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SANDRA S. BARON, ESQ.
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Dear Friends:

Starting in 2003 we will be known as the Media Law Resource Center. I am writing to give you a bit more background information on why we are changing our name and what this will mean for the organization and our many cooperative efforts.

As many of you know, the idea of changing our name is not new. The goal has always been to identify ourselves in a way that best reflects the growing scope of issues we research, track and report on, and that you are interesting in hearing about. Media Law Resource Center accomplishes this. The new name reflects our proud past, describes the present and allows for growth in the future.

When this organization was founded in 1980 libel was our membership's primary concern. Since then, the practical concerns of media and media counsel have broadened substantially to include, among other things, privacy and newsgathering issues, as well as a myriad of new Internet-related law issues. Among the many issues we have regularly been reporting on in our publications include privacy, newsgathering, fair use, and international legal liability.

The new name, "Media Law Resource Center," accurately reflects this broad pallette and will be a new and useful calling card to potential members who might otherwise perceive "Libel Defense Resource Center" as being too narrow in scope to their work.

On a practical note, we have already changed the name of the LibelLetter to the MediaLawLetter. And we are also planning to develop a new web site at www.medialaw.org. Going forward our goals, though, are the same: to support our members in their day-to-day media law operations, emphasizing practical issues and delivering useful information and services.

Sandra Baron
Executive Director, LDRC

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Dear MLRC members and friends:

I am pleased to invite you to attend MLRC's London Conference 2003: Developments in UK, European & International Libel, Privacy and Newsgathering Laws.

MLRC's London Conference 2003 takes place on September 22-23, 2003 at Stationers Hall, the ancient guildhall for booksellers and printers. The Conference will focus on developments in libel, privacy and newsgathering laws in a practical way, exploring where the law is going, and how best the media bar can address the changes. And it will also be a dynamic platform to continue and extend a dialogue with UK and European media lawyers and press experts on these issues.

The Conference will include four sessions on substantive law covering the topics of Jurisdiction & Internet Publication, Defamation, Privacy and Newsgathering Law. Each of these sessions will be facilitated by an American and English lawyer, and feature a multinational panel of lawyers who will be used as a starting point for a conversational dialogue among the attendees. We intend for these sessions to be interactive, drawing on the expertise of the group.

The conference also includes two panel sessions – a Journalists Panel offering the perspectives of leading newspaper and broadcast editors on the impact of developing law on gathering and reporting the news; and a Plaintiffs' Lawyer panel which will explore how the developing laws are impacting their approach and tactics. The Conference will close with a mock appellate court argument. Distinguished litigators Floyd Abrams and Geoffrey Robertson QC will argue a hypothetical media case to a panel of American, English and European court judges. The goal is to draw out in an intellectually engaging way comparative law differences and explore how these differences play out on a rhetorical and juridical level.

Our previous London Conferences in 1998 and 2000 were enormously successful and we are confident the 2003 Conference – which is designed to broaden the discussion to European and other international developments – will be an equal success. Because space is limited we encourage you to register promptly to ensure your place.

Sandra S. Baron

The Conference is presented with the sponsorship of Bloomberg News, Media/Professional Insurance and the law firms of Covington & Burling, Davis Wright Tremaine, Finers Stephens Innocent, Jackson Walker, & Pinsent Curtis Biddle.

MLRC London Conference 2003
Developments in UK, European and International Libel, Privacy and Newsgathering Laws
London, England September 22-23, 2003

- **Registration –** Registration for the Conference is $300. A registration form is attached. Because space will be limited, we ask that you let MLRC know as soon as possible whether you will be attending. Registration fees are not refundable after July 1, 2003.

- **Conference Center –** Stationers Hall is located at Ave Maria Lane, London EC4. The site can be previewed at www.stationers.org.

- **Hotel Arrangements** – MLRC has made arrangements with two nearby hotels. The Howard is a five star business class hotel a 10 minute walk from Stationers Hall. Club Quarters is a somewhat less expensive budget hotel located adjacent to Stationers Hall. Conference rates will be held until July 18, 2003. Conference goers should contact these hotels directly.

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Conference Rates from £114-185 + tax

CURRENT SCHEDULE
MLRC London Conference
September 22-23, 2003

MONDAY SEPTEMBER 22, 2002

9:10 a.m. Welcome – Sandra Baron, Executive Director Media Law Resource Center

9:15 a.m. Keynote Address – Lord Justice David Keene of the Court of Appeal

10:00 a.m. SESSION I – JURISDICTION & INTERNET PUBLICATION
Facilitators: David Schulz, Clifford Chance USA LLP (New York)
Mark Stephens, Finers Stephens Innocent (London)
Panel: Peter Bartlett, Minter Ellison (Melbourne)
Patrick Dunaud, Sokolow, Carerras & Mercadier (Paris)
Robert Vanderet, O'Melveny & Myers LLP (Los Angeles)

12:30 BUFFET LUNCH

1:15 – 2:30 JOURNALISTS PANEL

Moderators: David Hooper, Pinsent Curtis Biddle (London)
Kurt Wimmer, Covington & Burling (Washington, D.C. / London)
Panel: Frederick Kempe, Editor Wall Street Journal Europe
Tony Maddox, VP CNN International for Europe, Africa & Mideast
Piers Morgan, Editor The Mirror
Alan Rusbridger, Editor The Guardian

2:45 p.m. SESSION II – DEFAMATION

Facilitators: James T. Borelli, Media/Professional Insurance (Kansas City)
Meryl Evans, Reynolds Porter Chamberlain (London)
Panel: Charles Babcock, Jackson Walker L.L.P. (Dallas)
Dr. Jan Hegemann, Hogan & Hartson Raue L.L.P. (Berlin)
Adrienne Page QC, 5 Raymond Buildings (London)
Brian MacLeod Rogers, Barrister & Solicitor (Toronto)

5:00 p.m. Adjournment

RECEPTION – Sponsored by Bloomberg News

TUESDAY SEPTEMBER 23, 2002

9:15 a.m. SESSION III – PRIVACY
Facilitators: David Bodney, Steptoe & Johnson LLP (Phoenix)
David Sherbourne, 5 Raymond Chambers (London)
Panel: Professor Pierre-Yves Gautier, University Pantheon-Assas (Paris)
Michael Tugendhat QC, 5 Raymond Chambers (London)

12:00 p.m. BUFFET LUNCH

Speaker: Nick Wilkinson, Secretary of the Defence, Press and Broadcasting Advisory Committee. The Committee oversees a voluntary code between the UK Government and the media regarding publication of information affecting national security.

1:30 p.m. SESSION IV – NEWSGATHERING
Facilitators: Siobhain Butterworth, The Guardian (London)
Lee Levine, Levine Sullivan & Koch LLP (Washington, D.C.)
Panel: Harvey Kass, Associated Newspapers (London)
Rosalind McInnes, BBC Scotland (Glasgow)
Kelli Sager, David Wright Tremaine LLP (Los Angeles)
Dr. Jörg P. Soerhring, Latham Watkins Schön Nolte (Frankfurt)

4:00 p.m. PLAINTIFFS' PANEL
Moderators: Julie Ford, Bell Turney Coogan & Richards L.L.P. (Austin)
Amber Melville Brown, Schillings (London)

Panel: Andrew Caldecott QC, 1 Brick Court
David Price, David Price Solicitors & Advocates
James Price QC, 5 Raymond Buildings
Keith Schilling, Schillings

5:30 p.m. RECEPTION – Sponsored by Finers Stephens Innocent and Pinsent Curtis Biddle

6:30 – 8:45 MOCK APPELLATE COURT ARGUMENT

Judges: Judge Pierre Leval U.S. Court of Appeals, Second Circuit
Lord Justice Sedley, Court of Appeal of England & Wales (invited)

Counsel: Floyd Abrams, Cahill Gordon Reindel (New York)
` Geoffrey Robertson QC, Doughty Street Chambers (London)

London Conference 2003 Registration

MLRC London Conference 2003
Developments in UK, European and International Libel, Privacy and Newsgathering Laws
London, England September 22-23, 2003

I will attend _____
(name)

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(Please print your e-mail address clearly so that material and updates can be distributed quickly to you.)

Registration check in the amount of $300 should be made payable to MLRC.

Mail to:

MLRC
80 Eighth Avenue, Suite 200
New York, NY 10011-5126

Attendees May RSVP By Fax to 212-337-9893
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MLRC Media Law Resource Center

MEDIALAWLETTER

Associate Member Edition **Winter 2003**

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Jurisdiction From Internet Publishing
U.S. v. Australian View

Website Content Must Be Intentionally Directed At Forum To Support Personal Jurisdiction

Fourth Circuit Panel Unanimously Reverses District Court in Young v. New Haven Advocate

By Robert D. Lystad and Stephanie S. Abrutyn

The mere fact that Internet content is accessible in a specific geographic location is not sufficient, in and of itself, to support personal jurisdiction against out-of-state newspapers in a defamation lawsuit filed in the plaintiff's home state, said the U.S. Court of Appeals for the Fourth Circuit in a decision issued December 13, 2002. The appellate court reversed the decision of the U.S. District Court for the Western District of Virginia, which had found jurisdiction appropriate in Virginia over two Connecticut-based newspapers based solely on the newspapers' operation of websites that were accessible in Virginia, in spite of the fact that the newspapers had little or no circulation in Virginia and had virtually no other traditional jurisdictional contacts with the state. According to the Fourth Circuit, jurisdiction would be appropriate only if the newspapers evinced a "manifest intent" to target and focus its content on a Virginia audience. *Young v. New Haven Advocate*, No. 01-2340 (4th Cir. Dec. 13, 2002).

The Fourth Circuit's analysis is the first federal appellate decision resolving this issue. Had the Fourth Circuit adopted the District Court's approach, it could well have created a chilling effect on Internet speech. For some publishers, a chilling effect was felt just three days before the *Young* decision was issued, when the High Court of Australia held that Internet contact with a forum *is* sufficient to support jurisdiction in Australia over a U.S.-based publisher. *Dow Jones & Co. v. Gutnick*, 2002 HCA 56 (Dec. 10, 2002).

Connecticut Prisoners in Virginia

In late 1999, the State of Connecticut, as a cost-cutting measure and in an effort to reduce overcrowding in its prisons, contracted to transfer approximately 500 of its prisoners

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Australian High Court: Publishers Should Keep Their Assets, If Not Their Articles, In the United States

Dow Jones & Company, Inc. v. Gutnick

By Stuart Karle

To paraphrase W.C. Fields, on the whole we would have rather been in Richmond.

On December 10, the Australian High Court, that country's court of final appeal held that Dow Jones could be sued by a prominent Australian citizen in the Supreme Court of Victoria over an article published on Dow Jones's news website Barron's Online, which is available through WSJ.com. The High Court also held that the libel claim would be governed not by US law, but by Australian law, which would not require any showing of fault by Barron's New York-based reporter and editors. *Dow Jones & Company, Inc. v. Gutnick* [2002] HCA 56.

The unanimous, 7-0 result produced four opinions. In dicta, three of the opinions appear to hold out some hope for publishers wary of being sued half-way around the world for libel based on an article posted on a United States-based website. Unfortunately, for US publishers at least, these dicta are likely to be of little value.

Justice Michael Kirby, while concurring in the result, discussed the impact of the internet on libel law at some length and concluded that the court's finding, while required by precedent, was not "a wholly satisfactory outcome" and was "contrary to intuition." But Justice Kirby said the solution would have to be found not in the courthouse, but in legislation and international treaties.

The Article on Barron's Online

On Saturday, October 28, 2000, Dow Jones loaded onto its web servers in New Jersey an article headlined "Unholy Gains," which reported on the possible role played by religious charities in the United States in questionable trades of publicly-owned securities. (The article also appeared in that

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to a correctional facility in Big Stone Gap, Virginia. Most of the prisoners were minorities, while most of the prison staff were white. The decision to ship the inmates to Virginia ignited a public controversy in Connecticut, as allegations of abuse and poor conditions were leveled by the transferred prisoners. Concerns also arose in Connecticut with regard to the difficulty of visiting relatives detained in a Virginia prison and the widespread presence of Confederate flags in Big Stone Gap. The Connecticut media devoted extensive coverage to the controversy. Some news articles mentioned the prison warden, Stanley Young, by name, along with the presence of the Civil War memorabilia in his office.

Virginia Warden Young Sues

The *New Haven Advocate* and the *Hartford Courant* both wrote articles about the prison controversy. In May 2000, Warden Young filed a defamation action against the two newspapers in the U.S. District Court for the Western District of Virginia. Young alleged that certain articles had defamed him by portraying him as a racist who encouraged the abuse of prisoners.

At the time of publication, the *Courant* had eight subscribers located in Virginia, while the *Advocate* had zero. None of the reporters or editors had set foot in Virginia in the course of preparing the articles. However, the newspapers each have websites that allow anyone with Internet access (including, of course, Virginia residents) to view their editorial content. Having none of the traditional contacts with Virginia that typically are required to support personal jurisdiction, the newspapers filed motions to dismiss for lack of jurisdiction.

The newspapers argued that the mere fact that their articles could be viewed in Virginia over the Internet was not sufficient to support jurisdiction. They said that since they had no traditional contacts with Virginia and had never solicited business or directed any content (Internet or otherwise) at a Virginia audience, dismissal was proper. The newspapers argued that under *Calder v. Jones*, 465 U.S. 783 (1984), and other precedent, jurisdiction in Virginia was improper because they did not "expressly aim" their conduct at Virginia. They pointed out that the articles in

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week's print edition of Barron's, which had a circulation of approximately 300,000 copies, 99 percent of which was in the United States.) Barron's Online is a feature of WSJ.com, the principal news website published by Dow Jones. WSJ.com is available only to paying subscribers or trial subscribers; at the time "Unholy Gains" was placed on the website, WSJ.com had more than 500,000 paying subscribers. Several of the companies whose shares were involved in the questionable trading described by Barron's were associated with Joseph Gutnick, an Australian-based businessman who was also chairman of a company listed for trading in the United States and who had stated his intention to move a substantial portion of his business interests to the United States.

Shortly after the article appeared, Gutnick filed a claim in the Supreme Court of Victoria in Melbourne alleging that he had been libeled by the publication of the article on Barron's Online. The Statement of Claim made no mention of, and, indeed deleted from the exhibit attached to the claim, the bulk of the article, which concerned transactions and activities in the United States. The libel claim was based only on a few paragraphs that referred to a man convicted of money-laundering in a widely publicized case in Melbourne.

Dow Jones' application to dismiss the case, or in the alternative to have the case heard in Melbourne but to have the article judged under United States law, was denied by the trial court in August 2001; that decision was affirmed by the Court of Appeal of Victoria in a matter of weeks. In December 2001, the High Court granted Dow Jones' application for special leave to have its appeal heard on these two points.

The High Court Decision

Because in Australia "matters of substance are governed by the law of the place of the commission of the tort," the critical first question for the High Court was whether the libel, if there was one, had occurred in Australia. Libel is largely a strict liability tort in Australia, as it is throughout the Commonwealth, and would occur under traditional Commonwealth rules wherever an article is "published."

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question focused specifically on the Connecticut policy of the prisoner transfer, and that their websites were directed at Connecticut readers.

Young argued that jurisdiction was proper in Virginia because the alleged damage to his reputation occurred in Virginia—by virtue of the articles being downloaded and read in Virginia, where he lived and worked—and because the articles discussed events occurring in Virginia.

The District Court Decision

Senior U.S. District Court Judge Glenn Williams agreed with Young and held that jurisdiction was proper in his court. In an opinion issued August 10, 2001, Judge Williams held

The newspapers argued in their interlocutory appeal to the Fourth Circuit that an "exodus" of speakers from the Internet would result from the decision.

that "information placed on an Internet website should be subjected to multistate jurisdiction." Relying chiefly on *Calder*, Williams wrote that constitutional Due Process requirements had been met because the defendants had published statements on a website that could be viewed by Virginia readers. Since the newspapers knew that Warden Young lived and worked in Virginia, they should have been aware that any damage to his reputation would occur there. Williams held that "[w]hen such information is posted on the Internet, the [information] is offered to a worldwide audience," thus intimating that worldwide jurisdiction would be appropriate.

Since the District Court's holding supported jurisdiction in virtually any location where Internet material could be viewed, the newspapers argued in their interlocutory appeal to the Fourth Circuit that an "exodus" of speakers from the Internet would result from the decision, "as speakers concerned about lawsuits in far-off jurisdictions" would simply decline to publish on the Internet. The newspapers' appeal to the Fourth Circuit was supported by a broad coalition of media *amici*.

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Dow Jones argued in the High Court, as it had below, that the place of publication of Barron's Online was New Jersey, where the site's webservers are located. Wherever readers happened physically to be when they logged on to the website, all would have to send a message to New Jersey to retrieve the article. Dow Jones argued that choosing a single location for publication of the article would enable publishers to identify with certainty the legal rules with which their publications would need to comply.

The High Court rejected this argument, finding that it was bound by Commonwealth principles to find that publication occurred only when the text of the article was comprehensible-in this case, when the article appeared in readable form on a computer screen. Publication had therefore occurred in Victoria when a subscriber sitting there saw the article on her screen.

Rejected Simple Publication Rule

Dow Jones' alternative argument on publication was to urge the court to adopt the single publication rule in recognition of the fact that even if the article had been published when read in Victoria, it simultaneously had been published globally when readers pulled the article onto their computer screens. Because internet publication is global, the real place of the tort, and the jurisdiction in which claims should be litigated, is the country to which the defendant directed the article and where the dominant circulation of the article occurred.

While noting the "obvious force in pointing to the need for the publisher to be able to identify, in advance, by what law of defamation the publication may be judged," the court rejected adoption of a global tort theory to provide publishers with that certainty. The majority opinion discussed the development of the single publication rule in the United States from its inception through the decision of the New York Court of Appeal in Firth v State of New York, 775 N.E.2d 463 (2002) (applying the single publication rule to internet publications). The court was not impressed, stating that the single publication rule had morphed from one designed to limit the multiplicity of lawsuits into a choice of law rule, citing a 1949 note from the Harvard Law Review.

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Fourth Circuit Requires "Manifest Intent" to Reach Forum State's Audience

In its ruling, a three-judge panel of the Fourth Circuit unanimously reversed the District Court. The court said that under *Calder* and a recent Fourth Circuit case applying *Calder*, Internet content must be "expressly targeted at or directed to the forum state" to support jurisdiction. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002). Young had argued that *Calder* required a finding of jurisdiction simply because the newspapers posted articles on their websites that discussed the warden, and because the warden would feel the effects of the alleged libel in Virginia. "*Calder* does not sweep that broadly," the Fourth Circuit replied. Rather, jurisdiction would be proper only if the "newspapers manifested an intent to direct their website content . . . to a Virginia audience."

The Court specifically ruled that merely making content available on the Internet is not sufficient to support jurisdiction in any state where that information can be accessed.

The Court specifically ruled that merely making content available on the Internet is *not* sufficient to support jurisdiction in any state where that information can be accessed. Something more is required for a newspaper to be "intentionally directing" website content at a jurisdiction.

(The Fourth Circuit did not discuss whether jurisdiction was appropriate against the *Hartford Courant* based on its eight mail subscribers in Virginia because Young did not rely on those contacts in his argument, and neither did the District Court rely on those traditional contacts in its decision below.)

