field. ... A decision whether or not to impose a press ban is one that depends on the degree of secrecy required, force size, the equipment involved, and the geography of the field of operations. Moreover, the scope of press exclusion, if any, will differ somewhat in every case. Under such circumstances, where the decision being scrutinized is committed to the broad discretion of the commander in the field and is contingent upon a wide range of factors determinable only with reference to the particular military operation being undertaken, a declaratory judgment would be futile, and perhaps even dangerous, because of its limited value as a guide for future conduct.

Flynt v. Weinberger, 588 F. Supp. 57, 60-61, 10 Media L. Rep. 1978, 1981 (D.D.C. 1984).

The D.C. Circuit affirmed the district's court's finding of mootness, although it chided the lower court because "the district court, while purporting to dismiss the case for lack of jurisdiction, improperly considered and offered judgments on the underlying merits of the dispute." *Flynt v. Weinberger*, 762 F.2d 134, 135, 11 Media L. Rep. 2118, 2119-20 (D.C. Cir. 1985). The appellate court added that the plaintiffs should be permitted to amend their complaint

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to avoid mootness.

During the Gulf War, Federal District Court Judge Leonard Sand of the Southern District of New York wrote that there may be First Amendment issues at stake.

If the reasoning of these recent access cases were followed in a military context, there is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the functioning of government, including, for example, an overt combat operation. As such, the government could not wholly exclude the press from a land area where a war is occurring that involves this country. But this conclusion is far from certain since military operations are not closely akin to a building such as a prison, nor to a park or a courtroom.

Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558, 1571, 19 Media L. Rep. 1257, 1268 (S.D.N.Y. 1991).

But ultimately Sand concluded that “[s]ince the principles at stake are important and require a delicate balancing, prudence dictates that we leave the definition of the exact parameters of press access to military operations abroad for a later date when a full record is available, in the unfortunate event that there is another military operation.” *Id.* He also declined to rule on the constitutionality of the pool system imposed by the military on the press in that conflict, for similar reasons. *Id.* at 1574, 19 Media L. Rep. at 1270.

Pentagon Eases Access, But Skepticism Remains

As Larry Flynt sought an injunction to get access to American troops in Afghanistan, the Pentagon began to ease media access to Afghanistan by announcing in late December that it was removing the pool requirement for the media in Afghanistan. And in early January, journalists accompanied six teams of American troops on missions exploring caves vacated by the Taliban and al Qaeda.

The changes came as most networks replaced correspondents who had covered the war from the beginning with fresh reporters.

Pentagon spokeswoman Victoria Clarke also announced a procedure to allocate media seats on trips by Defense Secretary Donald Rumsfeld. Under the plan, the Associated Press will receive first priority, followed two television representatives. The priority list then reads as follows: Reuters; Agence France-Presse; a “large newspaper/wire service/magazine” (defined as an outlet having an audited circulation of more than 500,000 that “cover[s] the Pentagon on a regular basis,”); a “small newspaper/wire service/magazine” (not meeting criteria for a “large” organization); then two more television journalists, a second large media outlet, then radio, then a still photographer, and then another wire service (which would rotate among the services).

Within each category, each media outlet that expressed interest was placed on a list in a random order. (The complete lists for each category are available online at <http://www.defenselink.mil/news/Jan2002/d20020110sdtrav.pdf>.) When trips arise, outlets at the top of each list will be given an opportunity to fill an available slot in their category. An outlet will then move to the bottom of the list, whether it accepts or declines the slot. Whether an outlet “cover[s] the Pentagon on a regular basis” will be determined “based on their deliberate and long-term commitment (prior to September 11, 2001).”

If more than 13 seats are available, they will offered to the media in the following category order: large newspaper/wire service/magazine; small newspaper/wire service/magazine; television; radio; photographers; then wire services.

The issue of which reporters were allowed to travel with Rumsfeld arose when the Pentagon selected ten reporters — six television reporters and four print journalists, but no wire service reporters — to accompany him on a tour of Middle Eastern countries in early October.

But an incident in mid-January and two in late December engendered more skepticism.

The latest incident came on Jan. 11, as prisoners were moved from Afghanistan to the U.S. Navy Base at Guantanamo Bay, Cuba, where they are to be held

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Media Seek Access in Court and to Military

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pending trial. American military commanders in Kandahar allowed print and television photographers to take pictures as 20 prisoners boarded a C-17 cargo plane for the flight to Cuba, under the agreement that the photographers would not transmit the photos until given permission. But after the plane left, the photographers were told not to transmit the pictures.

At the Pentagon, spokesman Rear Adm. Craig Quigley said that the order was made after the Red Cross objected, saying that allowing the photos would violate the Geneva Convention on the treatment of prisoners. But International Red Cross officials said that they had not raised any specific objections, although it does have a general stance on the issue.

Apparently the only outlet to use the images was CBS, which 10 seconds of grainy video during the "CBS Evening News."

A second incident occurred on Dec. 31 when the Associated Press reported that American Marines had been seen leaving their base near Kandahar in combat gear, and interim Afghani President Hamid Karzi said that a mission was underway to capture Taliban leader Mullah Mohammed Omar. The AP photographer who saw the Marines was barred from taking pictures. But Rear Adm. Craig Quigley of the U.S. Central Command denied that any such mission was taking place when questioned by reporters at the Command's headquarters in Tampa, Fla.

