



MEDIA LAW LETTER

Associate Edition Winter 2003-04

MLRC		PAGE
	MLRC Annual Dinner, November 12, 2003	4
	MLRC Annual Meeting, November 12, 2003	6
London	MLRC London Conference 2003 Explores International Media Law Issues <i>Overview of the London Conference held on September 22-23, 2003.</i>	7
INTERNATIONAL		
U.K.	Trouble at the Palace <i>U.K. media lawyers reconsider Royal Family's stance on lawsuits after recent cases</i>	11
Ontario	Appeal in Canadian Case Rules Against Summary Judgment Finding that Website is a	13
Ct. of App.	"Broadcast" under Libel Litigation <i>Bahleida v. Santa</i>	
Britain Ct. of App.	No a La Carte Justice in England for Roman Polanski <i>Court held Polanski could not testify by video link from Paris in libel case</i> <i>Polanski v. Conde Nast Publications Ltd.</i>	14
France	Diana Photographers on Trial in Paris for Invasion of Privacy <i>Photographers face criminal penalties for allegedly violating French privacy law</i>	16
Britain High Ct.	Update: Modest Damages Awarded to Michael Douglas & Catherine Zeta-Jones <i>Court awarded couple £14,000 for unauthorized publication of wedding photographs</i> <i>Douglas & Zeta Jones v. Hello!</i>	16
UK	UK House of Lords Rejects Creating General Right of Privacy <i>House holds that the creation of such a claim is Parliament's task, not judiciary's</i> <i>Wainright v. Home Office</i>	17
2d Cir	UPDATE: Affirms Dismissal of Dow Jones Decl. Judgment Action Against Harrods <i>Holds District Court didn't abuse its discretion in refusing jurisdiction</i> <i>Dow Jones & Company, Inc. v. Harrods Limited and Mohamed Al Fayed</i>	17
Zimbabwe	Alert: Brutal Beating of Leading Media Lawyer by Police in Zimbabwe <i>Police violently attack and beat Beatrice Mtetwa after she called for police assistance</i>	19
Survey	Global Surveys Compare Freedom of Information and Internet Censorship <i>Two surveys illustrate how internet expansion causes countries to pass new laws on access</i>	20
The Hague	Dutch Court Rejects Linking Liability and Scientology Copyright Infringement Claim <i>Appellate court found in favor of ten Dutch ISPs and a website operator</i> <i>Church of Spiritual Technology v. Dataweb, B.V., Hof.</i>	21

Switzerland	Swiss Court Rejects Liability for Indirect Links to Racist Web Sites <i>Court finds that former assistant professor did not incorporate links as part of his own website</i>	22
Ireland	Advisory Group in Ireland Recommends Libel Reform <i>Comments on proposals solicited</i>	23
India	Romance Novelist Loses Copyright Case in India <i>India Supreme Court refuses to stay order permitting broadcast of tv series</i>	23
U.K.	Parliament Report Recommends Stronger Press Self-Regulation and Statutory Privacy Law <i>New Press Complaints Commission with increased powers to be less biased in favor of the press</i>	27
U.K.	Landmark U.K. Communications Bill Reforms Structure for Content Regulation <i>One "super regulator" would replace several bodies that currently regulate media</i>	29
INTERNET		
	Recent Internet Jurisdiction Cases <i>A look at three recent cases that deal with personal jurisdiction based on Internet contacts</i> Archer and White, Inc. v. Tishler; Confections, Inc. v. Keller; Elec. Booking v. E-Business Solutions	32
9th Cir.	Government Seeks to Reverse Conviction for Revealing Software Flaws <i>Fed. prosecutors ask 9th Cir. to reverse conviction of Bret McDaniel</i>	33
7th Cir, Cal. App.1st	Scope of Sec. 230 Immunity Questioned by Two Recent Decisions <i>Immunity for providers and users of interactive computer services for third-party content under fire</i> Doe v. GTE Corp.; Barrett v. Rosenthal	34
E.D. Va.	UPDATE: Decision in U-Haul Case Favoring Pop-up Ad Rights <i>Court rules that pop-up advertisements do not infringe upon copyright and trademark rights</i> U-Haul International, Inc. v. WhenU.com, Inc., et al.	36
9th Cir.	9th Cir. Holds that Communication Decency Act Protects Internet Dating Service <i>Interactive computer service not liable for content provided by third party</i> <i>Carafano v. Metroplash.com, Inc.</i>	37
Cal.	Injunction Barring Posting of Trade Secrets on 'Net Constitutional <i>Cal. Supreme Court holds posting does not violate 1st Amendment</i> <i>DVD Copy Control Ass'n v. Bunner</i>	40
Cal. Ct. App.	California Claims Jurisdiction over LL Bean's Online Activities <i>Court adopts "sliding scale" test to determine jurisdictional question</i> <i>Gator.com Corp., v. LL Bean, Inc.</i>	42
Survey	Survey Seeks to Identify Concerns Over Internet Jurisdiction <i>ABA and ICC distribute survey to companies in over 29 countries</i>	43
Pennsylvania	Pennsylvania Attorney General to Halt Secret Prior Restraint Orders <i>State AG agrees to seek court approval before sending notices to ISPs</i>	45
4th Cir.	Court Continues Trend Toward Limiting Personal Jurisdiction in Internet Cases <i>Follows reasoning of Young v. New Haven Advocate, affirms dismissal of trademark infringement suit</i> <i>Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers</i>	46

NEWS & UPDATES

S. Ct.	Supreme Court Considers Scope of FOIA <i>Will soon hear arguments and decide FOIA request for photographs of Vincent Foster Office of Independent Counsel v. Favish</i>	49
California	UPDATE: Kasky, Nike Settle After Supreme Court Revokes Cert. <i>Nike agreed to donate \$1.5 million to Fair Labor Association</i>	51
Best Internet Sites	“The Best” Websites for Media Lawyers	52
Poll	Television Association Study Reports on Influence of TV <i>Study finds television most watched, relied upon, and influential in terms of advertising</i>	54
Poll	First Amendment Survey Finds Increased Support for First Amendment Rights <i>However, 46% still say press enjoys too much freedom</i>	55

REPORTERS PRIVILEGE

7th Cir.	UPDATE: 7th Circuit Lets McKeivitt Ruling on Reporter Privilege Stand <i>7th Cir. denies a petition for rehearing/rehearing en banc</i> <i>McKeivitt v. Pallasch</i>	57
7th Cir.	Judge Posner Skeptical About Reporters Privilege <i>Denies request to stay order requiring reporters to produce tapes of interviews</i> <i>McKeivitt v. Pallasch</i>	57
D.D.C.	Scope of First Amendment Reporter’s Privilege in Privacy Act Tested in D.C. Dist. Ct. <i>Dr. Wen Ho Lee seeks confidential source information and documents of 5 journalists</i> <i>Lee v. Department of Justice</i>	59

NEWSGATHERING/ACCESS

Gitmo Bay	Guantanamo Bay Press Rules Rescinded <i>U.S. Military eases restrictions on reporters at detention camp</i>	62
Pentagon	Department of Defense Restores Access to Website After Chaotic Week <i>Pentagon blocked access, then restored content after independent website posted an exact copy</i>	62

2004 NAA/NAB/MLRC CONFERENCE

Alexandria, Virginia
September 29, 30 and October 1, 2004

Sponsorships for the 2004 Conference are being solicited.

Any firm interested in providing underwriting for the Conference should contact Sandy Baron at MLRC.

MLRC ANNUAL DINNER

November 12, 2003



The MLRC Annual Dinner was held at the Sheraton Hotel in New York on Wednesday night, November 12th...and it was quite a gala. The room was filled with well over 500 MLRC members and their guests, friends of MLRC, and invited guests.

Howard H "Tim" Hays, former owner and publisher of Press-Enterprise of Riverside, California, was presented with MLRC's William J. Brennan, Jr. Defense of Freedom Award. Under Mr. Hays, Press-Enterprise brought not one, but two, landmark cases to the Supreme Court of the United States on questions of access to court, and by extension other governmental, proceedings. He is a hero to all who recognize the profound value of the First Amendment rights of the press and public that he championed.

The Award was presented to Mr. Hays by Gary B. Pruitt, Chairman of the Board, President & Chief Ex-

ecutive Officer of The McClatchy Company. Gary's remarks, along with the other remarkable materials from this program, will be on the MLRC website in the near future, as will those of Harold W. Fuson, Jr., Vice-President and General Counsel of Copley Press, and Chair of the MLRC Board of Directors.

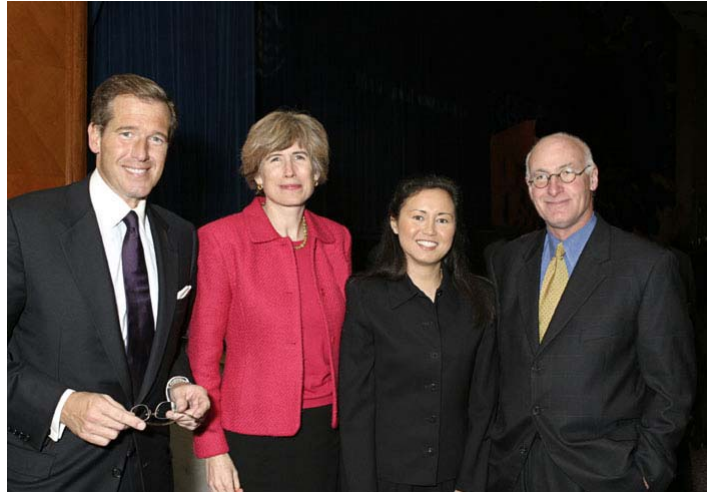
Also at the Dinner, was a panel led by Brian Williams of NBC News. The discussion – entitled "In the Trenches Revisited: War Reporting and the First Amendment - Part II" – was the second installment on the subject of covering war for America. This panel focused on covering

Iraq, what they experienced, what stories they found, and what stories require more attention. A transcript from that panel will also be posted on the MLRC website.

MLRC wants to thank all of the participants in the Annual Dinner program.



MLRC's William J. Brennan, Jr. Defense of Freedom Award



Panelists: Brian Williams (Moderator), Mary Beth Sheridan, Cheryl Diaz Meyer, Michael Weisskopf

In the Trenches Revisited: War Reporting and the First Amendment Part II



Gary B. Pruitt on Tim Hays, Press-Enterprise and the MLRC's William J. Brennan, Jr. Defense of Freedom Awards



Chairs of MLRC's Board of Directors, past and present: Robin Bierstedt, Hal Fuson, Bob Hawley

MLRC Annual Meeting

November 12, 2003

The meeting was called to order by Harold W. Fuson, Jr., chairman of the Board of Directors.

Mr. Fuson welcomed the MLRC media members to the meeting and thanked them for their support of the organization during the past year.

Mr. Fuson gave special thanks to Robin Bierstedt, Time, Inc. and Mary Ann Werner, The Washington Post Company, who will retire from Board service when their terms expire this year. Mr. Fuson reported that Stephen Fuzesi, Jr., Newsweek, Inc. and Katherine Hatton, Philadelphia Newspapers, Inc. had been nominated by the Board of Directors, per the MLRC by-laws, to join the board of directors. A motion was made, seconded and adopted unanimously by voice vote.

Next on the agenda was the re-election of Dale Cohen, Tribune Company and Henry Hoberman, ABC, Inc., each to a two-year term. A motion was made, seconded and adopted unanimously by voice vote.

After the elections, Mr. Fuson congratulated the MLRC for this year's London Conference and David Heller for his efforts in managing the conference.

Next on the agenda was the DCS Executive Committee President's Report by Lee Levine. Mr. Levine reported on the many projects undertaken by committees this year. While initially manned by DCS members, the committees now include many in-house counsel as well — and more are welcome. (For a full report on the committees, see the DCS report below.)

Next on the agenda was the Executive Director's Report. Mr. Fuson introduced Sandy Baron. After thanking Mr. Fuson, and all of the current Board of Directors — with special thanks to Ms. Bierstedt and Ms. Werner — Ms. Baron thanked the DCS membership for its efforts stating that MLRC thrives and prospers from the energy and ideas that the DCS provides.

Next, Ms. Baron told the board how proud she was that the London Conference was so well received by the membership. Ms. Baron thanked David Heller, Kurt Wimmer and Jim Borelli, and all of the members of the planning committee, for all of their help in making the conference as successful as it turned out to be.

Ms. Baron announced September 29, 30 and October 1 as the dates for next year's NAA/NAB/MLRC Conference

in Virginia. While the budget for the Conference is sound, the organizers are seeking sponsors for the event. Additionally, Ms. Baron stated that MLRC hopes to present a First Amendment Leadership Award to an individual, or individuals, who have made a great contribution to the expansion of First Amendment rights. Ms. Baron noted, however, that if a suitable candidate does not arise, MLRC reserves the right to not present the award.

Ms. Baron reported that the new website is still under construction and announced January 2004 as the tentative launch date. Ms. Baron anticipates that the website will be an indispensable resource that will provide members with MLRC materials online. In order to protect MLRC material, Ms. Baron told the board that the website will be password protected and the organization will require its members help in not allowing further distribution of materials to non-members. Ms. Baron reported that the website will be accessible through the domain names Medialaw.org and Medialaw.com. Ms. Baron conferred special thanks to Jon Hart and Elisa Rosen of Dow Lohnes & Albertson in Atlanta, GA who volunteered legal services to MLRC for the website initiative. Additionally, Ms. Baron thanked Nicole Wong and her colleagues at Perkins Coie for her help with developing a privacy policy. And she thanked David Schulz and his former colleagues at Clifford Chance, specifically Bob Penchina, for their assistance on trademark issues.

Ms. Baron told the Board that MLRC will co-sponsor a conference on January 29, 2004 with the Donald E. Biederman National Entertainment and Media Law Institute at Southwestern Law School in Los Angeles, at which David Kohler is now executive director. The conference will explore current and developing legal issues arising from fact-based and unscripted programming. The program would be divided into three parts: reality programming, newsgathering and ethics. Ms. Baron suggested that if the event goes well, MLRC and Southwestern might consider making it an annual event.

Ms. Baron reported that MLRC Bulletin for the fourth quarter 2003 will focus on the use of the Lanham Act, while in 2004, in addition to the annual damage survey and Supreme Court cert survey, the Bulletin will report a summary judgment survey and will devote an issue to reporters privilege.

Finally, Mr. Fuson asked if there was any new business. Being none, the meeting was adjourned.

MLRC London Conference 2003 Explores International Media Law Issues

On September 22-23, 2003, nearly 180 media lawyers from around the world gathered at Stationers' Hall in London for MLRC's Conference on International Libel, Privacy and Newsgathering Laws. This was MLRC's third and largest conference in London, drawing participants from North America, Europe, Australia, Asia and Africa. The conference program reflected the broad scope of participants, featuring international speakers and international experts on break-out style substantive law sessions.

Keynote Address Focuses on Privacy Law and Internet Jurisdiction

The conference began on September 22nd with a Keynote Address from Lord Justice David Keene of the Court of Appeal of England & Wales. Lord Justice Keene has sat as a judge on several recent high profile defamation and privacy cases, including the libel suit by McDonald's against two activists, Michael Douglass and Catherine Zeta Jones' privacy case against Hello! magazine over its unauthorized publication of wedding photographs, (*Douglas v. Hello! Ltd.*) and Naomi Campbell's privacy suit against the Mirror newspaper for revealing she was attending Narcotics Anonymous (*Naomi Campbell v. MGN, Ltd.*).

In his address, Lord Justice Keene discussed the ongoing development of privacy law in the UK as spurred by the incorporation of the European Convention on Human Rights into UK law, to give as he said "a view from the English bench on what has been happening," as well as commenting on the international jurisdiction issues raised in the Australian case of *Gutnick v. Dow Jones*.

