

MILRC Media
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Michael Douglas and Catherine Zeta-Jones Win Privacy Trial in London Over Unauthorized Wedding Photos

Following a highly publicized month-long bench trial, a London High Court judge ruled in favor of celebrity couple Michael Douglas and Catherine Zeta-Jones, and Northern & Shell PLC, publisher of the magazine *OK!*, on their claims against *Hello!* magazine over its unauthorized publication of photographs from the couple's wedding. *Douglas v. Hello! Ltd.*, [2003] EWHC 786 (High Court April 11, 2003). A copy of the judgment is available online through www.courtservice.gov.uk.

In late 2000, the couple sold an exclusive right to publish wedding photographs to *OK!* magazine for £1 million. In a detailed 80 page decision, High Court Justice Lindsay ruled that the publication of unauthorized wedding photographs in rival magazine *Hello!* amounted to a "breach of commercial confidence" for which he will likely award substantial damages after a hearing at a later date. Publication also constituted a breach of the Data Protection Act as to Douglas and Zeta-Jones – entitling them to at least nominal damages for the unauthorized processing of personal information in the form of photographs. Justice Lindsay rejected Douglas and Zeta-Jones' breach of privacy claim, noting that explicit recognition of a privacy tort is "better left to Parliament" – but he warned that if Parliament does not step in "the courts will be obliged to."

Privacy in All But Name

As a practical matter, though, this decision recognizes a right of privacy in all but name. At its broadest this right makes actionable the publication of truthful information that creates embarrassing or simply unwanted publicity. Indeed, Justice Lindsay explained that Douglas and Zeta-Jones' wedding was essentially a valuable "trade secret" which they were entitled to control both for commercial and personal interests.

While the court held that this commercial and personal right had to be balanced against the right of free expression, the balance tipped decidedly in favor of the Hollywood couple. The court reasoned that the publication was not in the "public interest," despite the intense interest in the wedding. In addition, *Hello!* knew, or should have known, that the photographs were obtained

by a trespasser. While not unlawful or even outrageous such, surreptitious newsgathering could not be justified under the circumstances.

Wedding Photo Rights Sold for £1 Million

OK! magazine is published in England; *Hello!*, in Spain with UK and other foreign versions. The magazines are competitors and both specialize in publishing photographs of celebrities together with generally flattering profiles. Prior to their wedding both magazines negotiated with a representative of Douglas and Zeta-Jones for the exclusive right to publish authorized wedding photographs. At trial, the actors explained that this arrangement was designed to protect the wedding "from the inevitable media intrusion" while still accommodating the public's interest in photographs of the event. Douglas and Zeta-Jones ultimately accepted an offer from *OK!* of £1 million for the right to publish an exclusive set of photographs to be selected by the couple. As part of the contract, the couple agreed to provide security to bar any unauthorized photography at the wedding.

After losing out in the negotiations, *Hello!* made it known that it was in the market for unauthorized photographs from the wedding. Testimony in the case showed that such an approach was common among the magazines and that *OK!* had published unauthorized photographs from celebrity events where *Hello!* had obtained exclusive rights.

Wedding at the Plaza Hotel Was a Private Event

Douglas and Zeta-Jones were married on November 18, 2000 at the Plaza Hotel in New York City with several hundred guests in attendance. The wedding was described by the tabloid press as the "event of the year." Nearly 400 people attended, including "many names that anyone would recognize as famous or celebrated." It was also, of course, to be photographed by *OK!* magazine. Nevertheless, Justice Lindsay concluded the wedding was "private." He was loathe to conclude otherwise simply based on the large number of guests "especially where the means of the parties were so ample" and "the couple was popular enough to have many friends."

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Douglas and Zeta-Jones Win Privacy Trial in London

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And Justice Lindsay accepted as reasonable the couple's claim that the media coverage by OK! actually preserved and reinforced the private nature of the event, since the exclusive was designed to eliminate unauthorized media intrusions. At trial, Catherine Zeta-Jones notably remarked that the £1 million they accepted "was not that much" for them and Justice Lindsay agreed describing the payment to the couple as a mere "blandishment." *Id.* at ¶ 66-69. Justice Lindsay also recognized that the agreement with OK! furthered the couple's interest in "the certainty of fair coverage," a point which he did not analyze but which simply appears to be added to the couple's basket of protected privacy interests. *Id.* at ¶ 52.

Photographer "Infiltrates" the Wedding

Rupert Thorpe, a California-based photographer, dressed in a tuxedo and pretending to be an invited guest managed to infiltrate the gauntlet of security and take photographs. *Hello!* purchased these photographs for approximately \$188,000. A good deal of the decision concerns the arrangements and dealings between *Hello!* and intermediaries involved in obtaining the photographs. The court found that while *Hello!* did not directly commission the photographs in advance – perhaps to avoid legal exposure – it knew that photographers would resort to deception to obtain pictures.

Two days after the wedding, Douglas and Zeta-Jones learned that unauthorized wedding photographs were being offered for sale. This discovery led to some dramatic testimony at trial. Catherine Zeta-Jones testified that "our peace and happiness evaporated. I felt violated and that something precious had been stolen from me." *Id.* at ¶ 82. Michael Douglas was "devastated and shocked by the news.... It was a truly gut wrenching and very disturbing experience which left both of us deeply upset. *Id.* at ¶ 83.

On cross-examination, Mr. Douglas conceded that their distress was minor in comparison to the loss of a limb. But Justice Lindsay had "no doubt but that Mr. Douglas and Miss Zeta-Jones both suffered real distress which led Miss Zeta-Jones to tears" wondering if one of their guests had betrayed them. *Id.* at ¶ 84.

That same day the couple's lawyers obtained an ex parte injunction barring *Hello!* from publishing the issue containing the wedding photographs. The injunction was dissolved three days later by the Court of Appeal. *Douglas v. Hello! Ltd.* (Dec. 21, 2000); see also LDRC LIBEL-LETTER Jan. 2001 at 23. While expressing sympathy to the couple's claims, the Court of Appeal concluded that an injunction at that stage was inappropriate. Interestingly, Justice Lindsay found that the injunction was lifted based on false testimony from the defendants who had lied about their involvement in procuring the pictures.

As an interesting side note, the offending photographer Rupert Thorpe was ultimately identified because he was captured in one of the photographs taken by OK! at the wedding. He was seen holding a camera in his hand at waist level. He was not named as a defendant in the case. Another American, Philip Ramey, a California photographer and photo agent who brokered the transaction, was named but apparently did not appear to defend himself.

Hello! and OK! Both Do Wedding Features

After the injunction was lifted OK! moved up its publication schedule so that it would not be scooped by *Hello!* Both magazines published issues featuring wedding photographs on the same day in late November 2000. The court found that the photographs published in *Hello!* were of poor quality and some were out of focus. At trial, Zeta-Jones described a photograph of her father as "very offensive." A photograph of her eating wedding cake was "very offensive" since "it looks like all I did was eat." Adding to her distress, this last photograph was republished in the *Sun* tabloid with the humorous headline "Catherine Eater Jones."

The text accompanying the photographs was, according to the Court, "snide" and "hurtful." For instance, in contrast to the usually flattering tone of such pieces, the text accompanying a photograph of Zeta-Jones dancing erroneously stated, "The vivacious bride took to the dance floor but not, at any time, with her groom." Justice Lindsay, however, found insufficient evidence to conclude that *Hello!* published such comments in retaliation for the couple giving the exclusive to rival OK!

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Douglas and Zeta-Jones Win Privacy Trial in London

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Breach of Commercial Confidence

Justice Lindsay held that Douglas and Zeta-Jones had a “hybrid” right of confidentiality which was partly personal and partly commercial. Under this right the publication does not have to be “highly offensive or offensive at all” but simply likely to “offend the Douglases” under the circumstances. *Id.* at ¶ 192.

The claimants had here a valuable trade asset, a commodity the value of which depended, in part at least, upon its content at first being kept secret and then of its being made public in ways controlled by Miss Zeta-Jones and Mr Douglas for the benefit of them and [OK!].... Of course, the general appearance of both Mr Douglas and Miss Zeta-Jones was no secret; what they looked like was well known to the public. But that does not deny the quality of commercial confidentiality to what they looked like on the exceptional occasion of their wedding.... The event was private in character and the elaborate steps to exclude the uninvited, to include only the invited, to preclude unauthorised photography, to control the authorised photography and to have had the Claimants’ intentions in that regard made clear all conduce to that conclusion. Such images as were, so to speak, radiated by the event were imparted to those present, including Mr Thorpe and his camera, in circumstances importing an obligation of confidence. Everyone there knew that was so. As for the Hello! Defendants, their consciences were, in my view, tainted; they were not acting in good faith nor by way of fair dealing.... The Hello! Defendants had indicated to paparazzi in advance that they would pay well for photographs and they knew the reputation of the paparazzi for being able to intrude.

Id. at ¶¶ 196-198.

Justice Lindsay found it obvious that Douglas, Zeta-Jones and OK! were damaged by Hello’s publication. In addition to the emotional distress, the couple had to rearrange their schedules to approve photographs for publication ahead of schedule. And the publication in OK! may have dampened interest in syndication rights for the author-

ized wedding photographs. OK! similarly had to speed up its publication schedule, it may have lost sales and it “lost also the kudos of being and being seen to be the only one of the two leading rivals to be able to offer authorised coverage of the ‘showbiz wedding of the year.’” *Id.* at ¶ 200.

Balance With Free Expression

Justice Lindsay’s decision in favor of the couple’s breach of commercial confidence claim was not the end of the matter. The claim still had to be balanced against Article 10’s right to free expression. This proved to be an easy hurdle. Justice Lindsay found that there was no “public interest” to publish the photographs as that term is used in the Press Complaints Commission Code. The Code is a set of best practice standards framed by the UK newspapers and magazines. Section 3 on Privacy provides:

- i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual’s private life without consent
- ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable.

Note - Private places are public or private property where there is a reasonable expectation of privacy.

Section 11 on Misrepresentation provides in relevant part that:

- i) Journalists must not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge.....
- iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.

Both Sections are subject to a “Public Interest” exception. In addition to several specific public interest exceptions, such as “detecting or exposing crime or a serious misdemeanor” and “protecting public health and safety” the Code contains a catch all that “there is a public interest in freedom of expression itself. The Commission will therefore have regard to the extent to which material has, or is

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Douglas and Zeta-Jones Win Privacy Trial in London

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about to, become available to the public.” The full text of the Code is available at www.pcc.org/uk.

Justice Lindsay held that the prohibition on long lens photography applied with equal force to secret “short lens” photography at a private event – and no “public interest” exception was claimed or applied. Although described as voluntary and non-legal, the best practices of the Code may well be adopted as legal requirements as UK courts struggle with privacy law questions. Under this decision, a newspaper or magazine that violates the Code may effectively lose any general claim of protection under Article 10.

The trial was divided on liability and damages with damage to be determined at a later date. Justice Lindsay hinted that damages may be in excess of £1 million by noting that the couple could have commanded far more than that for the sale of the photographs. But the conduct of Hello! was not so outrageous to justify exemplary or aggravated damages.

Conclusion

From an American media law perspective the decision is a tangle of concepts. At its core the decision recognizes a disturbingly broad right to control publicity. The judgment itself is enormously sympathetic in tone to Douglas and Zeta-Jones. It is tempting to describe Justice Lindsay as star-struck, perhaps a tribute to the presence and dramatic flair of Michael Douglass and Catherine Zeta-Jones, at least compared to the more unseemly publishers, editors, and photographers of the celebrity press.

The plaintiffs were represented by barristers Michael Tugendhat QC and David Sherborne of 5 Raymond Buildings and solicitors firm Theodore Goddard. Defendant Hello! magazine was represented by barrister James Price QC of 5 Raymond Buildings and solicitors firm Charles Russell.

MLRC Bulletin 2003:1 Criminalizing Speech About Reputation

The Legacy of Criminal Libel in the U.S. After Sullivan & Garrison

MLRC’s Bulletin 2003:1 examines the legacy of criminal libel in the U.S. in the decades since *New York Times v. Sullivan* and *Garrison v. Louisiana*. According to the Bulletin, since these cases were decided in 1964 the criminal defamation laws in 33 states have either been repealed or struck down. Today only 17 states have criminal libel statutes – and prosecutions are sporadic at best. MLRC’s study finds only 74 criminal prosecutions initiated from 1965 through 2002.

But the recent convictions in Kansas of the editor and publisher of a alternative political newspaper show that despite robust First Amendment protections, criminal libel prosecutions can strike the press – surely an unexpected and even embarrassing fact at a time when American media lawyers are advocating law reform to eliminate criminal libel abroad.

The MLRC study shows that while criminal defamation prosecutions are extremely rare – the cases that are brought are highly selective and used most often as a political weapon. The overwhelming majority of recent prosecutions

involve speech about public figures or matters of public interest. Law enforcement officers and elected public officials are the most frequent complainants.

Thus many criminal libel cases still echo the discredited prosecutions for seditious libel – showing that criminalizing speech about reputation is inherently troublesome under modern First Amendment principles since it involves the highly selective de-

terminations of government prosecutors of whose reputation to protect and what speech to punish.

In Part I, the Bulletin reviews the historical background of criminal libel from Colonial America through *Garrison*, the

impact *Sullivan* and *Garrison* has had in constitutionalizing criminal libel law and the status of the law in those states that have retained criminal libel statutes. Part II contains an analysis of post-*Garrison* criminal libel prosecutions and a compendium of such cases. Part III reviews the prevailing law and historical background in all 50 states and U.S. territories.

The overwhelming majority of recent prosecutions involve speech about public figures or matters of public interest. Law enforcement officers and elected public officials are the most frequent complainants.

Berezovsky Withdraws Defamation Suit Against Forbes

By Lynn Oberlander

On March 6, 2003, Boris Berezovsky and Nikolai Glouchkov withdrew their libel case against Forbes and Jim Michaels, its former editor. The suit arose out of a December 30, 1996 article, entitled "Godfather of the Kremlin?", which described the rise of Boris Berezovsky, a Russian businessman and politician with significant holdings in the automobile, oil and media industries.

The article, one of the first to appear in the Western press, described the climate of violence that surrounded Russia's transition from a planned to a capitalist economy. It noted that Berezovsky had been involved in industries that were extremely violent, and that Berezovsky had been investigated in connection with the murder of Vladislav Listiev, a television executive. It also said that Glouchkov, a Berezovsky ally and an executive of the Russian airline Aeroflot, had been convicted of theft of state property in 1982. At the time that the article was published, Berezovsky was a Deputy Secretary of the Security Council of the Russian Federation.

Forum Non Conveniens Motion Denied

Berezovsky and Glouchkov sued Forbes for libel in England, despite the fact that only a small fraction of the copies sold were distributed there and that the subjects of the article were in Russia. Forbes brought a motion for forum non conveniens, arguing that the case would be better tried in either the United States or Russia. The motion was granted by the trial court (Poplewell, J.) in October 1997, but reversed by the Court of Appeal a year later. LTL 19/11/98; TLR 27/11/98; (1999) EMLR 278.

That appeal was ultimately affirmed by the House of Lords in a 3-2 decision in May 2000. LTL 11/5/2000; TLR 16/5/2000; ILR 18/5/2000; (2000) 1 WLR 1004; (2000) 2 All ER 986; (2000) EMLR 643.