Pentagon officials later said that the Marines had been sent to gather only information, and denied any effort to deceive reporters. "We try hard to give you information, when we can, that tells you something has happened when it won't do any harm to a future operation," Clarke told reporters at the Pentagon on Jan. 2. "But in general, we're not getting into operational details."

"Did the U.S. military spokesman lie about...?" a reporter asked Clarke. "Oh, absolutely not. Absolutely not," she responded, cutting off the question.

The dispute over the Marine mission came about a week after three photographers — two from the Associated Press, and one from *The New York Times* — were detained at gunpoint by Afghan tribal fighters, with

what the photographers said was the tacit approval of nearby American troops. The Afghans allowed the photographers to leave after 45 minutes, but took the disks containing pictures they had taken with their digital cameras.

Previously, in what Pentagon officials later called a mistake, pool reporters at the Marine base "Camp Rhino" were temporarily confined to keep them from reporting on casualties caused by friendly fire.

Most Flight Restrictions Lifted

On Dec. 19, the Federal Aviation Administration lifted most of the restrictions on news and traffic flights imposed after Sept. 11.

While some restrictions remain in effect in New York, Washington, and Boston, the FAA removed them in 27 other large cities nationwide. *See* FDC 1/3359 (Dec. 19, 2001). The restrictions originally prohibited news flights from operating within 25 nautical miles of 30 major airports; the limit was reduced to 18 nautical miles in mid-October, and by early December the FAA had granted more than 2,000 waivers to individual operators.

The FAA actions mean that planes and helicopters outside of New York, Washington and Boston may resume covering news and traffic stories normally, although there are still restrictions around locations such as major sports arenas and nuclear power plants. *See* FDC 1/3352 (Dec. 19, 2001), FDC 1/3353 (Dec. 19, 2001).

In Washington, flights are still largely restricted within 15 statute miles of the Washington Monument. In New York, the restricted areas are within two nautical miles of lower Manhattan and eight nautical miles of LaGuardia Airport; in Boston, the restrictions still apply in and around the shores of Massachusetts Bay and within four nautical miles of Logan Airport. FDC 1/3354 (Dec. 19, 2001).

Second Suit Filed

While the lawsuit brought in November by the Global Relief Foundation against various news organizations which incorrectly reported that the foundation's assets had been frozen by the federal government still appears to be first lawsuit against the media stemming from coverage of the terrorist attacks and their aftermath, another libel suit

UPDATE: Reporters in the War Zone

In recent weeks, the Pentagon has organized press pools to accompany American ground troops as they fought with suspected al Qaeda and Taliban fighters holed up in the vicinity of Gardez in eastern Afghanistan, and to cover the detention of captured fighters at the naval base at Guantanamo Bay, Cuba. This policy stands in contrast to those earlier in the anti-terrorism campaign in Afghanistan and surrounding countries, when reporters were prevented from joining American combat troops.

Press With Troops, But Danger Lurks

The first reports from the Afghanistan pool became available March 5, four days after the beginning of the operation – dubbed “Operation Anaconda” by the Pentagon. Military officials apparently prevented the pool members from reporting from the battlefield earlier, in accordance with the ground rules for the pool.

Defense Secretary Donald Rumsfeld defended these restrictions at a March 4 press conference. “This is a most unusual conflict,” he said. “It is not a set of battle lines, where Bill Malden and Ernie Pyle can be with troops for week after week after week as they move across Europe or even across islands in the Pacific. This is a notably different activity. It’s terribly untidy. We have bent over backwards to see that every opportunity that we could imagine that press people could be connected to that they were connected to. And they have been.”

Rumsfeld added that “anyone who wants to in the press can get into Afghanistan and go anywhere they want. It’s a free country. It’s dangerous, and people are being killed, but it’s a free country.”

The danger to journalists in Afghanistan was reinforced on March 15, when the commanders of the multinational peacekeeping force in the country announced that they had credible intelligence that al Qaeda and Taliban operatives were planning to kidnap a foreign journalist in retaliation for the U.S. military operation.

Ten days earlier, a *Toronto Star* reporter was badly injured by a hand grenade thrown at car she was sharing with her husband, a photographer, and an Afghan driver. The car was in a convoy of reporters who left the town of Zurmat after they were threatened by gunmen loyal to a local warlord who had been detained by the American

military. The reporter is recovering at an American military hospital in Germany.

Eight journalists have been killed covering fighting in Afghanistan, in addition to the kidnapping and brutal murder of *Wall Street Journal* reporter Daniel Pearl in neighboring Pakistan.

Suit Seeks Open Hearings

Back in the U.S., there are several cases challenging the closure of deportation hearings after Sept. 11.

After the attacks, Chief Immigration Judge Michael Creppy instructed immigration judges to close immigration hearings connected to terrorism investigations. A copy of Creppy’s memo is available at www.aclu.org/court/creppy_memo.pdf (visited March 14, 2002).