According to Lord Justice Keene:

A very frank description of what has been happening in this country [is] the shoe-horning of what would more happily be described as breach of privacy into the tort of breach of confidence. Not a new tort, but an expanded tort of breach of confidence. The result has been that in some instances individuals have been recovering damages or obtaining an injunction for what in other jurisdictions would more openly be seen as an invasion of privacy.

As to the impact of *Gutnick v. Dow Jones*, Lord Justice Keene observed it:

Smacks of Realpolitik. And that is to say that the High Court of Australia, having done that, I believe it's going to be hard for other national supreme courts to impose some self-denying ordinance on themselves, particularly as the legal reasoning in the *Dow Jones* case is, I believe, quite persuasive.

A full transcript of the Lord Justice Keene's Keynote Address will be published shortly in the MediaLawLetter.

(Continued on page 8)

Special thanks...

To the planning committee for the London Conference: Jim Borelli and Kurt Wimmer, co-chairs of the International Law Committee, Siobhain Butterworth, David Hooper, Lee Levine, David Schulz, and Mark Stephens.

To Kurt Wimmer and Covington & Burling in London — especially, Christine Nicks — who managed all of the logistics for the event.

To Mark Stephens, Finers Stephens Innocent, who had the vision to invite Soli Sorabjee, as well as Lord Justice David Keene, and Admiral Wilkinson.

To Bloomberg News, and Charles Glasser, for the extraordinary evening event at Bloomberg headquarters on Monday night of the Conference.

To Finers Stephens Innocent and Reynolds Porter Chamberlain for a gala reception on Tuesday night of the Conference.

To Floyd Abrams and Geoffrey Robertson, QC, who were barristers extraordinaire for our mock appellate argument.

And to our judges — Judge Pierre Leval, Mr. Soli Sorabjee, and Mr. Justice Tugendhat.

We have sent our thanks to all of the speakers and guests who were kind enough to participate in this amazing dialogue amongst 180 lawyers, academics and judges on the development and application of media law around the world.

And finally to the break out and panel leaders noted in the article on the Conference, to all of the panelists, and to all of those who came to the Conference and made it the intellectually fulfilling event that it was.

MLRC London Conference 2003

(Continued from page 7)

Internet & Jurisdiction

Lord Justice Keene's commentary on *Gutnick* provided the entry into the first break-out style discussion that followed on Jurisdiction & Internet Publication, facilitated by David Schulz, Levine Sullivan Koch & Schulz LLP in New York and Mark Stephens, Finers Stephens Innocent in London. Schulz and Stephens relied on an international panel of experts as a launching pad for group discussion of the issues. Peter Bartlett, Minter Ellison, Melbourne, Australia; Roger Mann, Damm & Mann, Hamburg, Germany; Gavin Millar QC, Doughty Street Chambers, London; and Mary Wirth, Yahoo!, Sunnyvale, California provided their expert comments on the issues, including the impact of *Dow Jones v. Gutnick* and *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme* that inspired a spirited group discussion of the issues.

Among the key points raised in the session was the expansive exercise of jurisdiction by European and other foreign courts over Internet publication as compared to the limiting approach of U.S. courts, as seen in, e.g., *Young v. New Haven Advocate*, 315 F. 3d 256, 31 Media L. Rep. 1695 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2092 (2003).

Journalists Panel

Next, David Hooper, Reynolds Porter Chamberlain, London; and Kurt Wimmer, Covington & Burling, Washington, D.C. moderated a panel of leading journalists in a discussion of how developing UK law and international law impacts their decisions and ability to gather and report the news. The participants were Tony Maddox, VP CNN International for Europe, Africa & Mideast; Alan Rusbridger, editor-in-chief of *The Guardian*; and David Yelland, former editor-in-chief of *The Sun*, Britain's largest circulation newspaper, and now a columnist with *The Times*.

Among the key issues addressed were the impact of the Reynolds defense on the newsroom; how editors approach working with newsroom lawyers in the UK and US; and the policy of correcting stories.

Defamation Session

Jim Borelli, Media/Professional Insurance, Kansas City; and Meryl Evans, Reynolds Porter Chamberlain,

London facilitated a session on Defamation law, with expert input from Chip Babcock, Jackson Walker L.L.P., Dallas; Dr. Jan Hegemann, Hogan & Hartson Raue L.L.P., Berlin; Adrienne Page QC, 5 Raymond Buildings, London; and Brian MacLeod Rogers, Barrister & Solicitor, Toronto.

Among the key issues addressed: Whether and to what extent the UK press in benefitting from the qualified privilege defense articulated by the House of Lords in *Reynolds v. Times* [1999] UKHL 45; 4 All ER 609; 3 WLR 1010. The themes in recent cases, most of which have rejected the privilege, is that judges are finding imperfections in the journalism under consideration. The session considered comparative differences under German, Canadian and U.S. law for the protecting the reporting of allegations. Among the notable points raised was the development in Texas law of principles protecting the reporting of allegations in which courts have said that it is sufficient for the defense to establish the truth that a statement was made without proving the veracity of the underlying facts.

Bloomberg News Reception

Following the first day's sessions, conference delegates repaired to a reception at the London headquarters of Bloomberg News in Finsbury Square.. The reception was generously sponsored by Bloomberg News and arranged by Charles J. Glasser, Bloomberg News's in-house media counsel.

Address Soli Sorabjee, The Attorney General of India

The second day of the London Conference began with a exceptional speech by Mr. Soli Sorabjee, the Attorney General of India, on "Constitution, Courts and Freedom of Expression – the Indian Experience" Drawing on his experience as chief legal adviser to the Indian government and his lengthy involvement in human rights organizations and issues, Mr. Sorabjee discussed how freedom of the press is protected under the Indian Constitution and how that protection has been challenged by calls for censorship of controversial speech, with additional commentary on the role of right of reply and the protection for privacy in Indian law.

In discussing the challenges to free expression rights in India he notably observed that:

(Continued on page 9)

MLRC London Conference 2003

(Continued from page 8)

In order to prevent a threat to law and order the state should not suppress fundamental rights, and particularly freedom of expression, which is the duty of every democratic state to uphold.

A full transcript of the speech will be published shortly in the MediaLawLetter.

Privacy Session

David Bodney, Steptoe & Johnson LLP, Phoenix; and David Sherborne, 5 Raymond Chambers, London, facilitated the Privacy Law session, drawing on the expertise of Professor Pierre-Yves Gautier, of the University Pantheon-Assas in Paris.

They presented an overview of privacy law in the UK, US and France, before engaging the delegates in a wide ranging discussion of the issue. This included an in-depth discussion of the impact of *Douglas v. Hello*; the use of privacy claims as prior restraints; the role of the Press Complaints Commission and its Codes; on a comparative basis, the role of the public interest defense and the court's balancing of interests.

D-Notice Secretary

In the afternoon Rear Admiral Nick Wilkinson, the Secretary of the Defence, Press and Broadcasting Advisory Committee, spoke to the delegates to explain the history and operation of his unique office. The Committee oversees a voluntary code between the UK Government and the media regarding publication of information affecting national security and Wilkinson explained that he regularly advises journalists and government members on whether publications will impact national security and the UK's strict Official Secrets Act which provides for injunctions and punishment for publication of government secrets.

Describing his role and function, the Secretary noted:

It does not concern at all political or institutional embarrassment. It deals definitely with national security. But the way it works is, the most common way when a case comes up to me is a journalist rings me up and says, "Look, I'm thinking of doing a story tomorrow, this weekend, next week, about X." Something to do with some sensitive aspect of na-

tional security. I say, usually, well, there's nothing wrong with the story. It will embarrass the government, but so what. But there are some details in it which would certainly endanger a life or give away a current operational technique or give away a secret weapon characteristic, which would certainly be of interest to a hostile intelligence service. Usually they come back and they've rewritten the story. We have a fairly short chat and that is the end of it, and both sides are satisfied.

A full transcript of the Secretary's remarks will be published shortly in the MediaLawLetter.

Newsgathering

Siobhain Butterworth, The Guardian in London; and Lee Levine, Levine Sullivan Koch & Schulz LLP, Washington, D.C., led a session on Newsgathering Law with expert input from Harvey Kass, Associated Newspapers, London; Rosalind McInnes, BBC Scotland; Kelli Sager, Davis Wright Tremaine LLP, Los Angeles; and Dr. Jörg P. Soerhring, Latham Watkins Schön Nolte, Frankfurt.

Posing various hypotheticals to the experts and delegates, the session explored the legal issues surrounding publication of unlawfully acquired information; the use of misrepresentation and hidden cameras to obtain information and the restrictions on reporting on court proceedings and trials.

One of the interesting points discussed was the BBC's tactic of having a reporter join the Manchester Police Department, and undergo police training, to expose racism on the force. (The resulting report was recently broadcast in the UK to much controversy and several police officers have resigned.)

Plaintiffs Panel

Julie Ford, Bell Turney Coogan & Richards L.L.P., Austin, and Amber Melville Brown, Schillings, London next explored some media law issues via the perspective of several leading plaintiff lawyers, Nigel Tait, of Peter Carter Ruck & Partners; David Price, of David Price Solicitors & Advocates; and James Price QC, 5 Raymond

(Continued on page 10)

MLRC London Conference 2003

(Continued from page 9)

Buildings, as well as Sir Oliver Popplewell, a retired high court judge and former libel plaintiff. Among other things, the lawyers stressed that media counsel should be sensitive to plaintiffs' interest in vindication and that in some instances press errors are rightly actionable.

Conference delegates then enjoyed a reception in Stationers' Hall, generously co-sponsored by the firms Finers Stephens Innocent and Reynolds Porter Chamberlain.

Mock Appellate Court Argument Examines Right of Reply

The final session of the conference was a Mock Appellate Court Argument on the issue of Right of Reply, based on a current proposal by the Council of Europe to extend right of reply to the online media. The text of the proposal and additional commentary is available online at <www.coe.int/t/e/human_rights/media/> (see link for "A right of reply in the on-line environment?").

The session featured the leading legal advocates for free expression rights in the US and UK, Floyd Abrams, of Cahill Gordon Reindel in New York; and Geoffrey Robertson QC, a leading media and human rights law barrister at Doughty Street Chambers in London. Robertson argued in favor of the proposal; Abrams, against to a Judge Pierre Leval, U.S. Court of Appeals, Second Circuit, who acted as presiding judge, Mr. Soli Sorabjee, The Attorney General of India; and Mr. Justice Tugendhat, High Court of England & Wales.

Defending the Right of Reply proposal, Geoffrey Robertson argued that is based on:

A, on the right of self-defense, to defend your own reputation; B, on the right that is built into our justice system of hear the other side, the right of fairness or fair play. And I would base it, thirdly, on the right of the public to hear all sides..... [I]t serves the interests of truth, of fairness, and it's a value, of course, that transcends countries and continents and is achievable by this cheap and speedy device, particularly appropriate, as the Council points out, to the electronic media through the availability of the hyperlink.

Arguing against Floyd Abrams concluded:

[T]here are things that are in newspapers that are false. And there is material in newspapers that wound people and hurt people. And there are statements where, if more was said, more would be learned. Against that, what you must balance are all the risks of permitting the state, the government, itself, to become involved in the process of what is published.

The Court ruled 2-1 in Abrams' favor. Presiding Judge Pierre Leval thoughtfully observed:

[C]an we preserve that crucial investigative function of the press while affording this right of reply? And in my view, we cannot. In my view, the insidiously concealed, hidden costs are deadly.

A full transcript of the proceedings will be published shortly in the MediaLawLetter.

MLRC's London Conference was presented with sponsorship from Covington & Burling, Bloomberg News, Media/Professional Insurance, Davis Wright Tremaine LLP, Finers Stephens Innocent, Jackson Walker LLP and Reynolds Porter Chamberlain and we thank all of them for their support.

**MLRC 2003
London Conference
Transcripts Now Available**

To view, please visit our web site

www.ldrc.com

Trouble At the Palace

By David Hooper

Media lawyers in the United Kingdom have normally proceeded on the basis that members of the Royal Family do not sue, but a spate of recent cases brings that into question.

A Servant With A Secret

In November 2003 there was enormous media coverage given to allegations which turned out to relate to Prince Charles and Michael Fawcett, his former valet. The allegations apparently originated with George Smith, another former Royal servant. The Mail on Sunday, which wished to report the existence of these allegations that had gained currency after the dramatic collapse of the trial of Paul Burrell, Princess Diana's former butler, found itself the subject of a rare pre-publication injunction preventing publication of the alleged libels.

Initially the court even banned the publication of the name of the Plaintiff, Michael Fawcett. Exactly what these allegations were has never been published in the United Kingdom although an unprecedented public denial issued by Prince Charles' Private Secretary of any improper relationship between Prince and valet gave us some idea of what line of alleged country we were in.

There were exceptions of course to the Royals' reluctance to sue. In 1990 the Queen's nephew, Viscount Linley, recovered £35,000 libel damages against Today newspaper for false allegations that he had behaved like an upper class lager lout in a Chelsea pub. In 1997 Princess Diana received £75,000 damages against the Sunday Express for false allegations that she would be pocketing half the proceeds of the sale of her evening dresses which were being auctioned in New York. Those on the fringes of royalty did sometimes sue; Camilla Parker-Bowles' husband collected damages when a book had him married to the wrong person. However, if actions were brought at all they tended to be for breach of confidence.

Indeed the law of confidence largely developed from the case brought by Prince Albert in *Albert -v- Strange* (1849) 18 LJ CH 120 where the Prince was able to restrain a Windsor bookseller from publishing a catalogue of etchings by

Queen Victoria and the Prince. In 1993 Princess Diana obtained an injunction on breach of confidence and breach of contract grounds when photographs were taken by a hidden camera of her working out in a gym. Before a decision could be reached on this early instance of a claimed breach of privacy, the newspaper having sold an extra 80,000 copies, settled by paying £75,000 to the Princess.

Dianna's Butler v. the Duke

More recently Princess Diana's former butler, Paul Burrell, published his account of life as a royal butler provocatively entitled "A Royal Duty." The book contained short extracts from correspondence between Princess Diana and her father-in-law the Duke of Edinburgh. His account of the goings on at the Palace certainly appeared to be a breach of his obligations of confidence under his contract of employment.

Even though the copyright extracts were short, the splash given to them by the Mirror made it likely that the English courts would have felt that the quality, if not necessarily the quantity, of the material quoted was suf-

ficient to constitute substantial copying. The family of Princess Diana would probably have had a valid claim but in all likelihood decided that litigation would only give greater publicity to the book and that perhaps the butler could have given even greater details in court of what he had seen.

Stories about the Royal Family did not, however, go away and so it was that at the beginning of November 2003 the remarkable injunction was granted against The Mail on Sunday on the still untested grounds that it was threatening to publish defamatory material.

Guardian Wins Right to Name Names

The Guardian was, a few days later, successful in identifying Fawcett as the Plaintiff. The High Court rejected the Plaintiff's request that he be allowed to proceed anonymously. Material that the Mail on Sunday was subsequently able to publish made it clear that the Royal concerned was Prince Charles but exactly what the allegations were could

(Continued on page 12)

Trouble At the Palace

(Continued from page 11)

not be made clear. Indeed when foreign newspapers, notably those in Italy but surprisingly also those in privacy-loving France, published the allegations the British distributors declined to import them into the United Kingdom. There were, however, no shortage of websites prepared to speculate on the nature of the allegations. English readers cannot at present read the allegations which are in the public domain elsewhere.

A marker was put down by the Royal Family that it might be prepared to sue in such cases and the case was a reminder of the fact that actions could be brought by people linked with, but not part of, the Royal Family who claimed to be affected by the proposed story. The bringing of libel actions by the Royal Family would nevertheless appear to be a perilous activity. More promising for the Royal Family is their enforcement of obligations of confidentiality against former employees.