In the opinion, the Fourth Circuit examined the newspapers' activities with respect to Virginia in order to determine whether they had "manifested an intent" to focus on a Virginia audience. The Court first studied the general content of the newspapers' websites that Warden Young had placed in the record, and concluded that since the "overall content of both websites is decidedly local," the newspapers had aimed their articles and websites only at a Connecticut audience.

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Instead, the court said it was bound by the traditional Commonwealth notion that each publication of a defamatory article is a separate tort that can be sued on separately. This multiple publication principle arises from a mid-19th century case in which the Duke of Brunswick sued on an article from a newspaper that his servant had retrieved from a newspaper archive at the Duke's request more than a decade after the newspaper was first published. Justice Kirby, the High Court judge whose opinion seemed most sympathetic to Dow Jones's arguments, noted rather dryly that

> "[t]he idea that this Court should solve the present problem by reference to judicial remarks in England in a case, decided more than a hundred and fifty years ago, involving the conduct of the manservant of a Duke, dispatched to procure a back issue of a newspaper of minuscule circulation, is not immediately appealing to me."

The Internet Does Not Require New Rules

The majority opinion of the court also dismissed the notion that the "considerable technological advance of the world wide web" raised particularly new issues. "The law has had to grapple with such cases ever since newspapers and magazines came to be distributed to large numbers of people over wide geographic areas." Justice Kirby was again far more sympathetic, noting that

> "[i]ntuition suggests that the remarkable features of the Internet (which is still changing and expanding) make it more than simply another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals."

But the majority said it would be wrong to focus on the scope of publication because

> "those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction."

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The Court noted that the websites and the newspapers themselves were focused on local, Connecticut-related matters, such as providing local weather and traffic news, feature stories about Connecticut attractions, and links to websites for the University of Connecticut and the state government.

The Court also examined the allegedly defamatory articles themselves in order to determine whether they were "posted on the Internet with the intent to target a Virginia audience." Although the articles alleged that Warden Young's prison had sub-standard conditions (and once mentioned the presence of Civil War memorabilia in his office), the newspapers' mere knowledge that Young worked and lived in Virginia did not constitute a "targeting" of Virginia as the focus of the articles. The Court held that "Connecticut, not Virginia, was the focal point of the articles," because the articles concentrated on the impact of the Connecticut prisoner transfer policy in Connecticut. The news stories "reported on and encouraged a public debate in Connecticut about whether the transfer policy was sound or practical for that state and its citizens," and therefore the newspapers had no "manifest intent" to target Virginia readers when they posted the articles online.

Fortunately, the Fourth Circuit engaged in careful scrutiny of the two newspapers' websites rather than following the "Internet-has-changed-everything" mantra that has greeted so many other defendants in Internet jurisdiction cases. Following on the heels of the High Court of Australia's decision in *Dow Jones & Co. v. Gutnick*, the opinion in *Young* hopefully demonstrates that well-established personal jurisdiction principles can – and must – govern this new medium in order to avoid a chilling effect on the flow of Internet speech.

Robert D. Lystad, a partner in the Washington office of Baker & Hostetler LLP, argued the case before the Fourth Circuit on behalf of the New Haven Advocate and the Hartford Courant. Stephanie S. Abrutyn serves as Counsel/East Coast Media, for the Tribune Company, and as in-house counsel for the Advocate and Courant. Robert Stuart Collins of Fleming & Collins, Norton, VA, represented Young. The Fourth Circuit's decision was written by Judge M. Blane Michael and joined by Judges Roger Gregory and Bobby Baldock, a senior judge of the Tenth Circuit sitting by designation.

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In accepting this point, the High Court ignored the trial court's key finding that WSJ.com is a subscription website. The trial court emphasized that because Dow Jones could reject subscribers who said they were Australian, Dow Jones could have kept, or at least made some effort to keep, the Barron's article out of the antipodes. But none of the High Court opinions devoted any analysis to WSJ.com's paid subscriber base.

Once the court arrived at the determination that publication is local, not global, there was little work left for the court. The focus of Australian defamation law is damage to the plaintiff's reputation - the conduct of the reporter and publisher is irrelevant except in a very limited class of cases -

A plaintiff may sue a publisher in each and every jurisdiction in which he can allege he has a reputation.

and so a plaintiff may sue a publisher in each and every jurisdiction in which he can allege he has a reputation. Here, by seeking damages only for the hits registered by subscribers sitting in front of computer screens located in Victoria, Gutnick ensured that the tort occurred, and could only have occurred, in Victoria, according the High Court. "It is his reputation in that State, and only that State, which he seeks to vindicate," said the court. The court never explains precisely how this "vindication" would work in the vast regions of the world, like the United States, where the article went unchallenged.

Some modest comfort to foreign publishers may be found in dicta discussing what would happen if a plaintiff sought to recover damages in "a case in which it is alleged that the publisher's conduct has all occurred outside the jurisdiction of the forum." The court appears to be holding that if a plaintiff were to sue a United States-based publisher for libel for an article prepared entirely outside of Australia and for damages suffered outside of Australia, then it might be necessary to actually consider whether the publisher acted "reasonably before publishing" the article. One justice took this point further, positing that an action brought in Australia that also sought damages for publication in other jurisdic-

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tions might well be sent to one of those jurisdictions on a forum non conveniens application.

Of course, it is far from obvious that an Australian plaintiff's libel counsel, faced with the application of U.S. libel law to a case brought in Australia, would choose to sue in Australia at all. Top libel awards there are far less than the occasional multi-million dollar jackpots at the top of the U.S. libel heap. Rather than take on the burdens imposed by First Amendment jurisprudence and the limited damages available in Australia, many lawyers pressing claims to be governed by United States law would roll the dice and sue in the States.

The Court Discounts a Global Threat to Publishers

The court identified several principles that it said limited "the spectre which Dow Jones sought to conjure up . . . of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe . . . ."

First, the Court assumed that an internet publisher could "readily identify the defamation law" to which a person mentioned in an article may resort. With a little old man who never leaves his home in Sydney, this may be true. The point seems far weaker when General Electric, Microsoft, Sun, Cable & Wireless, Deutschebank, and any other member of the 1,000 or so largest companies in the world may claim reputations in literally dozens of countries. So, too, could individuals with homes in multiple countries, or business interests with which they are closely identified. A separate problem would seem to arise in preparing articles in which a number of different people or companies, with reputations in different countries, are mentioned only briefly. The law of many far-flung jurisdictions might apply to each of these articles.

Second, the court also said that defendants shouldn't be particularly concerned about getting dragged into remote jurisdictions because damages would only be substantial "if the plaintiff has a reputation in the place where publication is made." But in practice, this logic provides little comfort to a publisher. Australian libel damages are quite low - hundreds of thousands of dollars at the most, and hardly the millions potentially at risk in a United States courtroom - so the real economic driver is the recovery of costs by the prevailing party. Those costs, which include a substantial percentage of the prevailing party's legal fees, will typically far exceed any damage award, and can be in the millions. Thus the potential to recover fees provides a strong incentive for plaintiffs and an equally strong deterrent to U.S. publishers.

Third, the majority also reasons that plaintiffs are unlikely to sue if their damage award would be unrecoverable in the jurisdiction in which the publisher's assets can be attached. Under this logic, an Australian plaintiff simply wouldn't sue an American publisher whose assets are all in America because it is likely that the judgment wouldn't be collectible in the States. This theory is belied by this case, where the publisher of Barron's Online, Dow Jones & Company, Inc., is a United States corporation with no assets or employees in Australia. This plainly has not deterred Gutnick, or his solicitors and counsel. More importantly, it is generally not an option for a major publisher to allow its credibility or its reporters' reliability to be damned without a fight, at least not in what appears to be a responsible forum. Responsible publishers must take very seriously the specter of a libel plaintiff touting a default judgment as false vindication.

The Justice most hostile to Dow Jones' arguments stated that he saw this case as an attempt by an American publisher "to impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony in relation to Internet publications" and to confer upon the United States "an effective domain over the law of defamation, to the financial advantage of publishers in the United States . . ." But the hegemony permitted by this decision is that of Victorian libel law over a communication that beyond dispute was by and large published in America by an American magazine that is directed at Americans and that is concerned exclusively with issues of concern to American investors. Publication may for the Australian High Court be a local issue, but the problems left by this decision are global.

Dow Jones is represented by barristers Geoffrey Robertson, QC, of Doughty Street Chambers in London and Tim Robertson of Frederick Jordan Chambers in Sydney; solicitors Gilbert & Tobin in Sydney, and Stuart Karle of Dow Jones. Joseph Gutnick is represented by barristers Jeffrey L. Sher, QC, and Michael Wheelahan and solicitors Schetzer Brott & Appel, Melbourne. Intervenors represented by barristers Bret Walker and Sarah Pritchard, St. James Hall, and solicitors Blake, Dawson, Waldren of Sidney, and David Schulz of Clifford Chance, New York.

Landmark Decision by War Crimes Tribunal on Reporters Privilege

By Eric Lieberman

In a landmark decision, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that war correspondents have a qualified privilege not to testify before a war crimes tribunal about their newsgathering from conflict zones, and set aside a subpoena issued to former Washington Post war correspondent Jonathan Randal. From now on, journalists will only be compelled to give evidence before the ICTY in exceptional cases where the court is satisfied that "the evidence sought is of direct and important value in determining a core issue in the case," and "cannot reasonably be obtained elsewhere."

Background

In early 1993, Randal and another journalist conducted an interview with Radoslav Brdjanin in Banja Luka. Excerpts from the interview were subequently published in The Washington Post on February 11, 1993, in an article entitled "Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal."

The court specifically cited the European Court of Human Rights' seminal decision in Goodwin v. United Kingdom, which recognized the "vital public watchdog role" played by the press in democratic societies, as well as U.S. law.

Brdjanin was later charged with various war crimes. The prosecutors sought to have Randal's article admitted into evidence, claiming that it was relevant to establishing Brdjanin's criminal intent. Defense counsel objected to admitting the article unless he could cross-examine Randal about the article and its context.

On January 29, 2002, the Trial Chamber issued a subpoena to Randal. Randal refused to comply with the subpoena, and filed a motion to have it set aside. He argued that the ICTY should recognize a qualified privilege for conflict zone reporters not to testify about their newsgathering, and that the subpoena should be quashed because the prosecution failed to demonstrate why the claimed privilege should be overcome on the facts of his case. Randal contended that war correspondents who take the witness stand risk being perceived by potential sources as an investigative arm of a judicial system, and that subpoenas to reporters therefore threaten the free flow of information from conflict zones. Randal also argued that if reporters become identified as would-be witnesses, their personal safety within conflict zones would be further compromised.

On June 7, 2002, the Trial Chamber upheld the subpoena, and refused to recognize a qualified privilege for journalists when no issue of protecting confidential sources was involved. The Trial Chamber concluded that when testimony from a journalist relates to published information from identified sources, compelling the journalist's testimony poses only a minimal threat to newsgathering. The Trial Chamber thus held it sufficient that Randal's was "pertinent" to the case.

The Trial Chamber granted leave to appeal, which Randal subsequently filed in late June. An Appeals Chamber was constituted consisting of Presiding Judge Claude Jorda (France), Judge Mohammed Shahabudden (Guyana), Judge Mehmet Guney (Turkey), Judge Asoka de Zoysa Gunawardana (Sri Lanka), and Judge Theodor Meron (U.S.). A worldwide coalition of 34 media entities and organizations filed an amicus brief in support of Randal's appeal. The five-judge court heard argument from the parties and the amici on October 3, 2002.

The Appeals Chamber's Decision

The Appeals Chamber broke down the issue of whether war correspondents should be afforded a qualified privilege into three subsidiary questions: "Is there a public interest in the work of war correspondents? If yes, would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work? If yes, what test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court and, where it is

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implicated, the right of the defendant to challenge the evidence against him?"

1. *Is there a public interest in the work of war correspondents?*

The Appeals Chamber answered "yes" to the first question. The court explained that

> "international and national authorities support the related propositions that a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled production of evidence by journalists may, in certain circumstances, hinder their ability to gather and report the news."

The court specifically cited the European Court of Human Rights' seminal decision in *Goodwin v. United Kingdom*, which recognized the "vital public watchdog role" played by the press in democratic societies, as well as U.S. law.

The Appeals Chamber further explained that the work of war correspondents in particular serves the public interest, as evidenced by the crucial role that war correspondents played in uncovering evidence of human rights violations in the former Yugoslavia:

> The transmission of [accurate] information [from war zones] is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of this Tribunal. In this regard, it may be recalled that the images of the terrible suffering of the detainees at the Omarska Camp that played such an important role in awakening the international community to the seriousness of the human rights situation during the conflict in Bosnia Herzegovinia were broadcast by war correspondents.

The court found additional support for the public interest in the work of war correspondents in the "right to receive information" contained in Article 19 of the Universal Declaration of Human Rights. Article 19 provides in pertinent part that "[e]veryone has the right . . . to seek, receive and impart information and ideas through any media and regardless of frontiers."

2. *Would compelling war correspondents to testify in a war crimes tribunal adversely affect their ability to carry out their work?*

On this question, the Trial Chamber below concluded that compelling war correspondents to testify where the testimony sought relates to published information and does not involve confidential sources would not "hamper[]" or "endanger[]" their "objectivity and independence." The Trial Chamber faulted Randal for failing "to distinguish between those cases where something fundamental like being forced to reveal confidential sources and unpublished information or cases where newspapers are subjected to search of their offices or archives, from cases like his, where he had no problem with revealing to the entire world Brdjanin's alleged declarations in a publication but now seeks to avoid having to confirm it."

The Appeals Chamber viewed the issue differently. Even when the testimony of war correspondents does not relate to confidential sources, the court concluded "compelling war correspondents to testify before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern." In a critical paragraph of the opinion, the Appeals Chamber reasoned as follows:

> What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information. To publish the information obtained from an interviewee is one thing – it is often the very purpose for which the interviewee gave the interview – but to testify against the interviewed person on the basis of that interview is quite another. The consequences for the interviewed

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> persons are much worse in the latter case, as they may be found guilty in a war crimes trial and deprived of their liberty. If war correspondents were to be perceived as potential witnesses for the prosecution, two consequences may follow. First, they may have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.

Having reached the conclusion that routine compellability of journalists would not serve the public interest, the Appeals Chamber next addressed "how the course of justice can be adequately assured without unnecessarily hampering the newsgathering function of war correspondents."

3. *What test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court?*

The Trial Chamber justified issuing a subpoena to Randal because the evidence sought was "pertinent" to the case. The Appeals Chamber rejected that standard, concluding that

> "the word 'pertinent' is so general that it would not appear to grant war correspondents any more protection than that enjoyed by other witnesses."

Instead, the court established a two- pronged test that must be satisfied in order for a Trial Chamber to issue a subpoena to a war correspondent:

> "First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence cannot reasonably be obtained elsewhere."

Since the Trial Chamber failed to apply the correct legal standard before issuing Randal's subpoena, the Appeals Chamber set the subpoena aside.

The Appeals Chamber chose not to decide the facts of Randal's case, but offered some "observations" if the prosecution or defense decides to submit a new application in the Trial Chamber for Randal's testimony. Principally, the Appeals Chamber noted that because Randal speaks no Serbo-Croatian and relied on his fellow journalist for interpretation, it is "difficult to imagine how [Randal's] testimony could be of direct and important value to determining a core issue in the case."

Judge Shahabudden filed a separate concurring opinion. The full text of both opinions is available on-line at www.un.org/icty

Jonathan Randal was represented by Geoffrey Robertson QC and Steven Powles of Doughty Street Chambers, and Fiona Campbell and Mark Stephens of Finers Stephens Innocent. Amici were represented by Floyd Abrams, Joel Kurtzberg, and Karen Kaiser of Cahill Gordon & Reindel.

Eric Lieberman is Associate Counsel for The Washington Post Company.

UK Law Commission Recommends Reforms to Internet Defamation Laws

This month the Law Commission, an independent law reform body set up by the UK Parliament in 1965, released the results of its preliminary study on Defamation and the Internet, endorsing law reform in several key areas.

The Commission considered four areas of concern: 1) ISP liability for third party content; 2) statute of limitations rules for online publications; 3) internet jurisdiction issues; and 4) potential contempt of court liability for Internet publications.

Quite significantly, the Commission found that there is "a strong case for reviewing the liability of internet service providers." And it noted that one reform would be to follow the US example of exempting ISPs from liability for third party content. The Commission also recommended a full review of statute of limitations law for online archives, noting that "possible reforms include the introduction of some form of 'single publication rule' or the development of a separate archive defense."

On jurisdiction, the Commission expressed sympathy with publishers' concern for "unlimited global risk" for Internet publications, but it noted that a solution would likely require an international treaty rather than law reform. But the Commission did recommend that the government sponsor research on how other countries deal with Internet jurisdiction issues to better inform policy makers.

Finally, the Commission considered contempt of court liability – which is not a defamation issue, but which may pose unique issues for Internet publishers. Under UK law, the press is generally prohibited from publishing "prejudicial" reports about ongoing criminal cases. The Commission noted that in some circumstances online archives may raise contempt issues, but the Commission concluded that the criminal justice system can rely on the "good sense of jurors" to avoid such problems, concluding that reform in this area is not a priority.

The likely next step is for the Commission to undertake an in depth review of ISP liability and statute of limitation issues with the goal of developing a full reform recommendation. The Commission has a high success rate – nearly two-thirds of its law reform recommendations have been adopted by Parliament.

A copy of the Commission report is available at: www.lawcom.gov.uk/files/defamation2.pdf.

Modified ALI Proposal on International Judgments Still Troubling To First Amendment Advocates

Editor's Note: *WE NEED YOUR HELP ON THIS MATTER. Please review the text below and see how you, or perhaps your colleagues who are members of ALI, can help us on what became a struggle at ALI to protect existing protections against enforcement of foreign libel judgments.*

By Tom Leatherbury

Thanks to all of you who responded with suggestions and comments concerning the portion of the American Law Institute's proposed Act on International Jurisdiction and Recognition of Judgments which may affect the ease with which foreign libel judgments are enforced. Our collective comments had some impact on the most recent, revised draft, which was circulated and discussed by the ALI's Council in mid-December. The Reporters' Notes, however, remained troubling. The Reporters' Notes to the December draft provided:

(d) The Public Policy Exception and the First Amendment.