In March, the ACLU filed a suit on behalf of the *New Jersey Law Journal* and the North Jersey Media Group challenging the closures. The court set an April 5 hearing date on plaintiffs’ request for a preliminary injunction opening the hearings. *See North Jersey Media Group v. Ashcroft*, No. 02-CV-967 (D. N.J. filed March 6, 2002). The complaint is available online at www.aclu.org/court/creppy.pdf (visited March 14, 2002). The lead attorney for the media plaintiffs is Lawrence S. Lustberg of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. in Newark. The North Jersey Media Group publishes the *Herald News* in West Patterson, N.J., and the *Hackensack, N.J. Record*.

Separately, a Syrian man who was being detained pending deportation for overstaying his visa had filed his own lawsuit challenging the closed hearing policy. *See Zeidan v. Ashcroft*, No. 02-CV-843 (D. N.J. filed Feb. 28, 2002). The government released Maliek Zeidan on \$10,000 bail on March 13, and said that they would seek to have his lawsuit dismissed as moot. Zeidan was represented by Ennet Dann Zurofsky of Reitman Parsonnet in Newark.

The remaining New Jersey lawsuit joins two lawsuits filed in Michigan over the issue of closed immigration hearings. *See Detroit Free Press, Inc v. Ashcroft*, No. 02-CV-70339 (E.D. Mich. filed Jan. 28, 2002), and *Detroit News, Inc. v. Ashcroft*, No. 02-CV-70340 (E.D. Mich. filed Jan. 29, 2002).

Courts Rule on Terror War Issues

There have been a number of court decisions in the past few weeks in cases on media issues that have emerged in the war on terrorism, with First Amendment concerns winning out in most of these cases. Meanwhile, the government issued regulations for military tribunals which include a presumption of openness, and reporters faced new challenges in covering conflict in another area of the Middle East.

Court Foresees Win on Access to Cuba Base

In a little-noticed opinion issued on March 7, the U.S. District Court for the District of Columbia wrote that the Pentagon's method for providing transportation for journalists to Guantanamo Bay, Cuba – where suspected Taliban and al Qaeda prisoners are being held – may be unconstitutional. *Getty Images News Services Corp. v. Department of Defense*, 2002 WL 371955 (D.D.C., March 7, 2002).

While dismissing most of a lawsuit brought by Getty Photo Images to force the Pentagon to allow it to participate in media press pools in Afghanistan and elsewhere, District Judge John D. Bates wrote that

Getty has raised a serious question on the merits relating to its request for equal access to Guantanamo Bay, particularly with regard to the absence of clear standards and procedures. The Court is persuaded that Getty is likely to succeed on the claim that, at some point in time, published criteria and a process for obtaining relevant information must be in place to govern media access to ongoing detention activities at Guantanamo Bay.

Getty Images at *11.

Getty Images News Services filed suit after it was excluded from the Department of Defense National Media Pool, and from the media pools sent late last year to Afghanistan. (In court, the Pentagon said that the Afghanistan pools were ad hoc, and were not an activation of the National Media Pool.) The agency was also excluded from initial flights to the American military base at Guantanamo Bay, Cuba.

In its initial complaint, filed Jan. 31, 2000, Getty

sought a temporary restraining order and a preliminary injunction barring the Defense Department from not accommodating the photo agency along with other media outlets. Judge Bates denied the request for a temporary restraining order on Feb. 8.

By the time Bates made this decision, Pentagon officials had added Getty to the list of news organizations eligible for the press pool, lifted the press pool restrictions in Afghanistan, and allowed a Getty photographer aboard a plane to Guantanamo Bay, although defense officials did not form an official pool for coverage of the base. When Bates held a preliminary injunction hearing on Feb. 21, the Defense Department argued that the case was now moot.

Judge Bates agreed in large part with this argument, as explained in a decision released March 7. He held that Getty lacked standing on its claims regarding the national and Afghanistan pool, due to the mootness of the claims. On the question of access to Guantanamo Bay, the court refused Getty's request that the Defense Department be ordered to form a pool for media coverage of the base, holding that an expedited schedule for the trial was sufficient and that the absence of a pool did not constitute irreparable harm to Getty because a Getty photographer had already been flown to the base without any pool having been established.

Bates added, however, that Getty would probably be able to show that the Pentagon's lack of written criteria for providing access to Guantanamo Bay was improper.

As described by the court, the Pentagon's method for providing transportation was based on four criteria.

At the [preliminary injunction] hearing, DOD articulated four principles that guide the allocation of space on the media flights to Guantanamo Bay: (1) DOD seeks a mix of media types (e.g., television, print, radio, wire services) on the flights; (2) DOD gives some preference to media organizations that consistently reach large audiences; (3) DOD seeks to send international media organizations because the government has an interest in reaching a worldwide audience in

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Courts Rule on Terror War Issues

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matters concerning the war on terrorism; and (4) DOD seeks to send regional news media because the detention activities at Guantanamo Bay are, in part, a regional news story. ... DOD conceded that neither the four criteria nor any other standards for allocating access to Guantanamo Bay are written or published. DOD also conceded that there are no formal procedures by which DOD gathers information relevant to the evaluation of a particular media organization under these criteria.

Id. at *2.