In dissent, Lord Hoffman noted that Berezovsky was a libel tourist:

"But the notion that Mr. Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being low-

ered in the esteem of persons in this country who have heard of him is something which would be taken seriously only by a lawyer. . . The common sense of the matter is that he wants the verdict of an English court that he has been acquitted of the allegations in the article, for use wherever in the world his business may take him. He does not want to sue in the United States because he considers that New York Times Co. v. Sullivan 376 US 254 (1964) makes it too likely that he will lose. He does not want to sue in Russia for the unusual reason that other people might think it was too likely that he would win. He says that success in the Russian courts would not be adequate to vindicate his reputation because it might be attributed to his corrupt influence over the Russian judiciary."

Forbes sought to appeal to the European Court of Human Rights, but was informed that the issue was not yet ripe, and that they would not hear the case until after a trial had been conducted.

High Court Found It Defamatory

The English High Court (Eady, J) also ruled in November 2000 that under English libel law the article's description of the Listiev murder was tantamount to stating that Berezovsky was guilty of the murder and that he was a gangland leader running a mafia-style operation. The court, applying the notoriously restrictive British libel laws, then ruled that Forbes was obliged to prove that Berezovsky had killed Listiev – even though the article made plain that the Listiev murder "remains unsolved". The appeal of this ruling failed. (2001) EWCA Civ. 1251.

Resolved With Clarification

On March 6, 2003, the resolution of the case was announced in the High Court in London. Forbes stated in open court that

- 1) it was not the magazine's intention to state that Berezovsky was responsible for the murder of Listiev, only that he had been included in an inconclusive police investigation of the crime;

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Berezovsky Withdraws Defamation Suit Against Forbes*(Continued from page 7)*

- 2) there is no evidence that Berezovsky was responsible for this or any other murder;
- 3) that in light of the English court's ruling, it was wrong to characterize Berezovsky as a mafia boss; and
- 4) the magazine erred in stating that Glouchkov had been convicted for theft of state property in 1982 (the information Forbes had been given related to another person with the same name).

Berezovsky and Glouchkov withdrew their suit. No costs or damages were paid, and no apology was made. After the dismissal was announced, Berezovsky took out full page ads in a number of UK and US newspapers in a bizarre attempt to salvage his reputation by portraying the resolution as a retraction. It was not. The article remains on Forbes' website, along with an editor's note and a full copy of the Statement in Open Court (see www.forbes.com/berezovsky).

Berezovsky now lives in self-imposed exile in London and is the subject of criminal investigation by the Prosecutor General's office of the Russian Federation (Berezovsky says the investigations are politically motivated). Glouchkov languishes in jail in Russia, standing trial for fraud in the operation of Aeroflot.

Forbes was represented by Senior Vice President - General Counsel Terrence O'Connor, the late- Tennyson Schad, and Editorial Counsel Lynn Oberlander, and by solicitors David Hooper, Emily Pomeroy and Isabel Griffith of Pinsent Curtis Biddle. The Barristers on the case included Geoffrey Robertson, Q.C., Heather Rogers, and Sara Mansoori. Mr. Berezovsky and Mr. Glouchkov were represented by solicitors Andrew Stephenson and Claire Gill of Peter Carter-Ruck and Partners and barristers James Price QC and Justin Rusbrook and Desmond Browne QC and M. Nicklin.

***Any developments you think other
MLRC members should know about?***

Call us, send us an email or a note.

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JUST PUBLISHED!**2003:2 REPORT ON TRIALS & DAMAGES****2003 MLRC BULLETIN**

The **2003 BULLETIN** will include

- MLRC's **REPORT ON TRIALS AND DAMAGES** in cases against the media – our authoritative annual summary of media trials in libel, privacy and related cases, that details the current trends in damages and appeals.
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Notable News

- ***Hachette Sues Conde Nast and its Managing Director in the UK:*** The French publisher is suing for libel over alleged claims by Nicholas Coleridge, Managing Director of Conde Nast, UK, that Saddam Hussein profited from a 2% stake held in Lagardere, a division of Hachette. According to press accounts, the equity share was frozen by the UN in 1991 at the time of the Gulf War. Coleridge's statements appeared in the London Evening Standard in February. The Standard issued an apology that mollified Hachette, but Coleridge did not.
- ***Former KGB Agent Sues Amazon.com Over Posted Book Reviews:*** Alexander Vassiliev, a former KGB agent and co-author of a book entitled *The Haunted Wood: Soviet Espionage in America - The Stalin Era*, is suing in the UK over a customer book review filed on the U.S. Amazon.com site. The author of the comment was John Lowenthal, a UK resident, who contended that the documents that Vassiliev relied upon, cannot be verified as either authentic or accurate.

Enforceability of Foreign Libel Judgments Discussed at ALI Annual Meeting

By Tom Leatherbury

Background

Trends in foreign forum shopping and whether the enforcement of a foreign libel judgment would violate United States public policy took the spotlight for a short time at this year's Annual Meeting of the American Law Institute in Chicago.

In anticipation of the Annual Meeting, NYU Law Professors Andreas Lowenfeld and Linda Silberman, who serve as the Project Reporters, circulated a Tentative Draft of the International Jurisdiction and Judgments Project. This Project proposes a federal statute to bring more uniformity to the law of enforcement of foreign judgments.

The proposed statute generally would make it easier to enforce foreign judgments and lists certain mandatory grounds upon which a United States court should deny requests for enforcement of foreign judgments and certain discretionary grounds upon which a court may deny requests for enforcement. As one of the mandatory grounds, in Section 5(a)(vi), the proposed draft statute provides that a

“foreign judgment shall not be recognized or enforced in a court in the United States if the person resisting recognition or enforcement establishes that . . . the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States.”

Yet there has been considerable disagreement over the scope of the public policy exception, with the Reporters advocating an extremely narrow view of what constitutes fundamental public policy.

Reporter's Notes and First Amendment

The Reporters' Notes concerning “the public policy exception and the First Amendment,” question whether

the First Amendment qualifies as fundamental public policy in every case. While the Reporters' Notes have continued to evolve in response to criticism and comments and to recent case developments and while the Reporters have retreated somewhat from the more overtly pro-libel plaintiff stance of previous drafts, the Notes still remain critical of cases declining to enforce British libel judgments and, in my view, both create unnecessary uncertainty in this sensitive constitutional area and encourage further foreign forum shopping by libel plaintiffs.¹

Comments on these Notes

When the Tentative Draft was issued, MLRC's Ad Hoc Committee, established to review and respond to this ALI project, convened a conference call, and discussed the available courses of action. As a member of ALI, I volunteered to submit written comments to make available to the ALI membership at the Annual Meeting.²

ALI's Annual Meeting

The discussion of the International Jurisdiction and Judgments Project occupied the entire morning of May 13. The discussion was wide-ranging and fairly lively, with some commentators expressing fundamental doubts about whether this Project should go forward at all and, if it does, whether it should take the form of a model statute or a Restatement or some other form.

No motion was made to take action on this Tentative Draft, and it is clear the Reporters have a number of points to study and work through if this Project is to move forward with any appreciable chance of success. Mark Hornak of Buchanan Ingersoll aptly summarized the attitude toward the Tentative Draft as one of “enormous skepticism.”

On the particular portion of the Reporters' Notes dealing with foreign libel judgments, several of us spoke. Joe Steinfield of Prince, Lobel, Glovsky & Tye LLP in Boston led off and asked the Reporters point blank if their intention was to overrule *Bachchan* and *Matusевич*. Professor Silberman said that that was not their intention and that they had simply

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There has been considerable disagreement over the scope of the public policy exception, with the Reporters advocating an extremely narrow view of what constitutes fundamental public policy.

Foreign Libel Judgments and ALI

(Continued from page 9)

tried to lay out the issues and the arguments on both sides.

I highlighted the filed written comments, and Eric M. Freedman of Hofstra Law School batted clean up and emphasized that there was no “debate” in the caselaw, urging the Reporters to move their “debate” with these cases out of the Reporters’ Notes (which may be meaningless in the context of a proposed statute) and into the law reviews.

To the suggestion that this specific commentary on libel cases be deleted pending further caselaw development, however, Professor Lowenfeld was clearly resistant, stating that not talking about these cases in the Reporters’ Notes was like not talking about “the elephant in the living room.”

Interestingly, especially in light of the recent inclusion of the *Gutnick* case in the latest iteration of the Reporters’ Notes, after our discussion of this portion of the

Notes, ALI President Michael Traynor (of Cooley Godward in San Francisco) introduced two Australian High Court Justices who were in attendance.

Outside of the meeting room, both the written comments and the oral comments drew favorable remarks from a number of people. I will be contacting ALI to see if they will post my written comments on their

website and will be making some follow up calls. Since the next step in the life of this Project is unclear, it would still be very helpful for you to educate your colleagues who are ALI members about this controversy so we may call on them for their advice and assistance should we need it. If anyone wishes to join

the MLRC’s ad hoc committee, please send me an e-mail at tleatherbury@velaw.com

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

It would still be very helpful for you to educate your colleagues who are ALI members about this controversy so we may call on them for their advice and assistance should we need it.

¹ The pertinent portion of the Reporters’ Notes from the Tentative Draft is reprinted below.

Reporters’ Notes

(d) *The public policy exception and the First Amendment.* The appropriate scope for the public-policy exception 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. Matusевич*, 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 foreign news agency operating in New York and elsewhere that had distributed an allegedly libelous news story both in New York and in the United Kingdom; the libel related to alleged misconduct by the Indian plaintiff in India and the story was reported in numerous countries in the world. Several aspects of § 5(a)(vi) 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

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Hague Judgments Convention Project.” 61 Alb. L. Rev. 1283, 1305-1306 (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 for consideration of basic universal principles that should be applicable to any judgment for when such 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 enforcement of 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 U.S. court in *Yahoo!* appears to concede that the French court acted according to acceptable principles of private international law in applying French law to determine what forms of speech and conduct are acceptable within its borders. At the same time, it insisted upon the right to refuse recognition and enforcement to such a judgment if enforcement in the United States would be inconsistent with U.S. values. This somewhat unusual dichotomy between acceptance of jurisdiction to prescribe but denial of enforcement can be found in another recent decision by the highest court in Australia. In *Dow Jones & Co., Inc. v. Gutnick*, [2002] HCA 56 (2002), the High Court of Australia (its Supreme Court) upheld the assertion of judicial jurisdiction over the U.S. company, Dow Jones, which operated a subscription news site on the World Wide Web that carried an allegedly defamatory article about the plaintiff, a South African living in Victoria, Australia. The plaintiff had limited his claim to damages caused to his reputation in Victoria resulting from

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publication there. In holding both that Australia was not an “inappropriate” forum and the Australian law was properly applied to the plaintiff’s claim of defamation, Justice Kirby’s opinion underscored the practical difficulty that remained. He observed that a foreign publisher with no assets in the jurisdiction could wait until an attempt was made to enforce the judgment in its own courts where the judgment might be regarded “as unconstitutional or otherwise offensive to a different legal culture.” As Justice Kirby wrote:

However, such results are still less than wholly satisfactory. They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself. In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair.

Apart from concerns under the First Amendment, statutory provisions, such as 47 U.S.C. § 230 (2002), which protect internet providers from liability, may also be relevant in assessing whether the public-policy threshold for denial of recognition/enforcement is met.

The discussion above suggests that perhaps certain “public law” issues, particularly those involving internet defamation, are the ones most likely to raise the public-policy question. At the same time, the impact of particular developments in Europe, such as the European Convention on Human Rights and the International Covenant of Civil and Political Rights, on domestic law in England and other countries, may result in greater sensitivity to principles akin to the First Amendment, thus making recognition and enforcement of their judgments more likely. See Michael Traynor, “Conflict of Laws, Comparative Law, and The American Law Institute,” 49 Am. J. Comp. L. 391, 396 (2001).

² Below is the full text of those comments:

I appreciate the immense amount of work that has gone into this Tentative Draft to be discussed at the 2003 Annual Meeting. Nonetheless, I am writing as a member of the Working Group on this project to voice my continuing concern about the Reporters’ Notes on the “public-policy exception and the First Amendment” included at pages 60-64 of the Tentative Draft.

My fundamental concern is that it seems premature and particularly unwise for the Institute to single out First Amendment cases for comment at this time. The legal and practical realities of international libel litigation are changing extremely quickly to try and keep pace with the rapidly changing and increasingly global nature of communications. The ALI, as well as practitioners, would benefit greatly from additional experience and caselaw developments in this field before formulating meaningful commentary.

Moreover, while there may be a “sharp debate” about the enforcement of foreign libel judgments within academic circles, as demonstrated by some of the several articles the Notes cite, no such debate, dull or sharp, has developed in the cited caselaw. See *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Cty. 1992) (declining to enforce British libel judgment when British common law imposed strict liability for false statements about matters of public concern, including statements concerning bribes allegedly paid by arms manufacturers to politically well-connected Indians); *Telnikoff v. Matusevitch*, 347 Md. 561, 701 A.2d 230 (1997), (certified question), *answer conformed to*, 1998 U.S. App. LEXIS 10628 (D.C. Cir. May 5, 1998) (declining to enforce British libel

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judgment involving core political speech); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp. 2d 1181 (N.D. Cal. 2001) (barring enforcement of French injunction requiring *Yahoo!* to block French internet users from accessing online auctions of Nazi memorabilia). Given the existing caselaw declining to enforce such foreign judgments, the Notes create unwarranted uncertainty. The better course of action would be to delete this portion of the Notes and await further caselaw development to see if these cases warrant specific comment.

The need for caution and further caselaw is highlighted, too, by the Notes' reliance on the *Yahoo!* case, currently on appeal, and on a December 2002 decision from the High Court of Australia, *Dow Jones & Co., Inc. v. Gutnick*, [2002] HCA 56 (2002). According to one press account, the *Yahoo!* trial court's reasoning/holding was not well-received by the Ninth Circuit panel at oral argument. Jason Hoppin, *French Order is Greek to 9th Circuit*, THE RECORDER, Dec. 3, 2002, available at http://www.law.com/jsp/newswire_article.jsp?id=1036630517051. While the press account may not accurately predict the Ninth Circuit's holding, it still seems premature to use this case as the key illustration of the application of the proposed public policy exception in the First Amendment area.

Moreover, much like this portion of the Notes, the Australian Court's decision in *Gutnick* raises more questions than it answers. *Gutnick* highlights the problem American publishers face as more and more libel plaintiffs shop for friendly foreign forums in which to challenge publications originating in the United States. The Australian Court's decision to exercise personal jurisdiction over Dow Jones stands in sharp contrast to recent federal decisions declining to exercise personal jurisdiction over out-of-state publishers for Internet publications. *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). These federal cases, not mentioned in this portion of the Notes, again underscore that this portion of the Notes should be deleted pending further developments in this area.

Additionally, the substance of the Notes continues to give me great pause in the following respects:

1. The Notes indicate agreement with a law review article which suggests that *Bachchan* was wrongly decided because Britain's law contains only "minor deviations from American free speech standards." An examination of the briefs in *Bachchan* (and *Matusevitch*) reveals that the publishers did not argue that "minor deviations" between British and American law should be grounds for non-enforcement. Both cases involved fundamental distinctions between American and British law that went to the very core of the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).
2. The Notes state, without analysis or citation, that "[i]f 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." This dangerous and unsupported statement ignores the well-established chilling effect of large actual and punitive damage awards and litigation costs on the press. *New York Times*, 376 U.S. at 279 ("The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Whether or not a newspaper can survive a succession of judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) (plurality) ("It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to steer far wider of the unlawful zone thereby keeping protected discussion from public cognizance."); *Ollman v. Evans*, 750 F.2d 970, 996-97 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) ("[I]n the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damages awards, has threat-

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ened to impose self-censorship on the press which can as easily inhibit debate and criticism as would overt governmental regulation that the First Amendment most certainly would not permit.”).