The appropriate scope for the public policy exception [to enforceability of foreign judgment] has given rise to sharp debate in the context of several recent libel cases in the United States. In both *Bachchan v. India Abroad Publications, Inc.,* 154 Misc. 2d 228, 585 N.Y.S. 2d 661 (Sup. Ct. N.Y. Cty. 1992), and *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (1997), *aff'd* (table), 159 F.3d 636 (D.C. Cir. 1998), libel judgments obtained in England were denied enforcement in courts in the United States on the ground that the libel law of England is incompatible with the values reflected in the First Amendment of the U.S. Constitution, and hence, that enforcement would be contrary to U.S. public policy. In *Telnikoff*, the libel judgment had been obtained by one resident of England against another resident of England, both of whom were Russian émigrés; the offending letter and published comments had no connection with the United States. In *Bachchan*, an Indian plaintiff had sued a New York news operator, who had distributed an allegedly libelous news story in both New York and the United Kingdom; the libel related to alleged misconduct by the Indian plaintiff in India and the story was reported in numerous counties in the world. Several aspects of §5(a)(vi) [the section of the Act which contains the public policy exception] are raised by these cases. The first is whether the differences between American and English libel law — with respect to issues such as the standard for liability in actions brought against the press and differences over where the burden of proof lies — are so fundamental that they are repugnant to basic concepts of justice and decency in the United States. That issue remains subject to intense debate. *Compare* Scoles, Hay, Borchers, Symeonides, Conflict of Laws (Third ed. 2000) 1211 n. 12; Joachim Zekoll, "The Role and Status of American Law in the Hague Judgments Convention Project," 61 Alb. L. Rev. 1283, 1305-06 (1998) (criticizing the implicit holding in *Bachchan* that even minor deviations from American free speech standards violate public policy and render judgments unenforceable) *with* Kyu Ho Youm, "Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law", 16 Hastings Comm. & Ent. L.J. 235 (pointing out that American libel law offers publishers significantly more protections than does British law and thus the *Bachchan* decision was "no surprise"). The second aspect relates to the territorial connection or nexus with American interests necessary to trigger the exception of U.S. public policy. If the reason for enforcement in the United States is simply the presence of assets here, the values represented in differences about the limits of free expression do not appear to be engaged. In contrast, where expression emanates from the United States or is directed or connected to the United States in some way — *e.g.* an alleged libel in Singapore by the Asian Wall Street Journal — consideration of the effect of the differences in approach to freedom of expression is an appropriate consideration in the public policy calculus. Of course, not all interests are purely territorial, and the public policy exception clearly allows

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Modified ALI Proposal Still Troubling

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for consideration of basic universal principles that should be applicable to any judgment for which recognition is sought. Thus, a judgment for damages in a dictatorship that punished all critique of government might be denied enforcement irrespective of any connection with the United States. *See generally* Craig A. Stern, "Foreign Judgments and The Freedom of Speech: Look Who's Talking," 60 Brook. L. Rev. 999 (1994) (arguing that *Bachchan* misconstrues the First Amendment by making it a universal declaration of human rights rather than a limitation designed specifically for American civil government).

An illustration of the approach called for by §5(a)(vi) may be seen in *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Anti-semitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). A French court had issued an order pursuant to French Law purporting to restrain an Internet Service Provider based in the United States from making accessible to users in France offers to purchase Nazi texts and memorabilia. Prior to an action by the French plaintiffs to enforce the order in the United States, the U.S.-based Internet Service Provider applied to the U.S. District Court for a declaratory judgment stating that the order of the French court would impermissibly infringe on its rights under the First Amendment to the U.S. Constitution. In granting a judgment to this effect, the court wrote:

> The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

169 F. Supp. 2d at 1187.

The *Yahoo!* case has been argued in the Ninth Circuit and remains pending; however, press coverage of the argument indicated that the court expressed a great deal of skepticism about the district court's reasoning touted so highly by the ALI Reporters. The Reporters will continue to revise the December draft and will present a Tentative Draft to the ALI's general membership at the ALI Annual Meeting in May.

Based on correspondence with one of the Reporters, it is anticipated that the Tentative Draft will comment on the First Amendment cases but will try to avoid taking a position on how any particular case should be decided. However, the Reporters' Notes will continue to suggest that not every difference between the United States' libel law and the libel laws of other countries is a matter of "fundamental public policy" that would preclude enforcement of the foreign judgment and that a sufficient "nexus" between the allegedly libelous publication and the United States is necessary to invoke the public policy exception.

Finally, rather than recognize and acknowledge the unique constitutional privileges that protect American publishers and broadcasters as "fundamental public policy," the Reporters continue to want to leave room for a "universal human rights" exception which could bar the enforcement of a judgment rendered in a country whose justice system has insufficient regard for universally accepted "human rights."

Please let me know if you want to join our working group on this ALI project and please begin to educate the members of your firms who are ALI members that, at least in the First Amendment field, the Reporters are unwittingly injecting great confusion when clarity is most needed. We will report again when a new draft is circulated.

Tom Leatherbury is a partner in the Dallas office of Vinson & Elkins L.L.P.

High Court Again Refuses to Apply Qualified Privilege in *Loutchansky v. Times Newspapers*

By Meryl Evans

Introduction

The libel action brought by Russian businessman Grigori Loutchansky against Times Newspapers Ltd, publishers of *The Times*, has spawned a number of important, not to say extraordinary, decisions in the High Court in London and in the Court of Appeal on issues ranging from qualified privilege to liability for publication on the Internet.

A further round of hearings took place in the High Court in November and December 2002 primarily on *The Times'* qualified privilege defense. In order to explain the latest developments, it is necessary to recap the history of the case.

History

At issue are articles published in September and October 1999 reporting on Loutchansky's possible links to the Russian Mafia and the Bank of New York money-laundering scandal. *The Times* defended publication solely on the defense of qualified privilege. Because of evidentiary constraints, it did not raise the defense of justification, i.e., truth.

As outlined by the House of Lords in *Reynolds v. Times Newspapers Ltd* [1999] 3 WLR 1010, under the qualified privilege a newspaper can escape liability for publishing defamatory material which is in the public interest and which it was under a duty to publish, even though it cannot prove the publication to be true. The promise of the qualified privilege defense has dimmed, though, in practice with trial courts narrowly construing the privilege.

The case first came to trial in March 2000. The Judge, Mr Justice Gray, ruled that the Reynolds defense failed, applying what was, in our view, too stringent a test for the application of the privilege. The Judge effectively said that the defense only operates when the circumstances are such that the newspaper would have been "open to criticism" if it had decided not to publish. The Court of Appeal reversed this decision. *Loutchansky v. The Times Newspapers Ltd. & Ors*, [2001] EWCA Civ. 1805 ((Dec. 5, 2001). The Court of Appeal held that Justice Gray's test was too stringent and the case was sent back to the High Court for the same Judge to re-consider the case in light of the proper test as formulated by the Court of Appeal — as to which, more later.

Other Major Decisions Reached in the Course of the Action

A number of other major decisions reached in this case highlight the gauntlet media defendants face in defending a defamation claim under English law. *The Times* applied at an early stage to strike out the action or, alternatively, stay it. Loutchansky has, since December 1994, been excluded from the UK on the grounds that his presence here would not be "conducive to the public good." *The Times* argued that the action should not be allowed to proceed, it being disproportionate to take a case to trial when the Claimant can have little or no reputation in a jurisdiction from which he is excluded. Alternatively, the action should not be allowed to proceed unless and until Loutchansky succeeded in overturning the exclusion order (which he has been trying to do since 1996). Our application failed.

Justice Gray also ruled that The Times could not rely, in support of its Reynolds privilege defense, upon material which was in existence at the time of publication but which was not in the possession of the journalist.

Justice Gray also ruled that *The Times* could not rely, in support of its Reynolds privilege defense, upon material which was in existence at the time of publication but which was not in the possession of the journalist (despite the fact that this material might have been known to the journalist's sources).

He ruled that a 'single publication rule' should not be introduced into our law. As a result, the articles which appeared on *The Times's* website could be sued upon notwithstanding the expiry of more than one year (the limitation period for libel) since they were first placed on the

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website. The net result is that there is no effective limitation period for Internet publication in the UK. In addition, Justice Gray ruled that the Reynolds defense for the Internet publication failed because there could be no duty to continue to publish material which *The Times* knew could not be proved to be true.

The Times appealed all these decision to the Court of Appeal then to the House of Lords but the only argument which met with any success was that the Judge's test for Reynolds privilege was too stringent.

Re-determination of the Reynolds defense

In November 2002, Mr. Justice Gray sat in the High Court to hear renewed closing arguments from both sides, as though the original trial had just come to an end, but applying the test laid down by the Court of Appeal in December 2001. That test is difficult to summarize, partly because it is intimately bound up with the speeches — particularly that of Lord Nicholls — in the House of Lords in Reynolds itself. For present purposes I will sum it up thus: the Reynolds privilege arises where the public has a right to know the contents of the article because the subject matter of the article is in the public interest and it is the product of responsible journalism.

The Reynolds privilege arises where the public has a right to know the contents of the article because the subject matter of the article is in the public interest and it is the product of responsible journalism.

The Court of Appeal's test is extremely wide and it left open how trial judges are to assess whether or not journalism is responsible. One approach would be to have the parties present expert testimony from other journalists or academics on how the journalist's conduct compared to that of an ordinary competent journalist (if that indeed is the test for "responsible" journalism), although nothing in the Court of Appeal's judgment specifically anticipated such an approach. Another approach is for the trial judge to form his own view of responsible journalism in each case.

Justice Gray took the latter approach. Reviewing the articles under the Court of Appeal's test of responsible journalism Justice Gray held again that the defense failed. [2002] All ER 371 (High Court Nov. 26, 2002). In the manner of an editor, he reiterated his original criticisms of *The Times's* journalism which he now concluded was not "responsible." For example, he found the newspaper should have taken additional steps to verify the allegations of the articles and it should have made greater efforts to contact Loutchansky for comment prior to publication.

Justification

To complete the picture, *The Times* also applied to the Judge for permission to amend its defense to plead partial justification. The application was based in large part on the work of an Italian Public Prosecutor in Bologna who has applied for (but has hitherto been denied) an order for pre-trial custody against Loutchansky (amongst others). The Public Prosecutor believed that companies controlled by Loutchansky were involved in the criminal laundering of substantial amounts of money, leading back to the Bank of New York money-laundering scandal.

An application to amend the defense so late in the day is extremely unusual and, for it to succeed, the proposed pleading and the supporting evidence must be particularly compelling. Gray was not impressed by the standard of the Italian case against Loutchansky and did not believe that we would be able to obtain the evidence necessary to prove our draft pleading. Accordingly, he refused permission for the Defense to be amended.

What Happens Next?

Procedurally, the next step should be a hearing before Gray to assess the damages to be awarded to Loutchansky which are capped at £20,000 (because of a tactical choice made by Loutchansky earlier in the proceedings to limit a challenge to the assessment of damages under the Human Rights Act.) According to directions already given by

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Gray, Loutchansky must attend that hearing and be available for cross-examination for half a day. But it seems that Loutchansky may be content with what he has obtained so far (the satisfaction of defeating *The Times's* defense, and an injunction preventing re-publication of the defamatory allegations) and he is currently considering whether to apply for a damages hearing to be listed, or simply apply for his costs of the action. Should he opt for the latter, there will probably then be a contested hearing on costs which will involve a claim for over £1 million.

In the meantime, *The Times* has lodged an application in the Court of Appeal for permission to appeal Gray's ruling on Reynolds privilege. We await the outcome of that application. If it succeeds, we will seek to persuade the Court of Appeal that Gray did not apply the test properly and, as a result, once again reached too restrictive a conclusion on the impact of the shortcomings he perceived in *The Times's* journalism. If that application fails, we shall then have 6 months within which to apply to the European Court in Strasbourg.

The Judges become the arbiters of proper standards of journalism… and there is a significant risk that journalists will be measured against standards of perfection.

We have already lodged an application in Strasbourg in relation to the website publication and the rejection — by the High Court, the Court of Appeal and the House of Lords — of our argument that English law should adopt a single publication rule for the Internet, with the limitation period starting to run when the material is first posted. We have not yet heard whether the European Court will entertain that application.

The Law As It Stands

The joy with which the media welcomed the House of Lords's decision in Reynolds has long since dissipated. With the exception of certain snatches of sunlight — notably *Al-Fagih v. H H Saudi Research* — a gloom has settled over most media defense lawyers in this country. One fears that any imperfection in the journalism — or any imperfection perceived by the Judge — will be enough to defeat a *Reynolds* defense. In practice, the Judges become the arbiters of proper standards of journalism (without the benefit of any expert evidence on the point) and there is a significant risk that journalists will be measured against standards of perfection, judged under laboratory conditions and with the benefit of 20:20 hindsight, not of "responsible journalism" measured against the pressurized environment of a busy newsroom. One prospect for counter-acting this is to try to obtain directions for expert evidence to be given at trial concerning the standard of journalism, although whether the Courts will allow such evidence is another matter.

The net outcome in the Loutchansky case is all the more baffling since all these decisions have been reached since the enactment of the Human Rights Act which, among other things, enshrined in UK law the right to freedom of expression under Article 10 of the European Convention on Human Rights. The approach of the European Court has tended to give greater weight to freedom of expression than to the individual's right to his reputation (provided there is a public interest in publication) and one might have expected UK law to reflect this balance rather more closely.

Unless we get some encouragement from the higher courts, or ultimately from Strasbourg, defense lawyers will be slow to contest a case where the only available defense is the *Reynolds* privilege. That stance completely undermines the usefulness of the *Reynolds* decision so that, in spite of the House of Lords recognising that there will be instances when a publication will be warranted even though it cannot be proved to be true, there is a significant risk that the very fact that it cannot be proved to be true may be enough for a Judge to conclude that the journalism was irresponsible. Perfect journalism is, by definition, always right and capable of being proved right. Responsible journalism is not necessarily perfect.

Meryl Evans, a partner in the solicitors firm Reynolds Porter Chamberlain in London, represents The Times. Geraldine Proudler, Olswang, represents Loutchansky.

Supreme Court of Canada Opens Door to Qualified Privilege

By Roger McConchie

The Supreme Court of Canada has quietly, unanimously and in a single paragraph signaled that journalists enjoy a qualified privilege for the publication of "defamatory information in the public interest that he or she honestly believes to be true."

Prud'homme v. Prud'homme, [2002] S.C.J. No. 86, 2002 SCC 85, at paragraph 50 per Justices L'Heureux-Dube and LeBel, speaking for the entire nine-member Court:

> 50. The defence of qualified privilege is not reserved exclusively to elected municipal officials. It applies whenever a person has an interest or a duty, legal, social or moral, to make it to another person who has a corresponding interest or duty to receive it....This will be the case, for example, where an employer or professor provides references about his or her employee or student, or where a journalist publishes defamatory information in the public interest that he or she honestly believes to be true.

Clear Message for Libel Defense

The decision to juxtapose the classic example of qualified privilege (an employment reference) with the non-classic (in fact highly controversial) occasion (publication in the news media) has to be have been very deliberate. It is a clear message that lawyers acting in defense of defamation litigation against the media cannot afford to ignore. Qualified privilege should not be rejected out of hand as a potential defense plea.

It seems safe to predict that the requirement that publication be "in the public interest" will require a journalist to behave responsibly, in the sense of observing the standard of care of a reasonable journalist in all the circumstances.

In this decision pronounced December 20, 2002, Canada's highest Court dismissed an appeal from a ruling of the Quebec Court of Appeal which set aside a trial verdict against a municipal politician over statements he made at a city council meeting. See the full text at http://www.lex um.umontreal.ca/csc-scc/en/rec/html/prudhomm.en.html

Possible Reynolds Type Privilege

This is the first defamation case decided by the Supreme Court of Canada since its landmark decisions in *Hill v. Church of Scientology* and *Botiuk* in 1995. It has significant implications for the balance between freedom of expression and protection of reputation not only for Quebec but also in the common law provinces.

It seems likely that the Court's discussion of the relationship between Quebec law and the common law of the other nine provinces will inform the future evolution of the common law defense of qualified privilege by Canadian trial and appellate courts. In this regard, the above passage from *Prud'homme* and the associated reasoning appears to open the door to adoption by Canadian courts of "Reynolds privilege" [In *Reynolds v Times Newspapers Ltd.* [1999] 4 All E.R. 609, the House of Lords held that a publication to the world at large may attract the protection of qualified privilege, on a case by case basis, depending on all the circumstances. To obtain the benefit of "Reynolds privilege", a publisher must satisfy the requirements of "responsible journalism."]

The passage from Prud'homme and the associated reasoning appears to open the door to adoption by Canadian courts of "Reynolds privilege"

This is not to say that *Prud'homme* heralds an imminent sea change in the common law of defamation. However, a number of statements in this unanimous judgment appear to create a wide portal between a distinctive Quebec defamation law (based on fault) and the common law. Particularly with respect to qualified privilege, it appears on first reading of this judgment that common law libel litigants may well find themselves looking to the rich Quebec jurisprudence relating to the standard of care which journalists, publishers and broadcasters must exercise if they are to be exonerated for defamatory expression.

The Court held that it would be inappropriate simply to

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import the common law defence of qualified privilege into Quebec law but stated that this defence "has an equivalent in the civil law [of Quebec]:

> 59. [Quoting Gaudreault-Desbiens]: In this sense, the qualified privilege conferred on elected municipal officials by the civil law is not a mere defence of justification which a priori relies on the absence of fault on the part of the official, having regard to the nature of the office, the duties that it implies and the specific circumstances of the case. The rules of civil liability mean that the conduct of an elected official will be assessed objectively, referring to the conduct that comparable persons would have adopted in the same circumstances. What is called "qualified privilege" is therefore, in the civil law, simply the defence raised by a person who may have performed an objectively wrongful act, but who has not committed a fault, because the act was performed in the normal performance of the duties of public office, that office imposes a duty on him or her to perform that act (or the act may be connected to a duty inherent in the duties of that office) it was therefore in the public interest to perform it, and in performing it, the person who did so acted with all the care that a comparable person would reasonably have exercised in the same circumstances.
>
> … In Quebec civil law, the criteria for the defence of qualified privilege are circumstances that must be considered in assessing fault.

These passages from Prud-homme are highly compatible with the "circumstantial test" for qualified privilege prescribed by Lord Nicholls, who wrote the principal majority judgment of the House of Lords in Reynolds, supra. He held that a publication by the media to the world at large may attract a defence of qualified privilege at common law, if in all the circumstances of publication, the public interest is served by treating the occasion as one of qualified privilege, including consideration of the nature of the matter published and its source.

The so-called "circumstantial test" described by Lord Nicholls was analyzed by the English Court of Appeal in *Loutchansky v The Times Newspapers*, [2001] E.W.J. No. 5622, [2001] EWCA Civ 1805. In that case, the Master of the Rolls, speaking for the Court, held that the application of the circumstantial test required the journalist to "behave as a responsible journalist. He 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. That is why in this class of case the question of whether the publisher has behaved responsibly is necessarily and intimately bound up with the question whether the qualified privilege defense arises."

The decision in Prud'homme warrants very careful study.

Roger D. McConchie is a partner in Borden Ladner Gervais LLP, Vancouver, Canada.

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Naomi Campbell UK Privacy Judgment Reversed on Appeal

Article Reporting Her Drug Addiction Was in the Public Interest and Exempt from Data Protection Act

The UK Court of Appeal this month reversed a controversial High Court judgment in favor of model Naomi Campbell on breach of confidence and data protection claims against *The Mirror* newspaper for publishing a true report that she was a drug addict and attending Narcotics Anonymous (NA) for treatment. *Campbell v. MGN* [2002] EWCA Civ No: 1373 (CA Oct. 14, 2002) (Lord Phillips, Master of the Rolls; Lord Justice Chadwick and Lord Justice Keene). The decision is not yet available online, but a detailed summary is available on the website of *The Mirror's* solicitors, Davenport Lyons, at <www.davenportlyons.com>.