Enjoining the Fake Footman

So it was that later in November the Queen won an injunction against a Mirror reporter who had, in a case with some echoes of the *Food Lion* case in the US, used a fake

reference to secure a job as a footman at Buckingham Palace. After two days and 27 pages of coverage in the Mirror of goings on at the Palace and the alarming revelation that the Mirror reporter might have served President Bush an early morning cup of tea had the reporter not earlier resigned from his post to write about this lapse of security, the Queen obtained an injunction against the Mirror preventing any further revelations.

Subsequently the Mirror agreed to a permanent injunction and contributed £50,000 towards the Queen's legal costs. The newspaper had greatly increased its circulation with these issues and the Queen's legal bills would have comfortably exceeded £50,000. The marker was, however, put down that the Royal Family will continue to seek to enforce contractual obligations of confidentiality and the English courts are likely to uphold such claims. It was accepted that the Mirror could expose the breach of security but their reporter was precluded by his contract of employment from regaling us with details of life at the Palace.

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

*MEDIA LAW RESOURCE CENTER and
SOUTHWESTERN LAW SCHOOL,*

DONALD E. BIEDERMAN ENTERTAINMENT & MEDIA LAW INSTITUTE
are producing a conference --

The New Reality: Current Legal Issues in Fact Based Programming

Los Angeles, CA • January 29, 2004 • 4:00 -7:30 p.m.

- A Surreal Reality: Hot Issues in Reality Television
- Private Reality: The Continuing Development of Privacy Law
- The Ethical Reality: Ethics Issues in Advising Multiple Parties on Controversial or Unsettled Areas Of Law

Registration Materials at www.medialaw.org

*This event offers three hours of CLE credit, including one hour of legal ethics.
Southwestern is a State Bar of California approved MCLE provider.*

Appeal in Canadian Case Rules Against Summary Judgment Finding that Internet Website is a “Broadcast” under Libel Legislation

By **Brian MacLeod Rogers**

In a narrow procedural ruling on October 22, 2003, the Ontario Court of Appeal in *Bahleida v. Santa*, [2003] O.J. No. 4091 (C.A.), set aside a lower court ruling that an Internet Website posting constituted a broadcast for purposes of the province’s *Libel and Slander Act* (the “*Act*”).

The earlier ruling in Ontario Superior Court, made on March 31, 2003, ([2003] O.J. No. 1159) was the subject of a report in the June 2003 MediaLawLetter. That summary judgment ruling resulted in the dismissal of a libel claim over a Website posting; the dismissal was based on the judge’s finding that the posting was a “broadcast” and a libel notice was required. Under the *Act*, written notice of any complaint about libel in a newspaper or broadcast must be given within six weeks of the plaintiff having knowledge of it and prior to commencing litigation. In the case, notice was given four months after the plaintiff, Elaine Bahlieda, city clerk for Thunder Bay, Ontario, learned of the posting on a Website operated by the defendant, Orville Santa, a city councillor.

The Court of Appeal held that the original judge failed to make a crucial finding of fact: whether the Website “broadcasts” were from “a station in Ontario”, which is a requirement of the *Act* for the special notice and limitation provisions to apply. However, the Court’s main ground for reversing the original ruling was that there were conflicts in the experts’ testimony before the court on issues such as “whether the word dissemination [as used in the *Act*] can properly apply to information distributed by internet and whether internet publication is immediate and/or transient”. In keeping with general caselaw limiting the availability of summary judgment, the Court held that such proceedings were not a substitute for trial and were seldom suitable for “resolving conflicts in expert testimony particularly those involving difficult, complex policy issues with broad social ramifications”.

The case also squarely raised the conflict between English and U.S. caselaw on the “single publication” rule as applied to the Internet. On summary judgment, the motion judge rejected the English approach set out in *Loutchansky v. Times Newspapers Ltd.*, [2002] E.W.J. No. 5622; 1 All E.R. 652 (C.A.) while also refusing to adopt the “single pub-

lication” rule. The Court of Appeal avoided deciding the issue but signalled that it regarded it as very much an open question:

The conflicting expert opinions raise considerations that are germane not only to deciding whether internet publications are a broadcast within the meaning of the legislation, but also to determining whether subsequent viewing of the internet message by third parties amounts to a republication of the material.

The case will now proceed to trial after completion of examinations for discovery. Counsel for the plaintiff/appellant on appeal were Peter A. Downard and Berkley D. Sells, Fasken Martineau, DuMoulin LLP, and counsel for the defendant/respondent were Lorne Honickman and Carita Pereira, 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).

JUST PUBLISHED

2003 MLRC BULLETIN

**MLRC’S
SUPREME COURT REPORT:
A REVIEW OF THE 2002 TERM**

**INTERNATIONAL MEDIA
LIABILITY ARTICLES ON
INTERNATIONAL LAW & ISSUES**

**To order contact us or visit our website
www.medialaw.org**

No a La Carte Justice in England for Roman Polanski

Appellate Court Nixes Testimony by Videolink

By David Hooper

On 11 November 2003 the British Court of Appeal struck what may prove to be a knock-out blow against Roman Polanski's libel action against *Vanity Fair* magazine. *Polanski v. Conde Nast Publications Ltd.*, [2003] EWCA Civ 1573 (Brown, LJ, Parker LJ, and Thomas LJ). The court held that Polanski could not testify by video link from Paris, but instead would have to appear at trial in London in order for his case to proceed – and thus face arrest and extradition to the U.S. on his 1970's California sex offense conviction.

Polanski ironically had done much to restore his reputation by winning an Oscar last year for his wonderful film, *The Pianist*. Astonishingly, however, he was foolish enough to sue *Vanity Fair* for an anecdote dating back to 1969, contained in a single paragraph on page 17 of a profile of Elaine's Restaurant in New York. The July 2002 restaurant profile included author Lewis Lapham's recollection that the only time he "ever saw people gasp in Elaine's was when Roman Polanski walked in just after his wife Sharon Tate had been murdered by the Manson clan" and he tried to pick up a "Swedish beauty"... "inundating her with his Polish charm" and a "honeyed spiel which ended with the promise "I will make another Sharon Tate of you." Id. at ¶ 3.

A Fugitive of the Law

The libel action has simply served to remind us that the film director is on the run from the Californian Courts after pleading guilty on a plea bargain to unlawful sexual intercourse with a 13 year old girl, when he was a mature 42. Fearful of another spell in a Californian jail, Polanski has not set foot in the USA, or for that matter the UK, since 1978. He lives happily in France as a French citizen safe from the attentions of the Californian DA.

In an act of astonishing recklessness which could see Polanski getting little change from legal bills of \$750,000, Polanski went forum shopping in - you've guessed it - the UK. Unhappily for Polanski the UK does extradite convicted sex offenders to the USA.

Shortly before the trial was scheduled to start on 3 November 2003, Polanski sought to give his evidence by video link in the safety of a luxury hotel off the Champs Elysees. He relied on the UK Civil Procedure Rules Part 32-3, the criteria for the application of which are set out in Annex 3 of the Practice Directions to CPR, Part 32. He relied on the ability to give hearsay evidence under UK law and a decision in *Rowland -v- Bock* [2002] 4 All ER 370

The Court of Appeal accepted Vanity Fair's argument that allowing Polanski to give evidence by video link was an affront to the administration of justice and an abuse of the process of the court.

that "*full access to justice in a civil court should not, save in exceptional circumstances, be the price of a litigant losing his liberty and facing criminal proceedings.*"

Surprisingly the experienced libel judge, Mr Justice Eady, reluctantly allowed Polanski's application even though the fact that

Polanski's fugitive from justice was obviously an unattractive reason. Justice Eady felt that had Polanski not been allowed to give evidence by video (with the possibility of cross-examination), the alternative of allowing him to produce a written statement of evidence (without cross-examination) was the worse of the two evils.

Testimony Must Be in Person

The Court of Appeal disagreed. They accepted *Vanity Fair's* argument that allowing Polanski to give evidence by video link was an affront to the administration of justice and an abuse of the process of the court. Furthermore, Polanski could not get around this difficulty by giving his evidence by written statement. There was power under CPR 33.4(1) to permit the maker of the statement to be cross-examined and unless Polanski was willing to come to the UK to be cross-examined, his statement could not be admitted.

(Continued on page 15)

No a La Carte Justice in England for Roman Polanski

(Continued from page 14)

Polanski sought an indulgence from the court. He was not precluded from suing in the UK despite his conviction. He just had to hop on the Eurostar to London and show up at the Royal Courts of Justice. His snook-cocking at the Californian authorities and his forum-shopping raised issues of public policy which militated against Polanski's application to give his evidence from a Parisian hotel.

Rules on Video Link Evidence

The Court of Appeal laid down pointers as to when video link evidence would be allowed. The Court would look at the nature of the offence and the nature of the civil claim and the link between the two. Here both had a sexual content. The Court would consider the role of the witness, video evidence would be more likely to be permitted for a non-party witness as to fact (particularly if old and infirm as in *McPhilomeny -v- Times Newspapers Limited*) or for a Defendant, who after all had not chosen the jurisdiction. The Court would also look at the importance of the claim to the video link permission seeker and to that person's possibility of suing elsewhere.

Here, in a telling blow to forum shoppers, the Court of Appeal noted that this claim could have been brought in the USA (where the bulk of Vanity Fair's circulation is) or France (where Polanski lives and does have a reputation). Polanski had not after all set foot in the UK since February 1978. The Court would also look at the likely disadvantages of video link evidence against live evidence, notwithstanding the technical advances of video evidence. The facts of *Rowland -v- Bock* were distinguished, the one Plaintiff whose extradition was sought by a US court, had not even been convicted and the alleged offence bore no particular similarity to the facts of the claim.

Here Polanski wanted to litigate on special terms or as Vanity Fair elegantly put it "a la carte justice". No libel action has ever been fought in England in the Plaintiff's absence. On occasion the Plaintiff has not given evidence (*Bookbinder -v- Tebbit*) but the Plaintiff was then present at court to see his claim resoundingly fail.

Above all public policy should, the Court of Appeal observed, be to discourage litigants escaping the normal processes of law. It was inconceivable that if Polanski's sexual offending has been in the UK that he would have been allowed to sue from abroad. The same principle should be applied in relation to the Californian offence and if Polanski had mitigating reasons for his behaviour, his time would be better spent telling that to the Californian judge than seeking to massage his reputation from the comfort of his hotel by his ill-judged and costly choice of an English forum. Polanski is currently seeking permission to appeal to the House of Lords.

Vanity Fair was represented by Reynolds Porter Chamberlain and barristers Thomas Shields QC and Manuel Barca of One Brick Court. Polanski was represented by Schillings and barristers Ronald Thwaites QC, Ely Chambers, and Heather Rogers, Matrix Chambers.

**No libel action has ever
been fought in England in
the Plaintiff's absence.**

David Hooper is a partner in the solicitors firm Reynolds Porter Chamberlain in London.

Order Now!

MLRC 50 State Survey: EMPLOYMENT LIBEL AND PRIVACY LAW 2004

TOPICS INCLUDE: *Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort*

\$175

**For ordering information on the
most current editions,
go to www.medialaw.org.**

Diana Photographers on Trial in Paris for Invasion of Privacy

On October 24, 2003, a criminal trial began in Paris for three photographers who took photographs of the August 31, 1997 car crash that killed Princess Diana and her companion Dodi al Fayed. The photographers, Jacques Langevin of Sygma agency, Christian Martinez of the Angeli agency and freelancer Fabrice Chassery are accused of violating French privacy law by taking pictures of the interior of the wrecked car, although these pictures were never published.

Under the law the photographers face up to a year in jail and a fine of approximately \$50,000. According to one news report from the trial, the prosecutor asked for suspended prison sentences for the three on the grounds that they “sought to take pictures of misery and distress, not the kind of pictures which bear witness, such as war photography. They wanted pictures of people suffering.” See Philip Delves Broughton “Pictures of death crash ‘an invasion of privacy,’” *Daily Telegraph*, Oct. 25, 2003. (available online through <www.telegraph.co.uk>).

The trial is proceeding under the precedent of an earlier

French case brought by the pop singer Michel Sardou against paparazzi photographers. There the court held that the inside of a car – even when the car is in public – is to be considered as private as the inside of a house. This case will test the boundaries of that principle. According the *Daily Telegraph*’s report, Jacques Langevin, who is a well-known war photographer and not a paparazzi, testified that he routinely takes photographs of people in their cars, including French presidents.

The three are being prosecuted upon the complaint of Fayed’s father, Mohamed Fayed. The privacy action was stayed during the lengthy criminal investigation of photographers, including these three defendants, for allegedly contributing to the deaths of the couple by chasing their car to obtain photographs. That investigation concluded that the couple’s chauffeur was solely responsible for the deadly crash.

Note: In late November the court acquitted the reporters. Fayed announced he would appeal the verdict.

Update: Modest Damages Awarded to Michael Douglas & Catherine Zeta Jones

On November 7, 2003 High Court Justice Lindsay announced his damage awards in the high profile case brought by Michael Douglas, Catherine Zeta Jones and OK! magazine against Hello! magazine for its unauthorized publication of the couple’s wedding photographs. *Douglas & Zeta Jones v. Hello!* [2003] EWHC 2629 (Ch). See also *MediaLawLetter* April 2003 at 37.

While the couple had sought over \$1 million in damages for breach of commercial confidence and personal distress, the court awarded the couple only £14,600 (\$24,820), which included £3,750 each for distress, £7,000 for expenses incurred selecting and approving photographs for publication on an expedited basis, and £50 each for the data protection violation caused by the unauthorized publication.

Hello! was ordered to pay £1,033,756 (approximately \$1.7 million) in economic damages to rival magazine OK! which had obtained the exclusive right to publish the wedding photographs. Legal costs of the six-week-long high court trial and pretrial appeals, estimated at over 5 million pounds, will be decided at a later date.

Although Mr. Justice Lindsay issued a lengthy decision

on damages most of it covers the calculation of OK!’s economic damages for lost sales. Among other things, he rejected claimants suggestion that he award damages on a “notational license fee” theory, finding that such damages would be less than under his conventional damage calculation.

As to the award to Douglas and Zeta-Jones, Lindsay cited several media and non-media cases cited by the parties and noted, without discussing their relevance to their claims, that while “none provides a compelling guide as to the sum to be awarded ... they do provide a guiding matrix in which a place may be selected for the award here.” *Id.* at ¶ 56. Commenting on the damage award in aggregate, Lindsay noted that it was not so large as to “stifle free expression” yet likely to make “Hello! alive to the unwisdom of its acting as it did.” ¶ at 59.

Douglas and Zeta Jones were represented by the firm Addleshaw Goddard and barristers Alastair Wilson QC, 19 Old Buildings, and David Sherborne, 5 Raymond Buildings. Hello! was represented by the firms Charles Russell and M Law; and barristers James Price QC, 5 Raymond Buildings, and Giles Fernando.

UK House of Lords Rejects Creating General Right of Privacy

In a non-media case, the UK House of Lords this month flatly rejected adopting a general right of privacy as a new and independent tort claim, holding instead that the creation and dimensions of such a claim are tasks for Parliament, not the judiciary. *Wainwright v Home Office* [2003] UKHL 53 (Oct. 16, 2003).

No General Privacy Claim Over Illegal Search

At issue was a claim against the government by a mother and son who were strip searched during a prison visit. A Leeds County Court held that the search of the son, which included touching his genitals, was actionable under common law theories of trespass and battery because it violated prison guidelines and apparently caused the son severe distress. The county court also found that the son

***“It is no function
of the courts to legislate
in a new field.”***

and his mother, who was not physically touched or as severely upset, had claims against the government for invasion of privacy, as protected by Article 8 of the European Convention on Human Rights, incorporated into UK law through the Human Rights Act 1998.