With respect, the Notes run the risk of fueling another upsurge in libel actions —foreign libel actions brought against United States-based publishers with subsequent enforcement actions brought in this country. The “simple” collection, in this country, of a foreign libel judgment which would not pass muster under the First Amendment has a direct impact on the quality and quantity of speech in this country and abroad and directly implicates First Amendment values. The chill is frankly more frosty when the judgment is obtained in Australia and subsequently sought to be “collected” in New York than when the original action is brought in New York. Indeed, in light of *Gutnick* and other recent libel cases brought overseas against United States-based publications, the chill resulting from real and threatened foreign libel litigation is increasing substantially, and the Notes can and will be construed as encouraging more forum shopping and more foreign libel litigation against United States-based publishers and broadcasters—without the prospect of meaningful constitutional review when the judgment is brought to the United States for collection.

3. The Notes’ stated standard of acceptable foreign procedures is still far too low to accommodate the core constitutional values embodied in the First Amendment when the Reporters write, “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.” (emphasis added) Surely the ALI has no interest in appearing cavalier to the very real censorship and suppression of core political speech that takes place on a daily basis throughout the world (either through the threat of large damage actions under a rule of strict liability for false statements or through use of criminal processes or through harsher physical means). The Notes will again encourage forum shopping and the application of a sort of lowest common denominator in an area where the highest constitutional standards should be uniformly applied by United States courts.

In closing, I appreciate this and previous opportunities to comment. Although the facts and circumstances of foreign libel litigation are frequently fascinating, the desire to single out First Amendment cases in these Notes remains puzzling. The point about the scope of the public policy exception can be made and amply supported without reference to libel cases while we await further technological and legal developments in this fast-changing field. There are numerous cases outside the realm of the First Amendment where United States courts have declined to uphold foreign judgments on public policy grounds. *See, e.g., Victrix Steamship Co. v. Salen Dry Cargo*, 825 F.2d 709 (2d Cir. 1987) (declining to enforce British arbitration award, deferring instead to bankruptcy proceeding that was filed and ruled on in Sweden); *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986) (declining in part to recognize German judgment for attorney’s fees); *In re Chromalloy Aeroservices*, 939 F.Supp. 907 (D.D.C. 1996) (declining to recognize Egyptian judgment which nullified arbitration award). These cases and many others serve as possible examples for the Reporters to use to illustrate the impact of the draft statute.

By and large, the Tentative Draft embodies the wisdom of then-Judge Cardozo’s oft-quoted statement, “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918). However, I must continue to disagree with the Notes which single out the First Amendment for far less favorable treatment than it receives under current caselaw and fail to treat the First Amendment as the fundamental constitutional value that it is. I respectfully suggest that this portion of the Notes be deleted.

Mark R. Hornak has authorized me to indicate that he joins in these comments.

Reporter Files Article 19 Free Expression Claim Over Jurisdiction in Gutnick

William Alpert, the American reporter for Dow Jones whose reporting is at issue in the Australian libel case of *Gutnick v. Dow Jones*, has filed a petition with the United Nations Human Rights Commission alleging that Australia's exercise of jurisdiction in the case violates his right to free expression guaranteed by Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"). Although the UN can only issue a non-binding opinion on his petition, a decision in his favor could spur Australia to reform its libel law.

International Treaty Protects Free Expression Rights

Article 19 provides in relevant part that

"1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The full text of the ICCPR is available online at <www.unhchr.ch/>.

Article Accessed in Australia

At issue in the underlying libel case is a claim by Australian resident Joseph Gutnick over a *Barrons* magazine article entitled "Unholy Gains" that focused on Gutnick's dealings with New York religious charities and American stock regulations. While Barron's is published in the US for an American readership, the article was available worldwide on wsj.com, a subscription site.

Dow Jones challenged Australia's jurisdiction over the claim, arguing that there was no publication in Australia. Dow Jones argued that as a matter of law in Internet defamation cases publication occurs where the publisher's web servers are located and not every place the

publication is accessed. Last year the Australian High Court affirmed that Dow Jones was subject to jurisdiction in Australia, reaffirming the English common law rule that in defamation actions publication occurs where the challenged statement is comprehended by a reader. *Dow Jones & Company, Inc. v. Gutnick*, [2002] HCA 56 (Dec. 10, 2002).

Petition Asks UN to Declare Australia in Breach of Treaty

The petition to the UN is made in the name of the reporter because only individuals may petition the UN for human rights violations. The petition argues that

The petition notes that the article complies with all American laws and professional standards and that it has not been challenged legally or factually in the US where it was written and published.

Australia is violating Article 19 by requiring Alpert to defend his article in Australia under its restrictive libel laws. The petition notes that the article complies with all American laws and professional standards and that it has not been challenged legally or

factually in the US where it was written and published.

The petition also argues more generally that the major human rights treaties – the Universal Declaration of Human Rights, the European Convention on Human Rights and the ICCPR – all recognize freedom of expression as a fundamental right, while the right to reputation is only a secondary right.

Procedure for Hearing Claims

The UN Commission can ask the Australian government to respond in writing to the petition within six months. It may also ask both sides to make further written submissions (no oral testimony is taken) in a process that can take several years to adjudicate. The Commission's decisions are not legally binding, but a decision in favor of Alpert could spur Australia to reform its libel laws to comply with the ICCPR.

William Alpert is represented by Paul Reidy of Gilbert & Tobin in Sydney, Australia.

Canadian Case Rules Internet Website Is a “Broadcast” For Purposes of Libel Legislation

By Brian MacLeod Rogers

An Ontario case, *Bahlhieda v. Santa*, [2003] O.J. No. 1159 (Ontario Superior Court, Pierce J.; April 2, 2003), has ruled that an Internet Web site should be treated as a broadcast for purposes of the province’s *Libel and Slander Act* (“the *Act*”). As a result, a libel claim by a city official over a Web site posting by a city councillor was dismissed on summary judgment because the plaintiff failed to provide notice within the required time.

This goes a step further than an Ontario Court of Appeal ruling, *Weiss v. Sawyer*, [2002] O.J. No. 3570, which held that an online edition of a magazine still qualifies as a “newspaper” for purposes of the *Act*. On that basis, the court dismissed a libel claim for failing to give any notice prior to commencing the action. However, it ducked the issue of whether Internet publication could also amount to “broadcasting”, on the basis that it was not necessary to do so and there was insufficient evidence on the point. That issue will now be squarely before the Court of Appeal since the plaintiff has filed an appeal in *Bahlhieda v. Santa*.

“Broadcast” Broader Than “Newspaper”

Both newspapers and broadcasts, as defined by the *Act*, qualify for certain statutory defences and for special libel notice and limitation periods. However, the definition of “newspaper” requires it to be printed for distribution to the public and published at least twelve times a year, which means many magazines and newsletters (let alone websites) do not qualify.

For libel arising in a “newspaper” or “broadcast”, a plaintiff must serve written notice “specifying the matter complained of” on all potential defendants (media and non-media) within six weeks of learning of it. Such a notice then triggers a retraction provision through which a defendant can limit a plaintiff to actual damages. There is also a three-month limitation period for commencing an action

for libel in a newspaper or broadcast. Both the notice and limitation periods begin running as soon as the plaintiff has knowledge of the alleged libel, and if they are not met, any action is statute-barred. Under a provision that may be open to constitutional challenge, the *Act* limits these benefits to newspapers printed and published in Ontario and to broadcasts from a station in Ontario.

The plaintiff, Elaine Bahlhieda, was the city clerk in Thunder Bay, Ontario, and the defendant, Orville Santa, was a city councillor. The alleged libel was posted on Santa’s own Web site on May 10, 2001, and was discovered by Bahlhieda on July 15. Notice was given on November 14, 2001, and a statement of claim issued on January 8, 2002. The impugned material remained available directly on the website until mid-June 2002 and was then archived.

Experts’ Reports

Expert reports on whether the Internet is a broadcast medium, as defined in the *Act*, were filed by both sides. The *Act*’s definition is:

“broadcasting” means the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of,

- (a) any form of wireless radioelectric communication utilizing Hertzian waves including radiotelegraph and radiotelephone, or
- (b) cables, wires, fibre-optic linkages or laser beams, and “broadcast” has a corresponding meaning;

The plaintiff’s expert, Dr. Sunny Handa, attempted to distinguish Internet website transmission from broadcasting on the basis that the former is “pull” technology and the latter “push”. Further, its availability means that Internet users may access information for future reference at will, more like a newspaper or book than a broadcast.

This “blurring of the use of technologies” led the judge to focus on the infrastructure used by the Internet and the effect of dissemination through it.

Web site Is "Broadcast" For Libel Legislation Purposes

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However, on cross-examination, he admitted that: Video on demand was now available through cable television; streaming video or audio transmissions permitted the Internet to carry live concerts and other events, just like radio or television; and VCRs meant television broadcasts could be recorded for future viewing. This "blurring of the use of technologies" led the judge to focus on the infrastructure used by the Internet and the effect of dissemination through it.

There was little disagreement over infrastructure, which was summed up by the defendant's expert, Ron Riesenbach: "Today, television and radio signals are distributed over the same cable, fibre, microwave and satellite networks as the Internet."

The judge then referred to an 1897 paper by Oliver Wendell Holmes, Jr., "The Path of the Law" (10 *Harvard Law Review* 457) decrying "blind imitation of the past." She found that "broadcasting" under the *Act* was intended to encompass information transmitted to mass audiences with the maximum potential harm to reputation. That, she held, is the underlying purpose of the legislation's notice and limitation provisions. Accordingly, placing material on the Internet, via a Web site, where it may be accessed by a large audience, should be viewed as "broadcasting" for purposes of the *Act*, even though the federal *Broadcast Act's* definition excludes transmission of alphanumeric text. Presumably, e-mail directed at specific individuals, for example, would not qualify.

Loutchansky Rejected

The judge went on to consider *Loutchansky v. Times Newspapers Ltd.*, [2002] E.W.J. No. 5622; 1 All E.R. 652 (C.A.), in respect of the timing for the applicable notice and limitation periods under the *Act*. The plaintiff argued that the availability of the material on the Web site amounted to continuing republication; therefore, the belated libel notice should at least apply to the alleged libel for the period beginning six weeks before the notice was given.

The judge rejected this, pointing out that "the English limitation period for defamation arises from the accrual of the cause of action, not from the date it was discovered, as is the case in Ontario law". While the U.S. single publication approach, where the initial publication in any medium triggers the limitation period, was not applicable, neither was the

English approach that a new cause of action, and new limitation period, arises for each down-loading from the Internet.

Once a plaintiff has knowledge of the alleged libel, the clock starts ticking in Ontario, whether that publication was in a newspaper, television broadcast or Internet Web site.

Theoretically, an alleged libel can be discovered by a plaintiff at any time after publication or broadcast. This adds uncertainty for media defendants, but the longer the plaintiff's apparent delay in learning of the libel, the less credible will be his or her claim of its devastating impact. Courts may also apply an objective component and find that, through exercising reasonable diligence, the plaintiff could or should have known of the material facts earlier than claimed. *Bhaduria v. Persaud* (1998), 40 O.R. (3d) 140 (Gen. Div.). In *Bahlheda*, however, the plaintiff had identified the date she discovered the Web site posting and could not escape from her failure to give prompt notice. Therefore, her claim for libel for the Web site posting was struck as statute-barred.

Unhappily, only the provinces of Manitoba and Newfoundland in Canada have identical definitions of "broadcasting" in their *Defamation Acts*, reflecting amendments intended to include cable television. Most other provinces still define broadcasting as being "radio-electric communication" transmitted by way of "Hertzian waves", or in similar language, without reference to cable or wires in any form. Still others (Saskatchewan and Quebec) offer protection only to newspapers, and British Columbia has no libel notice requirement. The patchwork quilt of provincial libel laws could create real headaches where the plaintiff can bring an action in more than one jurisdiction.

Counsel for the plaintiff was Stephen G. Kovanchak, Kovanchak, Ferris, Ross, and counsel for the defendant was Lorne Honickman, Goodman and Carr LLP.

Brian MacLeod Rogers, Barrister and Solicitor, practices media law in Toronto, Ontario and was founding president of Ad IDEM (Advocates In Defence of Expression in the Media) in Canada (www.adidem.org).

Libel Can Be Pursued Through Class Action, Quebec Court of Appeal States

By Marc-André Blanchard

The Quebec Court of Appeal, in a ground-breaking decision in *Malhab vs. Métromédia C.M.R. Montréal Inc.* (C.A.Q. 500-09-011219-011, 2003-03-24), has recognized that a class action may be certified in a matter of libel.

It had always been the state of the law in Canada, including Quebec, that you could not defame an entire class of people and a claim for defamation could only be entertained if each and every individual member of a group was identifiable. This is no longer true in Quebec.

Radio Host Slurs Cab Drivers

The plaintiff, Mr. Malhab, wishes to exercise a class action for persons who, on November 17, 1998, were owners of taxi permits in Montreal and whose mother tongue is either Arabic or Créole.

On the same date, André Arthur, a controversial radio talk show personality for CKVL radio, property of Métromédia C.M.R. Montréal Inc., made defamatory and racist remarks concerning Arab and Haitian taxi drivers as a group.

Mr. Arthur stated that the language of use in taxis in Montreal was either Créole or Arabic and that most of the taxi drivers do not know the city. He suggested that the way of obtaining permits for those drivers was corruption. He stated that the poor quality of the taxi service in Montreal was attributable to that fact. He also stated that the taxis were malodorous and that to be understood in a taxi in Montreal, you had to be able to speak “ti-nPgre” (literally “little nigger”).

What is claimed in the class action is an award of \$750.00 per class member for moral damages and \$200.00 per member in punitive damages.

Importance of Group Size

The Superior Court justice (Marcelin J.) had found that even though the comments of Mr. Arthur were un-

acceptable, she was of the opinion that a class action recourse and a recourse in defamation were incompatible. She stated that if defamation was aimed at some individuals in particular, those persons could sue, but if defamation was so diffused as to not constitute a personal attack, there could be no claim in defamation. The Court of Appeal reversed the judgment and certified the class action, which will now proceed to trial.

Madam Justice Rayle, writing for the unanimous Court of Appeal, first pointed out that the recourse in defamation of the plaintiff was serious in regard to the particular nature of group defamation. She stated that the individualisation of the prejudice could stem from the relatively small size of the group that was the object of the comments, taking into account the specificity of the attacks.

She stated that it was up to the court of first instance to determine in what measure the individual character of the attack on reputation was reduced or even inexistent because of the size of the group that was the object of the attacks, taking into account the nature of the words spoken and the circumstances in which the defamation had occurred.

She noted that in this case, to feel personally attacked for incompetence, corruption or uncleanness, it was sufficient for a Montreal taxi driver to be Haitian or Arab.

She continued by saying that each and every Arab or Haitian taxi driver who was operating a taxi on November 17, 1998 in Montreal was necessarily, according to Mr. Arthur, unclean, incompetent and corrupt. She mentioned that where the worker is Haitian or Arab, there is no possibility other than to be stained in the public opinion and hurt in his personality integrity.

She then affirmed that nothing in our civil law, in theory, would prevent individual victims of defamation, having each individually suffered a moral prejudice, from seeking redress by way of a class action if they were able to show that they meet each and every requirement of our law, both substantively and in terms of procedure.

The court went on to state that a class action is only a

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In the rest of Canada, the common law does not recognize the right to a class action recourse for similar facts.

Libel Can Be Pursued Through Class Action, Quebec Court of Appeal States

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procedural matter that does not add anything to substantive law, i.e. civil law, in this instance.