In a significant press victory, the Court of Appeal held that *The Mirror's* article was 1) reasonable and in the public interest; and 2) protected by the journalism exemption to the Data Protection Act. The Court's holding on the Data Protection Act may be the most significant aspect of the decision, since it is the first UK appellate court decision on the application of data protection rules to the press – and it reverses the damaging trial court decision that stripped the press of its exemptions under the Act for published material. *See* LDRC *MediaLawLetter* April 2002 at 25.

> ***"Where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight."***

Background

On February 1, 2000, *The Mirror* published an article entitled "Naomi: I am a Drug Addict" which revealed in generally sympathetic terms that she had a drug problem (contrary to her many public denials) and was seeking treatment at NA. It was illustrated with a photograph of Campbell on a public street leaving an NA meeting and reported that she "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 meeting; that she dressed "in jeans and a baseball hat" and "is treated as just another addict trying to put her life back together."

Following a bench trial earlier this year, High Court Justice Morland surprisingly ruled that while *The Mirror* newspaper "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 disclosures of details regarding her NA meetings. *Campbell v. MGN*, [2002] EWHC 499 (QB) (March 27, 2002) at ¶ 10, 68-70. The court awarded Campbell £2,500 in damages for the two substantive claims and an additional £1,000 for aggravated damages for subsequent *Mirror* articles that criticized the well-known Campbell for complaining about privacy.

Justice Morland found that Campbell's privacy interest was "obvious" and suggested that "[a]ll that needed to be published in pursuit of the defendant's legitimate interests were the facts of drug addiction and therapy – full stop." Id. at ¶ 112. He found the newspaper liable for breach of confidence on the ground that the source for the information must have been an employee or fellow NA attendee obliged to keep the information private. Publication also violated the Data Protection Act by revealing sensitive personal information. Morland expressly rejected the newspapers claim that it was protected by the journalism exemption to the Act, holding that the exemption only applied to prepublication newsgathering.

The Mirror Was Entitled to Set the Record Straight

With respect to privacy, the Court of Appeal cautioned that "the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media," adding that a celebrity's status as a role model should not be taken as a green light to reveal his or her "clay feet." But here "where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record

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Naomi Campbell UK Privacy Judgment Reversed on Appeal

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straight." [2002] EWCA Civ No: 1373 (CA Oct. 14, 2002) ¶¶ 41-43.

Acknowledging, as did the trial court, that the *Mirror* was entitled to report that Campbell was a drug addict, it found that no reasonable person could find it offensive that the *Mirror* also disclosed that she was attending Narcotics Anonymous.

> What is it suggested that the Mirror should have published? 'Naomi Campbell is a drug addict. The Mirror has discovered that she is receiving treatment for her addiction'? Such a story, without any background detail to support it, would have bordered on the absurd. We consider that the detail that was given, and indeed the photographs, were a legitimate, if not an essential, part of the journalistic package designed to demonstrate that Miss Campbell had been deceiving the public when she said that she did not take drugs.

Id. at ¶ 62.

A narrow application of the Act was simply not appropriate for the data processing, i.e., newsgathering, which will normally be an incident of journalism.

Data Protection Act's Press Exemption Applies

The Court next analyzed at length Campbell's Data Protection Act claim, specifically whether the Act's media exemption applied to the Mirror's publication. Section 32 of the Act exempts from its scope data processed "with a view to the publication by any person of any journalistic, literary or artistic material." The trial court construed "with a view to the publication" to mean that the exemption only applied prior to publication, and that the exemption was intended merely to prevent pre-publication injunctions, a view supported by a number of English legal commentators and part of the legislative debate.

The Court of Appeal, though, recognized the flaw in this, citing with approval the Mirror's argument that under this interpretation:

> a newspaper would hardly ever be entitled to publish any of the information categorised as sensitive without running the risk of having to pay compensation. Indeed, it would be difficult to establish that the conditions for processing any personal information were satisfied. If this were correct, it would follow that the Data Protection Act had created a law of privacy and achieved a fundamental enhancement of Article 8 rights, at the expense of Article 10 rights, extending into all areas of media activity, to the extent that the Act was incompatible with the Human Rights Convention.

Id. at ¶ 92.

It concluded that

> it would seem totally illogical to exempt the data controller from the obligation, prior to publication, ... but to leave him exposed to a claim for compensation ... the moment that the data have been published.... For these reasons we have reached the conclusion that, giving the provisions of the subsections their natural meaning and the only meaning that makes sense of them, they apply both before and after publication.

Id. at ¶¶ 120 -121.

In a common sense approach, the Court of Appeal recognized that a narrow application of the Act was simply not appropriate for the data processing, i.e., newsgathering, which will normally be an incident of journalism. The Data Protection Act 1998 is available through <www.legislation.hmso.gov.uk>.

The Mirror was represented by Desmond Browne QC, Richard Spearman QC, Mark Warby QC ; and Kevin Bays and Mark Bateman of Davenport Lyons. Naomi Campbell was represented by Andrew Caldecott QC, Antony White QC and the solicitors firm Schillings.

Germany is More Appropriate Forum for Libel Action Against Publisher of German Magazine, BUNTE

By Mark A. Weissman

A New York Supreme Court judge recently dismissed a libel action against the publisher of the German magazine, BUNTE, on the grounds of *forum non conveniens.*

In March 2002, plaintiffs Thomas Zeumer, a renown German businessman, and Metropolitan Worldwide, Inc., a modeling agency of which Mr. Zeumer is president, were the subject of an article published in the German newsweekly, BUNTE. BUNTE is published in Germany by the German publishing company, Bunte Entertainment Verlag, GmbH. BUNTE is immensely popular in Germany, but has only limited circulation outside of that country. Of the total worldwide circulation of 800,000, less than 300 copies of BUNTE are circulated in the New York area.

The BUNTE article that was the subject of the libel suit allegedly related "the downfall of the fortunes" of Metropolitan, the agency which had once represented and purportedly discovered German "supermodels" such as Claudia Schiffer and Heidi Klum. The BUNTE article allegedly defamed plaintiffs by reporting that plaintiffs were under investigation by German prosecutors and had been sued by investors for securities fraud. The article also allegedly reported that plaintiffs had business dealings with a convicted criminal and that funds invested in Metropolitan Worldwide were diverted for Zeumer's personal use.

The BUNTE article was written and edited by BUNTE reporters in Germany. Newsgathering for the report was conducted primarily in Germany, although a New York-based reporter working for Hubert Burda Media, Inc., contributed some elements to the report. Hubert Burda Media, Inc. is a New York company that conducts research and newsgathering for BUNTE magazine, among others.

Shortly after BUNTE's publication of article, Zeumer sought and received a preliminary injunction in a German court to prevent BUNTE's publisher from republishing the allegedly defamatory article, and hired a second attorney, in Germany, to attempt to settle with BUNTE's publisher.

Zeumer and Metropolitan Worldwide then sued BUNTE's publisher in Supreme Court, New York County seeking compensatory and punitive damages for libel in excess of $100 million. Plaintiffs also named as defendants in the lawsuit the article's German author and German editor, as well as the New York-based reporter and her employer, Hubert Burda Media, Inc. Only the New York-based reporter and Hubert Burda Media, Inc. were served in the New York action.

The two New York defendants moved to dismiss the New York action on the grounds that New York had insignificant contacts with the BUNTE article and that Germany was a more appropriate forum for resolution of the issues in the case. Defendants argued that BUNTE was a German magazine and had limited circulation in New York, that all of the essential parties and witnesses were located in Germany, that virtually all of the reporting and newsgathering took place in Germany, and that plaintiffs had already commenced related actions in the German courts. Defendants also argued that in a New York court, the documentary evidence, including the allegedly defamatory article, would need to be translated for an English-speaking jury, unfamiliar with the nuances of the German language.

Defendants argued that BUNTE was a German magazine and had limited circulation in New York.

In their opposition, plaintiffs argued that New York was the more appropriate forum because Metropolitan Worldwide had its headquarters in New York, that Zeumer worked in New York, and that damages to plaintiffs' reputation occurred in New York, and that some witnesses resided in New York. Plaintiffs also argued that Germany was not an adequate legal forum for resolution of their claims because features of the American judicial system — such as trial by jury, contingency fees and punitive damages — are not available in German courts. In addition, plaintiffs sought to amend their complaint to add an additional New York defendant, Paolo Zampoli, alleging that Zampoli defamed Zeumer by allegedly calling him a "crook."

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Germany is More Appropriate Forum

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Justice Walter B. Tolub, of Supreme Court, New York County, dismissed the action on grounds of *forum non conveniens*, holding that Germany was the "appropriate forum" for resolution of the dispute. In dismissing the complaint, Justice Tolub found that "the defamatory statements were made in German and directed in the main to … German speaking and European residents," recognizing that there would "be problems of translation" in a New York trial.

The court also found that German libel law would likely be applicable, that many of the important witnesses were in Germany, that damages would be measured by the impact of the article in Germany, that plaintiffs maintained offices and conducted business in Germany, and that plaintiffs had already commenced actions in Germany. The court rejected plaintiffs' argument that Germany was not an adequate forum, reasoning that accepting plaintiffs' argument would prohibit *forum non conveniens* dismissal wherever a non-American forum is sought because "contingency fees and jury trials of civil cases are unique to our system of law."

The court also accepted defendants' argument that jurisdiction over the most significant defendants was doubtful given New York's policy against asserting long-arm jurisdiction over foreign publishers in defamation cases.

In its decision, the court conditioned dismissal on defendants' submission to the jurisdiction of German courts and their waiver of a statute of limitations defense.

In *Metropolitan Worldwide, Inc. v. Bunte Entertainment*, the plaintiffs were represented by Edward C. Kramer of the Law Office of Edward C. Kramer, P.C. in New York. Defendants were represented by David A. Schulz and Mark A. Weissman of Clifford Chance US LLP, in New York.

Mark A. Weissman is an associate in the New York office of Clifford Chance US LLP.

U.S. v. Randel: Ex-DEA Employee Sentenced to One Year in Prison for Giving Information to Times of London

Jonathan Randel, a former intelligence analyst with the Drug Enforcement Agency (DEA), was sentenced in federal district court to one year in prison after admitting to passing on government information to the Times of London. The information was not classified, it was designated as "sensitive." Randel was charged under 18 U.S.C. 641 with selling government property, the restricted government information, in violation of federal statute and his federal employment agreement. The U.S. Attorney's Office for the Northern District of Georgia charged Randel as a felon by placing a substantial media market price on the leaked information.

The indictment of Randel, which was filed on July 12, 2001, and the proceedings prior to sentencing, apparently took place way under the radar of local news, First Amendment, and legal organizations. He pled guilty to a single count of the indictment while the government dismissed six other counts on January 13, 2003.

The information at issue was published in the Times and concerned Lord Michael Ashcroft, former treasurer of the Conservative Party. After sentencing, the government stated that the case should serve as a warning to government employees tempted to divulge government information to the news media. This development comes after a DOJ task force report recommended government agencies utilize existing laws and policies to prosecute those who leak government information.

Background

The case originated with a Times investigation into the finances of Lord Ashcroft (no relation to US Attorney General John Ashcroft). In 1999, Randel, who was a DEA Intelligence Research Specialist, provided information from a restricted DEA database containing intelligence information on suspected narcotics traffickers. Lord Ashcroft's name surfaced in the database because of his financial stake in the Bank of Belize, which the DEA suspected had been used by a drug dealer to launder money.

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Ex-DEA Employee Sentenced to One Year in Prison for Giving Information to Times of London

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After receiving the information from Randel, the Times published a series of articles documenting Ashcroft's activities in Belize, and Belize's role as a haven for money-laundering by drug dealers. However, the Times articles reported that Ashcroft was not implicated in any criminal misdeeds in the DEA reports. Ashcroft eventually resigned his position due to the scandal.

Randel claimed that he gave the information to the Times for free because he thought Ashcroft was guilty of wrongdoing. The Times, however, gave Randel $13,000, which both the Times and Randel assert was to reimburse him for plane fare and days of work missed when he met with Times editors in London in connection with a defamation claim Lord Ashcroft subsequently brought against the Times. That suit was settled by the parties. However, in the criminal case, the government contended that the money was in direct exchange for the information.

The U.S. Attorney's Office for the Northern District of Georgia charged Randel as a felon by placing a substantial media market price on the leaked information.

Statutory Basis for Protection

The government eventually charged Randel with violating 18 U.S.C. 641, which applies to an individual who,

> "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof."

The statute also applies to the person who receives the information knowing it was stolen, embezzled, purloined or otherwise converted. The government chose not to pursue a case against the Times.

This is the same statute that the government used, among other provisions, to prosecute Samuel Morison, then an employee of the Naval Intelligent Support Center, for passing classified photographs to Jane's Defence Weekly, back in the mid-1980's. (For a more detailed discussion of the statute, see Reporting on the War on Terror: The Espionage Act and Other Scary Statutes by Susan Buckley, *LDRC Bulletin*, March 2002, 5, 29).

To charge Randel under the statute, the government maintained that the information in the records was government property. The government contended that the information had a market value of at least $13,000, the price the government claimed it fetched in the English news market. In a hearing on the issue, the government called a London literary agent who testified that the value of the information could even be greater, approaching $80,000.

In its indictment, the government also relied on an extensive nondisclosure agreement Randel had signed before being given access to DEA files and the intelligence database. According the government, Randel had explicitly agreed sensitive non-classified information was the property of the United States government and unauthorized disclosure of such information violated federal law.

At sentencing, district court Judge Richard W. Story was clearly dismayed by Randel's actions. Judge Story stated that even though Randel's conduct did not result in serious damage to national security, or the loss of life, "Anyone who would leak information poses a tremendous risk." William S. Duffy, the U.S. Attorney for the Northern District of Georgia, stated afterwards that Randel's case could have seriously damaged the justice system, and that his office would prosecute all similar cases.

Both the Times and Randel's attorney believed the sentence to be harsh. Times legal advisor, Alastair Brett, referring to the sentence as "monstrous," stated that journalists speak to many different sources and "we don't expect them to be banged up for it."

For Jonathan Randel: Steven Howard Sadow of Atlanta; Brenda Joy Bernstein of Atlanta.

For the United States: Randy S. Chartash and Phyllis Sumner of the U.S. Attorney's Office for the Northern District of Georgia.

Canadian Newspapers Win Trial on Substantial Truth

Public Official Sued Over Description of Criminal Record

By Damion Stodola

A British Columbia trial court recently considered the scope of evidence that media defendants can present to prove the defense of justification. *Jay v. Hollinger Canadian Newspapers et. al.*, 2002 BCSC 1655, No. 9395 (November 29, 2002) (T.M. McEwan, J) (available at www.canlii.org/bc/cas/bcsc/2002/2002bcsc1655.html.

Justification is a complete defense and must be proven by a balance of probabilities in order to rebut the presumption of falsity under common law libel in Canada. In proving this defense, defendants must adduce specific facts which prove the truth of the allegedly defamatory statement and of no other, notwithstanding errors in detail. In this case, the plaintiff attempted to apply this principle in a way that would have held the media defendants liable for inaccurately reporting a criminal record in a way that was no worse than what the plaintiff actually did.

The media defendants admitted the error but argued that their article was nevertheless substantially true. The plaintiff's strategy was to narrowly define the article's allegation and to take advantage of the case law prohibiting defendants from adducing evidence of a different event or crime to justify the publication of an otherwise defamatory statement. In dismissing the case, the Court declined to adopt the plaintiff's overly technical argument and instead applied the law in a coherent way.

Newspapers Reported Politicians Conviction

The plaintiff, a city councillor who failed to win a political party's approval to run in an upcoming election because of his criminal record, sued the reporters and publishers of the *Vancouver Sun* and the *Nelson Daily News* for inaccurately reporting that criminal record. The *Sun* published a follow-up article titled "Nelson Councillor Rejected By Liberals: Party officials found out that the 34 year-old has a criminal record." That article reported that 15 years earlier plaintiff "pleaded guilty to assaulting a Nelson resident *with a noxious substance*" – an offense that does not exist under the Canadian Criminal Code. In fact, the plaintiff was given a conditional discharge for the offense of common assault. At that time, the plaintiff struck a young woman "with his hand, in which he held a pen-like wrench" and on that same day "pinned her on the bed" and that "she was struck on the head, face and back."

The article also reported, slightly inaccurately, that the plaintiff had "defied a court order to stay away from the assault victim before she could testify" whereas the plaintiff, properly speaking, was sentenced for "breach of an undertaking" not to approach or contact the victim of the assault.

Reports Were Substantially True

The defendants admitted that they incorrectly reported the precise nature of the offense. In researching the story, the reporter confused the section of the Criminal Code extant when the plaintiff was charged in 1987 with an amended section of the Criminal Code that had not yet been enacted. This mistake led to the reporter to incorrectly describe the assault as one "with a noxious substance." The reporter left a voice message with the plaintiff describing the reporter's understanding of the criminal record and inviting him to respond. The plaintiff, despite having this specific knowledge of the reporter's error, did not return the message and instead waited for the story to be published. When the plaintiff's attorney demanded that the *Sun* print a retraction, the newspaper stood by its story and invited the plaintiff to present evidence proving the inaccuracy of the story. The plaintiff refused and claimed that to do so would "waive his privacy rights."

The plaintiff again invoked his privacy rights, citing the seminal case *Hill v. Scientology*, [1995] 2 S.C.R. 1130, in opposing the defendants' motion to compel answers to certain interrogatories and the production of documents relating to the facts of the plaintiff's conditional discharge for assault. Defendants' motion to compel was decided in their favor earlier this year on the grounds that there was no constitutional right "not to speak" in a civil proceeding about the facts of the dis-

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Canadian Newspapers Win Trial on Substantial Truth

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charge for assault. *Jay v. Hollinger Canadian Newspapers et. al.*, 2002 BCSC 23, No. 9395 (January 8, 2002).

Trial Court Rejects Overly Technical Application of Substantial Truth Defense

At trial before Judge McEwan, the defendants pled justification and supported this defense with details of the plaintiff's crime as it had occurred to demonstrate that the "gist" or "sting" of the article was, in fact, substantially true. The plaintiff, however, argued that this evidence was inadmissible under the case law which limits the evidence a defendant can adduce in support of justification to "the very thing described, such that it is no answer to say that while a person did not deserve to be described in a particular way, other events will show that that he is just that type of person." The plaintiff argued that any evidence regarding common assault was technically evidence of another event.

The Court noted that this argument would "preclude any reference to what occurred without an admission that the defendants had defamed the plaintiff, leaving them with only a plea in mitigation of damages." The Court declined to adopt this overly technical argument in favor of finding that "the law, as complicated as it may be, tends toward coherence." The Court noted that the rationale for restricting the type of evidence that can be adduced in support of justification is to prevent defendants from publishing exaggerated accounts of events with impunity. In other words, one cannot justify the publication of a defamatory remark by adducing facts that the plaintiff committed a less odious but similar event.

Having determined that the common assault was not a different event in legal terms, the Court noted that the real question was whether the failure to prove that the assault occurred in the manner alleged was fatal to the defendants' plea of justification. This could only be determined by comparing the facts of the assault with the "sting" or "gist" of the published article, thereby allowing the defendants to lead evidence of the plaintiff's common assault.