The Court of Appeal reversed all but the battery judgment for the son which was not appealed. *Home Office v Wainwright & Anor* [2001] EWCA Civ 2081 ¶ 57 (Dec. 20, 2001) (Woolf CJ, Mummery, LJ., Buxton, LJ) (“This claim fails, as there is no tort of invasion of privacy.”)

On appeal, the claimants asked the House of Lords to declare that there is a general tort of invasion of privacy in UK law making the searches actionable.

Cast Doubt on Value of General Right

In an opinion written by Lord Hoffman, the House of Lords refused to do so. Recalling the development of privacy law in the U.S. from Brandeis and Warren’s law review article in 1890 to Dean Prosser’s Law of Torts of 1971, the court notably observed that the “[t]he need in the United States to break down the concept of ‘invasion of privacy’ into a number of loosely-linked torts must cast

doubt upon the value of any high-level generalization” to concrete cases. *Id.* at ¶¶ 15-18 Moreover,

“it is no function of the courts to legislate in a new field. The extension of the existing laws and princi-

(Continued on page 18)

UPDATE: Second Circuit Affirms Dismissal of Dow Jones Declaratory Judgment Action Against Harrods

In an opinion issued October 10, the Court of Appeals for the Second Circuit upheld Judge Marrero’s decision granting summary judgment to defendants, Harrods, and Mohammed al Fayed, when the district court held that there was no “actual controversy” as required by the Declaratory Judgment Act. Because the Second Circuit panel of Judges Feinberg, Katzmann and Raggi found that the district court did not abuse its discretion in refusing to exercise jurisdiction in this matter, the court affirmed. *Dow Jones & Company, Inc. v. Harrods Limited and Mohamed Al Fayed*, Docket No. 02-9364 (10/10/03)(per curiam).

Dow Jones had sought a ruling that a short article headlined “The Enron of Britain,” written for the U.S. Wall Street Journal and posted on WSJ.com, was not defamatory as a matter of law. This suit was Dow Jones’ response to a threat, and the ultimate filing, of a libel suit by Harrods and al Fayed in England.

The Second Circuit noted that broad discretion is afforded district courts to refuse to exercise jurisdiction over a declaratory action, even if they had the authority to hear it. Finding that the district court had articulated the law correctly, and did not appear to have based its decision on clear error of fact, the appellate court, in a very short decision, affirmed.

MLRC’s article on the underlying district court decision can be found at MLRC *MediaLawLetter*, November 2002 at p. 25.

Counsel for Dow Jones was Jack M. Weiss, Gibson, Dunn & Crutcher LLP, New York, and Stuart Karle, Dow Jones & Co., New York.

Counsel for Harrods and al Fayed was Bruce R. Ewing, Dorsey & Whitney LLP, New York.

UK House of Lords Rejects Creating General Right of Privacy

(Continued from page 17)

ples is one thing, the creation of an altogether new right is another.”

Id. at ¶ 18 quoting *Malone v. Metropolitan Police Comr.* [1979] Ch 344, 372-381 (where the High Court dismissed claims that a police wiretap violated a right to privacy under the common law and the European Convention) (available online at www.leeds.ac.uk/law/hamlyn/malone-case.htm).

As to the obligation to recognize a right of privacy under the circumstances based on the European Convention, the court in *Malone*, whose reasoning Lord Hoffman commended, stated:

It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown’s treaty obligations, or to discover for the first time that such rules have always existed.

Interestingly, as the decision notes, *Malone* was appealed to the European Court of Human Rights which held that the police wiretap at issue was a violation of Article 8(2) of the ECHR. But in the pendency of the appeal to the ECHR the UK codified wiretap law by passing the Interception of Communications Act 1985, thus reinforcing the House of Lords’ view that Parliament address the issue of creating new privacy rights.

Douglas v. Hello! Distinguished

Lastly, the House of Lords addressed claimants’ argument that the recent case of *Douglas v. Hello!* [2001] QB 967, had already effectively broadened the law of breach of confidence to provide a general right to privacy in all but name. In *Douglas*, the Court of Appeal held that actors Michael Douglas and Catherine Zeta-Jones had a claim for breach of confidence against a magazine which published unauthorized photographs from the couple’s wedding even though the magazine had no “confidential” relationship with the couple. Lord Justice Sedley of the Court of Appeal notably stated that

“the law no longer needs to construct an artificial relationship of confidentiality between intruder

and victim; it can recognize privacy itself as a legal principle drawn from the fundamental value of personal autonomy,”

concluding that the breach of confidence might as well be renamed invasion of privacy. *Id.* at ¶ 125.

According to the Lord Hoffman, though, this “dictum does not support a principle of privacy so abstract as to include the circumstances of the present case.” *Wainright* at ¶ 30. As to whether Lord Justice Sedley accurately stated the law of breach of confidence, that “question must wait for another day.” *Id.*

Impact on Media Cases?

The significance of the decision to the media is not entirely clear. While the House of Lords refused to adopt what it described as an “abstract” right of privacy in an illegal search case, it avoided addressing the statement of Lord Justice Sedley in *Douglas* – that breach of confidence law is effectively a law of privacy against the press. The dimensions of breach of confidence law has been considered in a number of recent Court of Appeal cases, including *Douglas v. Hello!*, *A v. B & C* [2002] EWCA Civ 337 (March 11, 2002) and *Campbell v. Mirror Group Newspapers*, [2002] EWCA Civ 1373. The House of Lords has accepted *Campbell* for review and will consider the Court of Appeal’s judgment that model Naomi Campbell had no breach of confidence claim against the Mirror newspaper for revealing that she was a drug addict.

As for now, the House of Lords’ decision in *Wainright* may apply a brake to the explicit development of a privacy tort either through the common law or the European Convention on Human Rights.

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

Media Law Resource Center, Inc.
80 Eighth Avenue, Ste. 200
New York, NY 10011

Ph: 212.337.0200
ldrc@ldrc.com

Alert: Brutal Beating of Leading Media Lawyer Beatrice Mtetwa by Police in Zimbabwe

Beatrice Mtetwa, a Zimbabwean media and human rights lawyer, was brutally attacked this month by Zimbabwean police, leaving her with heavy bruising and cuts on her face and body. Many MLRC members recently meet Beatrice, who attended the MLRC London Conference. She is chairperson of the Zimbabwe Law Society Human Rights Committee and the senior partner in the firm Kantor & Immerman in Harare.

She has represented a number of newspapers and reporters under attack by the regime of Zimbabwean President Robert Mugabe, including Guardian reporter Andy Meldrum, whom she successfully defended against criminal charges of violating Zimbabwe's restrictive press laws (Meldrum was then illegally deported from the country). Beatrice is currently representing the *Daily News*, the country's last independent daily newspaper, which was shut down by the police last month.

Beatrice had called the police for assistance after being carjacked for the second time in 11 days. Instead of assisting her, the police violently attacked her, in a police car and subsequently in a police station. Following the beatings, no medical assistance was provided nor was she taken to hospital. She has courageously filed charges of assault against the police.

On learning of the attack, the International Bar Association immediately contacted Khembo Mohadi, the Minister of Home Affairs, expressing a deep concern for her safety and urging that officials investigate the attacks and bring the perpetrators to justice.

Below are extracts from the letter of October 15, 2003 by Emilio Cardenas, President of the IBA, to the Minister of Home Affairs, Zimbabwe:

The IBA is extremely concerned that Beatrice Mtetwa is being harassed as a result of carrying out her professional duties as a lawyer. The IBA would like to respectfully remind you of your obligation to under international law. Article 23 of the United Nations Basic Principles on the Role of Lawyers states, "Lawyers, like other citizens are entitled to freedom of expression, belief, association and assembly." Similarly, Article 17 states that, "Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."

Furthermore, the IBA would also like to remind you of your obligations under Article 16 of the UN Basic Principles on the Role of Lawyers, which states: "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics."

Having become party to the International Covenant on Civil and Political Rights (1966), Zimbabwe has a duty to uphold the provisions of the Covenant and to not thwart its fundamental purposes. Article 19(2) of the Covenant states: "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." We respectfully remind you that the ICCPR is recognised as a principle of customary international law.

The IBA is extremely concerned for the health and safety of lawyer Beatrice Mtetwa and shocked at her appalling treatment at the hands of the police. On behalf of the IBA, I respectfully request that you investigate the attacks against her immediately and bring the perpetrators to justice. I would appreciate to be informed about the outcome of your investigation. I also urge you to take necessary measures to ensure that such clear acts of intimidation against human rights defenders do not take place again. Thank you in advance for your cooperation.

MLRC ANNUAL DINNER 2004

Save the Date!

NOVEMBER 17, 2004

Global Surveys Compare Freedom of Information and Internet Censorship

Two recent country-by-country surveys of access to information illustrate how the expansion of the Internet into everyday use has pressured many governments to pass freedom of information laws while, often simultaneously, they impose restrictions on online access and content.

According to "Freedom of Information and Access to Government Records Around the World," an annual report issued in September by access advocates freedominfo.org., more than 50 countries now have guaranteed their citizens access to government information on public safety, corruption and human rights, and more than half of these freedom of information laws were passed in the last decade (seven in the last year alone). (Available at <http://freedominfo.org/survey.htm>.)

Also in September, Privacy International and GreenNet Educational Trust's issued their 45-country survey, "Silenced: An International Report on Censorship and Control of the Internet," reporting that censorship of the Internet is commonplace in most regions of the world. (Available at www.privacyinternational.org/survey/censorship/Silenced.pdf.) Though the survey concludes that "[n]o communications and information medium in history has endured such a continued and varied assault on its functioning and its infrastructure," it does not compare each country's Internet restrictions to its regulation of other forms of media.

Pro-FOI Factors

In addition to the increased demand for information fostered by the Internet, freedominfo.org cites the transition to constitutional democracy as an internal pressure that has led to FOI laws in several countries, as almost all newly developed or modified constitutions include a right to access information from government bodies. Anti-corruption campaigns have also been influential in transitional countries such as Thailand, where the Prime Minister has called for citizens to use their Access to Information Act to reduce corruption. In addition, external pressure from the international community has been influential in promoting access to information, with the World Bank, the International Monetary Fund and others pressing countries to adopt laws to reduce corruption and to make financial systems more accountable.

Anti-Terrorism Restrictions

Both surveys cite new laws promoting secrecy in the global war on terror as having undercut access to information in the last two years. Privacy International and the GreenNet Educational Trust note that anti-terrorism legislation has given governments unprecedented power "to intercept and monitor the communications of a wide range of organizations and individuals that oppose the actions and ideals of the ruling political authority."

For example, India enacted the Prevention of Terrorism Ordinance Act in 2002, authorizing the government to monitor electronic communications, including personal e-mail. The Department of Information Technology's Order No. GSR529(E), issued in July, 2003, permits the blacking out of websites "promoting hate content, slander or defa-

mation of others, promoting gambling, promoting racism, violence and terrorism and other such material." In an apparent exercise of this power, the Indian government blocked a discussion group, groups.yahoo.com/groups/kynhun, in September for "promoting anti-

national news and containing material against the Government of India and the state government of Meghalaya." Some of the messages apparently called for independence of the Nagas, an indigenous community living in northeast India, and there were references to corruption and police brutality.

Some anti-terrorism legislation has been rejected as an invasion of individual rights. Kenya's proposed Suppression of Terrorism Bill, which takes its definition of terrorism directly from the U.S. Patriot Act, is so vague that it could be used to declare virtually any opposition to government as "terrorist" activity. The Bill, which was proposed in July, would make it a criminal offence to collect, make, or transmit by e-mail, voice-mail or any other telecommunication method "any record of information of a kind likely to be useful to a person committing or preparing an act of terrorism." The Bill was immediately rejected by the Administration of Justice and Legal Affairs Committee of the Kenyan parliament, whose position on legal affairs heavily influences decisions by the national assembly.

Both surveys cite new laws promoting secrecy in the global war on terror as having undercut access to information in the last two years.

Dutch Court Rejects Linking Liability and Scientology Copyright Infringement Claim

On September 4, 2003 an appellate court in the Hague found in favor of ten Dutch ISPs and a website operator in a long running copyright infringement action brought by the Church of Scientology. *Church of Spiritual Technology v. Dataweb, B.V., Hof*. The Hague, 4 Sept. 2003, No. 99/1040 (unofficial English translation at: www.xs4all.nl/uk/news/overview/scientology.pdf.)

The court affirmed a ruling that the defendants were not liable for copyright infringement for republishing, directly or indirectly, allegedly secret church teachings gleaned from public filings in a California federal court litigation. More importantly, the court reversed judgments by the lower court that would have

- 1) imposed a duty on ISP's to stop hosting sites that contain, or link to, alleged infringing material upon complaint; and
- 2) required ISPs to reveal to the complainant the identity of the alleged infringer.

Republication online was not infringement because the materials were originally included in court documents.

The case was part of an aggressive attempt by the Church of Scientology to stop republications of church teachings – so-called “Operating Thetans” – that were disclosed in affidavits submitted to a federal court in California by Steven Fishman. Over ten years ago, the Church sued Fishman for libel after he claimed that he had been driven to commit crimes, including mail fraud, to pay for the church’s teachings. See *Church of Scientology Int'l v. Fishman*, No. 91-6426 (C.D. Cal. 1991). Fishman attached extracts of the “Operating Thetans” in his court filings.

Church Launches Campaign Against ISPs

In its attempts to stop the dissemination of these and related materials, the Church filed lawsuits that led to raids at ISPs and individual homes in Amsterdam, Finland, Glendale, California, Goulden, Colorado, Arlington, Virginia and elsewhere. See *LDRC LibelLetter*, Sept. 1995, at 1; Oct. 1995, at 5.

Agents of the church also visited the home of a *Washington Post* reporter covering the raids in an attempt to seize her copy of the documents, and Church later unsuccessfully attempted to enjoin the paper from publishing anything from the documents. *Religious Technology Center v. Lerma*, 897 F.Supp. 260, 23 Media L. Rep. 2520 (E.D.Va. Aug 30, 1995) (denying temporary restraining order and preliminary injunction), 908 F.Supp. 1362, 24 Media L. Rep. 1115 (E.D.Va. 1995) (granting summary judgment to defendants); see also *LDRC LibelLetter*, Dec. 1995, at 1.

The Dutch case began on Sept. 5, 1995, when a Dutch bailiff, a police officer, and a lawyer and employees of the Church of Scientology raided the Amsterdam offices of ISP “XS4ALL,” and seized the company’s computers.

The raid received extensive coverage in Holland and was the subject of much discussion on the then-nascent Internet. Dutch journalist Karin Spaink, outraged at the raid, posted the Fishman affidavits on a site

hosted by another ISP, Planet Internet. Similar sites were posted by other users, eventually reaching about 100 sites containing the affidavits, hosted by 10 Dutch ISPs.

Lower Court Mixed Ruling

On March 12, 1996, the trial court dismissed the case, ruling that the disclosure of the “Operating Thetan” sections was not a copyright violation because they had been included in a public record. *Church of Spiritual Technology v. Dataweb, B.V., Rb*. The Hague, March 12, 1996, CSM/lw 50011089, available in unofficial English translation at <http://www.xs4all.nl/~kspaink/cos/verd1eng.html>.

Court of Appeals Hears Arguments

On June 9, 1999, the full-proceeding branch of the District Court of The Hague affirmed the judgment of the summary proceeding court. But the court also ruled while that ISPs cannot be held liable for infringing mate-

(Continued on page 22)

Dutch Court Rejects Linking Liability and Scientology Copyright Infringement Claim

(Continued from page 21)

rial placed on sites that they host but do not control, they must remove such material or links to such material upon notification of probable infringement, and, upon request, inform the copyright holder of the identity of the customer who posted the material. *Church of Spiritual Technology v. Dataweb, B.V., Rb.* The Hague, March 12, 1996, Cause List No. 96/1048, available in unofficial English translation at <http://www.xs4all.nl/~kspaink/cos/verd2eng.html>.