The fact that the appreciation and evaluation of moral damages suffered on an individual basis is difficult cannot constitute a preliminary obstacle to a class action.

She went on to state that the number of Haitian and Arab taxi drivers (around 1,000) makes it difficult to obtain an individual mandate to pursue this matter before the courts.

The Court of Appeal stated that the defamatory nature of the words spoken must be analysed in regard to an objective norm (a criteria of the ordinary reasonable citizen) and that the appreciation of the fault must be done in context. This double exercise would be entertained by the court seized of the merits of the matter when it would have to weigh the impact that the right to reputation can reasonably impose on freedom of expression.

Conflict With Other Provinces

As we noted earlier, in the rest of Canada, the common law does not recognize the right to a class action recourse for similar facts. The Court of Appeal of Quebec did discuss the matter of *Kenora (Town) Police Services Board v. Savino* (20 C.P.C. (4th) 13), of the Court of Appeal of Ontario, where the alleged defamatory comment was that members of the Kenora Police Services had performed racist acts.

The Court of Appeal of Ontario in that matter refused certification as a class action since each member of the Kenora Police Services was required to disclose a cause of action in the pleadings as a condition to certification. Also, the Court of Appeal of Ontario stated that freedom of expression requires that criticisms of unspecified members of a public body in a general way not be proscribed by use of a class action defamation suit.

Surprisingly, with respect, the Court of Appeal of Quebec stated that it does not see any incompatibility in the principles stated in *Kenora v. Savino* and its decision in the Malhab matter.

Madam Justice Rayle stated that each member of the police force of Kenora was incapable of stating that they

were personally the object of the allegations of having performed racist acts. Madam Justice Rayle stated that, to the contrary, in the Malhab affair, it would be sufficient for a Montreal taxi driver to be Arabic or Haitian to be defamed. Literally translated, she stated: “(The words) do not reproach what he has done but we reproach what he is!”

Ruling Could Encourage Libel Suits

This decision by the Court of Appeal of Quebec could open the gate to a series of class actions in libel matters. Also, our experience in doing pre-publication or pre-broadcast review tells us that a group as large as the one present in the Malhab affair, around 1,000, was such a large group that defamation was no longer an issue to consider in similar circumstances. Unfortunately, we cannot say that any more in Quebec since now any group will be able to bring a matter to trial and it will be up the judge at trial to decide if each and every member has suffered a damage.

It will be interesting to see what a new judge seized of the merits of this matter will decide. Obviously, we will report then.

Marc-André Blanchard, Gowling Lafleur Henderson LLP, Montreal, Quebec.

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HIPAA and the Silencing of the Press

By Tonda F. Rush

Newspapers all over the country are lamenting the disappearance of hospital patients. Oh, they are not lost. They are just not in the paper. HIPAA has gagged the medical establishments. Medical secrecy is now a matter of federal law.

The Health Insurance Portability and Accountability Act (HIPAA) is about more than patients' names in the newspaper. It is a 1996 law that governs a wide spectrum of health information practices, from computer security to patient file access. Although HIPAA's purpose was to create privacy protocols around electronic medical information exchange in the insurance context, its reach is nonetheless far broader. And the April 14, 2003, implementation of the HIPAA privacy rule now bedevils newspapers.

New York Times reporter Myron Farber's investigation into suspicious nursing home deaths likely could no longer take place; if his secret source was a nursing home worker, the source would be in serious legal jeopardy. Nor could the *Orange County Register's* disclosure of fraud by University of California fertility doctors. Medical workers will be too frightened to be "whistleblowers"; biologists will refuse to prepare the necessary list of egg donors.

It will take longer for the public to learn of the possible dangers from brands of breast implants, toys, or tires when reports of product liability cases cannot be written.

HIPAA's arrival was particularly surprising in smaller towns across America, where the local birth lists or nursing home admissions were considered community information. These "refrigerator news" stories have disappeared. Clergy have complained to newspapers that they no longer can find out from the newspaper on Saturday which of their parishioners need to be on the prayer list on Sunday morning

Legislative History

Congress passed HIPAA in 1996 with the notion of improving health care by further regulation of the health insurance industry. Among its objectives was to allow patient information to move more smoothly through electronic transactions, with the intention of helping employees carry insurance coverage from job to job more easily.

With all of this electronic information, fears of massive dossiers and attendant privacy violations arose. Added to the fears were the objections of some privacy advocates who felt health care industries were unfairly trading in patient information for commercial purposes:

to sell a new mother's name to a diaper service, for example. Much debate over the need for a medical privacy law ensued. Congress finally decreed that if it could not pass a privacy protocol by 1999, the U.S. Department of Health and Human Services should write the privacy rule.

Congress could not. HHS did. The new rules were announced at the conclusion of the Clinton administration. A massive outcry from health insurance and practitioners arose because of the strict standards, causing Bush appointee Tommy Thompson to reopen the HIPAA privacy discussion as one of his first acts after arriving as new head of HHS.

In 2001 and 2002, Thompson requested comments on the rule, and made adjustments both times. News organizations commented in detail and critically on both occasions. Neither the news organizations comments nor various meetings with HHS produced much change in the rule that would benefit news organizations, however.

The rule was implemented in various stages beginning in 2001, but the April 14, 2003, enforcement date was the one that most affected newspapers. Most have received letters or policy statements from local hospitals pointing out that HIPAA now bars them from releasing much of anything about a patient.

Therefore, I join the MLRC in urging members to contact their Congressmen about the unacceptable impact HIPAA will have on newsgathering and reporting, and by extension, on public health and safety.

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HIPAA and the Silencing of the Press

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Implementing HIPAA

Under procedures recommended by the American Hospital Association and followed by hospital groups in many states, if reporters already have a patient's name, the hospital may be able to confirm the patient's presence, room number and a one-word statement of condition.

However, the patient must have been advised of the directory policy and have received an "opt-out" opportunity. If the patient is unable to act on his/her own, the hospital may place the person on the directory if it has information of past preferences by that patient and is acting in patient's best interest.

AHA also recommends that whenever reporters are in the hospital on a story, they be accompanied by an official escort. This wrinkle is not found in HIPAA, but presumably has been added out of concern about liability if their employees breach the rules.

Hospitals are not alone in erring on the side of caution. In the confusion over the new law, fire departments in many communities have begun to close down their fire reports, which are not covered by HIPAA and, in many instances, in clear violation of state law. To complicate matters, fire departments often operate ambulance services that *are* covered by HIPAA.

Reporters are finding that they cannot learn who was in even a traffic accident. Neither the hospital nor the ambulance services can tell. Police reports are often filed too late to be useful.

A Call to Action

Plainly, the HIPAA privacy rules have already begun to chill speech on health matters. It is becoming virtually impossible for journalists and other interested members of the public to obtain health information on matters of public interest that has routinely been available in the past. The rules' radical departure from longstanding public policy thus threatens public health, safety, and accountability. Privacy advocates' arguments that health information is not government information, and therefore not officially "public information" have speciously led policy experts to overlook nearly 100 years of com-

mon law privacy development in the states.

With injuries from terrorist attacks, anthrax infections and SARS such a central part of recent and current news, HIPAA must be amended to allow reporters to do their jobs and provide the public with the most accurate and complete information available, helping perhaps to alleviate unnecessary panic or to publicize the necessary precautions.

Therefore, I join the MLRC in urging members to contact their Congressmen about the unacceptable impact HIPAA will have on newsgathering and reporting, and by extension, on public health and safety.

For more information:

- The NNA/NAA's letter to Secretary Thompson of the U.S. Department of Health and Human Services: <<http://www.naa.org/conferences/annual02/live/NAA-NNA-ASNE-HIPAAcomments.pdf>>
- The HHS decisiontree on who is covered: <<http://www.hhs.gov/ocr>>
- Thomas R. Julin, et. al. *MLRC Newsgathering Committee Memo: A Controversial Federal Law May Impede Public Health Reporting When it is Most Needed* (2003)

Tonda Rush is with King & Ballow, Washington D.C. and is NNA Director/ Public Policy.

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German Court Finds ISP Not Liable for Opinions Posted by Users

By Kurt Wimmer & Harris Bor

The issue of the liability of Internet service providers (ISPs) for content posted by Internet users has been a challenging one in Europe. Unlike the United States, where ISPs enjoy a broad exemption from liability by virtue of the Telecommunications Act of 1996, European rules have varied among different countries. The European Union's ECommerce Directive (2000/31/EU), which was passed in 2000 and has been implemented in most of the 15 EU Member States, generally provides that ISPs are not liable for posted or hosted material unless the ISP has "actual knowledge" that the content is illegal or violates the rights of a third party. But the actual parameters of ISP liability for posted content continues to vary among European countries.

In a precedent-setting case in Germany, *Teltex GmbH v Teltarif. de Onlineverlag* (LG Köln, No. 28 O 627/02), a court in Co-

logne has ruled that an ISP was not liable for opinions posted by users of its chat room. More importantly, the court held that under German law and its implementation of the ECommerce Directive, ISPs do not have a general obligation to monitor postings in their chat rooms for possible illegal material.

The case involved an Internet forum, run by the defendant ISP, which focused on buying or selling mobile telephones.

Two users had posted comments in the chat room which were highly critical of the business practices of the plaintiff mobile phone company. The postings related negative experiences involving the plaintiff company and offered informal advice on how to deal with the company (by encouraging customers to take legal action against the company, for example).

The plaintiff argued that the postings were "grossly damaging" to its reputation and that they unfairly encouraged customers to bring actions against the company or to push for penal sanctions. The plaintiff submitted that, in particular, the ISP should be liable for the

postings and that it had failed in its obligation to monitor the content of the chat room for illegal material — essentially, that the ISP should not have waited to be alerted to the existence of the material before removing it from the website. The plaintiffs also sought injunctive relief in the form of a cease and desist order against the defendant.

After hearing the arguments of both sides, the court held that the material on the website was not defamatory and it refused to grant a cease and desist order in favor of the plaintiff.

In setting out its judgment, the court also remarked that an ISP would not normally be held liable for material held on its website and that there was no general duty for an ISP to monitor the material placed in its chat rooms.

The court held that under German law and its implementation of the E-Commerce Directive, ISPs do not have a general obligation to monitor postings in their chat rooms for possible illegal material.

The court stated that it was important to guarantee the freedom of consumers to comment about purchases that they have made to the extent that those comments are not defamatory. The Court suggested that libel might exist where the sole

purpose of the comments directed against a third person was to cause that person damage. The Court felt that was clearly not the case here. Even though some of the suggestions contained in the two postings had no legal basis or contained an element of bad faith, the comments were essentially matters of opinion based on personal experiences. It was also significant that the defendants failed to challenge the accuracy of the experiences described on the website.

Impact of EU Directive

In reaching its decision, the Court had regard to the German Teleservices Act (*Teledienstegesetz*), which came into force on 1 August 1997. The Act was amended in December 2001 in order to implement the provisions of the EU's ECommerce Directive. This has resulted in a clearer formulation of the law and in particular the level of responsibility an ISP must take for the supervision of its website and the extent to which an ISP must have

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German Court Finds ISP Not Liable

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knowledge of an illegal activity before becoming liable.

Cases that pre-date the implementation of the E-Commerce Directive demonstrate that German courts have in the past been fairly ready to hold ISPs liable for material on websites under their control and to place on them a broad responsibility to regularly monitor website content.

In 1998, a Munich court held a managing director of CompuServe Germany personally liable for child pornography placed on one of its news server sites (although the German Court of Appeal overturned the ruling). Similarly, in March 2000, a local court in Munich held an ISP liable for infringing copyright held in "MIDI music files" by allowing downloads through its website even though the vendor ISPs had no knowledge of the unlawful content of its site. Instead, knowledge was imputed through the ISPs "scouts" who were self employed and who had the job of screening the website's activity. Further, the Trier Regional Court held that an operator of an online guest book had to check the book weekly for illegal content (Case No. 4 O 106/00).

One may also point to a case in the Dusseldorf Regional Court which found in favor of a Munich lawyer who had objected to online comments insulting him (Case No. 2 a O 312/01) and one in the Cologne Court involving doctored pictures of Steffi Graff posted to a celebrity gossip forum which also found in favor of the plaintiff (Case No. 28 O 346/01).

Shift from ISP Liability

The amendments to the Act, along with cases such as *Teltex* (especially the Court's *obiter* comments), suggest a shift of emphasis. The German Teleservices Act, and indeed the law of all European Member States who have properly implemented the EU's E-commerce Directive, ensures that ISPs will not be liable for information on sites which they host, provided that:

(1) the provider has no actual knowledge of illegal activity or information or, where damages are involved, the ISP is not aware of the facts or circumstances from which the illegal activity or information is apparent, or;

(2) the ISP removes or disables such information when it is brought to its attention. Similar non-liability provisions exist for caching services or where the ISP acts

as a mere conduit. On the question of monitoring, Article 8, paragraph 2 of the Teleservices Act, again in line with the E-Commerce Directive, makes it clear that an ISP is under no general obligation to monitor the information it transmits or stores.

The upshot of the *Teltex* case and current European law is that ISPs may to some extent turn a blind eye to wrongdoing but must act to remove or disable illegal material if they have been alerted to its existence on their website. This is not dissimilar to the process required under the U.S. Digital Millennium Copyright Act, but without the more specific elaboration of procedures required under the DMCA.

One effect of the EU E-Commerce Directive is that ISPs established in a European Member State may now think twice before taking responsibility upon themselves to monitor the material on their websites, as they might well end up inadvertently exposing themselves to unnecessary risk. Interestingly, this is one result of pre-1996 U.S. cases that led to the Telecommunications Act's broad exemption to ISP liability.

Unlike the U.S., however, there is no legislation on the horizon to provide U.S.-style protections to ISPs.

Kurt Wimmer is a partner and Harris Bor an associate at Covington & Burling's London office.

MLRC would like to thank summer interns — Kelly C. Aldrich, University of Washington School of Law, Class of 2004, Anastasia B. Heeger, Brooklyn Law School, Class of 2004, Carter Nelsen, University of Michigan Law School, Class of 2005 and Lauren Perlgut, Columbia University School of Law, Class of 2005 for their contributions to this edition of the *MLRC MediaLawLetter*.

Ontario Plaintiff Classes Fail in Defamation Actions Against Publishers *Divide Between Québec, Other Provinces, Reaffirmed*

By Damion K.L. Stodola

While Québec's Court of Appeal recently certified a class in a defamation action (see *MLRC MediaLawLetter*, June 2003, at 29-30), two Ontario courts have recently dismissed defamation actions brought by groups of plaintiffs against newspaper publishers, reaffirming the divide between Québec and Canada's largest common law jurisdiction on the issue of whether each and every plaintiff in a group must be identifiable in order to sue for libel. See *Gauthier v. Toronto Star Daily Newspapers Ltd.*, No. 03-CV-242345 CP, (Sup. Ct. Jus., June 24, 2003) (Cullity, J.) (available at <http://www.canlii.org/on/cas/onsc/2003/2003onsc10984.html>); *Bai v. Sing Tao Daily Ltd.*, [2003] O.J. No. 1917 (C.A.) (May 20, 2003) (McMurtry, C.J.O.) (available at <http://www.canlii.org/on/cas/onc/2003/2003onca10260.html>).

In *Gauthier*, three Toronto police officers, on behalf of the approximately 7,200 professional and civilian members of the Toronto Police Service (TPS), sought libel damages for the publication of a series of articles that appeared in the *Toronto Star* which criticized the TPS for racial profiling. The plaintiffs alleged that the articles, which refer to the "Toronto police" and the "police" generally, accused them of being racists, bigots, grossly intolerant, and engaging in improper racial discrimination.