Nevertheless, Bates declined to issue a preliminary injunction, finding that “the balance of harms clearly weighs against granting a preliminary injunction at this time.”

The following day, Bates stayed the proceedings at the request of both parties, in contemplation of settlement of the case.

Getty is represented by Joshua Jacob Kaufman of Venable, Baetjer, Howard & Civiletti, LLP of Washington, D.C. Henry A. Azar, Jr. of the Justice Department is representing the government.

Court Order On Disclosure of Detainees’ Names Stayed

On April 19, a New Jersey appeals court issued a stay of ruling by a state court judge holding that a county jail which is holding detainees for the Immigration and Naturalization Service must make the names of the detainees public. *ACLU v. County of Hudson*, No. HUD-L-463-02 (N.J. Super. Ct., Hudson County opinion April 12, 2002), available at www.judiciary.state.nj.us/ditalia/aclu.htm.

The Hudson County and Passaic County jails are among several local jails housing the detainees under contracts with the INS. The people being held are foreign nationals who were detained after Sept. 11 for immigration violations while the INS holds deportation proceedings. The INS has refused to disclose the names of the detainees, and the deportation proceedings are

closed (*but see* decision regarding closure of these proceedings, *infra*).

In a March 26 oral decision and a April 12 written opinion, Superior Court Judge Arthur D’Italia ruled that the jails’ records, including the names of the INS detainees, were public documents under New Jersey law.

In the initial, oral ruling, D’Italia issued an immediate stay of his decision, pending an appeal. But he reconsidered in his written opinion, and instead issued a stay for only 10 days.

On April 17, six days after D’Italia issued his written opinion, INS Commissioner James W. Ziglar issued an interim rule, effective immediately, to “clarif[y] that non-Federal providers shall not release information relating to ... detainees, and that requests for public disclosure of information relating to Service detainees, including Service detainees temporarily being held by non-Federal providers on behalf of the Service, will be directed to the Service.” Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508 (April 22, 2002) (to be codified at 8 C.F.R. pts. 236 and 241).

The appeals court issued its stay on April 19, after the lawyers for both sides in the case held a conference call with Appellate Division Part C judges Howard Kestin and Edwin Alley. The court has scheduled argument in the case for May 20.

The ACLU is represented by Penny Venetis and Ronald Chen of the Rutgers University Constitutional Litigation Clinic, ACLU staff attorney Edward Barocas, and outside solo practitioner Howard Moskowitz of Jersey City. The counties are represented by First Assistant Hudson County Counsel Michael Dermody, Deputy Passaic County Counsel Matthew Malfa, and Assistant Passaic County Counsel Karen Brown. The INS, which intervened in the case, is represented by Thomas Calcagni, Michael Chagares and Carol Federighi.

The ACLU has filed a similar lawsuit in U.S. District Court for the District of Columbia regarding detainees nationwide. *Center for Nat’l Security Studies v. Department of Justice*, No. 01-CV-2500 (D.D.C. filed Dec. 5, 2001).

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Courts Rule on Terror War Issues

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Court Orders Open Hearings...

Meanwhile, a federal judge in Michigan granted a preliminary injunction against continued closure of deportation hearings of a founder of an Islamic charity, and the 6th Circuit ordered that transcripts of past hearing be released. The closure was challenged in suits brought by a number of parties, including the *Ann Arbor News*, the *Detroit Free Press*, *The Detroit News* and *Metro Times*. See *Detroit Free Press, Inc. v. Ashcroft*, Nos. No. 02_CV_70339 and 02_CV-70340, 2002 WL 534475 (E.D. Mich. April 3, 2002). See page 31.

But Secret Evidence Allowed

Ruling in the Global Relief Foundation's challenge of the government's seizure of its assets, U.S. District Judge Wayne Anderson held that the government could keep its evidence in support of the seizure secret. *Global Relief Fdm., Inc. v. O'Neill*, No. 02-CV-0674 (N.D. Ill. order April 5, 2002). The 7th Circuit denied an emergency appeal of this ruling. No. 02-1874 (7th Cir. April 15, 2002) (denying mandamus).

Military Tribunals To Be Open, Mostly

The final rules for military tribunals to prosecute terror suspects, made public in late March, provide that proceedings shall be open except to protect classified data or the personal safety of the participants.

The rules, which are contained in Department of Defense Military Commission Order No. 1, provide that "proceedings should be open to the maximum extent practicable," but the extent of openness is at the discretion of the presiding officer. Photography and video or audio broadcasting or recording are banned, except as necessary for the tribunal to record its own proceedings.

Defendants would be entitled to a free military lawyer, and could have their own civilian counsel as well. But the rules provide that any civilian defense counsel, and the defendant himself, may be excluded from any closed proceedings. Such closures may be made by the presiding officer on the officer's own

motion, or at the request of either of the parties.

The order is available online at www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

Also, in mid-April President Bush issued new rules for courts-martial which allow military judges to issue gag orders barring participants from discussing cases outside of court. See Exec. Order ____ (April 11, 2002) (adding R.C.M. 806(d)), available at www.whitehouse.gov/news/releases/2002/04/20020412_4.html.