Appeals Court Rules for ISPs

On appeal, the Church argued that the web site's posting of the "Operating Thetan" material could not be "fair use" under Article 15A of the Copyright Act of the Netherlands, since the material had never been actually published. The ISPs argued that the burden of monitoring links that was placed on them by the lower court was unreasonable.

Affirming the ruling on infringement, the Court of Appeals found that although the "Operating Thetan" texts had not been published as the term is defined in Dutch law, republication online was not infringement because the materials were originally included in court documents and because the websites were informative and not commercial. The court also referenced the protection for freedom of expression under Article 10 of the European Convention on Human Rights, noting that restricting publication here would not be justified.

Having found that there was no basis to the Scientologist's copyright claim, the appellate court, without much discussion, set aside the district's courts rulings on potential link liability for ISPs, and the requirement that ISPs disclose the names of alleged infringers.

"The service providers only provide the technical facilities to make possible publication of information by others. It would therefore not be correct to equate them with publishers, which, it is assumed, publish information themselves."

See Judgment, paragraph 12 (citing the Agreed Statement to Article 8 of the WIPO Copyright Convention

("It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Bern Convention.".)

Defendants were represented by W. Takekema; and P.H. Bakker Schut and J.C.H. van Manen (both of Amsterdam). Plaintiff was represented by E. Grabandt and R. Hermans of Amsterdam.

Swiss Court Rejects Liability for Indirect Links to Racist Web Sites

A Swiss court acquitted a man of charges of promoting racist propaganda for indirectly linking to racist web sites. See "Beschränkte Verantwortlichkeit für Links" (Limited Responsibility for Links), *Neue Zürcher Zeitung*, Oct. 1, 2003. Available on line at: www.nzz.ch/netzstoff/2003/2003.10.01-zh-article94R5F.html

At issue was an article on censorship written by Thomas Stricker, a former assistant professor of informatics (the study of the structure, behaviour, and interactions of natural and artificial computational systems) at the prestigious ETH University in Zurich. Stricker's article, posted on the university's web site, linked to anti-racist web sites that linked to racist and extremist web sites. Stricker was charged with racial discrimination and promoting racist propaganda in violation of Swiss law. See Art. 261bis Abs. 3 StGB. The University brought disciplinary proceedings against him, which were ultimately dropped when they refused to renew his teaching contract.

According to the newspaper report, the Swiss court held that a person who links to illegal content, such as pornography or racist sites, can only be criminally liable if he or she makes the illegal content "a component" of their own website thereby becoming the "owner" of the linked content. Without further discussion, the court concluded that this was clearly not the case with Strickler.

Advisory Group in Ireland Recommends Libel Reform

Comments on Proposals Solicited

By Pamela Cassidy

Dublin, August 2003

On June 20th the Minister for Justice and Law Reform published the report of the Defamation Advisory Group. The competing rights to freedom of expression and the citizen's good name have equal Constitutional protection in

Ireland, and that protection is detailed in a 1961 Defamation statute. The Advisory Group recommends the modernisation and codification of defamation law and procedure in a new statute. The Minister has invited comments from anyone with an interest in a consultation period that will end in December. The main recommendations are summarised below (divided into substantive and procedural).

Romance Novelist Loses Copyright Case in India

India's Supreme Court has refused to stop a "Bollywood" television series that romance author Barbara Taylor Bradford claims is a plagiarism of her novel, "A Woman of Substance."

In an August 4 decision, India's highest court refused to stay an order by the Calcutta High Court to allow the broadcast of the 260-episode series entitled, "Karishma: Miracle of Destiny." Bradford's book follows the rise of a woman from poverty to wealth and power. Karishma involves a woman who begins as a street sweeper who comes to head an international corporation.

Bradford did, however, notch a minor victory. The Supreme Court nixed an order that Bradford pay damages to the series producer – Sahara Media Entertainment – for the delay. The series was pulled off the air one day after it began broadcasting in May.

According to *The Times of India*, Bradford's attorneys asked in court to address whether the copyright in a literary work is restricted to the exact language used in the particular work and does not extend to the theme, plot, character and incidents of the copyrighted work.

"This judgment will further embolden infringers to violate intellectual property rights in India, especially by the Bollywood community," New York-based Bradford said in a statement. Bradford reportedly has said she will not pursue the matter.

According to *The Guardian* (London), Sahara claimed the soap was based on a story by a leading scriptwriter. Ejaz Maqbool, a lawyer for the firm, said: "It's a complete victory for us."

Defamation Fast Track

Speedy justice for reputational damage is imperative, urged leading advocate Éamon Leahy SC¹ at a media seminar last year,² and the Group agree. They propose two forms of fast track relief, first where a plaintiff has requested, and been refused, a timely apology; and second where a plaintiff or defendant can demonstrate that the defence/claim has little prospect of success. The successful plaintiff can obtain a declaration that the published words are false and defamatory, a correction order and an injunction. But he is not entitled to damages – not a cent. And this may well make the fast track provisions so unattractive as to be irrelevant to the majority of defamation plaintiffs. An award of damages is widely regarded as an essential element of vindication. If it is to work, this reform has to tempt defamation Plaintiffs.

Mr Leahy had a novel suggestion on damages: the successful fast track plaintiff will obtain *special* damages only. If he presses on to full trial (for his fast-track relief was in addition to, not in place of, the plaintiff's right to a full trial) seeking an additional award of general damages for indignation, hurt etc., he could be cross-examined as to why he was not satisfied with the initial award.

In a further new departure the Group proposed that the court can, when making a correction order, specify the contents of the correction. This goes beyond Mr Leahy's proposals. At present a publisher cannot be forced to subscribe to a 'correction' with which he disagrees. If he refuses, Mr Leahy suggests that the court should direct a report of the verdict in a position of equal prominence to the original allegations. This is not merely an academic point: a correction gives the plaintiff's reputation a clean

(Continued on page 24)

Ireland Libel Law Proposal

(Continued from page 23)

bill of health. That may prove frustrating for a publisher who is satisfied that the charge is true but cannot prove it to the standard required in a civil court.

Apology Without Liability

The Group's proposal that evidence a publisher 'made or offered an apology to the plaintiff .. shall not be construed as an admission of liability' is an attempt to address publishers' concerns that a timely apology exposes them to claims for unlimited damages, since they cannot protect their position on damages or costs by a private payment into court ("lodgement"). If the Group's recommendation as to a lodgement without admission of liability is accepted [see summary of recommendations below] then publishers will have this protection (welcome news, long overdue).

But is it realistic to insist, in addition, that a judge or jury, or indeed the plaintiff, ignore a public apology at trial? It has a curious logic – to admit publicly that you got it wrong but maintain, nevertheless, that you are not liable for the wrong. A lodgement is not disclosed to judge or jury until after verdict (for obvious reasons). But a public apology will be common knowledge.

The proposal follows a 1991 recommendation by the Law Reform Commission, who defined 'apology' as 'simply a matter of courtesy and draws the reader's attention to the fact that matter concerning the plaintiff is somehow in dispute .. it is quite distinct from a correction, retraction or any form of admission that the publisher was in error'. By contrast the Concise Oxford defines apology as 'the regretful acknowledgement of fault or failure'. Even if the Group were to include the LRC definition of apology, this proposal may prove unworkable in practice.

New Limitation Periods

Good news for publishers, and a warning for practitioners to keep a wary eye on time: the Group recommends the abolition of the distinction between libel and slander and a reduction in limitation periods to one year (unless there are exceptional circumstances within six years of publication).

Privilege and Public Interest Publication

Qualified privilege, a defence based on a nexus of duty and interest, is a vital protection for the honest individual in the ordinary conduct of social and business affairs. It applies in situations as various as staff complaints / advice within family relationships / volunteering information to the police. The Group make two recommendations, the first gives statutory basis to the general principles (whilst preserving existing common law privilege)³ but confines the protection to communications made 'to a particular person or group of persons only'.

The second recommendation formulates a new defence of 'reasonable publication' to the world at large of public interest information, provided the publisher takes various factors into account including the extent of public concern about the information, whether it concerns the public functions or activities of the subject, the seriousness of allegations, their source, and whether the information contains the substance of the plaintiff's response. An effective right of reply *before* publication is novel, as is the assessment of whether the allegations relate to the public functions of the subject. A consideration of whether the information relates to the 'public functions or activities' of the plaintiff is a departure from English law (which bases privilege on the status of the *information*) and in line with US law⁵ (which bases privilege on the status of the *individual*).

Increased Jurisdiction Circuit Court

Quicker, cheaper access to justice is the thinking behind the recommendation that the jurisdiction of the Circuit Court be increased from £30,000 to £50,000 for defamation claims, but the actual result may be to deprive plaintiffs, and indeed publishers, of their right to jury trial. Supreme Court Justice Hardiman has said, speaking extra judicially, that 'the verdict of a jury is felt to carry a degree of authoritative vindication difficult to replace in any other way'.

Similarly Mr Leahy: 'the best judges of what is or is not defamatory is the jury' and 'there are powerful arguments to be made for involving juries in the administration of justice'.

A more balanced recommendation, offering real choice, would give the High Court a greater discretion on costs in jury and complex cases.

(Continued on page 25)

Ireland Libel Law Proposal

(Continued from page 24)

Press Council

An innovative, carefully constructed proposal offering speedy correction where the press are adjudged, by a government appointed Press Council, to have fallen below ethical standards is to be incorporated in a Code of Conduct. The Group recommends a statutory basis to 'secure public confidence' in the process, thereby rejecting voluntary regulation. This is a departure from English practice, where the Government continues to be reluctant to interfere with the voluntary Press Complaints Commission. Also recommended is mandatory compliance with the Code. The Council will have power to direct publication of a summary of its adjudication, or a correction, and can apply to the Circuit Court to compel compliance. A Press Council claimant, who must make his complaint within 3 months of publication, will forgo his right to sue over the publication, and his right to damages. The Council's remit will include issues of defamation, privacy, non-defamatory but inaccurate information and material defamatory of the dead.

Procedural Reform

The recommendations are significant, but for real progress a more fundamental reform may be necessary, involving fully pleaded cases within a strict timetable, pre-trial automatic disclosure of documents and witness statements, and early judicial case management. This 'cards on the table' approach facilitates a realistic assessment of the merits of each case, and promotes timely settlement. The English experience is that procedural changes (accompanied by a defamation pre-action protocol) have proved more significant than legislative reform.

What the Reforms Will Mean in Practice

Nevertheless, the substantive reforms proposed are likely to result in quicker, cheaper defamation case disposal which is good news for publishers, and good news for defamation complainants.

Want to Comment on the Reforms?

The full text of the Advisory Group Report is available on the Minister's website at: [http://](http://www.justice.ie/802569B20047F907/vWeb/wpRXHR5NSJVY/)

www.justice.ie/802569B20047F907/vWeb/wpRXHR5NSJVY/. Submissions may be made in writing to Room 8, Civil Law Reform, Bishop's Square, Redmond's Hill, Dublin 2 Ireland, or by e.mail to defamation@justice.ie or by fax to 00 353 14790201 on or before Wednesday 31st December 2003. NOTE that all submissions are subject to release under the Freedom of Information Act.

Summary of Recommendations

- Fast-track procedure where a judge sitting without a jury can give summary relief, excluding damages
- Clarification of circumstances in which a Plaintiff can obtain aggravated damages
- New, statutory defence of reasonable publication
- New, statutory defence of 'innocent publication' for distributors, printers, broadcasters, internet service providers
- New, statutory Press Council with power to formulate a press Code of Conduct, investigate complaints and order corrections
- Reduction of limitation period from 6 years (libel) and 3 years (slander) to one year, save for exceptional circumstances
- Longstanding common law definition of defamation given a statutory basis
- Distinction between libel and slander abolished
- Jurisdiction of the Circuit Court to be increased to e50,000 for defamation cases

(Continued on page 26)

Volunteers for Task Force on Irish Law Reform Sought

Jim Borelli and Kurt Wimmer, Co-Chairs of MLRC's International Law Committee, are looking for volunteers for a small task force on this Irish libel law reform proposal. The task force would be asked to review the report and draft written comments for submission to Irish authorities on the matter. Please let Jim Borelli know (Jim.Borelli@mediaprof.com) if you would like to participate in this effort.

Ireland Libel Law Proposal

(Continued from page 25)

- Modern reformulation of the defences of fair comment, justification, privilege
- Modern reformulation of malicious falsehood
- Modern reformulation of the defence of unintentional defamation
- Statutory basis for the defence of consent
- New statutory rule that a single cause of action lies for multiple publications, including publication by electronic means
- Criminal libel to be replaced by publication of 'gravely harmful statements'
- Defamation action survives the death of the Plaintiff
- Press conference giving an account of a 'public meeting' attracts statutory qualified privilege

- Procedural reforms
 - Defendant can make payment into court without admission of liability
 - Plaintiff who accepts payment can make a public statement in court
 - The making of an apology, or an offer of an apology, is not an admission of liability
 - Both parties can make submissions to the jury on damages, and the judge can direct the jury on damages
 - Supreme Court can substitute its own award of damages on appeal
 - Meaning – reasonably capable rather than arguably capable - can be determined by the court at a preliminary stage
 - Defamation plaintiff must verify on oath particulars of claim
 - Dismissal for want of prosecution motion where plaintiff has taken no step on the record for a year
 - A conviction or acquittal by a court in the state is evidence of that conviction/ acquittal and the facts on which it is based

Pamela Cassidy is a Dublin Solicitor and a partner with BCM Hanby Wallace. She also spent 12 years working with a leading media firm in London, so has experience of both jurisdictions.

¹ Respected by all, mourned by his many colleagues and friends, Mr Leahy died aged 45 in July.

² Summarised in the Media Law Digest March 2002, www.bcmhanbywallace.com/mediadigest

³ Head 21 (3) (b).

⁴ Classic exposition in *New York Times v. Sullivan* 376 US 254 (1964)

Just Published! Order Now!

50 State Survey 2003-2004:

MEDIA PRIVACY AND RELATED LAW

*With a special report on privacy
and related law in the Federal
Courts of Appeals.*

TOPICS INCLUDE: *False Light • Private Facts • Intrusion • Eavesdropping • Hidden Camera • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Damages and Remedies • Relevant Statutes*

\$175

UK Parliament Report Recommends Stronger Press Self-Regulation and Statutory Privacy Law

By Marietta Cauchi

A United Kingdom parliamentary report on privacy and the media published June 16 recommends more effective press self-regulation under the aegis of a Press Complaints Commission with increased enforcement powers. The report also recommends Parliament consider enacting statutory privacy law as an alternative to ad hoc development through judicial decisions. The report issued by the select committee for culture, media and sport is available online at: www.parliament.the-stationery-office.co.uk/pa/cm/cmcmucmeds.htm.

Background: Ad Hoc Protection for Privacy

Privacy law in the UK is relatively new. It began with the inception of the Human Rights Act in October 2001, which implemented the European Convention on Human Rights. Article 8 of the ECHR gives an individual “the right to respect for his private and family life, his home and correspondence,” and generally is assumed to require that signatory states recognize a cause of action for invasion of privacy. But UK appellate courts have generally been reluctant to apply a new privacy law, preferring to rely on traditional principles of defamation, breach of confidence and infringement of intellectual property.

For example, in the watershed case of *A v B Plc and Another*, [2002] EWCA Civ 337, (reversing an order enjoining a newspaper from publishing true articles about a soccer player’s adulterous affairs), the Court of Appeal noted that judges need not determine if a new privacy tort exists. Lord Woolf, the Lord Chief Justice, made it clear that breach of confidence provides a remedy for violations of Article 8. “In the great majority of situations, if not all situations, where the protection of privacy was justified,” he wrote, “an action for breach of confidence now would, where appropriate, provide the necessary protection.”