In *Bai*, members of Falun Gong alleged that they were defamed by an article in the *Sing Tao Daily* which referred to Falun Gong as an "evil cult". The article, published in the aftermath of September 11, also lumped Falun Gong with other groups such as the Branch Davidians, Solar Temple and the World Trade Center terrorists under an article headlined "Radical Religious Groups Advocate Destroying the World."

In both cases, the plaintiffs' claims were dismissed on grounds that the impugned publications could not be reasonably understood to refer to any particular or all of the members of their class.

"Toronto Police" Cannot Sue Officers

Gauthier was commenced pursuant to Ontario's class action statute, the *Class Proceedings Act*, S.O. 1992, c. 6. Prior to class certification, the media defendants moved to strike the plaintiffs' statement of claim on grounds that the articles could not give rise to a libel action to any or all police officers.

Justice Maurice Cullity agreed with the defendants, and stated that "it is plain and obvious that the alleged defamatory statements in the articles are not capable of being understood to refer to the plaintiffs as individuals or to any particular member of the class." He further held that "the article cannot [...] reasonably be understood to state or suggest that every, or any particular,

member of the service has participated in the impugned practices or has exhibited racist attitudes."

The judge also alluded to the fact that "vulgar and unfounded generalizations" such as "all lawyers are

thieves" or "all police officers are racists" should not be interpreted to apply to each and every member of a class. Justice Cullity specifically noted that the articles did not suggest that "every member of the force is involved in racial profiling or has racist attitudes."

Falun Gong Decision More Definitive

Likewise, in *Bai*, the Ontario Court of Appeal affirmed the trial court's dismissal of the statement of claim on grounds that the impugned article did not point to a particular member or members of the group. The Falun Gong plaintiffs submitted that references to "Falun Gong" met the "of and concerning" requirement for libel because their unique activities (their physical exercises, meditation and dissemination of literature) made them easily identifiable as Falun Gong members. The court disagreed, underscored the personal nature of a libel action and held that "it is necessary that the plaintiffs show that they are identified or singled out."

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In Bai the court underscored the personal nature of a libel action and held that "it is necessary that the plaintiffs show that they are identified or singled out."

Actions Against Ontario Newspapers Dismissed

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Door Still Open for Large Classes of Plaintiffs

Despite the positive result in *Gauthier*, Justice Cullity's decision leaves a few nuggets for group libel plaintiffs. In contrast with the rule reaffirmed in *Bai* above, Justice Cullity seems to leave open the possibility that a plaintiff does not necessarily need to be identified or singled out from other members of the class in order to state a viable libel action: "if, contrary to plaintiff's submission, and my opinion, it is necessary for the plaintiffs to have been identified – singled out from the other members of the class – as particular individuals at whom the alleged defamatory statements were directed, it is even more obvious that this test has not been satisfied."

Judge Cullity quotes from *Bai*, but then states that:

"[i]t does not, however, follow that words cannot be defamatory of each member of a class that is determinate in the sense that its members can readily be identified."

In his decision, Judge Cullity cites *Knuppfer v. London Express Newspaper*, [1944] A.C. 116 (H.L.) and a brief passage in *obiter* from the holding in *Elliott v. Canadian Broadcasting Corporation*, (1995), 5 O.R. (3d) 302 (C.A.)

(dismissing libel claim but expressly refusing to preclude the possibility that an action for libel might be viable by a class as large as 25,000) for the proposition that a determinate class may be defamed without singling out plaintiffs from other members of the class.

Although counsel for the media defendants did not deny that each member of a class defined generically could be libeled, counsel maintained that such an action might only succeed if the class was small. Justice Cullity noted that the size of the class is not the only relevant consideration but suggested that a class might be defamed if "the intensity of suspicion" created by a publication could reasonably be thought and understood by a sensible reader to refer to the plaintiffs generically described.

In *Gauthier*, Alison B. Woodbury and Tony S.K. Wong of Blakes, Cassels & Graydon in Toronto represented the media defendants. Timothy S.B. Danson and Peter T.J. Danson represented the plaintiffs.

Tony S.K. Wong also represented the media defendants in *Bai*. Rocco Galati represented the Falun Gong plaintiffs.

Damion K.L. Stodola is an associate at the New York office of Coudert Brothers LLP.

Trial Records Set in 2002: Highest Media Victory Rate, Lowest Number of Trials

Media defendants won four of the five verdicts in trials of libel, privacy and related claims against media defendants in 2002. This is the lowest number of trials, and the highest media victory rate in any year since MLRC began tracking trials in 1980.

2002 is also the only year since 1980 without at least one award above \$1 million.

These are among the findings from the MLRC 2003 REPORT ON TRIALS AND DAMAGES, our annual examination of trials against the media and compilation of statistics on all such trials since 1980.

- Of the 452 cases that went to trial from 1980-1999, plaintiffs won and actually got to keep 91 awards, or 20 percent of the cases.

- Including these 2002 cases, plaintiffs have won 296 trials, or about 63 percent of the 477 cases against the media on libel, privacy and related claims that have resulted in trial verdicts since 1980. Plaintiff wins were modified by post-trial motions in 66 of these, or 24 percent. And of the 269 awards that survived post-trial motions, 125 (46.5 percent) were modified on appeal.
 - Of the 269 awards won by plaintiffs at trial since 1980 that survived post-trial motions, plaintiffs appear to have held on to 93 (34.5 percent). This number is made up of awards not appealed in 34 cases (12.6 percent), and awards actually affirmed in 59 cases (21.9 percent).

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Trial Records Set in 2002

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There were post-trials settlements in 35 of the cases (13 percent) in which plaintiffs had won awards at trial.

Trials Declining Over Long Term

The small number of cases in 2002 follows a general trend over the past 22 years of a declining number of trials resulting in verdicts. During the 1980s, the average number of trials reaching verdict each year was 26.3; during the 1990s, there were an average of 21.4 trials reaching verdict each year. So far in the 2000s, there have been an average of 11.3 trials with verdicts annually: 13 trials with verdicts in 2000, 16 in 2001, and the 5 in 2002.

Besides the five cases with verdicts after trial in 2002, there was also one case that ended with a mistrial (*Downing v. Aberchrombie & Fitch*, see *LDRC MediaLawLetter*, May 2002, at 8), and two cases in which defendants were held to be in default and verdicts were rendered against them without a trial.

One of the defaults involved the *Boston Globe*, which was held in default after refusing to reveal a confidential source and had a default verdict of almost \$2.1 million entered against it; the newspaper has asked the court to reconsider the default verdict. *Ayash v. Dana-Farber Cancer Inst.*, Civ. No. 96-565-E (Mass. Super. Ct., Suffolk County damages verdict Feb. 12, 2002); see *LDRC LibelLetter*, Feb. 2002, at 7.

The other was a \$2.1 million default verdict against non-appearing defendants in *Doe v. Franco Productions*, Civil No. 99-7885 (N.D. Ill. default verdict for plaintiffs Nov. 25, 2002).

Media Victory Rate at Trial Increasing

The 80 percent victory rate in 2002 trial verdicts beats the previous annual high, 70.6 percent in 1987. As the number of trial verdicts each year has gradually declined, the media victory rate has trended upward. In the 1980s, media defendants won 34.8 percent of verdicts; in the 1990s, they won 41.4 percent, and so far in the 2000s media defendants have won 52.9 percent of verdicts.

The one trial that ended in a damage award in 2002 was a Georgia case in which a sheriff's deputy was

awarded \$225,000 for articles in a local newspaper calling him a "murderer" after a man stopped for a routine traffic violation died in police custody. The newspaper is appealing. *Farmer v. Lake Park Post*, No. 2000-CV-308 (Ga. Super. Ct., Lowndes County jury verdict June 21, 2002), *appeal pending*, No. _____ (Ga. Ct. App. filed March 2003); see *LDRC MediaLawLetter*, July 2002, at 3.

The four 2002 cases in which media defendants were victorious were:

- *Armour v. Federated Publications, Inc.*, No. 01-93328-NZ (Mich. Cir. Ct., Ingham County directed verdict Nov. 20, 2002), *appeal pending*, No. 245361 (Mich. Ct. App., 4th Dist. filed _____);
- *Burger v. Priority Records*, No. KC027869 (Cal. Super. Ct., L.A. County jury verdict April 12, 2002), see *MLRC MediaLawLetter*, Feb. 2003, at 12;
- *Carpenter v. Alaska Broadcast Communications, Inc.*, No. 00-1153 CI (Alaska Super. Ct. verdict Feb. 7, 2002), *appeal pending sub. nom. State of Alaska v. Carpenter*, No. S10700 (Alaska appeal filed July 26, 2002), see *LDRC LibelLetter*, Feb. 2002, at 17;
- *Ferrara v. Farrel*, No. CL-007753-AJ (Fla. Cir. Ct., 15th Cir. jury verdict May 30, 2002), *post trial motions pending* (Fla. Cir. Ct. 2002), see *LDRC MediaLawLetter*, June 2002, at 19.

Results on Appeal

A slightly higher share of plaintiffs' awards in the 1990s survived post-trial motions and appeals than awards from the 1980s.

Of the 106 awards from the 1990s that survived posttrial motions, 42 (39.7 percent) remained intact: 20 (18.9 percent) were not appealed, and 22 (20.8 percent) were affirmed on appeal. These 42 awards that plaintiffs apparently got to keep in the 1990s represent 22.7 percent of the 185 cases that went to trial during that decade.

In the 1980s, 49 (32.9 percent) of the 149 awards remained intact: 13 (8.7 percent) were not appealed, and 36 (24.2 percent) of the awards were affirmed. Thus, plaintiffs apparently kept a somewhat lower percentage of their awards in the 1980s, as the 49 intact awards are 18.4 percent of the 267 trials during the 1980s.

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Trial Records Set in 2002

A large percentage of awards from the 2000s are still on appeal at this time, making calculation of these figures from the current decade premature.

A higher share of awards were not appealed in the 1990s versus the 1980s (18.9 percent in the 1990s, compared with 8.7 percent in the 1980s). And a higher share of awards were settled prior to appeal in the 1990s than in the 1980s (18.9 percent in the 1990s versus 8.7 percent in the 1980s). (The repetition of the percentages in each category is a coincidence.)

Other findings of the study include:

- *The media win rate at trial* in 2000-2002, at just under 53 percent, is substantially higher than the media win rate at trial in the 1990s, 41.1 percent, or the 1980s, 34.8 percent.
- *The average award at trial* in 2000-2002 is \$2.9 million, less than the average of almost \$5 million in the 1990s. But at \$600,000 the median of trial awards is substantially higher than the \$372,500 median of the 1990s.

As was true in the 1990s, the number of cases against newspapers that have gone to trial in the 2000s continues to decline from the 1980s, while the number of cases against television defendants that go to trial has remained relatively flat. Television defendants, moreover, do better at trial than newspapers on a percentage basis, winning 49 percent of their trials since 1980 versus only 33.2 percent for newspaper defendants.

World Summit on Information Society

Draft provisions being considered for adoption at an upcoming U.N. summit on information and communications technology are threats to free expression on the Internet, press advocates warn.

The ostensive goal of the World Summit on the Information Society (<http://www.itu.int/wsis/>), the first phase of which will begin in Geneva this December, is to identify ways that communications technologies can be used to build a new, socio-economically equitable world society. In particular, WSIS aims to ensure that

Opponents are particularly concerned about any attempts to establish a universal press law that would attempt to govern Internet content or to establish jurisdiction over U.S.-based media.

developing countries and disadvantaged communities benefit from technological advances; draft WSIS working papers describe bridging the “digital divide” as critical to eliminating socio-economic differences “between and within” countries. To that end, several proposals focus on improving and increasing access to communications networks, and instituting training and education programs in under-served communities.

The WSIS drafting process is being overseen by the

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What is the Civil Society?

There are three main entities contributing to the drafting process: an Intergovernmental Bureau, a Business Bureau and a Civil Society Bureau. The media are represented by one delegate (out of 21) to Civil Society and do not have direct access to the drafting group. The other 20 delegates of the Bureau represent interests such as unions, creators and actors of culture, towns and local authorities, NGOs, youth, gender, indigenous people, handicapped people, etc. The society also includes regional contact points for each continents.

The Civil Society website can be accessed at: <http://www.geneva2003.org/wsis/indexa02.htm>.

Free speech advocates are concerned that Civil Society are being heavily influenced by a group called Communication Rights in the Information Society Campaign (CRIS) which also holds one seat in the Civil Society under the rubric of “Networks and Coalitions.” CRIS counts among its ranks several people involved in NWICO, including Sean O Siochru, a former secretary general of the MacBride Roundtable (named for the former head of a NWICO-era commission), and Dutch communications theorist Cees Hamelin.

WSIS Proposals Threaten Free Speech

(Continued from page 27)

Geneva-based International Telecommunication Union. The ITU, an organization of governments and telecommunications industry representatives, describes itself as “responsible for standardization, coordination and development of international telecommunications.”

WSIS drafts, however, include many provisions that critics say will ultimately produce unnecessary and stifling regulations on Internet news and information, and potentially could set dangerous precedents for limiting traditional news media. Many officials involved in the drafting of the WSIS platform have spoken of a need to regulate cyberspace, especially to secure against terrorism, to control hate speech, pornography and pedophilia, and to protect privacy. WSIS opponents are particularly concerned about any attempts to establish a universal press law that would attempt to govern Internet content or to establish jurisdiction over U.S.-based media.

Good Intentions, Bad Result

The World Press Freedom Committee (WPFC) and other groups warn that if WSIS endorses content restrictions, no matter how well intentioned, countries might interpret such restrictions as authorizing and legitimizing other state media controls.

“Attempts to control [the Internet] now and to place it under state surveillance can only stifle a form of media that could allow everyone everywhere to communicate their messages without being restricted by social, political or national boundaries,”

WPFC European Representative Ronald Koven said at a recent conference on “Press Freedom and the Internet,” sponsored by the WPFC and the Association of the Bar of the City of New York.

In particular, critics take issue with provisions that recognize a “right to communicate” and a need to “balance” information flows. Despite their apparent innocuousness, the phrases are being linked to the New World Information and Communication Order (NWICO) – a now-defunct UNESCO backed program that sought to promote economic and political development in developing countries by controlling the exchange of global infor-

mation. NWICO sparked a huge controversy in the 1980s and a key justification for the United States’ and Britain’s withdrawals from UNESCO.

During NWICO debates, the “right to communicate” referred to an attempt to redefine free expression and press freedom as a collective right of governments or ethnic groups, WPFC has said in its position papers on WSIS. The ultimate goal of the “right to communicate,” WPFC argues, was “to give such collectives the right to take over space or airtime in news media, regardless of the editors.”

Another WSIS draft provision that concerns press advocates is an apparent attempt to qualify guarantees of an “independent and free communication media” by language that such freedoms must be “in accordance with the legal system of each country.” Accepting such a qualifier could legitimize state controls such as government-installed firewalls.

For their part, WSIS organizers insist the summit is not aimed at curbing free expression and downplay suggestions that the draft provisions would unreasonably curtail Internet speech. Speaking at the recent Internet freedom conference in New York, Guy-Olivier Segond, the ITU-designated “special ambassador” for WSIS, insisted that Article 19 of the Universal Declaration of Human Rights would be a priority and “basis for action” in the final WSIS plan. Yet, Segond also emphasized that limits on freedom of expression to curtail privacy, child pornography and terrorism would be necessary.