Annual Study on Media Trials Shows That Media Defendants' Win Rate Is Higher, but So Are Damage Awards

LDRC released this past week its annual REPORT ON TRIALS AND DAMAGES surveying the media's record on trials of libel, privacy and related actions, the 13th report since 1980. As openers, LDRC found that while there were more trials in 2001 than in 2000, the annual numbers of trials so far in the first years of the new century are lower than they were during the 1980s and 1990s.

The LDRC 2002 REPORT ON TRIALS AND DAMAGES also shows that :

- media defendants won these cases at a higher rate in 2001 than in the two previous decades, and
- while damage awards against media defendants from these trials were lower in 2001 than in 2000, they are still higher than they were in the 1980s and 1990s.

Of profound significance is the entry of a default judgment in one libel trial, against the *Boston Globe* in state court in Massachusetts, based upon the media defendants' refusal to identify the confidential sources used for the news reports at issue in the lawsuit. A subsequent \$2.1 million award against the newspaper (\$3.5 million to date as a result of the addition of pretrial interest to the award) makes it one of the highest awards

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Study on Media Trials Shows Media Defendants' Win Rate Is Higher, but So Are Damage Awards

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arising from a 2001 loss. (The award was announced as the REPORT was going to press, and is not included in the REPORT's statistics. See articles on pp. 7 and 9 for more on this case.)

From the LDRC 2002 REPORT ON TRIALS AND DAMAGES:

- **Number of trials.** There were 17 full trials against the media in 2001 — eight defense victories, eight plaintiffs' victories, and one mistrial due to a hung jury. This is a lower number of trials than the average during the 1990s, 18.5, and much lower than the 1980s average of 26.1 trials a year.
- **Win rate.** The media victory rate in 2001 — 50 percent of those cases in which a verdict was reached — is a modest increase from the 2000 defense victory rate of 46.2 percent. But these recent rates of defense victory are significantly higher than the rates for the 1980s (35.1 percent) and the 1990s (38.7 percent).
- **Damage awards.** In the eight cases won by plaintiffs in 2001, the average award was \$1.8 million, and the median was \$1 million. The 2001 median is one of the highest in the 20-year history of the REPORT, although the 2001 average is among the lowest over the course of the REPORT's history. Lower averages and high medians in recent years are the result of a number of very high awards each year.
- **Punitive damage awards.** Punitive damages made up 30.4 percent of the total damages awarded at trial to successful plaintiffs in 2001. This is higher than in 2000, when only 3.7 percent of the total award amount was punitive damages. But the 2001 figure is still less than half of the percentage of total damages awarded than in the 1990s (67.1 percent) and 1980s (63.1 percent).
- **High number of television trials. Low number of newspaper trials.** There were 12 trials involving broadcast defendants — a landmark year for trials involving television. In the last two decades, television averaged about 4 trials per year. And the

television guys won 58 percent of these trials in 2001, a terrific win rate for media defendants at trial.

By contrast, the number of newspaper trials was at an all time low, with only 4 newspaper trials reported, of which the defendants won one. In the 1990s, newspapers had an average of just under 9 trials per year. And in the 1980s, newspapers had an average of just over 16 trials per year. Clearly, these are dramatically descending numbers since the beginning of LDRC's reporting on media trials.

- **First Internet trial.** The REPORT also marks the first time a trial based on Internet content has met the criteria for inclusion. It involved a newsletter published online and while the trial itself was in 1999, LDRC found the case this past year. *SNA v. Array*, 51 F.Supp.2d 554 (E.D. Pa. bench verdict June 9, 1999)

In addition to information on 2001 trials, the REPORT also includes statistical information on 483 trials since 1980, which resulted in 274 damage awards against media defendants. In approximately 9 percent of those, the trial judges granted judgment notwithstanding the verdict in favor of the media defendants. On appeal, 45.8 percent of the remaining awards against the media were reduced or eliminated, while only 22 percent were affirmed. 14 percent of awards were not appealed by defendants, while 12.8 percent of cases won by plaintiffs at trial were settled before appeal. 5.4 percent are either pending or their disposition is unknown.

All media members of LDRC and Defense Counsel Section members who pay dues at a level of \$1,000 or more should have already received the LDRC 2002 REPORT ON TRIALS AND DAMAGES. Others may order the report for \$35 by contacting LDRC, 80 Eighth Avenue, Suite 200, New York, NY 10011, via phone at (212) 337-0200, or via our web site, www.ldrc.com.

Supreme Court, 6-3, Voids “Virtual” Child Porn Law

By Laurence Sutter

The United States Supreme Court, resolving a split in the circuits (which had ruled 4-1 in favor of the legislation), has rejected as overbroad Congress’s criminalizing material which appears to be, or is promoted as, child pornography. See *Ashcroft v. Free Speech Coalition et al.*

Justice Kennedy wrote the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Thomas concurred in the judgement, and wrote separately. Justice O’Connor also concurred in the judgment in part and dissented in part, with Justices Rehnquist and Scalia joining in the dissenting portion of the opinion. Chief Justice Rehnquist wrote a separate dissenting opinion in which Justice Scalia joined all but one part.