But proceedings for breach of privacy as a separate cause of action persist. Many of these are dealt with by temporary – but dispositive – injunctions at the trial court level with little publicity. Others, such as the celebrity cases *Douglas v Hello! and Others*, [2003] EWHC 786, and *Naomi Campbell v Mirror Group Newspapers*, [2002] EWHC 499 (QB), have resulted in decisions that are anything but clear.

At the trial of her action against Mirror Group Newspapers, Naomi Campbell did not pursue the contention that she had a separate cause of action for breach of privacy for the newspaper’s disclosure that she was attending Narcotics Anonymous meetings. But at trial she won her claim for damages for breach of confidentiality and breach of the Data Protection Act because an article about her addiction featured details of her treatment that could be considered “sensitive personal data.” The Court of Appeal later reversed this judgment, holding that the publication of peripheral details about Campbell’s treatment, such as her attendance at Narcotics Anonymous, was justified and in the public interest. *Campbell v. MGN Ltd.*, [2002] EWCA Civ. No: 1373.

Michael Douglas and Catherine Zeta-Jones won their claim against Hello! Magazine for breach of their right of commercial confidence when the magazine published photographs of their wedding that had been exclusively sold to rival OK! Magazine. But the court found that there was no invasion of privacy, providing a victory of sorts for the media defendants. Judge Lindsay echoed Lord Woolf’s remarks that the law of confidentiality is usually sufficient to protect an individual’s right to privacy under the ECHR. And where it is not, he said, it is up to Parliament and not the courts to correct that inadequacy.

Report: Time for a New Privacy Law?

The U.K. members of Parliament responsible for the recent report picked up on Judge Lindsay’s remarks in the *Douglas* case and urged ministers to consider enacting a privacy law – not, they said, to punish the press but to provide some certainty in this area of the law which is subject to ad hoc and inconsistent court rulings.

Most of the report calls for an overhaul of the Press Complaints Commission – the self-regulatory body formed by UK newspapers and periodicals – to make it more proactive and powerful and less likely to be perceived as biased in favor of the press. The main recommendation is the establishment of a new procedure so that complainants can immediately ask the PCC for an adjudication on their complaint rather than first mediating their complaint.

The report also urges the PCC to set up a pre-publication team to deal with inquiries from members of the public who

(Continued on page 28)

UK Report: Press Self-Regulation & New Privacy Law

(Continued from page 27)

do not want media publicity and to liaise with the relevant newspaper editors. This process is aimed at settling issues that arise before publication but fall short of “prior restraint” or “press censorship.” The report says the PCC, through its pre-publication team, should be proactive in events likely to cause intense media scrutiny, such as disasters where people are in grief and shock.

Having earlier this year tightened up the Code of Practice to ban payments to witnesses in criminal trials, the report now asks the PCC to ban the practice of paying policeman for information. The report also recommends that the Code of Practice should be updated to include e-mail and other electronic communications in its rules on interception. A copy of the Code is available through the PCC’s website: www.pcc.org.uk.

Composition of PCC

The report contains a number of proposals about the constitution of the PCC. PCC chairman, Sir Christopher Meyer, said that he plans to increase non-media “lay” majority by one and that the selection process would be transparent.

Other recommendations concerning the PCC’s independence include:

- Editor commissioners would serve a fixed term, with those whose publications persistently offend being removed from the commission;
- The Code Committee, which considers changes to the Code of Practice and which is composed entirely of editors, would be reconstituted with a “significant minority of lay members”; and
- An independent person should be appointed to hear appeals against PCC adjudications and to conduct an annual external audit of the PCC’s processes and practices.

Sanctions Proposal

The report says that existing sanctions should be made more effective and new ones introduced. For example, PCC adjudications should be more prominent with “tasters” being printed on the front page of the offending publication and the full text inside. And publications should automatically annotate archives as to their accuracy and sensitivity and be responsible for removing the relevant article from all publicly available databases.

Among other new proposals the report suggests one “gently punitive” measure and one “modestly compensatory” measure against offending publications:

- the annual registration fees paid by newspapers to Pressbof, the body that funds the PCC, should be geared according to the number of adjudications made against each publication in the previous year
- the industry is also asked to consider a fixed scale of fines for the most serious cases with the compensation being paid to a charity of the complainant’s choice. Currently newspapers are only required to publish adverse findings by the PCC.

Finally, the report suggested that offending newspapers should be required to compensate a vindicated complainant for out-of-pocket costs, such as the acquisition of a trial transcript, but not legal costs.

Conclusion

While a privacy statute might clarify principles such as available defenses and damages, it would in all likelihood straitjacket the media, drawing immutable lines between what can and can’t be published. The recommendations for stronger self-regulation, if adopted, might forestall legislation. The report’s proposals appear designed to restoring the PCC’s credibility with the public as an effective self-regulator after much recent criticism.

The PCC was notably branded a “pussycat” and “largely autocratic” by TV newsreader Anna Ford after it rejected her complaint that the publication of long-lens photographs of her on a beach holiday with her family was an intrusion of her privacy under the Code of Practice. The PCC similarly rejected the complaint of disc jockey Sara Cox, over the publication of topless photographs of her taken while on a secluded beach. She later sued the People newspaper in court, obtaining a quick settlement, adding to the public perception that the PCC does not currently have sufficient powers to adequately address complaints. If the PCC does not beef up its practices and procedures, and with the judiciary singularly concerned about making new law, a privacy statute may yet become a reality.

Marietta Cauchi is a financial journalist with Dow Jones Newswires in London and, before that, was a media lawyer at Finers Stephens Innocent in London.

Landmark U.K. Communications Bill Reforms Structure for Content Regulation

By Kurt Wimmer

On July 17, 2003, a dramatic overhaul of the United Kingdom's communications regulatory structure received Royal assent after a rocky two-year path toward adoption. The 590-page Communications Act 2003 will rationalize the structure under which independent media (and, to some degree, the BBC) are regulated in England, Scotland, Wales and Northern Ireland; it will permit U.S. companies to invest in the U.K. broadcast marketplace for the first time; and it will implement several provisions of the E.U.'s landmark Telecommunications Directives from 2002.¹ Perhaps most importantly to news organizations, it will install one "super regulator" in the place of several bodies that currently regulate the media. By far, the most dominant subject of the Communications Act 2003 is the regulation of telecommunications and other electronic communications services, an area that is far beyond the scope of this article, but the impact of the Act on content regulation in the U.K. should not be underestimated.

UK Regulatory System Streamlined

The regulatory structure for the media in the United Kingdom has always been complex. No fewer than five regulatory agencies can have jurisdiction over various types of media and communications regulation and content disputes — the Independent Television Commission (ITC), the Broadcasting Standards Commission (BSC), the Radio Authority (RA), the Office of Telecommunications (OfTel) and the Radiocommunications Agency.

In addition, an Information Commissioner has a role in determining whether journalistic practices constitute "processing personal data" under data protection legislation, a self-regulatory Press Complaints Commission Content considers readers' and viewers' complaints, and the BBC's Board of Governors regulates the public broadcaster.

Under the Communications Act, much of this landscape will be rationalized. One regulator — the Office of Communications, or Ofcom — will handle most regulatory and content issues. For Americans used to the converged regulatory practice of the FCC, Ofcom's jurisdiction will be familiar. Additionally, however, Ofcom will have a role in media content — one of its four stated goals is to "protect the public from any offensive or potentially harmful effects of broadcast media, and to safeguard people from being unfairly treated in television and radio programmes."² On this score, Ofcom will take over significant content regulation from the ITC and the BSC. The types of issues that can be addressed by these entities, based on recent actions, can range from requiring television programmers to warn viewers of sexual content in upcoming programs to criticizing programmers for "distasteful" programming (such as a video clip showing a "bad parent" swinging a toddler over his head or the host of Big Brother "humiliating" a contestant).

Perhaps most importantly to news organizations, it will install one "super regulator" in the place of several bodies that currently regulate the media.

Content Regulation

To further Ofcom's content mandate under the new Communications Act, a "Content Board" will be created. Although the Act is not a paragon of clarity on this point, Ofcom has stressed that the Content Board will not regulate the Internet or the printed media.³ It will focus solely on television (terrestrial broadcast, cable and satellite) and radio. Ofcom will be permitted under the Act to determine the goals of the Content Board, in addition to the Act's stated goals of increasing "media literacy" and effective self-regulation. Ofcom's current view on the role of the Content Board provides that:

The Content Board will want to understand, analyse and champion the voices and interests of the viewer, the listener and the citizen. The Content Board will aim to reach those parts of the public interest that competition and market forces cannot

(Continued on page 30)

U.K. Bill Reforms Structure for Content Regulation

(Continued from page 29)

and do not reach. The key themes it will grapple with are content quality and standards – the Content Board is in effect the Content Quality & Standards Board. Other themes are diversity, plurality, regionalism/localness and of course ‘public-service broadcasting’ – at times going beyond commercial considerations to wider public concerns.⁴

Ofcom’s Content Board will not have direct responsibility for licensing, but will have the ability to provide “input” to licensing decisions.

Three Tiers of Content Regulation

Ofcom has expressed its ambitions to regulate broadcast content in three “tiers.” Tier One is characterized as “negative content regulation” — harm, offense, accuracy, impartiality, fairness and privacy.⁵ Ofcom intends to draft “codes of practice” in each of these areas, and it intends to consult with broadcasters, the public and other interested parties. It also will bring advertising into this tier as well. Although the BBC is generally outside the regulatory ambit of Ofcom’s powers under the new Act because it is self-regulated by its own Board of Governors, Ofcom intends to include the BBC as one of the broadcasters that it will regulate.

Ofcom’s Tier Two of content regulation will encompass the extent to which broadcasters are complying with requirements for quotas for independent television production, European content production and U.K. content production. The issue of local quotas, first introduced under the EU’s Television Without Frontiers framework in the 1980s, has been extended by the Act to require certain levels of independent television production, particularly by the BBC, to foster the U.K. film and video industry.

Finally, Tier Three of Ofcom’s content regulation authority will consider the public service broadcasting obligations of private television channels. Each channel will be required to submit a yearly plan, and its progress toward achieving the goals in its plan will be assessed annually. Beyond these “tiered” content concerns, the Content Board will provide input on whether particular mergers in the media marketplace should be permitted.

Ofcom will not, however, be the sole content regulator in the United Kingdom. The Information Commissioner,

who is responsible for increasingly dicey issues concerning data protection, will continue to be organized entirely separately from Ofcom. In addition, the Press Complaints Commission, a self-regulatory body that has come under separate pressure for change,⁶ will continue to be separate and distinct from Ofcom.

Media Ownership

Perhaps the most controversial element of the Communications Act has been its treatment of non-European ownership of television and radio stations. The Act has taken a decidedly internationalist stance on media ownership. Unlike the United States, which typically refuses to permit non-U.S. ownership of media properties unless the country in which the aspiring owner is located would permit U.S. companies to own its domestic outlets, the U.K. adopted an open marketplace. The new Act simply abolished restrictions in the Broadcasting Act 1990 that limited foreign ownership of broadcast stations. Companies from outside Europe, and particularly in the United States, now can bid to own U.K. media properties.

Like the United States, U.K. law also had regulated media concentration. The Act adopts a more relaxed approach to multimedia mergers, finding that cross-media mergers are subject to a public interest test by regulators. Companies are free to propose mergers, but the Department of Trade and Industry and the Secretary of State will consider the effect of the merger on the choice and quality of program transmissions in determining whether to approve it.

In addition, the Act maintains some longstanding limits on media concentration. ITV, the major independent broadcaster, cannot be purchased by a major national newspaper group.

The public service test will apply when any national newspaper group with at least 20 percent penetration attempts to acquire Channel 5 or an independent national radio service. This test also will apply when any company attempts to acquire any Channel 3 service, if ITV or Channel 5 propose to acquire any national radio service, or when any two national radio services propose to merge. Rules preventing religious organizations from holding broadcast licenses have been abolished, but rules keeping

(Continued on page 31)

U.K. Bill Reforms Structure for Content Regulation

(Continued from page 30)

political organizations from holding broadcast licenses have been kept. Rules on local concentration were adopted as well.

More to Come . . .

The Act implements only a handful of the rules established by the EU for the regulation of electronic communications. Notably, it does not implement the new privacy regulations required by those directives, which must be transposed into national law by this October. The new telecommunications data protection directive will require recipients of unsolicited commercial email for direct marketing, or "spam," to affirmatively "opt in" to receiving such email messages (with exceptions for preexisting business relationships). It also will require websites that use "cookies" to disclose that such devices are used and provide users with an opportunity not to receive them. A draft proposal has been issued to implement these rules in the U.K. with an expectation that they will be adopted by the EU's October 2003 deadline.

Kurt Wimmer is a partner in the Washington office of Covington & Burling, and was managing partner of its London office until August 2003.

¹ The full text of the Act is available at <http://www.hmso.gov.uk/acts/acts2003/20030021.pdf>.

² See "What Ofcom Will Do," http://www.ofcom.org.uk/about_ofcom/what_ofcom_does/index.htm

³ Because the Act is implementing the EU's technology-neutral Telecommunications Directives, it speaks in terms of content transmitted by "electronic communications networks." This is true as to the Content Board as well (see Act, Section 13), leading many in the Internet community to express concerns that the Content Board could take jurisdiction over Internet content. There is no explicit guarantee in the Communications Act itself that the Content Board will limit its efforts to broadcasting, but Ofcom has made explicit concessions, after debates in the House of Commons and the House of Lords on this point, that it does not view its content jurisdiction as extending to the Internet.

⁴ See "Strategic Focus," http://www.ofcom.org.uk/about_ofcom/content_board/index.htm.

⁵ See *id.*

⁶ See "UK Parliament Report Recommends Stronger Press Self-Regulation and Statutory Privacy Law" on p. 57 of this *MediaLawLetter*

RECENTLY PUBLISHED

2003 MLRC BULLETIN

INTERNATIONAL MEDIA LIABILITY: ARTICLES ON INTERNATIONAL LAW & ISSUES

To order contact us or visit our website
www.medialaw.org

Just Published!

MLRC 50-STATE SURVEY 2003-04: MEDIA LIBEL LAW

*With updated reports on libel law in the Federal
Circuits and an outline of English libel law.*

MEDIA LIBEL LAW TOPICS INCLUDE: *Defamatory Meaning • Opinion • Truth/Falsity • Fault • Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/Statutory Provisions*

\$175

For ordering information on the most current editions, including the 2002-2003 edition currently in stock, go to www.medialaw.org

Recent Internet Jurisdiction Cases

By Colin Rushing

As three recent cases indicate, personal jurisdiction based on Internet contacts, like all personal jurisdiction questions, continues to be fact-intensive and to some extent, ad hoc. But there also appears to be an emerging distinction between defamation cases, in which courts increasingly require the allegedly tortious Internet communications to be directed at the forum, and trademark and unfair competition cases, in which relatively slim contacts with the forum state form the basis for a finding of personal jurisdiction.

Archer and White v. Tishler

Reflecting the emerging consensus in defamation cases, in *Archer and White, Inc. v. Tishler*, No. Civ. A. 3:03-CV-0742-D, 2003 WL 22456806 (N.D. Tex. Oct. 23, 2003), the Northern District of Texas refused to exercise personal jurisdiction over an Illinois dentist who posted allegedly defamatory comments on the Internet about a dental tool manufactured and shipped to the defendant by the Texas-based plaintiff.

The Internet posting alone was not a sufficient basis for establishing personal jurisdiction in Texas: Although the plaintiff's "largest customer base is composed of Texas dentists," absent "evidence that [the defendant] intended to target or focus on Texas readers as distinguished from readers in other states," the court held that the fact of the website posting was not sufficient to establish personal jurisdiction over the defendant.