In fact, the court determined that the published words had a lesser "sting" than the facts of plaintiff's conviction. The Court noted that the article, read in context and by reasonable readers, could not be interpreted as having the lurid and defamatory meanings attributed to it by the plaintiff – that defendants implied the use of a date-rape drug, sexual assault, and illicit sexual intercourse. The Court noted that the statement that plaintiff was charged with assault with a noxious substance was more confusing than lurid and noted that it bore a less sexual connotation than the explicit sexual overtones of the circumstances in which the plaintiff was actually charged, namely an assault wherein the victim was "pinned to the bed." As such, the Court held that the impugned words in the article did not "add substantially to the defamatory quality of the acts concerning publication of which [the plaintiff] could have had no legal recourses."

The Court noted that the article, read in context and by reasonable readers, could not be interpreted as having the lurid and defamatory meanings attributed to it by the plaintiff.

Damion Stodola is an associate at Coudert Brothers in New York City. The newspapers were represented at trial by Barry Gibson QC of Farris, Vaughan, Wills & Murphy in Vancouver, B.C. Plaintiff was represented by T.W. Pearkes

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Press Conference Qualified Privilege in Nova Scotia

By Roger D. McConchie

On October 24, 2002, in *Campbell v Jones* 2002 NSCA 128, the Nova Scotia Court of Appeal (2-1) set aside a jury's $240,000 defamation verdict against two lawyers over statements they made at a press conference which allegedly conveyed the innuendo that the plaintiff police officer was racist, motivated by racism or discriminates in the conduct of her duties on the basis of race, economic status and social status. The lawyers represented three 12 year old black school girls from a poor neighborhood.

The Court of Appeal held there was no liability because the lawyers' statements had been made on an occasion of qualified privilege.

The news media defendant had settled with the plaintiff before trial for $14,500 and were therefore not parties to the appeal. The judgment does not directly deal with the existence of a privilege for the media to report the lawyer's statements.

Applying the Supreme Court of Canada's decision in *R v Golden,* [2001] S.C.J. 81 (decided after the trial), the Court of Appeal held that the three girls had in fact been subjected to an unlawful "strip search" contrary to the *Charter*, as alleged by the lawyers in the complaint and at the press conference. [Paragraphs 23, 65, 72]. The trial judge had found that the search was "not technically a strip search."

The appeal decision did not address a defence of justification (truth) with respect to the imputations of racisim.

Roscoe J.A. (Glube C.J.N.S. concurring) held that the two lawyers, who in advance of the press conference had filed complaints to the Police Commission on behalf of three school girls, had an ethical duty to speak out against injustice. Roscoe J.A. held that the press conference was held to be an occasion of qualified privilege, stating inter alia:

> *59 ...[L]awyers, who are officers of the court with duties to improve the administration of justice and upheld the law, have a special relationship with and responsibility to the public to speak out when elements of the justice system itself have breached the fundamental rights of citizens and they have reason to believe that complaints pursuant to the Police Act will not provide an adequate remedy.*
>
> *....*
>
> *68 ...In determining whether the press conference was an occasion of qualified privilege, the trial judge had to consider all of the circumstances. Here, there was an intertwining of Charter rights; the right to counsel and the right not to be subjected to an unreasonable search, with Charter values; freedom of speech and equality rights. Freedom of speech was being exercised to promote equality rights and to draw attention to violations of Charter rights.*
>
> *...*
>
> *70...In a case such as this where freedom of expression is exercised not merely for its own sake, or to advance one's own self-interest, but to bring attention to and seek redress for multiple breaches of such important Charter rights as the right to counsel, the right to security of the person, including the right not to be subject to unreasonable search, and the right to equal protection and benefit of the law, one would expect it to be even more difficult to justify its curtailment. In any event, in my view, it was incumbent upon the trial judge to at least turn his mind to the myriad of Charter rights and values at issue in the case before him. If constitutional rights are to have any meaning, they must surely include the freedom of persons whose Charter guarantees have been deliberately violated by officials of state agencies to cry out loud and long against their transgressors in the public forum, and in the case of children and others less capable of articulation of the issues, to have their advocates cry out on their behalf.*

Roscoe J.A. noted the trial judge had found that the defendant lawyers were not actuated by express malice,

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Press Conference Qualified Privilege in Nova Scotia

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either in the sense of personal animosity or in the sense of reckless indifference to the truth.

Perhaps the most far-reaching implications of this decision are found in the observations of Roscoe J.A. that the Supreme Court of Canada's decision in *Jones v Bennett*, [1969] S.C.R. 277, often cited as authority for the proposition that "publication to the world" via the news media is too broad to be an occasion of qualified privilege, "pre-dated the *Charter* by over 12 years" [paragraph 67] and that the common law should be modified incrementally to ensure that it conforms with *Charter* values. [paragraph 69]

The dissent of Saunders J.A., which is even longer than the majority decision, also warrants careful analysis. Among other things, Saunders J.A. held that even if the occasion of the press conference was privileged (which he rejected), the conduct of the lawyers exceeded the occasion and the privilege was therefore lost.

It will not be surprising, having regard to the uncertainties surrounding the scope of qualified privilege in light of the Charter and the Reynolds decision of the House of Lords, if the plaintiff seeks leave to appeal to the Supreme Court of Canada.

Counsel for Plaintiff: George W. MacDonald, Q.C. and Hugh H. Wright. Counsel for the defendant Jones: William L. Ryan, Q.C. and Nancy G. Rubin. Counsel for the defendant Derrick: S. Bruce Outhouse, Q.C. and Lester Jesudason.

Roger D. McConchie is a civil litigation partner at the Vancouver office of Borden Ladner Gervais.

2003 MLRC Bulletin

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Fifth Circuit Holds *Calder* Sets High Bar for Establishing Specific Jurisdiction in Internet Defamation Cases

By David T. Moran and Kimberly Van Amburg

A three member panel of the Fifth Circuit recently held that in order to establish specific jurisdiction in an Internet defamation case, the plaintiff must have knowledge of the "particular forum" in which the plaintiff's reputation will be harmed and the article or its sources must "in some way connect with" the forum state. *Revell v. Lidov et al*., ___ F.3d ___, 2002 WL 31890992, ___ (5th Cir. Dec. 31, 2002). (Judge Higginbotham).

Revell v. Lidov is an important Internet defamation and personal jurisdiction case because it holds that under *Calder v. Jones*, 465 U.S. 783 (1984), specific jurisdiction does not arise – even if the publisher knows that the publication will harm the plaintiff wherever he resides — unless the author directs the statements toward the plaintiff in the forum. It is the particular knowledge that the plaintiff's reputation will be harmed ***in the forum*** and the article's connection ***with the forum*** that are key to establishing specific jurisdiction.

The Court held that "[k]nowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm" forms an "essential part" of the Calder test.

In addition, *Revell* is important because in analyzing specific jurisdiction under the "sliding scale" set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc*., 952 F. Supp. 1119 (W.D. Pa. 1997), the Court looked solely at the interactive features of the Internet bulletin board on which the article was posted and disregarded interactive features contained in other portions of the website. In addition, the Court held that Internet bulletin boards are "interactive" under the *Zippo* sliding scale.

Posted Article on PanAm 103

Hart G.W. Lidov, an Assistant Professor of Pathology and Neurology at the Harvard Medical School and Children's Hospital, authored an article on the subject of the 1988 terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland, and posted it on a Columbia Journalism Review ("CJR") Internet bulletin board. The article accused senior members of the Reagan Administration of involvement in a conspiracy to conceal information relating to the bombing. The article was particularly critical of former Associate Deputy Director of the Federal Bureau of Investigations, Oliver "Buck" Revell, and accused him of complicity in the conspiracy and of knowing about the bombing in advance and making sure that his son, who was previously booked on the flight, took a different flight. The CJR bulletin board was accessible by a link to persons who visited the CJR website. Lidov, who was unaware at the time he authored and posted the article that Revell resided in Dallas, Texas, posted the article on the CJR bulletin board without Columbia University's knowledge or participation. Lidov was not employed by or affiliated with Columbia University.

Revell filed suit against Lidov, Columbia University, and the Columbia University School of Journalism ("Columbia University") in the United States District Court for the Northern District of Texas, asserting causes of action for defamation, intentional infliction of emotional distress, conspiracy, and negligent publication arising out of Lidov's posting of the article. Lidov and Columbia University filed motions to dismiss Revell's claims for lack of personal jurisdiction, and those motions were granted. The Fifth Circuit affirmed the district court's dismissal of the claims.

Expressly Directed at Forum

Revell argued that because he asserted intentional tort claims against the defendants and the harm to his reputation occurred in Texas, the "effects" test of *Calder v. Jones* mandated specific jurisdiction. The Fifth Circuit reasoned that the "effects" test is only one facet of the minimum contacts analysis, and went on to hold that the "application of *Calder* in the Internet context requires proof that the out-of-state defendant's Internet activity is expressly directed at or directed to the forum state." *Revell v. Lidov*, 2002 WL 31890992, ___ (citing *Young v. New Haven Advocate*, ___ F.3d ___, 2002 WL 31780988 (4th Cir. Dec. 13, 2002)).

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The Court held that "[k]nowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm" forms an "essential part" of the *Calder* test. *Id*. Because neither Lidov nor Columbia University were aware that Revell resided in Dallas or that harm to his reputation would necessarily occur there, the Court held this "essential part" of the *Calder* test was not met in spite of the fact that Lidov "must have known" that harm to Revell's reputation would occur wherever he resided. *Id*.

The Court further held that the facts that the article:

(a) contains no reference to Texas;
(b) does not refer to the Texas activities of Revell; and
(c) was not directed at Texas readers as opposed to those in other states;
(d) were "insurmountable hurdles" to the exercise of personal jurisdiction over the defendants in Texas. *Id.*

Thus, specific jurisdiction under *Calder* requires a publisher's knowledge of the state of the plaintiff's residence and some additional connection or reference to the forum state. The Fifth Circuit found these factors lacking.

Application of the Zippo Sliding Scale

In analyzing both general and specific jurisdiction, the Fifth Circuit applied the *Zippo* "sliding scale" adopted by most federal courts in Internet jurisdiction cases. Under the *Zippo* sliding scale, if a defendant enters into contracts with residents of another state that involve the "repeated transmission of computer files" over the Internet, jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on a web site which is accessible to users in other jurisdictions, and in these cases jurisdiction is not proper. In the middle ground are interactive websites where a user can exchange information with a host computer. In this middle ground, jurisdiction is determined by looking at the "level of interactivity and commercial nature" of the exchange of information. *Zippo*, 952 F. Supp. at 1124.

Revell argued that the *Zippo* "sliding scale" mandated jurisdiction because the CJR website (as opposed to the bulletin board on which the article was posted and accessible) allowed visitors to subscribe to the CJR, purchase advertising, and submit electronic applications to the School of Journalism. Thus, Revell reasoned the website was "completely interactive" and in the top tier of interactivity under *Zippo*. The Court rejected these arguments. As it relates to specific jurisdiction, the Fifth Circuit held — as did the district court — that it is the level of interactivity of the Internet bulletin board on which the article was posted, rather than the website as a whole, that should be examined. *See Revell v. Lidov*, 2002 WL 31890992, ___. In addition, the Court held that the bulletin board was in the middle range of interactivity under *Zippo* because individuals could send information to and receive information from the bulletin board.

These holdings are important for two reasons. First, in analyzing specific jurisdiction the Fifth Circuit looked at the interactive features of the bulletin board — where the article was posted — without regard to the interactive features of the CJR website as a whole. Thus, in the Fifth Circuit a defendant may be able to "compartmentalize" a website into pages or sites at issue versus those not at issue, and a court may disregard certain interactive features that would otherwise weigh in favor of jurisdiction.

Second, the district court, following case law from other jurisdictions, held that the bulletin board on which the article was posted by Lidov was passive. *See Revell v. Lidov,* No. 3:00-CV-1268-R, 2001 WL 285253, *6 (N.D. Tex. 2001). The Fifth Circuit, however, held that the CJR bulletin board was interactive. *Revell v. Lidov*, 2002 WL 31890992. Thus, whether an internet bulletin board or discussion group is considered passive or interactive under *Zippo* will vary depending upon the substantive law of the controlling jurisdiction.

For Revell: Joe C. Tooley (argued), Rockwall, TX.

For Lidov: Paul Christopher Watler (argued), Robert Brooks Gilbreath, John T. Gerhart, Jenkens & Gilchrist, Dallas, TX.

Charles L. Babcock and David T. Moran are partners, and Kimberly Van Amburg is an associate, in the Dallas, Texas office of Jackson Walker L.L.P. They represented The Board of Trustees of Columbia University in the City of New York and Columbia University School of Journalism in this lawsuit.

Ninth Circuit Finds Personal Jurisdiction for Out-of-State Web Site

Furthering the continued debate over how jurisdictional rules apply in cyberspace, the Ninth Circuit, in a October 7 opinion, held that a federal district court in Washington state has personal jurisdiction over a website operated in Colorado and incorporated in Delaware.*(Northwest Healthcare Alliance, Inc. v. Healthgrades.com, 2002 WL 31246123)* Recognizing that the Internet presents unique jurisdictional issues, the court utilized the "effects test" of *Calder v. Jones* in finding personal jurisdiction "when the harm suffered by plaintiff sounds in tort". The Ninth Circuit had previously applied the "effects test" for non-Internet parties in *Panavision Int'l L.P. v. Toeppen*.(141 F. 3d 1316)

Healthgrades.com, Inc. (defendant) is a web site operated out of Denver but incorporated in Delaware. The site rates and grades the performance and services of health care providers. Northwest Healthcare Alliance (plaintiff) is a health care provider in Washington state and received (in its estimation) an unfavorable review by Healthgrades. Northwest Healthcare brought two claims in state court: defamation and infraction of Washington state's Consumer Protection Act.

Healthgrades moved and was granted permission to remove the case to federal court for diversity jurisdiction. Immediately after, Healthgrades moved to dismiss for lack of personal jurisdiction. The district court granted the motion to dismiss asserting that there was no personal jurisdiction over defendant because Healthgrades had not purposefully availed itself in the forum, and not committed acts directly aimed at Washington state.

Ninth Circuit Finds Personal Jurisdiction

The Ninth Circuit reversed finding that the district court could exert personal jurisdiction without violating Healthgrades constitutional due process. Previously, the Ninth Circuit had applied two tests in determining whether personal jurisdiction existed over web sites that were operated out-of-state: *Cybersell*'s sliding scale test; and *Calder*'s "effects test". Following its decision in *Panavision*, the Ninth Circuit applied the "effects test" as the alleged defamatory harms to the plaintiff were tortious in nature.

Web Site Purposefully Interjected Itself into Forum

By choosing the "effects test", the Ninth Circuit decided to place great importance on how the defendant's web site interacted with Washington citizens. Under this test, personal jurisdiction is appropriate when the defendant "1) engaged in intentional actions; 2) expressly aimed at the forum state; 3) causing harm, the brunt of which is suffered-and which the defendant knows is likely to be suffered- in the forum state".(citing *Panavision*).

The Ninth Circuit found that Healthgrades purposefully interjected itself into Washington state by rating health care providers located in Washington. First, according to the court, Healthgrades had intentionally aimed its business at Washington state because the site should have known this information on Northwest, and all other Washington state providers, would be most useful to Washington residents. Second, Healthcare used information gathered from Washington state. Third, the allegedly defamatory remarks concerned "the Washington activities of a Washington resident". Finally, Northwest Healthcare's alleged harm was primarily felt in Washington, plaintiff's place of business and incorporation.

By choosing the "effects test", the Ninth Circuit decided to place great importance on how the defendant's web site interacted with Washington citizens.

In summary, the court held,

> "The effects, therefore, of defendant's out-of-state conduct were felt in Washington, plaintiff's claims arise from that out-of-state conduct, and the defendant could reasonably expect to be called to account for its conduct in the forum where it understood the effects of its actions would be felt."

For Northwest Healthcare Alliance, Inc.: Mark M. Hough and James Rhett Brigman of Riddell & Williams (Seattle).

For Healthgrades.com, Inc.: Robert Jason Henry of Lasher, Holzapfel, Sperry & Ebberson (Seattle); and Kris J. Kostolansky of Rothgerber Johnson & Lyons, LLP (Denver).

Virginia High Court Allows Subpoena for Anonymous Speaker

By Samir C. Jain and Edward Siskel

In *America Online Inc. v. Nam Tai Electronics, Inc.*, 2002 Va. LEXIS 157 (Nov. 1, 2002), the Virginia Supreme Court refused to quash a subpoena duces tecum issued by a Virginia trial court in response to a California court's commission for out-of-state discovery that compels AOL to disclose the identity of one of its subscribers who posted an anonymous message on an Internet bulletin board. In a unanimous opinion written by Justice Lawrence L. Koontz, Jr., the Court held, *inter alia*, that a Virginia trial court properly applied principles of comity in denying the motion to quash because enforcing the subpoena was not contrary to Virginia public policy.

AOL has subsequently filed a notice of intent to apply for rehearing. As it stands, however, the Court's ruling establishes that, in Virginia, the United States Supreme Court's decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), does not preclude a plaintiff from seeking relief for reputational injuries under a state law business tort claim, even though the same allegations do not support a claim for libel. The decision potentially represents a substantial incursion on the right to speak anonymously on the Internet and creates an opening for plaintiffs to circumvent constitutional restrictions on defamation claims through creative pleading.

The decision creates an opening for plaintiffs to circumvent constitutional restrictions on defamation claims through creative pleading.

Chat Room Claims

Nam Tai Electronics, Inc. ("Nam Tai") filed a complaint in California state court against fifty-one John Doe defendants for libel, trade libel and unfair business practices under California Business and Professions Code § 17200 *et seq*., alleging that an anonymous individual had posted "false, defamatory, and otherwise unlawful messages" concerning the performance of Nam Tai's stock on an Internet bulletin board. While the claims were styled as three separate causes of action, the gravamen of each count was the same--that the publication of an allegedly false statement caused Nam Tai reputational harm.

Underlying all three claims was a single message posted by someone using the screen name "scovey2" which Nam Tai asserted "defamed and damaged [its] reputation, injured [its] good will and interfered with [its] relationship with its shareholders and the general public." Based on the language of the complaint, the injury underlying the libel and unfair business practices claims was the same.

Sought Speaker ID

After Nam Tai determined that "scovey2" had an account with AOL, it obtained a commission for out-of-state discovery from the California court to depose AOL's custodian of records in Virginia. A Virginia trial court then issued a subpoena to AOL pursuant to the Virginia equivalent of the Uniform Foreign Depositions Act.

AOL responded by filing a motion to quash in Virginia state court, asserting, *inter alia*, that the subpoena would "infringe on the well-established First Amendment right to speak anonymously," and that First Amendment protections governing defamation claims apply equally to Nam Tai's unfair business practices claim.

Based on *America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001) (holding that principles of comity guide the decision whether to enforce a foreign court's order permitting third-party discovery and, therefore, require a determination that the order does not violate Virginia public policy), the Virginia trial court explained that it was required to determine "whether comity should be granted to the California court's Order and, if not, whether the subpoena should nevertheless be enforced in light of the merits of Nam Tai's underlying California law-based claims." Because the Court could not make that determination on the existing record, it entered a protective order barring discovery until the California court clarified the procedural and substantive basis for its order.

Libel Out, Business Tort Ok'd

In response, the California court made the following finding:

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> That Nam Tai has alleged sufficient facts in its complaint, under California law, for libel, trade libel and for injunctive relief under [California's unfair business practices statute], such that Nam Tai is entitled under California law to conduct discovery to identify the anonymous defendant in this matter notwithstanding the First Amendment privacy concerns raised in AOL's motion to quash.