From Miller to Ferber to CPPA

Miller v. California, 413 U.S. 15 (1973), set the current constitutional test separating protected from unprotected sexually explicit material — a blend of subjective and objective standards. The community’s tolerance of the explicit acts depicted and the material’s appeal to a “prurient” interest in sexual matters, as measured by community standards, on the one hand, are balanced against the countervailing factor of serious literary, artistic, political or scientific merit, on the other.

The issue then arose whether sexual performances by minors were subject to the *Miller* test. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court ruled that such sexual performances were a form of child abuse as to which content was irrelevant. Those whose muse commanded the depiction of under-age sexuality, the Court suggested, could use adults who looked like children, or some form of simulation.

But then in 1996 Congress criminalized precisely that. Congress was spurred by the ease by which

images could be “morphed” on a computer, and by the suggestion that wily pornographers — or their lawyers — might create foolproof reasonable doubt by suggesting that any impugned images might merely be “morphs” of adults.

The Child Pornography Protection Act (“CPPA,” amending 18 U.S.C. § 2256(8)) augmented the definition of “child pornography” to include:

(i) any explicit visual depiction that “is, or *appears* to be, of a minor” (emphasis added);

(ii) the “morphing” of an image of an actual child to make it appear that the child is engaging in sexual activity; and

(iii) any sexually explicit material “advertised, promoted, presented, described or distributed in such a manner that it conveys the impression” that it depicts a minor engaging in sexually explicit conduct.

“Sexually explicit” includes a wide variety of actual or simulated explicit acts as well

as “lewd exhibition of the genitals or pubic area.” Respondents, photographers, artists and an adult industry coalition, did not challenge the second provision. The existing law which this amended already criminalized all forms of production and distribution, as well as mere possession (upheld in *Osborne v. Ohio*, 495 U.S. 103 (1990), on the basis that protecting the victims of child pornography was a compelling state interest).

Kennedy’s Majority Opinion

Justice Kennedy’s analysis of the statute began with the obvious: the CPPA criminalized that which was neither obscene under *Miller* nor child abuse under *Ferber*: works of serious literary or artistic value, works which did not offend the community’s tolerance of sexual matters, and even materials which were not “taken as a whole” but contained only an isolated passage of prohibited matter, would be caught. He rejected the argument that images “virtually indistinguishable” from those involving live children

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should suffice — which would, clearly, have involved distorting or overruling *Ferber*.

The Court identified four Government arguments to support the statute: First, “virtual” child pornography’s effect on children might make it easier for pedophiles to seduce them. So may many things, and, reaching back to *Butler v. Michigan*, 352 U.S. 380 (1957), the Court reaffirmed that adults may not be reduced to reading only what is fit for children nor may material be banned because of its supposed tendency to induce immoral acts (the so-called “bad tendency doctrine”). Closely related is the argument that this material whets the depraved appetites of pedophiles. But such a justification amounts to thought control, the Court said: improper thoughts must ripen into improper action which alone can be criminalized.

Following the *Osborne* rationale, the Government also argued that elimination of “virtual” child pornography would eliminate the market for the real thing, which the Court found somewhat illogical but in any event unjustifiable absent an underlying crime.

Finally, the Government advanced its evidentiary rationale — child pornographers would be harder to convict if they could argue that the material was just “morphed” images of adults. “This analysis turns the First Amendment upside down,” the opinion said. “The Government may not suppress lawful speech as the means to suppress unlawful speech.” Nor did the existence of an affirmative defense (that the models used actually were over 18 and the producer could prove it) in the statute help the Government, since it applied only to producers and, of course, only to images where live models were used.

The Court more easily dismissed the third prohibition, against materials marketed so as to “convey the impression” that they are child pornography. The majority acknowledged (probably in response to the

dissent) that “pandering” — “the commercial exploitation of erotic materials solely for their prurient appeal,” *Ginzburg v. United States*, 383 U.S. 463, 474 (1966) — may be allowed as evidence of obscenity in a close case. But under the CPPA everyone in the chain of distribution, including mere possessors who were not the “panderer” and who might even know the material was mislabeled, would be condemned. It, too, was found overbroad, and the Ninth Circuit’s decision affirmed.

Thomas Concurs

Justice Thomas’s concurrence was most concerned with the evidentiary rationale, but noting that it had never been successfully argued, left for the future the possibility of a narrowly drawn statute or a redrafted affirmative defense that might somewhat impinge on lawful materials in order the suppress the unlawful.

In Free Speech Coalition, the Court reaffirms that absent the actual abuse of a living child, Miller and the First Amendment must be satisfied before sexually explicit material can be criminalized.

Rehnquist/Scalia Dissent

Chief Justice Rehnquist and Justice Scalia, in dissent, argued that the statute could be saved from overbreadth by a narrowing construction limiting it to “hard-core,” actual sexually explicit conduct indistinguishable from material already prohibited prior to the CPPA. They also would have read a scienter requirement into the possessory offense. The marketing provision would be narrowed to cover only actual “pandering.”