Brach's Confections v. Keller

But in *Brach's Confections, Inc. v. Keller*, No. 03 C 2032, 2003 WL 22225617 (N.D. Ill. Sept. 24, 2003), the Northern District of Illinois found sufficient minimum contacts based on the New Jersey defendant's sale of candy to four Illinois residents. In that case, the defendant — operator of websites through which candy was sold — allegedly infringed the Illinois-based plaintiff's trademark rights both by using allegedly infringing domain names and using the plaintiff's trademarks in the contents of the website itself. (Confusingly, the district court thought it was compelled to apply the law of the Federal Circuit, and not the Seventh

Circuit, because the claims presented a "federal question.")

Citing the "sliding scale" analysis first outlined in the now-famous *Zippo* case (the district court, based on the few sales to Illinois residents, held that the defendant was "The district court also denied the defendant's motion to dismiss on venue grounds.

Electronic Broking Services, Ltd. v. E-Business Solutions & Servs.

Demonstrating that personal jurisdiction determinations remain an essentially *ad hoc* inquiry, however, in *Electronic Broking Services, Ltd. v. E-Business Solutions & Servs.*, _ F. Supp. 2d _, 2003 WL 22298059, No. CIV JFM-03-1350 (D. Md. Sept. 30, 2003), the District of Maryland refused to exercise personal jurisdiction over an Egyptian company that did some business in Maryland through a semi-interactive website.

In that case, the plaintiff (based in the United Kingdom) alleged that the defendant, an Egyptian company, sold financial services that were principally advertised on the Internet under an infringing trademark. Although one of the defendant's customers was based in Maryland, the district court refused to exercise personal jurisdiction over the company: In the absence of evidence that the defendant "intentionally targeted residents in Maryland through its website or directed its electronic activity into Maryland with the manifested intent of conducting business within the state," the district court held that the website alone could not establish the basis for personal jurisdiction.

Nor was the defendant's business relationship with a Maryland company sufficient: Because the plaintiff was a British company, and the defendants were in Egypt, the district court held that the burdens on the defendants were too great, and Maryland's interest in the litigation (and the plaintiff's interest in litigating in Maryland) too small, to warrant the exercise of personal jurisdiction.

Colin Rushing is an associate with by Wilmer, Cutler & Pickering in Washington, D.C., and a member of MLRC's Cyberspace Committee.

Government Seeks to Reverse Conviction For Revealing Software Flaws

By Jack Greiner

Federal prosecutors recently asked the Ninth Circuit Court of Appeals to reverse the conviction of Bret McDanel, a little over one year after those same prosecutors put him in jail.

In June, 2002, McDanel had been convicted for causing damage to a computer system in violation of the Federal Computer Fraud and Abuse Act. He was sentenced to 16 months in prison, which was, at the time, the maximum sentence.

The conviction resulted from the statute's ambiguous language and, in application, was a content based regulation. By moving for a reversal of the conviction, the feds apparently are willing to admit that the conviction never should have happened.

McDanel, who used the online handle "Secret Squirrel" was employed as a computer administrator at Tornado Development, Inc. in El Segundo, California. Tornado offered a unified messaging service that let customers retrieve e-mail, voice mail and faxes through one website. McDanel discovered that when users sent a web address as part of an e-mail, recipients and other outsiders could gain access to the sender's account.

The undisputed evidence demonstrated that McDanel warned his supervisors, but they failed to fix the problem. McDanel left the company in 2000, but learned that Tornado had still not taken care of the problem. Apparently frustrated by Tornado's inaction, McDanel, in late summer 2000, delivered 5600 e-mails to Tornado customers warning them about the problem.

At trial, the prosecutors claimed that the message regarding the security vulnerability, coupled with the flood of e-mails that allegedly crashed Tornado's e-mail server, caused over \$5,000 in damage, the statutory threshold. The Computer Fraud and Abuse Act bars anyone from sending information with the intent to cause damage to a protected computer. "Damage" includes "impairment to integrity" of a system of data.

In McDanel's case, the prosecutors contended that

"impairment to integrity" includes the publication of a security vulnerability in a system. This was the ultimate "shoot the messenger" kind of prosecution. McDanel disclosed to Tornado's customers – who surely had a right to know – that the system was flawed. These customers in turn contacted Tornado to demand a fix. Tornado was forced to fix the problem (which it should have done in the first place) and deal with angry customers (which it wouldn't have had to do had it fixed the problem in the first place). For his role in bringing the problem to light, McDanel was sentenced to 16 months in prison.

McDanel used his valid account on the system to send his mass mailing, so there was no allegation that he gained system access improperly. And the security flaw that McDanel disclosed was easily detectable by security experts, so it couldn't be considered confidential. McDanel's

only "crime" was spilling the beans and forcing his former employer to address a problem.

Apparently guided by the adage that "wisdom often never comes, so it should not be rejected merely because it comes

late" the feds are now willing to admit that they erred in prosecuting McDanel. In their October 15 filing, prosecutors said "[t]he government concedes that the evidence did not establish an intent to 'damage' within the meaning of the statute."

Unfortunately for McDanel, the government filed its petition *after* McDanel served his 16-month term. Tornado is out of business. If any good can come from this mess, hopefully it is the reiteration of the principal that the First Amendment must protect "messengers" (or in this case, "Secret Squirrels") from being shot based on the content of their message.

Ronald Cheng, assistant U.S. Attorney for the Central District of California filed the petition to reverse the conviction. Mr. McDanel is represented by Jennifer Granick, Executive Director of Stanford law School's Center for Internet and Society.

Jack Greiner is a partner in the Cincinnati law firm of Graydon, Head & Ritchey.

The conviction resulted from the statute's ambiguous language and, in application, was a content based regulation.

Scope of Section 230 Immunity Questioned by Two Recent Decisions

By Patrick Carome and C. Colin Rushing

Two appellate decisions — one state and one federal — have recently been issued challenging the scope of federal statutory immunity available for the “provider or user” of interactive computer services from claims based on third-party content, departing from the otherwise unanimous published precedent confirming the broad scope of that immunity.

Beginning with *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), appellate courts have until October of this year uniformly agreed that 47 U.S.C. § 230 provides the providers and users of interactive computer services with broad immunity from claims based on third-party content. The Third, Ninth and Tenth circuits have all agreed with *Zeran*, as have the Supreme Court of Florida, state intermediate courts of appeal in California, Connecticut, and Illinois, and numerous federal and state trial courts.

But in *Doe v. GTE Corp.*, No. 02-4323, ___ F.3d ___, 2003 WL 22389811 (7th Cir. Oct. 21, 2003), a panel of the Seventh Circuit declined to apply Section 230 immunity in a case brought against companies whose sole connection to the alleged tort was hosting certain web-sites, deciding instead to affirm dismissal of the claims on state law grounds. And in *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416 (Cal. Ct. App. Oct. 15, 2003), the California Court of Appeal for the First District held that Section 230 does not apply when the defendant asserting immunity “knew or had reason to know” that the content at issue was defamatory.

Seventh Circuit Affirms Dismissal Using State Law Not Section 230

In *Doe v. GTE Corp.*, the plaintiffs alleged that GTE Corp. and Genuity, Inc. were liable for hosting web sites where certain allegedly tortious materials were sold (namely, videotapes surreptitiously taken of the plaintiffs in locker rooms, showers, and bathrooms). Consistent with *Zeran* and all other decisions confronting similar facts, the district court rejected these claims on the basis of Section 230.

The Seventh Circuit affirmed, but only on the alternative ground that, as a matter of state law, GTE Corp. and Genuity were not under a duty to investigate their custom-

ers’ web sites for harmful materials. The court considered but then did not rule on the question whether Section 230 immunized GTE and Genuity from the plaintiffs’ claims. Instead, Judge Easterbrook mused that *Zeran* and the three other federal courts of appeal that have construed Section 230(c)(1) — which provides that the provider or user of an interactive computer service “shall not be treated” as the publisher or speaker of “information provided by another information content provider” — might have been wrong.

First, he suggested that Section 230(c)(1) might simply be “definitional,” delineating the types of entities that can take advantage of the immunity provided in Section 230(c)(2) — a separate provision that establishes that providers or users of interactive computer services cannot be held liable when they block or remove objectionable third-party content. Second, the opinion hypothesizes that Section 230(c)(1) immunity might be available only for torts for which publication is an explicit element, such as defamation.

Ultimately the Seventh Circuit did not decide the Section 230 issue in the case, and ruled instead in favor of the defendants on state law grounds. While all of Judge Easterbrook’s observations concerning Section 230 are therefore mere *dicta*, the opinion represents the first time that a federal court of appeals has not readily embraced an expansive construction of the immunity statute.

California Court of Appeal Rejects Zeran

Writing for the California Court of Appeal for the First District in *Barrett v. Rosenthal*, Judge Kline agreed with *Zeran* that Section 230(c)(1) was a source of immunity but disagreed with *Zeran* on a central aspect of that immunity, holding that Section 230(c)(1) does not apply where the defendant “knew or should have known” that the content at issue was defamatory.

According to Judge Kline, because Congress used the term “publisher or speaker” in Section 230(c)(1), it did not bar the type of defamation claims that historically have been allowed against mere “distributors” of other people’s content — claims that ordinarily require a showing that the distributor knew (or, perhaps, should have known) that it was distributing tortious material.

(Continued on page 35)

Scope of Sect. 230 Immunity Questioned by Recent Decisions

(Continued from page 34)

By doing so, Judge Kline rejected arguably the most important element of the Section 230 immunity; under his construction, a dispositive motion on the basis of Section 230 might be difficult if not impossible in the face of an allegation or evidence that the defendant asserting the immunity was somehow “on notice” of the allegedly tortious content — a requirement that might be satisfied merely by sending an e-mail.

In reaching this conclusion, the *Barrett* court deviated not only from the established federal precedent but from a recent decision of another appellate court in California: In *Gentry v. eBay, Inc.*, the California Court of Appeal for the Fourth District explicitly considered and rejected the argument that Section 230 did not apply to claims based on theories of “notice-based” liability. See 121 Cal. Rptr. 2d 703, 718 (Cal. Ct. App. 2002) (recognizing that notice-based liability was “the classic kind of claim that *Zeran* found to be preempted by Section 230” and that other courts applying Section 230 had “uniformly rejected” such claims).

Importantly, the *Barrett* court rejected *Zeran* and the subsequent authority in a relatively unique context: the defendant asserting Section 230 immunity in *Barrett* was not a provider of an interactive computer service, but was instead a “user” who had selected an allegedly tortious e-mail for republication on an Internet newsgroup. The defendant could raise the Section 230 defense because, on its face, Section 230(c)(1) appears to apply equally to the “provider[s]” and the “user[s]” of interactive computer services.

Notwithstanding this parity in the language, nearly all reported Section 230 decisions have involved cases in which the defendant is a company that provides some sort of Internet-based service, including Internet service providers such as AOL and web-based services such as eBay and Amazon.com. Nonetheless, it was in this context that the California court in *Barrett* explicitly rejected *Zeran* and its progeny and held that Section 230 would not apply whenever the defendant asserting the immunity “knew or had reason to know” that the information at issue was tortious.

Ironically, Stephen Barrett, one of the plaintiffs in *Barrett v. Rosenthal*, subsequently lost this same issue in parallel litigation that he brought in Illinois against the operator of a website on which allegedly tortious articles were

posted. When asked to reject *Zeran* and hold that Section 230 did not apply to claims in which the defendant asserting immunity was allegedly on notice of the tortious content, the Appellate Court of Illinois, Second District, relied instead on the “perfectly uniform” chain of federal cases and held that Section 230 did apply to such claims. See *Barrett v. Fonorow*, ___ N.E.2d ___, 2003 WL 22455494 (Ill. App. 2d Dist. Oct. 28, 2003). The decision in *Barrett v. Fonorow* mentions neither the California *Barrett* case nor Judge Easterbrook’s opinion in *Doe v. GTE Corp.*

Patrick J. Carome is a partner, and C. Colin Rushing is an associate, at Wilmer, Cutler & Pickering, in Washington, D.C. Mr. Carome represented AOL in the Zeran case.

MLRC MediaLawLetter Committee

David Bralow (Co-Chair)

Bruce Rosen (Co-Chair)

Robert Balin

Jim Borelli

Jay Ward Brown

Peter Canfield

Thomas Clyde

Robert Dreps

Judy Endejan

Jon Epstein

Charles Glasser, Jr.

Richard M. Goehler

Karlene Goller

Steven D. Hardin

S. Russell Headrick

Russell Hickey

David Hooper

Elizabeth B. Johnson

Jonathan Katz

Debora Kristensen

Eric Lieberman

Daniel Mach

John Paterson

Deborah H. Patterson

Mark J. Prak

William Robinson

Madeleine Schachter

Laurence B. Sutter

Charles D. Tobin

Paul Watler

Update: Decision in U-Haul Case Favoring Pop-up Ad Rights

By Jon Katz

In August 2003, the *Media Law Letter* reported on the June 24, 2003, federal court order granting partial summary judgment against U-Haul's lawsuit contesting the technology that enables competitors' pop-up ads to be displayed during visits to U-Haul's Internet sites. The Eastern District of Virginia subsequently filed a detailed opinion on September 5, 2003, that articulated the basis for its earlier order and granted summary judgment against five counts of the complaint and dismissed the remaining four counts without prejudice. *U-Haul International, Inc., v. WhenU.com, Inc., et al.*, Civ. Act. No. 02-1469-A 2003 U.S. Dist. LEXIS 15710 (E.D. Va. Sept. 5, 2003) (Gerald Bruce Lee, J.).

Price of Using Internet

U-Haul's complaint alleged copyright and trademark infringement, and trademark dilution, due to pop-up ads appearing during visits to Internet pages that contain U-Haul's intellectual property. The lawsuit also alleged unfair competition for allegedly misleading the plaintiff's visitors that U-Haul has a contractual relationship with the competitors that appear on the pop-up ads. U-Haul further alleged misappropriation of advertising content, interference with prospective economic advantage, and unjust enrichment. Finally, U-Haul alleged a violation of Virginia's Business Conspiracy Act, claiming that WhenU.com's pop-up ads amounted to a scheme to willfully and maliciously injure U-Haul's business.

The court had little problem in finding against U-Haul, despite repeatedly acknowledging how annoying pop-up ads are to computer users:

"Alas, we computer users must endure pop-up advertising along with her ugly brother unsolicited bulk email, 'spam', as a burden of using the Internet."

The judge conceded that his ruling was made despite his own frustrations with pop-up ads:

"Computer users, like this trial judge, may wonder what we have done to warrant the punishment of

seizure of our computer screens by pop-up advertisements for secret web cameras, insurance, travel values, and fad diets. Did we unwittingly sign up for incessant advertisements that require us to click, click, and click again in order to return to our Internet work?"

However, the court pointed out that computer users bear the blame for enabling pop-up ads, because pop-up software gets onto users' computers by the users' consent through loading and downloading software that piggybacks pop-up software. The implication is that computer users would know in advance they were downloading pop-up software if only they would read the computerized user agreements that one must ordinarily approve before installing software on a computer. *U-Haul International, Inc.* (slip op., Sept. 5, 2003).

No Trademark Misuse

In finding against U-Haul's claims of trademark infringement, unfair competition, and trademark dilution, the court pointed out that the pop-up windows themselves contained no U-Haul trademarks. In fact, the pop-ups contained promotions for U-Haul's competitors, even though other portions of a computer user's screen showed the U-Haul trademark.

The court further found that the pop-up ads did not unfairly use U-Haul's trademarks by juxtaposing the U-Haul site content against the pop-up window content. The court confirmed that businesses are permitted to use their competitors' trade names in comparative advertising, and favorably cited a federal case permitting advertising and packaging proclaiming "If You Like ESTEE LAUDER ... You'll Love BEAUTY USA." *U-Haul International, Inc.* (slip op., Sept. 5, 2003).