The Virginia trial court reviewed this clarifying order and concluded that "neither of the defamation claims would withstand demurrer if filed in Virginia." Thus, comity did not require enforcing the subpoena for those claims. Still, the court directed AOL to comply with the subpoena because it found that the unfair business practices claim was not offensive to Virginia public policy.

In reaching that conclusion, the trial court relied on *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985), for the proposition that the First Amendment protections asserted by AOL are not applicable to Nam Tai's unfair business practices claim. *Chaves* involved a tortious interference with contract claim that was brought in conjunction with a defamation claim based on the same conduct. The Court rejected the plaintiff's defamation claim because it involved statements of opinion, but refused to apply the same restrictions to the tortious interference claim because such a rule "by logical extension, [ ] would apply to any verbal conduct, however, tortious, and would completely destroy the right of action universally recognized." *Id.* at 121.

The Virginia Supreme Court reading of Hustler Magazine is inconsistent with the interpretation of Hustler Magazine in subsequent Supreme Court precedent and by the vast majority of other courts.

Argued Hustler to Virginia High Court

On appeal to the Virginia Supreme Court, AOL argued, *inter alia*, that the trial court erred in relying on *Chaves*, because that decision has been called into question by the United States Supreme Court's subsequent decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).[1]

Hustler Magazine held that the same First Amendment protections which precluded Falwell's defamation claim foreclosed his claim for intentional infliction of emotional distress. The Court reached this conclusion in part because it was necessary to "give adequate 'breathing space' to the freedoms protected by the First Amendment," *id.* at 56, but also because of a practical concern that the contrary rule would allow plaintiffs to circumvent free speech protections by refashioning libel claims as suits for other torts. *Id.* at 53 ("Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject").

For the same reasons, AOL argued Nam Tai cannot use its unfair business practices claim to attack otherwise protected speech, and to the extent *Chaves* holds to the contrary, AOL asserted that it has been overruled by *Hustler Magazine*.

The Virginia Supreme Court recognized that since *Hustler Magazine* was decided, other courts "have sustained challenges to tort litigation on the ground that the plaintiff was seeking to 'avoid the protection afforded by the Constitution … merely by the use of creative pleading.'" 2002 Va. LEXIS at * 21 (quoting *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union*, 39 F.3d 191, 196 (8th Cir. 1994).

Nevertheless, the Court concluded that "*Chaves* is sound precedent," based solely on its decision in *Maximus, Inc. v. Lockheed Information Management Systems Co.*, 254 Va. 408, 493 S.E.2d 375 (1997), which "acknowledged 'the similarity … [of] the defamation law construct to business torts' noted in *Chaves*, but declined to extend First Amendment protections to a tortious interference with a contract expectancy cause of action." Therefore, the Court could not say "the trial court erred in determining that Nam Tai's statutory cause of action for unfair business practices under California law is reasonably comparable to the law of Vir-

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ginia and is not repugnant to the public policy of Virginia." 2002 Va. LEXIS at *21-22.

Unreasonably Narrow View of Hustler

The Virginia Supreme Court has thus adopted an extremely narrow reading of *Hustler Magazine.* But this reading is inconsistent with the interpretation of *Hustler Magazine* in subsequent Supreme Court precedent, see *Cohen v. Cowles*, 501 U.S. 663, 671 (1991) (recognizing that *Hustler Magazine* applies broadly to non-defamation tort claims seeking recovery for reputational injury), and by the vast majority of other courts.

Lower courts have applied *Hustler Magazine*'s reasoning to foreclose a broad range of other tort claims that sounded in defamation where the constitutional requirements for defamation could not be met, including publication damages for loss of good will and lost sales resulting from breach of a duty of loyalty, *Food Lion, Inc. v. Capital Cities/ABC*, *Inc.*, 194 F.3d 505, 522 (4th Cir. 1999); false light, *Brown v. Hearst Corp.*, 54 F.3d 21 (1st Cir. 1995); tortious interference, *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union*, 39 F.3d 191, 196 (8th Cir. 1994); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990); negligence, *EEE ZZZ Lay Drain Co., Inc. v. Lakeland Ledger Publishing Corp.*, 2000 U.S. Dist. LEXIS 21266, *13 (W.D. N.C. 2000); misappropriation of name and right of publicity, *Doe v. TCI Cabletelevision*, 2002 Mo. App. LEXIS 1577, *44; fraud, *Hornberger v. ABC, Inc.*, 351 N.J. Super. 577, 627-30, 799 A.2d 566 (2002); and even unfair business practices under California Bus. & Prof. Code § 17200, *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1048-49 (C.D. Cal. 1998).

Misapplied Prior Virginia Law

Moreover, the Virginia Supreme Court's interpretation of *Maximus* is questionable when one looks at the posture of that case. *Maximus* involved a free-standing claim for tortious interference with a contract expectancy. 254 Va. at 410. The plaintiff lost a government contract after the defendant, a competing bidder, filed a formal protest stating that two members of the panel awarding the contract had undisclosed conflicts of interest. *Id.*

The complaint did not include a defamation claim against the defendant, nor could it have because the plaintiff was not the subject of any allegedly injurious statement; the two members of the panel were the only ones arguably defamed. Moreover, the plaintiff did not allege any reputational harm; the only injury was the loss of the government contract.

The trial court nevertheless analogized to the law of defamation, holding that the defendant was entitled to a qualified privilege and that the plaintiff would have to satisfy a heightened burden similar to a defamation action. In rejecting the trial court's analogy, the *Maximus* Court explained that any similarity between defamation and business torts in terms of balancing interests "neither suggests nor demands that the specific requirement for imposition of liability in one cause of action must be applied to the other cause of action." *Id.*

As a statement of Virginia law in the context of a free-standing tortious interference claim like the one alleged in *Maximus*, this is clearly true. There is no reason to think that, under the facts of *Maximus*, simply because there is balancing of interests in both contexts, the same defenses must apply.

The *Maximus* Court's analysis, however, did not speak to the concern at issue in *Hustler Magazine* and the case at hand where the issue is whether a tort claim for reputational injuries is being used to circumvent First Amendment protections that would otherwise apply to a libel claim based on the same conduct. Nor did it consider the continuing viability of *Chaves* after *Hustler Magazine*. There simply was no occasion to address these questions in *Maximus* because the plaintiff could not have styled its interference with contract expectancy claim as a defamation claim, and there was no reason to think they were using the non-defamation tort as a means to plead around the First Amendment.

The Virginia Supreme Court's decision in this case represents a potentially serious incursion on the right to speak anonymously on the Internet. Given the strong

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precedent in most other jurisdictions, including California, for applying First Amendment protections to non-defamation tort claims under these circumstances, it is likely that the defendant in this case and other similar anonymous speakers will eventually prevail on the merits of the underlying claim. And yet, unless the Court grants rehearing or the decision is appropriately cabined to the particular facts, as long as the Court is willing to enforce a subpoena, speakers may be forced to forfeit their anonymity when a clever plaintiff can come up with an alternative tort claim to cover the same alleged injury.

Samir C. Jain is a partner, and Edward Siskel is a law clerk, at the law firm of Wilmer, Cutler & Pickering. They represent America Online, Inc. in the petition for rehearing of the Nam Tai case. The views expressed here are their own and do not necessarily reflect those of their clients.

[1] AOL also argued that the California court did not properly apply its own First Amendment precedent in finding that Nam Tai had stated a claim for a violation of the unfair business practices statute because in a series of cases beginning with *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 728 P.2d 1177 (1986), California courts had rejected attempts to circumvent First Amendment protections by bringing non-defamation tort actions where the "gravamen [of the underlying claim] is the alleged injurious falsehood of a statement. 728 P.2d at 1180. The Court rejected this argument, however, explaining that in affording comity "[w]e presume that the foreign court is in a better position than the Virginia courts to determine the substantive law of its jurisdiction and, thus, afford a high degree of deference to its judgment in such matters." 2002 Va. LEXIS at *18-19.

Late Night Web Postings Cause Georgia Supreme Court to Strengthen Georgia Libel Law

By James C. Rawls and Eric P. Schroeder

Invoking Richard Jewell and the publishing opportunities afforded by the Internet, the Georgia Supreme Court reaffirmed the involuntary public figure standard in Georgia and will now require all Georgia libel plaintiffs to request a retraction within 7 days after any defamatory publication — including web postings — if they are to recover punitive damages. The 4-3 decision in *Mathis v. Cannon*, authored by Chief Justice Norman Fletcher, strengthens Georgia libel law by expanding statutory and First Amendment protections for speech on the Internet and erasing any distinction between media and non-media defendants in Georgia. *Mathis v. Cannon, Case No. S02G0361 (Ga. November 25, 2002)*.

On The Internet, Late At Night

At issue in *Mathis* were late-night web postings about a waste management dispute in south Georgia. Defendant Bruce Mathis posted three messages on a "Yahoo" Internet bulletin board in 1999 concerning plaintiff Thomas C. Cannon's involvement with the "Solid Waste Management Authority of Crisp County", an agency charged with developing a profitable solid waste facility in rural Crisp County, Georgia. Mr. Cannon was instrumental in helping the Authority fund the waste facility and gain contracts with surrounding cities and counties to be "waste providers". Mr. Cannon's company, TransWaste Services, Inc., also happened to be the *exclusive* waste hauler for the project.

Defendant Mathis was a member of a citizen's group that played a role in having a grand jury investigate the Authority when it became apparent that the waste facility was losing money. During the investigation, Cannon's company sued the Authority for failing to make payments on its exclusive collection contract for the facility. In late October 1999, the grand jury issued a report criticizing the Authority. Three days later, on November 1, 1999, Mr. Cannon learned that the Authority had paid $220,000 to Crisp County, instead of to TransWaste, and TransWaste stopped all deliveries to the waste facility.

That evening, Mathis posted three late-night messages on a Yahoo message board for Waste Industries

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Inc., TransWaste's corporate parent. The first message was:

> **what u doing???**
> by: duelly41
>
> does wwin think they can take our county----stop the trash flow cannon we would love u for it--our county not a dumping ground and sorry u and lt governor are mad about it--but that is not going to float in crisp county--so get out now u thief

The second message was:

> **cannon a crook????**
> by: duelly41
>
> explain to us why us got fired from the calton company please???? want hear your side of the story cannon!!!!!!!!

The third message was:

> **cannon a crook**
> by: duelly 41
>
> hey cannon why u got fired from calton company???? why does cannon and lt governor mark taylor think that crisp county needs to be dumping ground of the south??? u be busted man crawl under a rock and hide cannon and poole!!! if u deal with cannon u a crook too!!!!!!! so stay out of crisp county and we thank u for it

Plaintiff Prevails In Lower Courts

Mr. Cannon filed suit against Mathis for libel *per se*, seeking general and punitive damages. The trial court denied summary judgment to Mathis, instead granting Cannon partial summary judgment on the issue of liability. Mathis appealed, claiming that Cannon was a public figure, and could not prove the required actual malice, and also arguing that Georgia's "retraction statute" — *O.C.G.A. 51-5-11* — which requires that plaintiffs request a retraction within seven days or punitive damages are not available — barred any claim for punitive damages because Cannon did not request a retraction.

The Georgia Court of Appeals affirmed the trial court, *252 Ga. App. 282, 556 S.E.2d 172 (2001)*, ruling that Mr. Cannon was a private figure because he had not injected himself into the waste facility controversy. Rather, the appeals court ruled, he was "involuntarily drawn into the controversy" and thus could not be a limited-purpose public figure. The ruling implied that public figure status must be reserved for "voluntary" actions.

The Court of Appeals affirmed the ruling that the comments about Cannon were libelous *per se*, and the ruling that Georgia's "retraction statute" did not on its face apply to web postings, but instead was to be read narrowly to apply only to newspapers and printed media.

The Ga. Supreme Court Reverses on All Issues

Granting certiorari, the Georgia Supreme Court asked for briefing on whether a "private individual must show actual malice by clear and convincing evidence before punitive damages can be recovered from a private individual speaking on a matter of public concern." The Court's subsequent decision, however, went well beyond this question and reversed the Court of Appeals on each issue presented.

On the public figure issue, the Supreme Court made clear that a plaintiff could be an "involuntary public-figure" under Georgia law. Adopting a three-part test first adopted by the Georgia Court of Appeals in *Atlanta Journal-Constitution v. Jewell, 251 Ga. App. 808, 555 S.E.2d 175 (2001)*, the Court determined that Georgia courts must: 1) "isolate the controversy"; 2) "examine plaintiff's involvement"; and 3) "determine whether the alleged defamation was germane to the plaintiff's participation".

Applying this test, the Supreme Court first broadly identified the public controversy as the Authority's financial troubles, and determined that Cannon had "voluntarily injected" or "at a minimum, became drawn into" the controversy over operation of the Authority's waste facility by gaining funding for the Authority and then accelerating the Authority's financial crisis when his company sued. The Court then ruled the web postings were germane to the controversy because they were "part of the ongoing de-

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Late Night Web Postings Cause Georgia Supreme Court to Strengthen Georgia Libel Law

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bate" about garbage disposal in Crisp County, ruling that Cannon was thus a "limited-purpose" public figure.

As to the web posting themselves, the Court ruled that no person reading the postings could reasonably interpret "the incoherent messages as stating actual facts" about Mr. Cannon, citing *Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)*, strongly suggesting that the postings were mere rhetorical hyperbole entitled to full constitutional protection.

On the retraction statute, the Supreme Court refused to draw a distinction between media and non-media defendants and extended Georgia's retraction statute to all publishers, regardless of their identity. Declining to read the statute as narrowly as the Court of Appeals, the Court ruled that "publication", as used in the statute, was to be construed as it was commonly understood in libel law, and should "accommodate changes in communication and the publishing industry due to the computer and the Internet". Thus the retraction statute was held to apply to Mathis' web postings, and eliminated Mr. Cannon's punitive damage claim.

On the retraction statute, the Supreme Court refused to draw a distinction between media and non-media defendants.

The Court acknowledged the "practical effect" of its decision requires Georgia libel plaintiffs "who intend to seek punitive damages to request a correction or retraction before filing their civil action against any person for publishing a false, defamatory statement." The Supreme Court, citing *Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)*, encouraged "self-help" by defamation victims to "contradict the lie or correct the error", stating that its rule struck a balance in favor of "uninhibited, robust and wide open" debate.

In addition to its expansive reading of the public figure and punitive damages issues, the Supreme Court embraced strong protections for speech addressing matters of public concern, relying heavily on *Gertz*. Setting forth the requirements for stating a claim for libel *per se*, the Georgia Supreme Court clearly stated that plaintiffs in Georgia must prove "actual injury" to reputation when the speech involves a matter of public concern. The Court further made clear that Georgia plaintiffs must prove falsity if the speech is on a matter of public concern, and the Court made no distinction between media and non-media defendants.

Three dissenting judges disagreed with the majority's public figure analysis because, they countered, Mr. Cannon was not a public official, he had not injected himself into the controversy and the controversy at issue was not as significant as, for example, the Centennial Park bombing at issue in the *Jewell* case. The dissenters also disagreed with the majority's retraction statute analysis, asserting that the majority expanded the plain language of the statute.

Mr. Mathis was represented by James W. Hurt of Cordele, Georgia. Mr. Cannon was represented by Robert C. Norman Jr. of Jones, Cork & Miller of Macon, Georgia.

The case was closely watched by the libel defense community in Georgia. Amicus briefs were filed by the Georgia First Amendment Foundation and New World Communications of Atlanta, Inc. (represented by Joseph R. Bankoff and Jamie Norhaus Shipp of King & Spalding); the ACLU and Electronic Frontier Foundation (represented by Jeffrey O. Bramlett and Michael B. Terry of Bondurant, Mixson & Elmore LLP); the Georgia Press Association (represented by David E. Hudson of Hull, Towill, Norman, Barrett & Salley) and by Cable News Network, Gannett Co., Inc. and the Georgia Association of Broadcasters (represented by James C. Rawls and Eric P. Schroeder of Powell, Goldstein Frazer & Murphy LLP).

James C. Rawls is a partner, and Eric P. Schroeder is an associate, with Powell, Goldstein Frazer & Murphy LLP in Atlanta, Georgia. The two represented amicii CNN, Gannett Co., Inc. and the Georgia Association of Broadcasters in the Mathis *case.*

Supreme Court Gives Big Win to Copyright Owners in *Eldred v. Ashcroft*

Editor's Note: *Intellectual property issues often highlight fault lines in the media bar...indeed, within media companies themselves. Chuck Sims, who authored the summary of Eldred v. Ashcroft published here has, I think you will agree, a decided perspective on the matter. We would welcome rejoinders, however, from those of you who look at Eldred and the arguments made by Professor Lessig, the amicus on behalf of Eldred's side of the case, and the dissenting justices differently from the views expressed below.*

By Charles Sims

On January 15, the Supreme Court finally pulled the plug on the attack on the Copyright Term Extension Act ("CTEA") by Professor Lawrence Lessig and his band of anti-copyright crusaders. In a strongly worded, 7-2 decision, the Court upheld the Copyright Term Extension Act, rejecting each of the petitioners' arguments. The thrust of the decision was to emphasize the framers' commitment of copyright law and policy to Congress, leaving to Congress – and not to the judiciary – fine judgments how much protection will best serve the public interest. *Eldred v. Ashcroft*, 2003 WL 118221.

Instead, the Court reaffirmed that the Copyright Clause empowers Congress — not the courts — "to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the [Copyright] Clause."

Justice Ginsburg's opinion was joined (without separate concurrences) by six other justices; Justices Breyer and Stevens each dissented, separately. The lineup was thus precisely the same as in the *Tasini* case, where Justices Breyer and Stevens again took the "low protection" point of view.

The bulk of the majority opinion addressed the Copyright Clause attack on the CTEA. Relying on the constitutional text, as well as history and precedent, the Court rejected Lessig's challenge comprehensively, holding that "the Copyright Clause empowers Congress to prescribe 'limited Times" for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future. Among the highlights of the decision:

- The Court rejected the entire attack, and upheld the CTEA in its entirety, as to both future works and existing works (*i.e.,* works already created when the CTEA was enacted).
- The Court rejected the argument that the CTEA exceeded Congress's power under the copyright clause of the Constitution. The Court held that the extension of copyright term, for both existing and future works, is supported by the text, by history, and by various goals Congress could permissibly seek to further. The Court cited particularly comparable extensions enacted by the first Congress and subsequent Congresses; the goal of seeking harmonization with the copyright law of our trading partners, particularly in the EU; and Congress' effort to take account of demographic, economic, and technological changes.
- The Court rejected the argument that any expansion of copyright protection for existing works is invalid because it is not supported by a "quid pro quo," and pointedly dispatched Lessig's contention that courts should look to "quid pro quo" analysis when considering revisions to copyright law.
- It is for Congress, not the courts, to determine if the copyright law effectuates the goals of the Copyright and Patent Clause."
- The Court rejected as fundamentally wrong Justice Stevens' characterization of reward to the author as "a secondary consideration" of copyright law. It reaffirmed, instead, the view that "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . copyright law serves public ends by providing individuals with an incentive to pursue private ones."
- The Court refused to consider a twenty year extension as if it had established a "perpetual copyright."