O’Connor Concurs and Dissents

Writing separately, Justice O’Connor agreed that the marketing provision was unconstitutional as well as the “appears to be” prohibition except in the case of what she termed “virtual-child pornography”: “pornographic images of children created wholly on a computer, without using actual children.” Joined by the Chief Justice and Justice Scalia in this portion of her opinion, Justice O’Connor argued that the statute could

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Supreme Court, 6-3, Voids “Virtual” Child Porn Law

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permissibly be narrowed to cover images “virtually indistinguishable” from real children but not involving youthful-looking adults.

The Import of Kennedy’s Majority

In *Free Speech Coalition*, the Court reaffirms that absent the actual abuse of a living child, *Miller* and the First Amendment must be satisfied before sexually explicit material can be criminalized.

Forty-five years ago, in *Roth v. United States*, 354 U.S. 476 (1957), Justice Brennan advised his readers that not all representations of sex — even explicit ones — were obscene. “Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern[.]”

So, too, Justice Kennedy, in *Free Speech Coalition*, did not shrink from pointing out that “the Court [in *Ferber*] recognized some works in this category might have significant value.” Including *Romeo and Juliet* (who’s thirteen but has the presence of mind to marry Romeo before she sleeps with him), *American Beauty* and *Traffic*. Perhaps he had Justice Brennan’s famous passage in mind when in *Free Speech Coalition*, in a passage also likely to be frequently quoted, he in turn reminded his readers of the abiding human interest in youth and its dalliances:

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach.

Justice Kennedy also pointed out that 18, the age below which explicit depictions are prohibited by the statute, is well above the age many states permit their citizens to engage in sexual relations in or out of wedlock. Rejecting the justification that the material covered by the statute might lure children into the clutches of molesters, Justice Kennedy observed that so could video games and candy, “but we would not expect those to be prohibited because they can be misused.”

That may sound arch, but Justice Kennedy wasn’t kidding. The opinion resonates with the gravity of the issues at hand. It opens with a recitation of the First Amendment, the draconian penalties (up to 15 years for a first offense, up to 30 for a second) under the statute, and summarizes the Court’s historical protection of disfavored, unpopular and offensive expression. He dismisses the Government’s argument based on the material’s effect on the minds of child pornographers in another noteworthy passage

First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

In terms of jurisprudence the decision is perhaps most noteworthy for what it did not do, but what it didn’t do was profound. First, it kept *Ferber* in its box: there would be no expansion of a *Miller*-less obscenity test without a living, abused child. Indeed, Justice Kennedy pointed out that the dissenting Circuit Judge below had acknowledged this to be the law but urged that it be changed. The decision also kept *Osborne* in its box: the Court dismissed its “destruction of the market” rationale by noting that *Osborne* involved images of real, not virtual, children.

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Supreme Court, 6-3, Voids “Virtual” Child Porn Law

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Second, *Free Speech Coalition* preserves American constitutional obscenity jurisprudence, which began with *Roth*. A reversal, approving the “bad tendency doctrine” applied to abusers and victims alike, would have replaced it with something quite akin to the doctrine of *R. v. Hicklin*, [1868] L. R. 3 Q.B. 360 (“to deprave and corrupt” the most vulnerable consumer.)

It’s also noteworthy that the opinion was written by Justice Kennedy, the court’s bellwether vote, and that Justices O’Connor and Thomas concurred for the most part. For the time being *Miller* and *Ferber* are still good. But the trend in an increasingly conservative political climate is to fashion ostensibly content-neutral rationales to curtail sexually explicit content and thus avoid the First Amendment and its quaint notions of individual intellectual freedom and insurmountable strict scrutiny level, and *Miller*, with its pesky balancing of social worth against popular sentiment. In addition to zoning and licensing schemes, the centuries-old accusation of corruption of the youth, both as spectators and participants, provides an attractive implement.

Many concerned with the welfare of children may be disappointed by *Free Speech Coalition*. But given its limitless rationale of condemning everything the legislature concludes could inspire a child molester it’s hard to see what choice the Court had. The CPPA’s paradigm case remains that of (let us say) an artist, in the solitude of his home or atelier, sketching from his imagination erotic pictures of youthful-looking subjects (in the Third Circuit they need not even be nude), and thereby finding himself guilty of several federal felonies, RICO, forfeiture and decades in the penitentiary if a jury finds that they “appear to be” (to whom?) under 18. One needn’t be a First Amendment absolutist to suggest that this burns a very large house to roast a very small pig.

Laurence Sutter is Senior Vice President, General Counsel and Secretary of General Media, Inc.

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Editor's Note: Along with so many of you in the LDRC membership, I was stunned by the sudden and abrupt deaths of two of our colleagues in the First Amendment, media defense bar – two superb lawyers and two truly wonderful men. Goodness, how we will miss these men of valor whose lives we should continue to honor by remembering all that they brought to the cause of free speech and free press. --Sandy Baron

Richard L. Klein (1954-2002)

Rick Klein, a partner at Willkie Farr & Gallagher responsible for media law litigation for Bloomberg L.P. died on February 28, 2002 after suffering a massive heart attack at work. Sandy asked if I could jot down a few words about him for the LibelLetter, and I thought that I'd share the perspective of an associate who worked for him.