Lack of Transparency Alleged

What has many press groups concerned is an apparent lack of transparency in agenda-setting and drafting leading up to the summit’s opening in December. Media groups do not have direct access to the WSIS drafters, representatives of the 191 member states of the United Nations. Rather, the media’s representation in the process is a seat on the Civil Society bureau (see inset), a working group that contributes suggestions to the WSIS architects.

“When we come in with recommendations, they incorporate those into a larger document,” WPFC’s Koven, the Civil Society media representative, said in a recent interview. “Our media recommendations get lost in a welter of

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WSIS Proposals Threaten Free Speech

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recommendations when it comes to press freedom.” Koven said WPFC is particularly concerned that as democratic governments – including the United States – become increasingly concerned with preventing terrorism, state controls over the Internet are becoming more acceptable.

In November 2002, media groups including the Committee to Protect Journalists, the International Association of Broadcasting, the World Association of Newspapers and the WPFC released a statement calling for WSIS drafters to affirm that Internet media will be afforded the same freedom of expression as traditional news media. The group also called for an unqualified endorsement of the free speech guarantees of Article 19, and a total renunciation of any attempts to control the “free flow of information across national frontiers.” (<http://www.wpfc.org/index.jsp?page=Statement%20of%20Vienna>).

The United States is being represented in the drafting process by two State Department officials, David Gross and Richard Beaird. They have been conducting a series of public meetings on the WSIS to provide opportunities for public input. Press freedom groups are urging media organizations to make their concerns known before the next drafting meeting, PrepCom3, in mid-September. (See inset.)

Council of Europe To Recommend New Media Right of Reply

On June 25, the Council of Europe released the latest draft recommendation on “the right of reply in the new media environment.” The bill will ask member states to enact legislation requiring regularly-issued publications to guarantee the publication of a response to inaccurate factual statements made about people which affect their “personal rights.” (http://www.coe.int/T/E/human_rights/media)

Provisions

The current draft requires the response to be free of charge, posted promptly, given the same prominence as the original piece, and linked to the original in archives, where possible. Exceptions include where the length of the reply is longer than necessary; if the error has already been corrected; if the reply is in a different language than the source; if the responder cannot show a “legitimate interest”; if the reply constitutes a punishable offense or infringes on the legally-protected interests of a third party, or if the reply concerns “truthful” accounts of public government proceedings.

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Comments and concerns about WSIS may be addressed to the following State Department officials. The address for all of them is: U.S. Department of State, 2201 C Street, N.W., Washington, D.C. 20520-5820

Sally Shipman, Telecommunications Policy Advisor
Office of International Communications and Information Policy
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David Gross, Deputy Asst. Sec. of State for International Communications Office of International Communications and Information Policy

Richard Beaird, Sr Dpty U.S. Coordinator, Office of Multilateral Affairs Office of International Communications and Information Policy

Dr. Kim Holmes, Asst Secretary of State for International Organization Affairs

Key dates in 2003:

July 15-18: Open intergovernmental Drafting Group meeting at UNESCO headquarters in Paris.

August 1: Deadline for NGOs, Civil Society and business entities to request accreditation to PrepCom-3.

August 18: All documents for PrepCom-3, including the outcome of the July Drafting Group meeting, are posted on the WSIS website.

Sept. 1: Executive Secretariat recommendations on entities seeking accreditation to PrepComs and the Summit.

Sept. 15-26: PrepCom-3 in Geneva

Tentative: A PrepCom-4 is possible before the start of the December summit.

Dec. 10-12: WSIS in Geneva.

Council of Europe To Recommend New Media Right of Reply

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The resolution applies to “any means of communication for the dissemination to the public of information at regular intervals in the same format, such as newspapers, periodicals, radio and television, or to any other service available to the public containing frequently updated and edited information of public interest.” The first draft applied to “professional on-line media”; by March, the “professional” had been dropped. The broad scope has creators of online weblogs (bloggers) worried about its impact.

Legislative History

The Council of Europe was founded in 1949 by the Treaty of London to protect human rights and safeguard the shared interests of its ten European countries.

The Council first addressed the right of reply with the passage in 1974 of Resolution 74(26): “On the Right of Reply – Position of the Individual in Relation to the Press.” Emphasizing the importance of freedom of expression, information from many different sources, and remedy against an attack on reputation, the resolution extended the right to any “mass media of a periodical nature,” including the written press, radio, and television. The right has been reinforced in other media resolutions, such as the European Convention on Transfrontier Television (1989); Article 8 grants a right of reply to people within a jurisdiction where a program is broadcast.

Implementation

Currently, the Council is composed of 45 member states. While members must adhere to certain human rights guidelines, most of the recommendations passed by the Council are subject to ratification by the individual state legislatures. The majority of the 45 countries already have right of reply laws in effect; the UK, Ireland, and Portugal are among those that do not – and are unlikely to add them now.

The measure, even if implemented by the member states, may be very difficult to enforce. Publishers who wish to avoid the mandated replies can create their websites outside of countries that impose such burdens. The superior free speech rights in the U.S., for exam-

ple, have always made it an attractive haven for revolutionary political sentiments, revisionist history or hate speech, which are illegal in many parts of the world.

The Media Committee will meet in Strasbourg in mid-October to finalize the draft. The Council of Europe is accepting comments and suggestions, preferably in the form of drafting proposals; e-mail media@coe.int by September 15.

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Supreme Court: State May Constitutionally Ban Cross Burning

By Seth D. Berlin and Audrey Critchley

On April 7, 2003, the U.S. Supreme Court held that a state may, consistent with the First Amendment, criminalize burning a cross with the intent to intimidate. *Virginia v. Black*, No. 01-1107, 2003 WL 1791218. Although six of the justices reached that conclusion, albeit for varying reasons, the Court was deeply divided – filing five separate opinions – on the significance of a provision in the statute that treats the burning of a cross as prima facie evidence of intent to intimidate. As a result of the splintered ruling, the Court vacated one man’s conviction under the statute, and remanded for further proceedings two other convictions.

The Prosecutions Under the Va. Cross Burning Statute

Virginia’s cross burning statute provides that “[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway, or other public place.” Va. Code Ann. § 18.2-423. It further provides that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” *Id.*

The constitutional challenge arose from three separate convictions under the statute. One defendant, Barry Black, led a Ku Klux Klan rally during which Klan members spoke about “what they were” and “what they believed in” and which culminated in the burning of a 25- to 30-foot cross. The rally took place on private property, with the owner’s consent, in an open field several hundred yards from a state highway. The other two defendants, Richard Elliott and Jonathan O’Mara, burned a cross on the yard of Elliott’s neighbor, apparently in response to the neighbor’s complaints about Elliott’s use of his backyard as a firing range.

The Court of Appeals of Virginia affirmed the convictions of all three defendants. The Supreme Court of Virginia consolidated the cases and reversed the convictions, finding the statute unconstitutional on its face.

Cross Burning With the Intent to Intimidate May Constitutionally Be Punished

The U.S. Supreme Court affirmed in part, reversed in part, and remanded for further proceedings. Writing for the Court, Justice O’Connor concluded that “a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate.” Slip op. at 1. However, the Court found, “the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.” *Id.*

After describing at length the origins of cross burning, Justice O’Connor explained that it could be used either as a “tool of intimidation and a threat of impending violence,” or as a symbol of Ku Klux Klan ideology and unity. *Id.* at 8. Thus,

“while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives.

And when a cross burning is used to intimidate, few if any messages are more powerful.”

Id. at 12. In a point also emphasized by Justice Stevens in a brief concurring opinion, the Court found that burning a cross, where “intended to create a pervasive fear in victims that they are a target of violence,” constitutes a “true threat” falling outside the First Amendment’s protection. *Id.* at 14; *see also id.* at 1 (Stevens, J., concurring).

Relationship to R.A.V. v. City of St. Paul

In reaching that conclusion, the Court distinguished its earlier holding in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), picking up its discussion of the circumstances in which the government may, without running afoul of the First Amendment, proscribe only a subset of one of the categories of unprotected speech. In *R.A.V.*, the Court had invalidated a similar statute, which banned “certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would ‘arouse anger, alarm or resent-

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Supreme Court on Cross Burning

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ment in others *on the basis of race, color, creed, religion or gender.*” Slip op. at 15 (quoting *R.A.V.*, 505 U.S. at 380) (emphasis added). That statute failed to pass constitutional muster because it engaged in content-based discrimination against “those speakers who express views on disfavored subjects.” 505 U.S. at 391.

By contrast, the Virginia cross burning statute “does not single out for opprobrium only that speech directed toward ‘one of the specified disfavored topics’”; rather, to the extent that it bans cross burning, a particular form of true threat, “the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” Slip op. at 16-17 (quoting *R.A.V.*, 505 U.S. at 388, 391).

Applying this principle, the Court concluded that

“[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence.” Slip op. at 17.

Cross Burning Has Some Protection

The Court recognized, however, that cross burning may also constitute symbolic expression uniting the members of a group around its ideology. Under those circumstances, it cannot be punished consistent with the First Amendment. As a result, Justice O’Connor concluded that the *prima facie* evidence provision of the cross burning statute – interpreted by Virginia’s Model Jury Instructions to mean that “[t]he burning of a cross, by itself, is sufficient evidence from which you may infer the required intent,” *id.* at 18 – is unconstitutional on its face because it “strips away the very reason why a State may ban cross burning with the intent to intimidate,” *id.* at 19.

According to Justice O’Connor, these provisions would permit a jury to convict in every case where a defendant exercises his right not to put on a defense, and make it more likely that a defendant will be convicted even if he puts on a defense and even where he was engaged in constitutionally protected speech. Because the

statute, as interpreted by the jury instruction, “permits the Commonwealth to arrest, prosecute and convict a person based solely on the fact of cross burning itself,” it blurs the line between protected and unprotected conduct by ignoring “all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate.” *Id.* at 19, 21. As a result,

“the provision chills constitutionally protected political speech because of the possibility that a State will prosecute – and potentially convict – somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.”

Id. at 20.

Applying this analysis, Justice O’Connor found Black’s conviction problematic because it was based on the Model Jury Instruction’s construction of the “*prima facie* evidence” provision and because he led a rally, rather than burning a cross directed at any particular person. The other two convictions, which had not been based on the “*prima facie* evidence” provision, were remanded to the Virginia Supreme Court for further consideration in light of the Court’s ruling.

Justices Souter, Kennedy and Ginsburg: Banning Cross Burning is Unconstitutional

Justice Souter, joined by Justices Kennedy and Ginsburg would have found that the statute’s prohibition on cross burning was unconstitutional and that it could not be saved by any exception under *R.A.V.*, particularly because cross burning is a symbol long associated with a specific message and viewpoint. According to Justice Souter, the cross burning statute’s “tendency to suppress a message disqualifies it from any rescue by exception from *R.A.V.*’s general rule” barring content-based proscriptions on expression. Slip op. at 3 (Souter, J., concurring in judgment in part and dissenting in part).

“The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature

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Supreme Court on Cross Burning

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thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment.” *Id.* at 4.

In addition, Justice Souter found the prima facie evidence provision problematic because it leads to a “high probability that . . . ‘official suppression of ideas is afoot.’” *Id.* at 5 (quoting *R.A.V.*, 505 U.S. at 390). In Justice Souter’s view – a point with which Justice O’Connor agreed – the “primary effect” of the provision

“is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning.”

Id. at 6; *see also* Slip op. at 21 (O’Connor, J.). Such a result is inconsistent with the First Amendment because it “tend[s] to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression.” Slip op. at 7. As a result, Justice Souter would have affirmed the Supreme Court of Virginia’s judgment vacating all three convictions.

Justice Scalia wrote separately because he disagreed, on fairly technical grounds, with the Court’s interpretation of the prima facie evidence provision, addressing the Court’s role in interpreting state statutes facing constitutional challenges.

Justice Thomas Dissents: Cross Burning is Conduct, Not Speech

Justice Thomas filed a particularly strongly-worded dissent, arguing that, in light of the strong historical connection between cross burning and violence, the cross burning statute bans only threatening *conduct* and therefore does not implicate First Amendment protections at all. Slip op. at 8 (Thomas, J., dissenting). Characterizing the Ku Klux Klan as a “terrorist organization,” Justice Thomas noted that “cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.” *Id.* at 2, 5.

Moreover, “the perception that a burning cross is a threat and a precursor of worse things to come is not limited to blacks,” but rather, “is now widely viewed as a signal of impending terror and lawlessness.” *Id.* Indeed, ac-

ording to Justice Thomas, because Virginia’s cross burning statute was enacted in 1950 at a time when Virginia otherwise enforced *de jure* segregation, the Legislature’s purpose was to criminalize conduct that terrorized citizens, not to restrict any racist message conveyed by the conduct. *Id.* at 6-8. As a result, the statute “prohibits only conduct, not expression. And, just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point.” *Id.* at 8.

Justice Thomas also would not have found the prima facie evidence provision constitutionally infirm because (a) it creates only an inference of intent, and does not compel conviction and, (b) as a result, the fact that a person might be arrested and prosecuted under the statute before ultimately being exonerated does not trigger overbreadth concerns.

For Virginia: William H. Hurd, Richmond, VA; Jerry W. Kilgore, Attorney General, William H. Hurd, State Solicitor, Maureen Riley Matsen, William E. Thro, Alison P. Landry, Christy A. McCormick, Assistant Attorneys General, Richmond, Virginia.

Amicus Curiae: Michael R. Dreeben, Washington, DC, for United States supporting the petitioner.

For Respondents: Rodney A. Smolla, Norfolk, VA; Rebecca K. Glenberg, Richmond, Virginia, James O. Broccoletti, Zoby & Broccoletti, P.C., Norfolk, Virginia; David P. Baugh, Sara G. Davis, Law Offices of David P. Baugh, Richmond, Virginia; Kevin E. Martingayle, Stallings & Richardson, P.C., Virginia Beach, Virginia, for Respondent

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Supreme Court Hangs Up on Fraudulent Telemarketing Schemes

Illinois ex rel Madigan v. Telemarketing Associates, Inc.

By Scott Dailard

On May 5, 2003, the U.S. Supreme Court ruled unanimously that telephone solicitation arrangements that permit charitable fundraisers to retain a large percentage of donated funds can constitute actionable fraud if accompanied by “intentionally misleading statements” designed to deceive donors about how their donations will be used. *Illinois ex rel Madigan v. Telemarketing Associates, Inc.*, 155 L. Ed. 2d 793, 801 (2003).

Writing for the Court, Justice Ginsburg distinguished this case from previous decisions striking down laws and regulations that prohibited certain charitable solicitations solely on the grounds that a prescribed percentage of the donated funds would end up in the pockets of professional fundraisers. *See, e.g., Riley v. National Fed’n of the Blind of N.C.*, 487 U.S. 781 (1988); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980). These cases held that regulations of charitable solicitations that barred fundraising fees in excess of specified reasonable levels effectively operated as prior restraints and were prohibited by the First Amendment.

Justice Ginsburg noted, however, that allegations of specific deceptive statements distinguished the Illinois Attorney General’s complaint against the fundraisers from the prophylactic bans on high-fee charitable solicitation that the Court had struck down in previous decisions.

III. A.G. Alleges Charity Fraud

VietNow, a charitable non-profit organization that aids Vietnam veterans, retained two Illinois for-profit fundraising corporations, Telemarketing Associates, Inc. (“TAI”) and Armet, to solicit funds on its behalf. VietNow’s contract with these companies specified that the

professional fundraisers would retain 85 percent of the gross funds contributed by Illinois donors. Only 15 percent of these donations would be passed along to the charity.