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Eldred v. Ashcroft

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- Without pausing to remark on the incongruousness and expedience of Professor Lessig's reliance on the states' rights holdings that he had undoubtedly strongly opposed, the Court rejected Lessig's contention that the "congruence and proportionality" standard of review described in cases evaluating exercises of Congress' power under Section 5 of the Fourteenth Amendment should generally apply to "necessary and proper" cases generally. Justice Ginsburg's opinion for the Court cabined that analysis to the Section 5 context where it arose.

First Amendment Argument Rejected

The principal theme of the petitioners throughout the litigation had been the disastrous impact of the CTEA on First Amendment rights. They argued that the CTEA "is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment." The Court made quick work of that argument, rejecting it in the shortest and most pointed portion of its opinion without plowing new ground (Point III).

The basis for the Court's First Amendment holding was *Harper & Row v. Nation Enterprises,* 471 U.S. 539. Since copyright law is itself the "engine" of free expression, not its enemy, and because it has "built-in" First Amendment accommodations (fair use and the idea-expression dichotomy), and the CTEA supplements those safeguards in additional respects, no separate First Amendment assessment or intermediate review was appropriate. When "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."

In rejecting petitioners' First Amendment challenge, the Court rejected the primary goal of the petitioners and their anti-copyright protection allies, which was for closer judicial scrutiny of statutes enacted to protect intellectual property. Instead, the Court reaffirmed that the Copyright Clause empowers Congress — not the courts — "to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the [Copyright] Clause."

Dissents

Neither Justice Breyer nor Justice Stevens joined the other's dissent, and both were highly predictable. Justice Breyer echoed the themes of his pre-bench law review article, which had used economic analysis to argue what he considered "the uneasy case for copyright," contending that the extension was altogether invalid in affording too little public benefit for the delayed entry of many works into the public domain. Justice Stevens made a more limited argument, informed by his antitrust, anti-monopoly background, arguing that the CTEA's application of copyright monopoly to existing works exceeded Congress's power.

Solicitor General, Theodore B. Olson argued the case for the government. Eldred was represented by Professor Lawrence Lessig, Harvard University.

Media Consider Unified Response to Intrusive Credential Applications

By David Tomlin

Journalists who cover the President or take assignments that require them to visit military installations are used to giving Social Security numbers or other personal information in exchange for the credentials that put them in position to get the story. But since 9-11, news organizations have begun to notice that sponsors of sports and entertainment events have begun to present credential applications that demand the same kind of data, or even more. At a time when the risk of identity theft has grown sharply and when personal privacy seems threatened from so many directions, some editors are working to organize resistance.

Their effort began gathering momentum last spring during preparations for the U.S. Open Golf and U.S. Open Tennis tournaments. Sponsors of both events insisted that journalists sign releases that would have cleared the way for essentially unlimited background investigations.

Recommendations to news managers for a consistent strategy for a negotiating response to unreasonable credential terms when they arise.

No Exclusions

The releases would have authorized any third party with information about a journalist-applicant to share it with the golf and tennis organizations or their security agents. Health care, tax, legal, business and all other kinds of information were not excluded.

Several news companies organized a hasty campaign to protest these overly intrusive demands. With the help of their media counsel, led by David Schulz of Clifford Chance, they were able to negotiate significant modifications that narrowed the scope of the release and added safeguards for any data collected. Based on this experience, Schulz drafted recommendations to news managers for a consistent strategy for a negotiating response to unreasonable credential terms when they arise.

While in some cases there might be good grounds for a legal challenge, there usually isn't enough time to get to the courthouse.

The Associated Press has circulated the recommendations to directors of the AP Managing Editors, AP Broadcasters, AP Sports Editors and AP Photo Managers and urged that they be adopted as policy.

Five Recommendations

The recommendations are as follows:

1. News managers confronted with intrusive credential demands should immediately seek allies for a unified approach to the event sponsors.
2. Journalists or their counsel should insist that no background check should ever be required in order to obtain a credential where the access provided to a journalist creates no greater security risk than the access provided to the general public.
3. When special access warrants heightened security concerns, the scope of any background check required should be no more intrusive than necessary to satisfy reasonable, legitimate security needs.
4. All information relating to a background check conducted on a journalist, should be treated with appropriate confidence and discretion, and should be disclosed only to those who have a "need to know" in order to implement necessary security measures.
5. All written information relating to a background check should be destroyed promptly once a decision has been made to grant or deny a credential, and may be used for no other purpose.

Experience so far indicates that event sponsors often make the credential demands at the prompting of security managers' or local police and are unaware of the concerns created among journalists. When these are brought to their attention, they are usually willing to discuss changes.

David Tomlin is a former reporter, editor and bureau chief for The Associated Press, where he now works in the president's office as an attorney.

Homeland Security Update: Fighting Terrorism Through Secrecy

By Robert D. Lystad

Congressional approval of the Homeland Security Act, said President George W. Bush, marked "an historic and bold step forward to protect the American people." Sen. Joseph I. Lieberman (D-Conn.) concurred, calling it "an historic day in this new age of insecurity."

For advocates of access to government information, it was an historic day as well. For all the wrong reasons. Long-time freedom of information champion Sen. Patrick Leahy (D-Vt.) called it "the most severe weakening of the Freedom of Information Act in its 36-year history."

Why? Because the new law – which was passed and signed into law in November – provides a broad exemption from disclosure under the FOIA for business information voluntarily supplied to the new Department of Homeland Security that relates to "critical infrastructure." As if an automatic FOIA exemption were not enough, the law imposes criminal penalties for leaks of business information. And companies that share information with the government also gained immunity from civil liability even if the information reveals wrongdoing, as well as immunity from antitrust suits for sharing the information with the government and each other.

Thus, as Sen. Leahy explained, if a company submits information that its factory is leaking arsenic in ground water, "that information no longer could be used in a civil or criminal proceeding brought by local authorities or by the neighbors who were harmed by drinking the water."

With passage of the Homeland Security Act, Americans will be subject to the most powerful government agency in history, one that seeks to fuse nearly two dozen federal organizations into a single mega-department with one urgent mission: stopping terrorism. The department could command more than 70,000 armed federal agents with arrest powers.

The FOIA exemption attracted little notice on Capitol Hill until several journalism organizations joined forces this summer with environmental advocates and other public interest groups to lobby against the White House-backed provisions. The groups succeeded in having compromise language approved in the Senate. That language, sponsored by Sens. Leahy, Carl Levin (D-Mich.) and Robert Bennet (R-Utah), would have created a narrow exemption from disclosure for confidential business information shared with the government. (For further details of the competing provisions, see *LDRC MediaLawLetter,* July 2002, at 35).

Emboldened by the November election results, however, the Bush Administration and House Republicans persuaded Senate Republicans and a few Democrats to reject the narrower Senate compromise and instead support the broad, business-friendly language passed by the House of Representatives, angering access proponents.

> "The principles of open government and the public's right to know are cornerstones upon which our country were built," said Sen. Levin. With the White House proposal, "we are sacrificing these principles in the name of protecting them."

While some groups are devising a strategy to revisit the broad FOIA provision in the next Congress, prospects appear dim. With Republicans assuming majority control of the Senate, it seems unlikely they will want to disturb the legislation that passed. Indeed, private industries may become more emboldened to seek exemptions from the FOIA for other types of information provided to the government.

Robert D. Lystad is a partner at Baker & Hostetler LLP, Washington, D.C. The firm serves as First Amendment counsel to the Society of Professional Journalists.

Virginia Court Denies Motion to Televise Trial of Alleged D.C. Sniper John Allen Muhammad

By Kathleen Kirby

On December 12, 2002, Prince William County Circuit Court Judge LeRoy F. Millette Jr. denied a motion filed by numerous media organizations seeking leave to record and telecast pre-trial and trial proceedings involving alleged D.C. sniper John Allen Muhammad. Muhammad will be tried in Prince William County, Virginia in the October 9, 2002 killing of Dean Harold Meyers, who was shot once in the head as he pumped gas at a Sunoco station north of Manassas. Muhammad and John Lee Malvo, 17, are charged or suspected in 13 shootings in the Washington D.C. area —10 of them fatal — and eight other attacks across the country.

Fair Trial Paramount

In ruling from the bench immediately following oral argument, Judge Millette emphasized that the defendant's right to a fair trial was "paramount." He agreed with the positions advanced by the Commonwealth's attorney and defense counsel that televised coverage might intimidate witnesses, affect testimony, cause counsel to behave differently, and make it difficult for jurors to follow the court's instructions. He also cited the potential for prejudice should Muhammad stand trial in other jurisdictions where charges are pending.

The prosecutor, Peter Ebert, cited his experience in the same courthouse nine years ago with the Lorena Bobbitt penis-slashing trial, which was televised. He said witnesses had a tendency to "ham it up" when a camera was present, and that the coverage provided by reporters with seats in the courtroom for the Muhammad proceedings would be "adequate."

Defense counsel Peter Greenspun stated that media coverage would serve only to fuel public interest in the trial. He argued that televised coverage "would create an actual prejudice in this and all future prosecutions." Mr. Greenspun also stated his objection to still cameras in the court, which to date have been permitted in the Muhammad proceedings.

Virginia AV Statute Applied

The media's motion was filed pursuant to Virginia Code § 19.2-266, which sets forth the framework for audio-visual coverage of court proceedings. The statute provides in pertinent part as follows:

> § 19.2-266. Exclusion of persons from trial; photographs and broadcasting permitted under designated guidelines; exceptions
>
> * * *
>
> A court may solely in its discretion permit the taking of photographs in the courtroom during the progress of judicial proceedings and the broadcasting of judicial proceedings by radio or television and the use of electronic or photographic means for the perpetuation of the record or parts thereof in criminal and in civil cases, but only in accordance with the rules set forth hereunder.
> Va. Code Ann. § 19.2-266.

The statute also sets forth specific guidelines—violations of which are punishable by contempt—which the Virginia legislature intended to ensure that electronic coverage does not negatively affect the proceedings, or in any way prejudice the parties. For instance, the presiding judge has the authority at any time to interrupt or terminate coverage. Va. Code Ann. § 19.2-266, Coverage Allowed (1). Coverage of proceedings for hearings on motions to suppress evidence is prohibited. Va. Code Ann. § 19.2-266, Coverage Allowed (2). Coverage of jurors is prohibited. Va. Code Ann. § 19.2-266, Coverage Allowed (4). Moreover, the guidelines provide that the location and operation of camera equipment, and the movements of media personnel, are not distracting. Va. Code Ann. § 19.2-266, Location of Equipment and Personnel (1-9).

The statute provides that a court may exercise its discretion and prohibit the recording and telecast of proceedings only upon a finding of "good cause." Va. Code Ann. § 19.2-266, Coverage Allowed (1). According to the Virginia Supreme Court, a party opposing electronic coverage

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has the significant burden of demonstrating "good cause" that justifies prohibiting coverage. *Diehl v. Commonwealth*, 9 Va.App. 191 (1989). at 197, 385 S.E.2d at 232 . Moreover, the Court has held that the "good cause" standard cannot be met by conclusory allegations of prejudice. *Vinson v. Commonwealth*, 258 Va. 459, 470, 522 S.E.2d 170, 178 (1999) (on review of capital murder conviction, Virginia Supreme Court rejected defendant's "conclusory argument" that television cameras prejudiced defendant's "right to a fair and impartial jury" and found no abuse of discretion in permitting television cameras in courtroom); *Fisher v. Commonwealth*, 236 Va. 403, 410 n.2, 374 S.E.2d 46, 50 n.2 (1988) (on review of capital murder conviction, Virginia Supreme Court rejected defendant's "generalized objection" to cameras in the courtroom, and found no prejudice or infringement of the defendant's due process rights).

The statute provides that a court may exercise its discretion and prohibit the recording and telecast of proceedings only upon a finding of "good cause." Va.

Media Argument

The media groups sought permission to station two pool cameras in the back of the courtroom under the guidelines set forth in the statute, and in accordance with the internal guidelines issued by the Virginia Association of Broadcasters. Electronic coverage of the trial, their motion argued, would be consistent with Virginia's common law presumption in favor of open judicial proceedings and would best allow the press to fulfill its role as surrogate for the public in this case. Given that the Virginia General Assembly has recognized that audio-visual coverage of judicial proceedings can be accomplished without prejudice to the parties and without disruption or distraction, the motion argued, electronic coverage should be permitted absent a demonstration of "good cause."

Moreover, the Commonwealth's indictment under Virginia's new anti-terrorism statute alleges that Muhammad engaged in the "commission of or attempted commission of an act of terrorism with the intent to intimidate the civilian population at large." Under this definition, the entire community is the "victim" in this case. "There is a significant need for recording and telecast of these proceedings, because the physical confines of the courtroom and the importance of preserving order and decorum in the courtroom necessarily limit attendance," the motion stated.

Defense Counsel Opposition

In a written opposition filed on December 6, Defense counsel argued that the Virginia Code does not provide a specific set of circumstances that justify an exclusion of cameras from the courtroom. Further, the Virginia courts have not provided an approved checklist of approved findings which a trial judge must make to properly render such a decision.

The unique and unusual circumstances of this case, the counsel for Mr. Muhammad argued, require exclusion given that cameras in the courtroom would prejudice:

(1) the Defendant's right and ability to obtain a fair and impartial jury in this jurisdiction and any other,

(2) the ability of the prosecution to protect witnesses from intimidation, influence or distraction,

(3) the ability of the Accused to call for witnesses in the absence of intimidation, undue influence and distractions,

(4) the Defendant's right to have a fair trial such that the court, counsel, court personnel, witnesses, and trial participants are distracted by the presence of cameras,

(5) the additional pressure the ultimate jurors, already facing the huge task of setting aside public perception and pressure will receive, sequestered,

(6) the likelihood from pre-trial proceedings that evidentiary matters will be revealed and argued, and

(7) the greater likelihood the jury will have to be sequestered, and

(8) the impact televising this case would have on the ability of Mr. Muhammad to receive a fair trial in any of the other jurisdictions where capital murder, first degree murder, and numerous other serious charges are pending.

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Virginia Court Denies Motion to Televise Trial of Alleged D.C. Sniper John Allen Muhammad

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Media Rebuttal

At oral argument, the media attempted to rebut the objections asserted by the prosecution and defense, relying on the Virginia Supreme Court precedent stating that generalized objections or assertions that the presence of cameras "may" have an adverse effect upon the interest of the defendant, without further proof, do not rise to the level of "good cause." The media asserted that fear of jurors being exposed to potentially prejudicial information or of witnesses being exposed to the testimony of other witnesses could be addressed through means other than closure of trial proceedings to the electronic media, including instructing the jury on the nature of such media coverage and maintaining control of the courtroom.

In addition, particularly in response to defense counsel's allegations that news coverage often tends to "mislead" the public, the media argued that media coverage of the case would be extensive regardless of whether or not cameras were permitted inside the courtroom, and that permitting a camera to record the proceedings would allow the public to witness the most orderly presentation of the evidence and arrive at their own conclusions. Since the crimes themselves (regardless of who committed them) have had a direct, extraordinary impact on the public, it is critical, we argued, for the public to be able to directly watch the case regardless of the outcome of the trial.

Ruling Denies Access

Judge Millette's oral ruling was brief. He emphasized that the defendant's right to a fair trial was paramount, and concluded that it was more than "mere speculation" that participants in the trial would be affected "by having their every word broadcast and seen by many people across the country." Given the confines of the courtroom, Judge Millette left open the possibility of providing a closed-circuit telecast for victims' families perhaps others. He also gave a preliminary ruling that still photography would be allowed at the trial, provided that it is not disruptive.

The media parties, represented by Barbara VanGelder are considering an appeal. Muhammad will be tried in Prince William in the October 9, 2002 killing of Dean Harold Meyers, who was shot once in the head as he pumped gas at a Sunoco station north of Manassas. Muhammad's trial in Prince William is scheduled to begin on October 14, 2003. Malvo's first trial will be in Fairfax County, Virginia, where he is charged with the shooting death of FBI analyst Linda Franklin outside a Home Depot store. Malvo's court-appointed guardian is preparing for preliminary hearing early next year at which a judge is expected to determine whether Malvo will be tried as an adult and face the death penalty. A date for his capital murder trial has not yet been set.

Kathleen Kirby, Wiley Rein & Fielding LLP, is First Amendment counsel to the Radio-Television News Directors Association.

Third Circuit Upholds Closure of Post 9/11 INS Deportations

Circuit Conflict May Bring Issue to Supreme Court

In a closely watched case, the Third Circuit Court of Appeals this month upheld the legality of secret INS deportation proceedings for post 9/11 detainees. The court reversed a New Jersey district court decision that had recognized a broad First Amendment right of access under which closure would only have been permitted on a case-by-case basis under a strict scrutiny standard. *North Jersey Media Group, Inc. v. Ashcroft*, No. 02-2524 (Oct. 8, 2002), reversing 205 F. Supp. 2d 288, 30 Media L. Rep. 1865 (May 28, 2002) (Bissel, J.).

Found Richmond Newspapers Applied, But Not Met

In a 2-1 decision, written by Chief Judge Edward Becker, and joined by Judge Morton Greenberg, (Judge Anthony Sirica dissenting), the court flatly rejected the government's sweeping argument that no constitutional right of access could apply to federal administrative proceedings, holding instead that the legality of the closure had to be measured under the First Amendment access standards articulated in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). But in applying the *Richmond Newspapers* considerations of "experience" and "logic," the Third Circuit concluded that there was no history of openness to deportation proceedings and that openness for these post 9/11 deportations – so-called special interest cases – would not play a positive role "at a time when our nation is faced with threats of such profound and unknown dimension."

The court comes down firmly on the side of security in the wake of last year's attacks on the World Trade Center and Pentagon.

The decision rightly notes that at issue in the case is the "the eternal struggle between liberty and security." And while not unmindful of the First Amendment interests at stake, the court comes down firmly on the side of security in the wake of last year's attacks on the World Trade Center and Pentagon.

The Third Circuit's decision conflicts with the recent decision in the nearly identical Sixth Circuit case of *Detroit Free Press v. Aschcroft*, 2002 U.S. LEXIS 17646 (6th Cir. 2002), setting the stage for the possible resolution of the issue by the U.S. Supreme Court. See LDRC *MediaLawLetter*, Sept. 2002 at 3.

Background – The "Creppy Directive"

At issue in this case, as in the Sixth Circuit litigation, was a directive promulgated shortly after the September 11th attacks by Chief Immigration Judge Michael J. Creppy (the "Directive"). The Directive ordered immigration judges to close special interest deportation proceedings – cases involving aliens who, in the determination of the Justice Department, might have connections to, or information about, terrorist activities against the United States.

The Directive, issued pursuant to 8 C.F.R. 3.27 (2002) (permitting the closure of deportation proceedings to protect "witnesses, parties or the public interest"), ordered that special interest cases be closed to visitors, family, and the press and, furthermore, that immigration judges not confirm or deny whether such cases were on the docket or scheduled for hearings. According to the Third Circuit, the Directive imposed "a complete blackout of information on these cases."