Rick's boundless — and persuasive — charm is what enticed me to come work for Willkie. He could flash that electric smile and make you feel honored to work 20 straight weekend hours on a access motion to intervene. Rick was everything a partner should be to a young associate: a rabbi, a teacher, a stern taskmaster and an outstanding editor. A graduate of Columbia Law School ('79), and a former clerk to Judge Haight in the Southern District, Rick could inspire as well, having a deep respect for the law in general, and for First Amendment jurisprudence in particular. Although he started out his career as a generalist litigator, he applied himself to learning the principles and policies that shape media law.

As many LDRC members may not know, in the last few years of his life Rick conducted a heroic battle against Multiple Myeloma, a rare form of bone cancer. He went through intense chemotherapy, stem cell transplants, and other procedures with a determination to come back to the firm, to live life fully and practice law at its highest level. Within 2 months of his therapy, Rick was back in the office, giving hell to anyone who sought to serve subpoenas on Bloomberg reporters, duking it out with erstwhile plaintiffs' counsel, and holding all our feet to the fire. Those of us lucky enough to have shared any time with Rick - socially or professionally - can count ourselves as lucky indeed.

*Charles Glasser
Media Law and Newsroom Counsel,
Bloomberg L.P., New York*

Samuel E. Klein (1946-2002)

"Samuel E. Klein was a journalist's best friend." So read an obituary for our lost friend, colleague and mentor, who died suddenly and too soon, at 55.

It is a great loss. Those of us who were privileged to work with him — and there are many of us — know that he was a lawyer of tremendous skill, determination and heart. It is telling that, upon learning of his death, sadness and praise were expressed not only by his grief-stricken clients and colleagues, but by long-time adversaries who fought him in grueling and notorious libel battles. One such opponent, Richard A. Sprague, called Sam "one of the finest, finest people" he knew; the other, James E. Beasley, said he was "the finest First Amendment lawyer in the United States."

He established his reputation as a formidable defender of the First Amendment and was intensely committed to all of his clients at many newspapers, magazines and television and radio networks and stations. His passion for their causes was unequalled.

He helped found Pennsylvania's First Amendment Coalition and was the first author and later editor of "The Media Survival Kit," a well-worn guidebook for reporters. He was a preparer of the LDRC'S outline for the LDRC 50-STATE SURVEY: MEDIA LIBEL LAW. Somehow, he found time in his endless work days to teach communications law, serve a variety of charities, and help manage our law firm.

But these accomplishments do not really describe the man we will remember. Sam was warm and kind-hearted, charismatic, a family man, funny and direct, and a mentor always generous with his time and his prodigious knowledge.

Journalists may feel that they've lost a best friend. We do, too.

*Gayle Sproul, Amy Ginensky and Vernon Francis
Dechert
Philadelphia, PA*

Fred Friendly-Style Seminar at Columbia University Student Press Convention

On March 21 LDRC produced a Fred Friendly-style seminar for the Columbia Scholastic Press Association's Annual Convention at Columbia University. The Columbia Student Press Association ("CSPA") has been promoting student journalism through competitions and workshops since 1924. The Convention is an annual event for high school journalism students and faculty advisers from all over the country – which made this an ideal platform to showcase and promote the LDRC Institute's First Amendment education program – Free Press in a Free Society.

Jay Brown, a partner with LDRC member firm Levine Sullivan & Koch, moderated a seminar with the theme "The Press, Law Enforcement & the Public's Right to Know." The hypothetical has print and television reporters following a hot story while law enforcement investigates crime, exploring how both sides do their respective jobs and the tensions that arise as they try to balance the public's right to information and public safety.

Hypothetical Explored Press and Public Safety Issues Post 9/11

This event used a hypothetical that directly explored the press / law enforcement theme in the context of issues that have come up post 9/11. Here the crimes under investigation were a series of bomb blasts in New York City at ATM machines and empty police cars. Suspicion falls on a high school student with alleged white extremist views. This was done deliberately to leave room for debate on the public safety issue and not have the press trumped with the claim of national security – but still posing serious public safety issues.

The panel featured: Zachary Carter (a former US Attorney & federal judge and now head of the white collar crime and civil fraud practice group at LDRC member firm Dorsey & Whitney); Stephen Engelberg (the Investigative Editor for the *New York Times*); David Gelber (a CBS News Producer for 60 Minutes & 60 Minutes II); Len Levitt (*Newsday* Columnist); Sol Watson (General Counsel The New York Times Company); and Lou Young (a veteran reporter for WCBS-TV).

Prioritizing public safety concerns, Zachary Carter took a hard line on the press, but the press representatives put on

a strong defense for how they would gather the news and the public's interest in receiving news. Questions from the students were intelligent and focused, including a some that touched on the murder of Daniel Pearl and the extent to which reporters will put themselves at risk for a story. Toward the end, Len Levitt summed up the unresolved complexities following 9/11 by discussing his inchoate sense of how those events have changed things for him as a reporter, as yet in no specifically identifiable way, other than in his "reporter's gut."

Teachers Invited to Follow Up and Contact LDRC

Faculty advisers attending the Convention will receive follow up information on LDRC's education program and will be invited to contact us if they are interested in hosting a program in their school. We will then try and match interested teachers with local LDRC's moderator.

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