In addition, TAI and Armet brokered out-of-state contracts with other paid solicitors on VietNow’s behalf. These agreements allowed the out-of-state fundraisers to retain between 70 and 80 percent of donated funds. An additional 10 to 20 percent of the donations were paid as commissions to TAI and Armet and only 10 percent wound up in the coffers of VietNow.

As a result of these arrangements, VietNow’s fundraising contractors collected approximately \$7.1 million in charitable donations, \$6 million of which they retained for themselves, leaving only \$1.1 million for the benefit of VietNow.

The Illinois Attorney General filed suit against the professional fundraisers, alleging fraud and breach of fiduciary duty. In addition to alleging that the 85 percent fundraising fee was “excessive” and “not justified by expenses paid,” the complaint also alleged that the fundraisers made knowingly false and deceptive representations that contributions would be “used to help and assist VietNow’s charitable purposes.” *Telemarketing Associates*, 155 L. Ed. at 802 (internal quotation marks omitted). Affidavits attached to the Attorney General’s complaint heavily influenced the Court’s decision and indicated that the fundraisers:

told prospective donors that contributions would be used for specifically identified charitable endeavors One affiant asked what percentage of her contribution would be used for fundraising expenses; she “was told 90% or more goes to the vets.” Another affiant stated she was told her donation would not be used for “labor expenses” because “all members are volunteers.”

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Supreme Court Hangs Up on Fraudulent Telemarketing Schemes

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Id. The complaint also alleged that the fundraisers falsely represented that the “donated funds would go to VietNow’s specific ‘charitable purposes,’” when in fact the “amount of funds being paid over to charity was merely incidental to the fundraising effort.” *Id.* at 809.

The state trial court dismissed the complaint on First Amendment grounds, and the Illinois Court of Appeals and Supreme Court affirmed. Although the complaint alleged violations of Illinois’ generally-applicable antifraud laws, the Illinois courts concluded that the fundraisers’ statements were alleged to be false primarily because these companies had contracted to retain 85 percent of the donated funds and failed to reveal this information to donors. The Illinois Supreme Court concluded that the attorney general’s complaint was a constructive attempt to regulate protected solicitations based upon the same kind of percentage-rate formula rejected in *Schaumburg*, *Munson* and *Riley*.

Fraudulent Solicitation Unprotected Speech

The Supreme Court reversed the decision of the Illinois Supreme Court and substantially adopted the position advanced by the United States as *amicus curiae*. Specifically, the Court held that “fraudulent charitable solicitation is unprotected speech” and that “[f]raud actions so tailored, targeting misleading affirmative representations about how donations will be used, are plainly distinguishable . . . from the measures invalidated in *Schaumburg*, *Munson*, and *Riley*.” *Id.* at 804, 809.

Justice Ginsburg reaffirmed that “fraud may not be inferred simply from the percentage of charitable donations absorbed by fundraising costs” and noted that “this Court has not yet accepted any percentage-based measure as dispositive.” *Id.* at 806, 809 n.8. She reasoned, however, that there are differences critical to First Amendment concerns between fraud actions based on representations made in individual cases and statutes that categorically ban solicitations when fundraising costs run high.

“Breathing Room” for Protected Solicitation

The Court concluded that fraud claims like the one brought by the Illinois Attorney General could sustain a

motion to dismiss “[s]o long as the emphasis is on what the fundraisers misleadingly convey, and not on the percentage limitations on solicitors’ fees *per se*” *Id.* at 809*. In reaching this conclusion, the Court noted that under Illinois law, the elements of a fraud claim must be established by clear and convincing evidence. In the view of the Court, this exacting standard of proof, combined with the requirement that fraud plaintiffs establish an intention to mislead, provides “sufficient breathing room for protected speech” and distinguishes a “properly tailored fraud action” from a “prior restraint on solicitation, or a regulation that imposes on fundraisers an uphill burden to prove their conduct lawful” *Id.* at 810.

No “Blanket Exemption” in First Amendment

The *Telemarketing Associates* decision reaffirms the principle that, consistent with the First Amendment, fraudulent solicitation cannot be inferred from any particular percentage-based fundraising fee formula. Nonetheless, it is permissible “to take fee arrangements into account in assessing whether particular affirmative representations designedly deceive the public.” *Id.* at 811.

The Court concluded that “[w]hat the First Amendment and our case law emphatically do not require . . . is a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations.” *Id.* at 810.

For petitioner: Illinois Assistant Attorney General Richard S. Huszagh. For respondent: M. Errol Copilevitz of Copilevitz & Canter (Kansas City). For the United States as *amicus curiae*: Deputy Solicitor General Paul D. Clement, Washington, D.C.

Scott Dailard is a member in the Washington, D.C., office of Dow, Lohnes & Albertson, PLLC.

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Dastar Corp. v. Twentieth Century Fox Film Corp.

The Supreme Court Takes Away One Remedy For False Attribution, But Others Remain

By Jonathan D. Hacker

In what appears at first to be a clear victory for users of creative works in the public domain, the Supreme Court recently held in *Dastar Corp. v. Twentieth Century Fox Film Corp., et al.*, No. 02-428 (June 9, 2003), that the author of an uncopyrighted work cannot state a claim under § 43(a)(1)(A) of the Lanham Act against a party that uses or distributes the work with misattribution of authorship. But closer inspection of the opinion reveals a much murkier outcome.

This is not just the bitter spin of a defeated advocate – I was part of the team representing respondents, the nominally losing side in the Supreme Court – for our clients are users of public domain materials in addition to being authors of creative works. For that reason, I am as interested as anyone in dispassionately analyzing the Court’s opinion in *Dastar* and understanding its future implications. As it happens, analyzing the opinion is one thing, understanding its future implications is another.

Unfortunately this brief report cannot capture everything there is to say about *Dastar*. I’ll stick to the major highlights – enough to show what remains uncertain.

From “Crusade” to “Campaigns”

Section 43(a)(1)(B) of the Lanham Act creates a cause of action against any person who uses any “false or misleading representation of fact which . . . is likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”

The plaintiffs in *Dastar* – our clients – brought suit against Dastar under this provision, alleging that Dastar had essentially copied a television series called *Crusade in Europe* (based on the Eisenhower World War II mem-

oir of the same name) originally produced in 1949 by Twentieth Century Fox, and now distributed as a video by plaintiffs Fox, SFM Entertainment, and New Line Home Video.

Because the copyright on the series had expired, Dastar believed the series was left in the public domain for others to copy and use. So Dastar copied and used it, essentially reselling it (with minimal alteration) under the title *Campaigns in Europe*. Dastar also erased all references to the original producers of the series and substituted various credits to itself and its employees. All of this, plaintiffs’ suit asserted, combined to leave the unambiguous impression that the video was a new, original product created entirely by Dastar.

Accordingly, plaintiffs alleged, Dastar had made a “false or misleading representation of fact” which was likely to cause confusion, mistake, or deception as to the true “origin” of the product. (Plaintiffs also brought a copyright action asserting that Dastar violated a still-extant

copyright in the *Crusade* book, as to which plaintiffs own exclusive television and video rights. Plaintiffs prevailed on the copyright claim after a full bench trial; subsequent proceedings were stayed while the Court resolved the separate Lanham Act issue.)

Court: No Lanham Liability

Plaintiffs prevailed in the district court and the court of appeals, but the Supreme Court rejected their theory of Lanham Act liability by a vote of 8-0 (Justice Breyer recused himself because his brother, District Judge Charles Breyer, sat by designation on the court of appeals panel in the case).

The Court held that allowing a Lanham Act cause of action for Dastar’s assertedly false self-attribution would effectively extend copyright law beyond its intended and permissible bounds. According to the Court, the phrase

Dastar may be a victory for those who would copy and use public domain works without attribution to the original authors, but it is almost certainly a hollow one for those who would claim credit for such works when none is due.

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Dastar Corp. v. Twentieth Century Fox Film Corp.

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“origin of goods” in § 43(a) therefore must be construed as only “the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.” Slip op. at 13-14.

In other words, the Court held, the “origin” of a book is not the author, but only the bookbinder; the “origin” of a video is not the creative producer, but only the producer of the tangible videocassettes offered for sale.

The Court initially sought to ground this reading in the “natural understanding” of “origin,” but, recognizing that the “origin” of a book is its author under any plausible meaning of “origin,” the Court quickly moved away from the text of the Lanham Act and turned to what the Court saw as the history and purposes of the statute.

As it turned out, the history and purposes on which the Court primarily focused were not those of the Lanham Act, but of copyright law. As the Court described it, copyright law reflects a “bargain” between opposing but equal sides. On one side of the bargain is the copyright holder, who possesses a monopoly over use of the copyrighted work. On the other side is the public, which, once the copyright expires, possesses the right to copy and use “at will” creative works in the public domain. Slip op. at 10. This includes, the Court assumed, the right to falsely credit oneself with authorship of such works.

It follows, the Court concluded, that the phrase “origin” of “goods” in § 43(a)(1)(B) cannot refer to the authorship of creative works, if it were otherwise, the author of an uncopyrighted work would be able to sue whenever another person falsely claims authorship, even though copyright law, the Court suggested, gives the other person the “right” to do so. *Id.*

Although the Court thus wiped false attribution claims out of the Lanham Act’s “origin” provision, § 43(a)(1)(A), it may not have eliminated them altogether. The end of the opinion explicitly suggests that such claims simply may have been steered into a companion provision, § 43(a)(1)(B). Slip op. at 14.

This provision is directed not at false or misleading claims of “origin,” but more broadly at statements in advertising or promotion that “misrepresent[] the nature, qualities, [or] characteristics” of the product. Certainly a book seller’s false claim that she authored the book would

clearly seem to be a misrepresentation as to the nature or qualities or characteristics of the book – whether or not the book is copyrighted.

What Does It Mean?

The principal effect of *Dastar* is clear enough: if someone is falsely claiming credit for your uncopyrighted work, you can’t sue her under § 43(a)(1)(A). There may be little more to it than that. You might still have a claim under § 43(a)(1)(B), as the Court suggests, and state false advertising and unfair trade practices laws probably could be brought to bear as well.

The Court does employ some broad language describing the public’s right under copyright law to use and copy works in the public domain, but only as justification for reading the word “origin” in § 43(a)(1)(A) narrowly. The plain language of § 43(a)(1)(B), and of relevant state laws, may not be as susceptible to such narrowing constructions.

So *Dastar* may be a victory for those who would copy and use public domain works without attribution to the original authors, but it is almost certainly a hollow one for those who would claim credit for such works when none is due. And since nobody in the *Dastar* case was contending that the Lanham Act requires attribution in the abstract – the issue was whether § 43(a)(1)(A) prohibits *false* attributions – it is not clear whether *anyone* can draw much comfort from the Court’s opinion. After *Dastar*, a person can copy and use public domain works without attribution, but one who claims false credit for a public domain work still risks legal liability. Since that was pretty much the state of the law before *Dastar*, it remains to be seen what change, if any, the decision will bring.

Mr. Hacker is a counsel in the Washington, D.C., office of O’Melveny & Myers LLP and a member of the firm’s Supreme Court and Appellate Practice. He was a member of the O’Melveny team lead by Dale M. Cendali, a partner in the firm’s New York office, who argued Dastar on behalf of respondents. The opinions expressed in this article are solely Mr. Hacker’s, and do not necessarily reflect the views of O’Melveny & Myers or the plaintiffs in the Dastar litigation.

Florida Appellate Court Affirms Denial of Dismissal in Internet Defamation Case

Holds Trial Court has Jurisdiction Over Out-of-State Defendant for Internet Posting

In a March 12 decision, the Florida Fourth District Court of Appeals affirmed a denial of defendant's motion to dismiss in an Internet defamation case. *Becker v. Hooshmand, M.D.*, 2003 WL 1041232, Fla. App. 4 Dist.) The defendant claimed that the court could not claim jurisdiction over a non-Florida resident for comments posted in an Internet chat room. Chief Judge Polen disagreed holding that Florida's long-arm statute permitted the trial court to exercise proper jurisdiction over the defendant because defendant had committed a tort within the state of Florida.

Plaintiff is a Florida resident and physician with a medical practice in the state who brought claims of defamation, defamation per se, and tortious interference with a business relationship over comments Ms. Becker posted in an Internet chat room. Ms. Becker resides in Pennsylvania. These comments, according to the plaintiff, were targeted to Florida residents, or those "likely to seek medical care in the state of Florida", and harmed his reputation. Ms. Becker filed a motion to dismiss for lack of jurisdiction, which was denied by the trial court.

The Court of Appeals affirmed, holding that the trial court had jurisdiction through Florida's long-arm statute. Under Florida law, long-arm jurisdiction is valid when the plaintiff has "established sufficient jurisdictional facts" to justify jurisdiction, and if defendant has "sufficient minimum contacts to satisfy the constitutional due process requirements." (*Citing Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989)). Plaintiffs can satisfy their initial burden of pleading the "basis for service under the long-arm statute," by either merely "alleging" the statute without supporting facts, or "alleging specific facts that indicate that the defendant's actions" fall under the long-arm statute. Once plaintiff has satisfied their burden, the defendant has the opportunity to contest jurisdiction by submitting affidavits in support.

The court ruled that Dr. Hooshmand satisfied his initial burden by alleging sufficient facts in his complaint that Ms. Becker committed a tortious act in Florida. In determining whether a tort was committed for purposes of long-arm jurisdiction, Florida courts will focus on where the harm to the plaintiff occurred; not the residency of the defendant or where the tort was committed. In *Wendt v. Horowitz*, 822 So. 2d 1252 (Fla. 2002) the Florida Supreme Court held that a

tort can be committed under long-arm jurisdiction through a "defendant's telephonic, electronic, or written communications into Florida," as long as the communication at issue is the basis for the cause of action.

Other Florida precedent have also held that a tort can be committed through the mailing of a letter into Florida, and "making a defamatory statement over the telephone constitutes the commission of a tortious act for purposes of Florida's long arm statute." *citing Achievers Unlimited, Inc. v. Nutri Herb*, 710 So. 2d 716 (Fla. 4th DCA 1998).

Comparing the present situation with cited precedent, the court concluded that the facts presented by Dr. Hooshmand were analogous to those in earlier cases which involved other forms of communication, including electronic communication. Plaintiff's burden was therefore satisfied.

Finally, the court noted that while the defense did submit an affidavit contesting jurisdiction, it was submitted after the trial court approved jurisdiction. The trial court properly then ruled on the motion to dismiss based solely on the complaint.

For Becker: Kevin S. Doty of Hatch & Doty (Vero Beach, Florida)

For Hooshmand: Janet M. Carnet and Louis B. Vocelle, Jr. of Clem, Polackwich, Vocelle & Berg (Vero Beach, Florida)

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Falwell Website Complaint Dismissed by Virginia Federal Court

Court Finds No Personal Jurisdiction Over Anti-Falwell Web Site Run By Illinois Resident

Reverend Jerry Falwell's second attempt to silence jerryfalwell.com, a web site devoted to anti-Falwell criticism, cartoons and parody, was dismissed by a Virginia federal judge on March 4, 2003. After losing before a World Intellectual Property Organization arbitration panel, Rev. Falwell filed a libel and trademark suit. Judge Moon, of the Western District of Virginia, dismissed Rev. Falwell's complaint for lack of personal jurisdiction. See *Falwell v. Cohn*, 2003 WL 751130 (March 4, 2003). Defendant Gary Cohn, operator of jerryfalwell.com, is an Illinois resident and Rev. Falwell is a Virginia resident.