The rationale for the Directive, as explained in the litigation, was that the information blackout would help prevent terrorist organizations from learning the facts and details of individual cases, as well as the overall pattern of the government's investigation. As to this latter concern, the government argued that blanket closure was necessary to prevent information, which might appear insignificant in individual cases, from being pieced together in mosaic fashion to reveal the content, methods and directions of the government's investigations.

This rationale was questioned by the media plaintiffs in the district court and on appeal where they noted that detainees were themselves free to communicate with family and friends thereby circumventing the stated purpose of the closure rule. But the Third Circuit dismissed this objection in a footnote, noting that under more recent regula-

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tions immigration judges are empowered to seal proceedings to protect sensitive law enforcement information – a conclusion that arguably only reinforces the media's position that closure on a case-by-case basis can accommodate both sides' interests. In the end, by finding that no qualified right of access attached to the proceedings, the government approach – inexact as it may be – was entitled to almost complete deference under post 9/11 circumstances.

The instant case was filed in New Jersey federal district court in March 2002 by the New Jersey Law Journal and North Jersey Media, publisher of the *Record* and *Herald* newspapers, joined by a media coalition as amicus curiae. Reporters from the newspapers were denied access and information about special interest deportation proceedings in federal immigration court in Newark, New Jersey, where a large number of special interest cases were pending.

District Court: Qualified Right of Access Exists

The district court, applying the Supreme Court's "experience" and "logic" test articulated in *Richmond Newspapers* and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), held that a qualified right of access existed to the deportation hearings. 205 F. Supp. 2d 288, 30 Media L. Rep. 1865 (May 28, 2002). Under the experience prong, the district court found that while there may be no clear history of access to deportation proceedings "there is certainly no tradition of their presumptive closure." Moreover, it found that from 1903 onwards deportation proceedings have been subject to due process requirements "the touchstone of which is the right to an open hearing."

Under the logic prong, the district court noted the "abundant similarities" between deportation proceedings and judicial proceedings, concluding that the "same functional goals served by openness in the criminal and civil context would be equally served in the context of deportation proceedings." 205 F. Supp. 2d at 301.

Finding that the Directive could not withstand strict scrutiny, the district court issued a nation-wide preliminary injunction against the Directive, which was subsequently stayed by the U.S. Supreme Court pending the appeal to the Third Circuit.

3rd Circuit Applies Richmond Newspapers Test

The Third Circuit agreed with the district court (and the Sixth Circuit) that *Richmond Newspapers* is the proper framework to analyze whether a right of access attaches to deportation proceedings – a victory of sorts for the media in light of the government's argument that no constitutional right of access could attach to federal administrative proceedings. But the Third Circuit concluded that under this framework there was neither the "experience" nor the "logic" to support access to deportation proceedings.

> ***"We ultimately do not believe that deportation hearings boast a tradition of openness sufficient to satisfy* Richmond Newspapers.*"***

No History of Access

In a lengthy analysis of the historical right to access to government proceedings generally, and deportation proceedings specifically, the court held that any history of open deportation proceedings "is too recent and inconsistent to support a First Amendment right of access. According to the court:

> "The strongest historical evidence of open deportation proceedings is that since the 1890s, when Congress first codified deportation procedures, the governing statutes have always expressly closed exclusion hearings, but have never closed deportation hearings.... But there is also evidence that, in practice, deportation hearings have frequently been closed to the general public. From the early 1900s, the government has often conducted deportation hearings in prisons, hospitals, or in private homes, places where there is no general right of public access.... We ultimately do not believe that deportation hearings boast a

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> tradition of openness sufficient to satisfy *Richmond Newspapers*."

In fact, whatever tradition of openness surrounds deportation proceedings (regulations established in 1964 created a presumption of openness and there was virtually no evidence in the record of actual practice prior to 1964), the court found it was not comparable to the criminal proceedings at issue in *Richmond Newspapers* involving the "unbroken, uncontradicted history" of public access to criminal trials since "before the Norman Conquest."

The Supreme Court's recent decision in *Federal Maritime Commission (FMC) v. South Carolina Ports Authority*, 122 S. Ct. 1864 (U.S. 2002) – rendered after the New Jersey district court's decision – did give the Third Circuit pause. In *FMC*, the Supreme Court held that state sovereign immunity barred a state administrative agency from hearing a private party complaint against a non-consenting state. In so ruling, the Court observed that while administrative proceedings were unknown during the Framer's time, they "walk[], talk[] and squawk[] like a civil lawsuit." *Id*. at 1873.

The Third Circuit noted, though, that while on a procedural level deportation proceedings and civil trials are practically indistinguishable, the Supreme Court did not intend "to import the full panoply of constitutional rights to any administrative proceeding that resembles a civil trial." According to the court:

> "This is not a situation where the Framers contemplated a perfectly transparent government, only to have deportation proceedings, which they did not foresee, jeopardize that intended scheme. This is also not a situation involving allegations that the government assigned to an administrative agency a function that courts historically performed in

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order to deprive the public of an access right it once possessed. And most importantly, this is not a situation that risks affront to states' residual and inviolable sovereignty, the concern that motivated the *Ports Authority* Court."

"Logic" Prong Does Not Support Access

In weighing *Richmond's* "logic" prong – whether public access plays a significant positive role in the functioning of the particular process in question – the Third Circuit gave particular deference to the government's security arguments. The court noted that under the logic prong a court should consider not just whether access served some good, but also the "flip side" – the extent to which access impairs the public good – an analysis, the court found, that the district court and Sixth Circuit neglected to perform. Under this balanced analysis the court credited the "substantial evidence" presented by the government that open deportation proceedings would threaten national security. And while acknowledging that these security concerns were to some degree speculative, it noted its reluctance "to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise."

National security is an area where courts have traditionally extended great deference to Executive expertise."

Conclusion

In its conclusion, the Third Circuit acknowledged the well-received observation of the Sixth Circuit in *Detroit Free Press* that "democracies die behind closed doors." In response – and rather unusual for a judicial decision – the Third Circuit cited with approval a *Washington Post* op-ed which argued quite somberly that the real threat to American democracy is not posed by the incrementalism of restricted access, but by the side effects of any future terrorist attacks.

> Democracy in America does at this moment face a serious threat. But it is not the threat the [Sixth Circuit] has in mind, at least not directly. It is true that last September's unprecedented mass-slaughter of American citizens on American soil inevitably forced the government to take security measures that infringed on some rights and privileges. But these do not in themselves represent any real threat to democracy. A real threat could arise, however, should the government fail in its mission to prevent another September 11. If that happens, the public will demand, and will get, immense restrictions on liberties.

See Michael Kelly, "Secrecy, Case by Case," Washington Post (Aug. 28, 2002) (archived at www.washingtonpost.com).

Interestingly, Kelly wholly approved of the Sixth Circuit's decision to allow closure of deportation hearings on a case by case basis – a policy which whether it be practical or wise is not required by law according to the Third Circuit. Plaintiffs are considering requesting a rehearing en banc or a petition for certiorari to the U.S. Supreme Court.

Plaintiffs North Jersey Media Group, Inc. and the New Jersey Law Journal were represented by Lee Gelernt (argued), Steven Shapiro, and Lucas Guttentag of the ACLU's Immigrants' Rights Project; Edward Barocas, ACLU New Jersey; Lawrence Lustberg and Shavar Jeffries of Gibbons, Del Deo, Dolan, Griffinger & Vecchione in Newark, New Jersey; Professor David Cole, Georgetown University; and Nancy Chang and Shayana Kadidal of the Center for Constitutional Rights. A coalition of media companies, intervening as amicus curiae, were represented by David Schulz and Mark Weissman of Clifford Chance Rogers & Wells.

The government was represented by Assistant Attorney General Robert McCallum, U.S. Attorney Christopher Christie, Deputy Assistant Attorney General Gregory Katsas (argued) and Sharon Swingle and Robert Loeb of the U.S. Department of Justice.

D.C. Circuit Hears FOIA Appeal On Release of Detainees' Names

By Charles D. Tobin

The judiciary must to defer to the executive branch's judgment in post-9/11 access matters "if the price of being wrong is airplanes flying into buildings again," the Justice Department told a federal appeals court this month during oral argument in a landmark FOIA case.

But a coalition of access groups, which seeks disclosure of the names of people detained in the government's search for domestic links to terrorism, urged the panel not to use "deference as a substitute for [the government's] burden" to show the information is exempt under the statute.

The United States Circuit Court of Appeals for the District of Columbia Circuit November 18 heard argument in the appeal of *Center for National Security Studies, et al. v. U.S. Department of Justice*, 215 F. Supp. 2d 94 (D.D.C 2002). More than 25 civil rights and public interest groups – including the Reporters Committee for Freedom of the Press – brought the lawsuit in late 2001 seeking the names and other information about the more than 1,000 people detained after the 9/11 attacks.

"The courts owe the affidavits a greater degree of deference . . . if the price of being wrong is airplanes flying into buildings again."

In her ruling last summer, District Court Judge Gladys Kessler held that most of the detainees' names must be released, but that the government may keep secret the locations of the arrests, detentions and, for those detainees let go, their release. The government appealed the ruling, and the coalition of plaintiffs cross-appealed.

At argument in the D.C. Circuit, Deputy Assistant Attorney General Gregory Katsas told the judges that in ordering the names released, the district court "undervalued" the "grave and obvious dangers with providing a roadmap" to al Qaeda of the government's efforts to root out terrorist cells in the U.S. For this reason, he argued, the detainees' names should be withheld under FOIA exemption 7.

But Judge David S. Tatel, a Clinton appointee to the court, aggressively challenged the logic of the argument. Tatel noted that on the Friday before the hearing, Justice had trumpeted to the press the arrests of a Detroit group of alleged conspirators, providing the public with their names and extensive information about their suspected contacts and activities. Katsas responded that the government must be free to choose the instances in which it believes releasing information will further, rather than impede, an investigation. "There are times when disclosure of information is helpful."

Judge Tatel also extensively questioned the government's lawyer about whether the breadth of the government's position. Didn't the government affidavits urging secrecy, Judge Tatel asked, argue for deference whenever identifying the subject would impede a complex probe, such as a narcotics or organized crime investigation? Or was Justice seeking a narrow ruling that in the war on terrorism the judiciary must defer to the investigators? Citing Supreme Court precedent regarding the executive branch's authority over national security issues, Katsas responded, "The courts owe the affidavits a greater degree of deference . . . if the price of being wrong is airplanes flying into buildings again."

Additionally, Judge Tatel questioned whether a key government affidavit – which said release of the information "could" hamper the investigation -- met its burden under FOIA to show disclosure "could reasonably be expected" either "to interfere with enforcement proceedings" or "to constitute an unwarranted invasion of personal privacy." Finally, Judge Tatel noted on the privacy issue that case law under exemption 7 holds in favor of disclosure when the record contains "compelling evidence" of government misconduct, and disclosure is necessary to confirm or rebut the claim. Weren't detainees' claims that they were deprived of outside contact and legal counsel enough evidence of misconduct to warrant disclosure, he asked?

DOJ's Katsas responded that the merits of the detainees' complaints should be decided in litigation in which they are the parties, not in this FOIA case. In any event, he argued, complaining detainees only were briefly prohibited from seeing counsel. "There are not allegations

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D.C. Circuit Hears FOIA Appeal On Release of Detainees' Names

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that people are locked up in dungeons and held incommunicado," Katsas argued.

Arguing the pro-access side, Kate Martin with the Center for National Security Studies volunteered at the outset of her argument that preventing another terrorist attack is a government interest "of the highest importance." She noted, however, that the government's affidavits "carefully never allege" that a single arrestee is a suspected terrorist. FOIA, she argued, does not "license a scheme of secret arrests," and that the First Amendment does not permit it either. Martin underscored that the government already released much information about the geographic areas in which the government has focused its search for al Qaeda cells.

Judge David B. Sentelle, an appointee of former President Bush, aggressively questioned Martin throughout her pro-access argument. When Martin pointed to myriad newspaper stories detailing information released by the government about the geographic areas on which investigators are concentrating, Judge Sentelle warned her not to cite to them. He said that based on his years of experience with the press, "Trust me, newspaper articles are not evidence."

She noted, however, that the government's affidavits "carefully never allege" that a single arrestee is a suspected terrorist.

Judge Sentelle also questioned that, if the geographic data has been released as Martin asserted, "then why are we here?" Martin responded that despite the release of some information, the names of 750 of these detainees, and where they were arrested, have always remained cabined. The judge then asked Martin if she knew whether al Qaeda had the names already, and Martin was forced to concede that she did not. He followed up rhetorically: "So there are at least 750 pieces of information relevant to the government investigation that you would put into the hands of al Qaeda?" Martin responded, "That's right your honor."

Judge Sentelle also alluded to case law under the Classified Information Procedures Act, where potentially exculpatory, classified information may be withheld from a criminal defendant where the disclosure would reveal the "pattern" of the government's investigation. Martin responded that the government has never even shown that revealing to al Qaeda the "pattern" of the investigation "would be valuable to them," and that they do not already have the information.

Finally, Martin also briefly argued – in a point made extensively in an *amicus* brief filed on behalf of more than a dozen media entities – that the due process rights of the detainees give rise to a constitutional right of public access to their identities. "If the Constitution prohibits secret arrests, then the First Amendment gives the public the right to know who's arrested," Martin told the panel. Judge Sentelle replied that he does not "understand what the First Amendment has to do with it." "I missed that part of the First Amendment."

The third member of the panel, Judge Karen Lecraft Henderson, also appointed by former President Bush, said very little during the argument. She interrupted once to ask the government about its progress under the portion of Judge Kessler's order requiring Justice to more diligently search for documents sought in plaintiff's FOIA request that contain policies regarding the detentions. The government's lawyer responded that the search for documents is "ongoing."

Chuck Tobin is with the Washington D.C. office of Holland & Knight LLP.

Any developments you think other MLRC members should know about?

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UPDATE

Access to War, Inspections Are Issues

Pentagon Plans to "Embed" Media

As the military prepared for possible action against Iraq, Pentagon officials have said several times over the past several months that their plan is to embed journalists within military units in any such conflict, in addition to activating the military reporting pool.

"Can I give you assurance that we recognize the desirability of having people embedded?," Defense Secretary Donald Rumsfeld asked himself during an Oct. 30 meeting of Pentagon officials with media Washington bureau chiefs. A transcript of the meeting is available at www.defenselink.mil/news/Nov2002/t11012002_t1030sd.html.

"Yes, we do recognize that," Rumsfeld answered. "Do we want to try to get them in as early as possible, that it's not going to put at risk the U.S. forces that are in there? Yes, we do want to do that."

Rumsfeld added, however, that he could not assure that reporters would be able to travel with military units immediately once war begins, because of the unpredictable nature of warfare.

Asked whether having journalists embedded in military units was a "core principle," Rumsfeld said that it is "generally almost always helpful to have the press there to see things and be able to report and comment and provide information about what's taking place." But he added that "[t]here are obviously times when that's not appropriate, the danger is too great or the confidentiality of what's taking place is such that it's not appropriate."

Military officials also told media representatives that journalists may have to alter their equipment so that it does not reveal the location of American troops.

Placing reporters with military units would mark a departure from recent military operations, including the overthrow of the Taliban regime in Afghanistan last year, during which journalists were generally prevented from entering war zones until long after the initial attacks. Rumsfeld explained the delay in Afghanistan by stating that "we spent days and ultimately weeks trying to get first Special Forces people and later ground forces into Afghanistan, and to do it we had to first develop relationships with the Northern Alliance and then we had to develop an arrangement whereby we could physically get them in there."

The Pentagon has already offered the first of what is meant to be a series of training sessions during which reporters will learn about military culture and operations. Officials said that participation in the program is not a prerequisite to being placed with troops or with the media pool.

Rumsfeld said that he "think[s] it is particularly useful because we see intelligence that they [Iraqi officials] are already arranging things that will mislead the press in Iraq as to how they want to do things.

> "There's a risk that they will do that and try to blame it on the United States in the event that something takes place in Iraq, and having people who are honest and professional see these things and be aware of that is useful," he added. "So I consider it not just the right thing to do but also a helpful thing."

Inspectors Hold Media At Bay, While Iraqis Invite Them In

United Nations weapons inspectors have had little comment for reporters that have trailed them from inspection site to inspection site, and reporters have not been allowed to accompany the inspectors during their visits.

"We don't want journalists to be with us in the facilities," International Atomic Energy Agency spokeswoman Melissa Fleming told the Associated Press. "We believe we can't carry out our professional job (with journalists accompanying inspectors).

"We want to be the ones who draw the conclusions about what we see," she added. "We are the experts. Our nuclear inspectors know what given dual use items might mean, whereas a journalist doesn't."

In many cases, however, Iraqi officials allowed reporters limited access to inspection sites after the UN teams have finished their surprise visits.

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Access to War, Inspections Are Issues

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"We will allow everybody to follow in order that international public opinion be acquainted with what is going on in our country and from our point of view, the press will be granted full access to every single site," an anonymous Iraqi official told the Associated Press. "Taking into consideration the transparency of our position, we are not hiding anything. Every journalist is allowed."

Developments in Access Cases

Cases regarding public access to court hearings and information involving the Sept. 11 terrorist attacks and their aftermath continue, with several new developments:

- The 3rd Circuit Court of Appeals rejected a motion for rehearing *en banc* in a lawsuit challenging the blanket policy of holding closed immigration hearings in cases that the government says are related to terrorism investigations. *North Jersey Media v. Attorney General*, No. 02-2524 (3rd Cir. motion denied Dec. 3, 2002). On Oct. 8, the appellate court reversed a lower court ruling that the policy was unconstitutional. 308 F.3d 198 (3rd Cir. 2002). Five of the court's 12 sitting judges favored granting the rehearing; Judge Anthony Scirica filed a dissent of the denial.
- The 3rd Circuit's opinion conflicts with the 6th Circuit's ruling that immigration hearings involving Muslim activist Rabih Haddad could not be closed under the blanket order. *See Detroit Free Press v. Ashcroft*, Civil No. 02-1437, 303 F.3d 681 (6th Cir. 2002). An open hearing was held in Haddad's case in October under the 6th Circuit's ruling. *See Detroit Free Press v. Ashcroft*, 2002 WL 31317398 (E.D. Mich. Oct. 7, 2002) (granting in part plaintiff's emergency motion to compel compliance with court order). *See insert on this page.*
- The government reached an agreement with the ACLU and other groups that sued for information regarding searches that have been conducted under the USA Patriot Act since its passage last October. *ACLU v. Department of Justice*, Civil No. 02-2077 (D.D.C. Nov. 26, 2002). The Act allows records searches at libraries, bookstores and Internet service providers. Under the agreement, the government will release the documents by Jan. 15, as well as a list of documents it feels must remain confidential. The plaintiffs – which besides the ACLU include the Electronic Information Privacy Center, the American Booksellers Foundation for Free Expression, and the Freedom to Read Foundation – may then challenge the decision to withhold any documents. The suit was filed after the government did not respond to a Freedom of Information Act request for the information.
- On Nov. 22, the government agreed to release a secret FBI report on how the agency interrogated Abdallah Higazy, who falsely confessed to owning a radio capable of ground-to-air communication that was found in a hotel near the World Trade Center, rather than challenge motions brought by several news organizations seeking access to the report. *U.S. v. Higazy* (S.D.N.Y. motions filed Nov. 14, 2002). The request was filed by the *New York Times*, CNN, the *Daily News* and *Newsday*.