Young & Revell Set the Standard

Relying on the recent Fourth Circuit Court of Appeals decision in *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), the Court found that jerryfalwell.com is "not aimed at a Virginia audience" nor "manifests an intent to expressly target a Virginia audience." The Court stated that jerryfalwell.com addresses a national audience, and even though Rev. Falwell's church and many of his followers are located in Virginia, Rev. Falwell is admittedly a national figure. The court concluded that Cohn could not have "reasonably anticipated being haled into court in Virginia." *Id.*

In *Young*, the Fourth Circuit held that Virginia did not have jurisdiction over two Connecticut newspapers that posted articles to their respective web sites. The defamation suit was brought by the warden of a Virginia prison that was housing Connecticut inmates. The Fourth Circuit found that neither the articles nor the web site were aimed at or intended to target a Virginia audience, even though the warden and the prison were located in Virginia. *Id.* See also *MediaLawLetter*, December 2002, 5-9.

Two weeks after *Young*, the Federal Court of Appeals for the Fifth Circuit in *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) also addressed jurisdiction in an Internet publication defamation case. *Revell* held that to establish specific jurisdiction, a defendant must have known plaintiff's reputation will be harmed in a particular forum and that the articles or sources must be connected with the forum. The Fifth Circuit

cited *Young*, reasoning that minimum contacts sufficient for jurisdiction requires proof that the activities were expressly directed at that jurisdiction. *Revell* also adopted the sliding scale approach developed in *Zippo Manufacturing v. Zippo Dot Com*, 952 F.Supp. 1119 (W.D. Pa. 1997) to determine if a defendant has maintained minimum contacts. Passive sites that allow posting to a web site will not be sufficient for minimum contacts under *Zippo*, but web sites with repeated contacts between the site and the forum may be sufficient. See *MLRC MediaLawLetter*, Jan. 2003, 15-16.

WIPO Denied Transfer of Domain Name

Last June, a WIPO arbitration panel denied Falwell's request to transfer domain names jerryfalwell.com and jerryfallwell.com held by Cohn. Rev. Falwell failed to prove the three elements necessary to establish a domain name transfer:

- (1) the domain name was identical or confusingly similar to a trade or service mark in which Rev. Falwell had rights;
- (2) Cohn had no rights or legitimate interests in respect to jerryfalwell.com; and
- (3) Cohn registered and used the domain names in bad faith.

The Panel found that Rev. Falwell did not prove his name was used in a trademark sense or for commercial purposes, something the Panel noted Rev. Falwell might have been hesitant to do considering his position as a minister and educator. The Panel also found that Cohn's web site constituted legitimate, noncommercial, fair use of Rev. Falwell's name. See *Reverend Falwell and The Liberty Alliance v. Gary Cohn*, WIPO Case No. D2002-0184 (June 3, 2002).

For Falwell: Jerry Falwell, Jr. (Lynchburg, VA); John H. Midlen, Jr. of Midlen Law Center (Chevy Chase, MD)

For Cohn: Rebecca K. Glenberg of the ACLU of Virginia (Richmond); Alexander Wayne Bell (Lynchburg, VA); Paul Alan Levy of Public Citizen Litigation Group (DC)

The Court found that jerryfalwell.com is "not aimed at a Virginia audience" nor "manifests an intent to expressly target a Virginia audience."

Second Circuit: Internet Posting Subject to Single Publication Rule

By George Freeman

On April 2, 2003, the U.S. Court of Appeals for the Second Circuit affirmed a grant of summary judgment in favor of The New York Times in a libel case based on an Op-Ed piece in The Times. In the first federal appellate court decision to rule on the subject, the court also determined that Internet postings are subject to the single publication rule for statute of limitations purposes. *Van Buskirk v. The New York Times Co.*, 2003 WL 1733739.

The case arose from an Op-Ed piece written by Maj. John Plaster which sharply criticized the controversial CNN program on Operation Tailwind which charged that the U.S. military conducted a raid in Laos in 1970 in which defectors were killed and nerve gas was used. CNN later retracted its story, in part because of the furor started by critiques such as Maj. Plaster's. The primary source for the CNN program was Lt. Robert Van Buskirk, who then sued both The Times and Maj. Plaster claiming defamation.

One of Van Buskirk's claims in the lawsuit was based on an Internet posting of a letter Maj. Plaster wrote making essentially the same charges as in The Times Op-Ed piece. However, his letter was first posted over a year before the filing of the Complaint and more than a year and a half before the filing of an Amended Complaint which first made mention of Maj. Plaster's letter.

In the trial court, Chief Judge Michael Mukasey of the Southern District of New York granted The Times motion to dismiss. Judge Mukasey found that the one year statute of limitations and New York's single publication rule – under which the limitations period begins to run when a newspaper or other publication is initially distributed, and does not begin to run anew when the same material is subsequently or continually redistributed – applies to publication on the Internet.

The Second Circuit affirmed. Noting that the issue remained unsettled when oral argument was heard, the court's ruling stated that subsequently the New York State Court of Appeals had held that the single publication rule applied to Internet publishing in *Firth v. New York* last summer. Following the state's highest court, and determining that the

policies behind the single publication rule supported its application to Internet publishing, the Second Circuit therefore dismissed the libel claim based on the Internet posting.

With respect to Van Buskirk's central claim, that he was defamed by the Plaster Op-Ed piece, the court agreed with Judge Mukasey's opinion below that the article lacked a defamatory meaning. The court agreed with the district court that the article did not suggest that Van Buskirk had committed a war crime; indeed, it cited with approval the lower court's conclusion that the article suggested the opposite – that Van Buskirk could not have committed a war crime since the article's thesis was that the reports were untrue and that CNN had gotten it wrong.

At oral argument Judge Ralph Winter aggressively pressed the notion that the Op-Ed piece also suggested that Van Buskirk had misled CNN, and that such an allegation did have a defamatory meaning.

However, notwithstanding his viewpoint at oral argument, the court's unanimous opinion concluded that, as The Times argued, the article simply could not be read to suggest that he misled CNN and,

moreover, that the Complaint never alleged that. Although the Second Circuit discussed whether the lower court should have allowed Plaintiff to amend his complaint to allege this new-found theory (one based on a footnote in Judge Mukasey's opinion below), it concluded that since the article did not allege that Van Buskirk misled CNN, any further amendment would be futile.

The Times was represented by George Freeman of its Legal Department. Plaintiff was represented by Elihu Ber- man of Clearwater, FL.

Judge Mukasey found that the one year statute of limitations and New York's single publication rule applies to publication on the Internet.

Any developments you think other MLRC members should know about?

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New York Appellate Court Allows Republication Claim in Web Case

A New York appellate court in June took a step back from earlier decisions applying the single publication rule to Internet publications. *Firth v. State*, No. 93031 2003 N.Y. App. Div. LEXIS 6666 (N.Y. App.Div. June 12, 2003).

The Appellate Division, Third Department, upheld a lower-court decision declining to dismiss the second of two defamation claims by George Firth, former director of the Division of Law Enforcement (DLE) in the state's Department of Environmental Conservation. The appellate court, in an opinion by Justice Anthony Kane, denied summary judgment to New York State, holding that Firth could bring a cause of action for republication based on the fact that the state had moved the information in question to a new Web directory.

An investigation into Firth's management of the DLE led to a December 1996 report by the state Inspector General that accused Firth of mishandling weapons purchases for the DLE. The 99-page report was printed in hard copy, and an executive summary and a link to the full text were posted on the Web site of the state Education Department. Firth sued in March 1998, well past the one-year statute of limitations for defamation actions in New York.

The Court of Claims, Appellate Division and Court of Appeals all rejected Firth's argument that the state had republished the report by leaving it on the Web site, thus extending the statute of limitations every day the report remained online. The Court of Appeals affirmed dismissal of the claim last year, holding that the single-publication rule applies to the Internet as well as print publications. *Firth v. State*, 98 N.Y. 2d 365 (N.Y. 2002). The rule, traditionally applied to such media as books and newspapers, allows only one defamation claim for the initial publication, subject to the statute of limitations. See *Gregoire v. Putnam's Sons*, 298 N.Y. 119 (N.Y. 1948).

In December 2000, the New York State Library, a division of the Education Department, moved the report

to a new address within the department's network of Web pages. The site is still active (<http://www.nysl.nysed.gov/edocs/ig/execsum.htm>, an executive summary with links to downloadable versions of the full report). Firth claimed that amounted to republication, and the state moved for summary judgment on this second claim. The Court of Claims in March 2002 denied that motion, and the Appellate Division affirmed: "[A]llegations that the report was moved to a different Internet address are sufficient to state a cause of action for republication to a new audience akin to the repackaging of a book from hard cover to paperback." *Firth*, 2003 N.Y. App. Div. LEXIS 6666, at *3. Affidavits submitted on behalf of the state by an attorney and a state employee were insufficient, the court held, and an affidavit later submitted by the Web coordinator of the State Library was inadmissible because it wasn't included with the state's summary-judgment motion.

The appellate court, in an opinion by Justice Anthony Kane, denied summary judgment to New York State, holding that Firth could bring a cause of action for republication based on the fact that the state had moved the information in question to a new Web directory.

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Access on Terror War

While the war in Iraq wound down, issues continued to be raised regarding access to information about the war on terrorism.

U.S. Officials Block Report Disclosure

Bush Administration officials are blocking release of a Congressional report detailing the government failings that allowed the Sept. 11 terrorist attacks to occur, according to story posted on *Newsweek's* web site in early May.

The report was completed in December 2002 by a joint Congressional committee charged with examining the performance of American intelligence and law enforcement in the months leading up to the attacks. Some general information was released at that time, while the entire report was submitted to the administration for security review. According to the story, a "working group" of administration intelligence officials has refused to declassify many of the report's conclusions, and is even attempting to declare classified some information that administration officials have discussed in various public hearings.

According to the *Newsweek* story, the Congressional report includes revelations that could be embarrassing to the administration as it gears up for a reelection bid in 2004.

The *Newsweek* story is online at <http://www.msnbc.com/news/907379.asp>.

All But One Wiretap Approved

All 1,228 applications for intelligence wiretaps and all but one of 1,359 applications for other wiretaps sought by federal and state prosecutors in 2002 were granted, the Administrative Office for the U.S. Courts reported in early May.

The report was issued one month after the U.S. Supreme Court declined to review a decision regarding the government's use of a wiretap authorization procedure,

originally intended only for intelligence investigations, in other criminal investigations. See *MLRC MediaLawLetter*, April 2003, at 66. Use of the procedure, which is conducted in secret without notice to the subject of the wiretap, was exclusively limited to intelligence investigations until passage of the USA Patriot Act in 2001; the Act permits use of the secret procedure as long as intelligence is a "significant purpose" of the investigation. See *LDRC LibelLetter*, Dec. 2001, at 49.

The 1,228 approved intelligence wiretaps include two which were initially rejected by the Foreign Intelligence Surveillance Court, which considers such applications, but were granted after an appeal to the Foreign Intelligence Surveillance Court of Review. These denials, which stemmed from a single case, were the first

ever to proceed to the appellate court. Also, the fact that both courts released their decisions – the appellate decision in redacted form – was unprecedented. See *LDRC MediaLawLetter*, Nov. 2002, at 43. The Supreme Court declined to review the appellate decision. See *MLRC MediaLawLetter*,

April 2003, at 66.

A spokeswoman for the Administrative Office of the U.S. Courts told *The Washington Times* that the only decision rejecting a non-intelligence wiretap was made by a California state court, but did not have any further details.

Libel Defense Seeks Access to Aziz

Attorneys for the London *Daily Telegraph*, preparing to defend the newspaper in a lawsuit threatened in British court over stories reporting that documents discovered in Iraq revealed that Parliament Member George Galloway was paid by the regime of Saddam Hussein, were reportedly preparing to ask American military officials for access to former Iraqi foreign minister Tariq Aziz. Aziz turned himself in to American forces on April 25, and is likely to be prosecuted for war crimes.

“Working group” of administration intelligence officials is even attempting to declare classified some information that administration officials have discussed in various public hearings.

Criminal Charges Dropped Against English Reporter Testing Airport Security

Subterfuge In the Public Interest Okay

The UK Crown Prosecution Service announced last month that it was dropping criminal charges against a *London Evening Standard* reporter who applied for a job as a cleaner at Heathrow Airport as part of a newspaper investigation into post-9/11 airport security.

Last year the reporter, Wayne Veysey, was charged with the crime of “dishonestly attempting to gain pecuniary advantage” for submitting a false resumé that did not disclose he was a reporter. The reporter’s father was charged with the same crime for providing his son with a false employment reference. The pair were arrested in April 2002 after airport security checks determined the job application was false.

Dismissing the case at the request of the prosecution, Harrow Crown Court Judge Barrington Black noted sympathetically that the decision to drop the prosecution was “realistic,” adding:

“It is clearly in the public interest that the poor standard of safety and security should be liable to exposure by the free press in the same way that bully boys and the greedy are liable to exposure.... Therefore it is acceptable if some subterfuge is used, provided that the aim is in the public interest.”

Quoted in Ciar Byrne “Standard reporter walks free,” the *Guardian*, May 29, 2003. (available at <www.guardian.co.uk>).

The prosecution’s decision is consistent with the Press Complaints Commission standards which state that reporters may use subterfuge “only in the public interest and only when the material cannot be obtained by other means.” The *Evening Standard* described the decision as a “major victory for press freedom” and serious undercover reporting.

French Court Acquits Former Yahoo! Executive for Sale of Nazi Memorabilia

On February 11, a French court acquitted Tim Koogle, the former president of Yahoo!, of charges of “justifying war crimes and crimes against humanity”. The court found that Yahoo and Koogle did not post Nazi memorabilia on Yahoo’s auction web sites in a “glorifying, praising” or favorable manner. The charges were brought by several French Jewish and other anti-racist groups and were the latest round in proceedings stemming from the posting of the Nazi materials on Yahoo.

The first proceedings began in 2000 when Yahoo, and its French subsidiary, were sued for permitting Nazi collectibles (including knives, swastikas, and photos of concentration camps) to be posted on its auction web sites accessible to French residents. French law makes it illegal to possess, sell or display publicly pre-World War II Nazi uniforms, emblems or insignias.

The French court ordered Yahoo, in a startling opinion, to “take any, and all measures” to ensure that the materials were not accessible to French residents. Yahoo’s protests that its servers were located in the United States and that its sites aimed at U.S. residents were dismissed by the court because French residents had access to the offending material. Yahoo subsequently removed all of the offending materials from its site (although Nazi stamps and coins are still available). (*For a further discussion, please see LDRC LibelLetter November 2001, pg. 37*)

Yahoo filed a complaint with the federal district court in San Jose in December 2000 seeking a declaratory judgment that the ruling of the French court was unenforceable in the United States. The court granted Yahoo summary judgment, holding that the French decision was contrary to the First Amendment of the Constitution and U.S. public policy. (*LDRC LibelLetter November 2001, pg. 37*). That decision is on appeal to the Ninth Circuit.

In October 2001, French Holocaust survivors, their families, and several groups including the Movement Against Racism and for Friendship Between People filed the “war crimes” charges against Mr. Koogle. The plaintiffs sought damages of one euro.

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For his strength and courage of conviction, and, of course, his willingness to spend what it took of his own money to take the cases all the way to the top of the legal system, Mr. Hays deserves the profound gratitude and honor of the public and the media.

The Award will be presented to Mr. Hays by Gary B. Pruitt, Esq., Chairman of the Board, President and Chief Executive Officer of The McClatchy Company.

Following the Brennan Award, the Dinner will feature another sequel, a continuation of the discussion begun last year regarding government secrecy’s impact on military and security coverage – an issue that threatens to overwhelm the principles Tim Hays championed.

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