Further, said the court, WhenU was permitted to use U-Haul's uniform resource locator (URL) in enabling a competitors' pop-up ad. This activity did not involve "use" when it comes to unfair "use" of trademarks, where WhenU did not sell the U-Haul URL to its customers, and did not display the U-Haul name or URL in its pop-up ads.

Moreover, the court found that WhenU was not cybersquatting on U-Haul's trademark, noting that the pop-up

(Continued on page 37)

Decision in U-Haul Case Favoring Pop-up Ad Rights

(Continued from page 36)

software “resides within the user’s computer and does not interact or communicate with U-Haul’s website, its computer servers, or its computer systems.” The court was convinced that the software that enabled the WhenU pop-up ads is “no different than an e-mail system that pops a window when the registered user receives a new e-mail message.”

Not Copyright Infringement

The court also rejected U-Haul’s claims of copyright infringement. The pop-up ads do not copy U-Haul’s work, the court found, and “a pop-up advertisement is not a derivative of a copyrighted work.”

Finally, the court re-confirmed from its June 24, 2003, order that it would dismiss without prejudice and permit U-Haul to re-file its claims of misappropriation, interference with prospective economic advantage, unjust enrichment, and violation of Virginia’s Business Conspiracy Act.

The *WhenU* decision represents another instance where technology outpaces the laws governing commercial conduct. The court reached its decision by construing intellectual property laws that originally were enacted long before the Internet existed. In this round, commercial speech rights were vindicated.

The sole plaintiff, U-Haul International, was represented by Richmond’s Sands, Anderson, *et al.* The defendants are WhenU.com, which is the company that provides the pop-up technology; Avi Naider; Budget Rent A Car; Moversbay.com; Door to Door Storage; and Conducive Corporation. The defense lawyers were Hale and Dorr, LLP; Lutzker & Lutzker, LLP; Arent, Fox, *et al.*; Christian & Barton, LLP; Kilpatrick Stockton, LLP; and Venable, Baetjer & Howard, LLP.

Jonathan L. Katz is the Media Law partner for Silver Spring, Maryland’s Marks & Katz, LLC.

Ninth Circuit Holds that Communication Decency Act Protects Internet Dating Service

By Timothy L. Alger

The Ninth Circuit Court of Appeals has held that information collected from third parties and formatted or manipulated by an Internet service is subject to publisher immunity under the Communications Decency Act of 1996, 47 U.S.C. § 230(c) (“CDA”). In doing so, the court affirmed summary judgment for Lycos, Inc., operator of the Matchmaker.com dating service, on claims of libel, disclosure of private facts, negligence, and misappropriation. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1110 (9th Cir. 2003).

Lycos’ winning argument to the Ninth Circuit was rejected twice previously in the District Court, first by Judge Carlos Moreno (now on the California Supreme Court) on a Rule 12(b)(6) motion to dismiss, and by Judge Dickran Tevrizian, on a Rule 56 motion for summary judgment. Judge Tevrizian granted summary judgment to Lycos (which purchased Metrosplash.com, Inc., owner of the Matchmaker dating service, in 2000), after finding that the plaintiff was a public figure and could not establish constitutional actual malice by clear and convincing evidence. Judge Tevrizian’s decision was reported in the June 2002 MLRC *MediaLawLetter*, at 23.

The Ninth Circuit affirmed the grant of summary judgment, but this time agreed with Lycos that the CDA gave it immunity from suit as a publisher of third-party content. The Ninth Circuit did not reach the issue of the plaintiff’s public-figure status or the question of actual malice, and in a footnote explicitly left undisturbed the District Court’s reasoning on those points — which is good news for media defendants facing lawsuits by entertainers. See *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055 (C.D. Cal. 2002) (holding that television actress with limited fame was a general purpose public figure because of the nature of her profession).

User Posed As Actress

Christianne Carafano, who uses the stage name Chase Masterson (“Leeta, the D’abo girl” in *Star Trek: Deep Space Nine*), sued Lycos and its subsidiaries, Metrosplash.com, Inc. and Matchmaker.com, Inc., for libel, invasion of privacy for disclosure of public facts, appro-

(Continued on page 38)

Communication Decency Act Protects Internet Dating Service

(Continued from page 37)

priation of her right of publicity, and negligence. Carafano contended that Lycos was responsible for a fabricated dating profile that had been posted by an unknown person on the Matchmaker service.

Matchmaker maintains a database of personal profiles posted by members, including trial members who receive free access for several weeks. To become a member, a person must select a “community” (focusing on a particular city or special interest) and complete a questionnaire of up to 62 multiple-choice questions. A member also must answer at least one of a series of essay questions, and may post up to 10 photographs. The answers to the questions, and the optional photographs, become the data that makes up the member’s “profile.” Membership is anonymous.

Matchmaker does not review the text of profiles prior to posting. As soon as a member completes and submits his or her questionnaire on-line, the answers are automatically formatted into a profile that is made available to other members of the community.

On October 23, 1999, an unknown person posted a profile, under the name “Chase529,” on Matchmaker’s Los Angeles community. Matchmaker’s records show that the profile was posted, and subsequently modified one time, by a person using computer terminals in Europe. The profile included four photographs of Carafano. The answer to an essay question contained plaintiff’s home address.

Carafano alleged that other essay answers and the answer to a multiple-choice question falsely characterized her as licentious. The profile also included an e-mail address which, when contacted, sent out an automatic reply that included a sexual taunt and Carafano’s home telephone number.

Carafano testified at deposition that she received obscene phone calls and a threatening fax because of the false profile, and was compelled to flee her home for several months for fear for her safety. She also testified that she became so distressed that she was unable to work as an actress for about a year.

CDA Immunity Invoked

At the outset of the litigation, Lycos moved to dismiss Carafano’s claims, arguing that it was immune under the CDA, which provides that “[n]o provider or user of an

interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). The CDA defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server” *Id.* § 230(f)(2). Judge Moreno denied the motion, holding that the CDA applied only to Internet service providers, and not website-based interactive computer services such as Matchmaker.com. (This limited view of the CDA’s scope has since been rejected by appellate courts that have considered the question, most recently by the Ninth Circuit in *Batzel v. Smith*, 333 F.3d 1018, 1030 & n.15 (9th Cir. 2003)).

After discovery, Lycos moved for summary judgment, again pursuant to the CDA. Lycos also moved for summary judgment on the alternative ground that Carafano was a public figure and, because Matchmaker did not review users’ postings before they became available on the service, it could not have known that the Carafano profile was false or probably false. Judge Tevrizian (to whom the case was assigned after Judge Moreno was appointed to the California Supreme Court), agreed with Lycos that the Matchmaker service was an “interactive computer service,” as defined by the CDA.

But Judge Tevrizian went on to conclude that the process by which the member profiles are created — through the use of multiple-choice questions and specific essay questions — made the service an “information content provider,” and therefore unable to claim immunity from publisher liability under section 230(c)(1). *See* 47 U.S.C. 230(f)(3) (an “information content provider” is someone who “is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service”).

Judge Tevrizian then went on to the alternative public figure-no actual malice argument, and granted summary judgment to Lycos. Carafano appealed, contending, among other things, that Matchmaker delayed removing the fabricated profile after being contacted by her assistant, and this constituted actual malice.

(Continued on page 39)

Communication Decency Act Protects Internet Dating Service

(Continued from page 38)

Ninth Circuit Rules For Lycos

In urging the Ninth Circuit to affirm the judgment, Lycos raised the CDA *again* — this time, successfully. Lycos also argued that the District Court correctly held that Carafano was a public figure and there was no actual malice.

After oral argument on June 2, 2003, in the *Carafano* case, the Ninth Circuit decided *Batzel*, which represented the court's first opportunity to interpret the CDA. In *Batzel*, the court held that the distributor of an Internet newsletter fell within the scope of section 230(c), but remanded the case because there was evidence that the third party who provided the allegedly false information that was included in defendant's newsletter did not intend for it to be posted on the Internet. *Batzel*, 333 F.3d at 1034. In addressing the CDA's scope, the Ninth Circuit held that the selection of content and minor editing of the on-line newsletter did not make the editor a "content provider" of the allegedly false statements. *Id.* at 1031.

Given this, the Ninth Circuit had little trouble applying the CDA's immunity to the Matchmaker service. Judge Tevrizian had concluded that Matchmaker shaped the content of the user profiles by providing the questions that, when answered, generated the profiles, and therefore participated in the "creation or development" of the false Carafano profile. This reasoning was rejected by Ninth Circuit Judges Sidney R. Thomas and Richard A. Paez and Nevada District Senior Judge Edward C. Reed, Jr. (sitting by designation):

Doubtless, the questionnaire facilitated the expression of information by individual users. However, the selection of the content was left exclusively to the user. The actual profile "information" consisted of the particular options chosen and the additional essay answers provided. Matchmaker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph. Matchmaker cannot be considered an "information content provider" under the statute because no profile has any content until a user actively creates it. *Carafano*, 339 F.3d at 1124.

The use of multiple choice questions and the formatting of the member's answers into a profile that could be searched also did not turn Lycos into a co-author of the profile or, as Carafano argued, "a 'developer' of the 'underlying misinformation,'" the court said. "Without standardized, easily encoded answers, Matchmaker might not be able to offer these services and certainly not to the same degree," Judge Thomas wrote. "Arguably, this promotes the expressed Congressional policy 'to promote the continued development of the Internet and other interactive computer services.'" 47 U.S.C. § 230(b)(1). *Carafano*, 339 F.3d at 1125.

Finally, the Ninth Circuit made clear that in evaluating a claim implicating the CDA, a court must look at the specific information that is alleged to be false, *i.e.*, an interactive computer service might be a "content provider" of some information, but, by making *it's* content available on the Internet, it does not become liable for *other* content on the service's site that is provided by third parties. Judge Thomas wrote:

[E]ven assuming Matchmaker could be considered an information content provider, the statute precludes treatment as a publisher or speaker for "any information provided by *another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). The statute would still bar Carafano's claims unless Matchmaker created or developed the particular information at issue.

Id. at 1125. In other words, a web posting can be a mix of protected and unprotected content, and a court should not consider all of the content as a combined whole, causing the service to lose its immunity under the CDA for third-party material because of its own contribution.

Mr. Alger is a partner at Quinn Emanuel Urquhart Oliver & Hedges LLP in Los Angeles. He represented Lycos, Inc. in the Carafano case, in the trial court and on appeal. Plaintiff was represented on appeal by Stephen F. Rhode and Mechele M. Berencsi of Rhode & Victoroff in Los Angeles.

Injunction Barring Posting of Trade Secrets on the Internet Held Not to Violate First Amendment

By Robert G. Sugarman and Geoffrey D. Berman

On August 25, the California Supreme Court held that a properly issued preliminary injunction barring publication of wrongfully obtained trade secrets is not a violation of the First Amendment of the United States and California Constitutions. *DVD Copy Control Ass'n v. Bunner*, 2003 WL 21999000, 4 Cal. Rptr. 3d 69 Cal., 2003. The holding has implications beyond California because the injunction was issued pursuant to a provision of the California Trade Secrets Act, some version of which has been adopted by many states.

The Right to Publish v. The Right to Protect

The case concerns Andrew Bunner, who, in the Fall of 1999, posted on the Internet a computer code allowing users to decrypt data on DVDs containing copyrighted motion pictures.

Utilizing a system called the Content Scramble System (CSS), the copyrighted motion picture content on DVDs is encrypted to prevent unlawful copying. Using CSS, licensed DVD players automatically decrypt the data, allowing viewing of the motion picture. The program posted on the Internet by Bunner and others – called DeCSS – both allows the motion picture to be viewed on unlicensed players and facilitates unauthorized copying and distribution without compensation to the artists and producers who created them.

DVD Copy Control Association (DVD CCA) – a trade association composed of licensees of the technology in the motion picture, computer, and consumer electronics industries – filed suit in California shortly after DeCSS was posted and moved preliminarily to enjoin postings of the code, which contains DVD CCA's trade secrets, including algorithms needed to decrypt the DVD data. The court granted the motion.

Bunner (the only defendant to have appeared on the merits of the case) appealed, claiming that the preliminary

injunction was a violation of his First Amendment rights because it amounted to an illegal prior restraint on publication. The Court of Appeal for the Sixth District agreed and vacated the injunction, holding that DeCSS was pure speech and that the injunction violated Bunner's First Amendment rights. *DVD Copy v. Bunner*, 113 Cal. Rptr. 2d 338, Cal. App. 6th Dist., 2001.

The California Supreme Court granted DVD CCA's petition for review and overturned that ruling. In its appeal to the California Supreme Court, DVD CCA had a broad range of amicus support, ranging from the Recording Industry Association of America, the Director's Guild, the Screen Actor's Guild, Microsoft, AOL-Time Warner and the Attorney General of California (who participated in the oral argument as well).

**The Court applied
"intermediate scrutiny," under
which the injunction must
"burden no more speech than
necessary to serve a significant
government interest."**

Is Computer Code Speech?

The Court first held that computer code is speech, and therefore is entitled to First Amendment protection. In that regard, the Court observed that just as only English speakers will understand English speech, only those versed in computer code will understand speech in that language. But it is speech nonetheless.

computer code will understand speech in that language. But it is speech nonetheless.

Level Of Scrutiny

The Court then turned to the question of what level of First Amendment scrutiny to apply. The Court's analysis turned on whether the injunction at issue was content based or content neutral.

Here, the Court ruled the injunction was content neutral because it was not aimed at the content (*i.e.* the message or subject-matter) of the speech. Rather it was aimed at protecting DVD CCA's property. Bunner was still free to comment on and criticize the encryption system so long as he did not publish the trade secrets. Thus, the Court applied "intermediate scrutiny," under which the injunction must "burden no more speech than necessary to serve a significant government interest."

(Continued on page 41)

Injunction Barring Posting of Trade Secrets on the Internet Held Not to Violate First Amendment

(Continued from page 40)

The Significant Government Interest

The Court held that the injunction was properly crafted to protect a significant government interest – the enforcement of trade secret laws which encourage innovation by allowing inventors to reap the fruits of their labor. The Court also noted that by punishing the unauthorized use of another's proprietary information, the trade secret laws encourage commercial ethics. The Court concluded that the injunction at issue was a proper way to protect these interests because preventing valuable data from unauthorized distribution is "the very definition of the property interest."

The Court rejected Bunner's argument that he should be immune from the injunction because he himself did not obtain the trade secrets by improper means. The trade secrets were initially posted on the Internet by a Norwegian named Jon Johansen. The Court held that since, as found by the trial court, Bunner either knew or should have known that the trade secrets were illegally obtained, the injunction could be applied to him. The Court also found that because the injunction did not concern or prevent dissemination of information of public concern, it did not implicate the "core purpose of the First Amendment."

Finally, the Court held that the injunction is not an unlawful prior restraint. Because the injunction is content neutral and addressed Bunner's previous publication of the trade secrets, it was free from the heavy presumption against prior restraints.

Final Disposition

This decision by California's highest court does not end the matter. The Court assumed that the injunction had been properly issued – an issue not reached by the Court of Appeal. The Court, therefore, remanded the case to the Court of Appeal to consider this issue. Bunner is likely to argue that DeCSS had been so widely disseminated at the time the preliminary injunction was issued that it was no longer a trade secret, and therefore not entitled to protection. The trial court rejected that argument at the time the injunction was issued on the grounds that DVD CCA had acted expeditiously and should not, therefore, be denied relief.

Robert G. Sugarman is a partner and Geoffrey D. Berman an associate at Weil, Gotshal & Manges LLP, which represented DVD CCA.

Order Now!

**MLRC 50 State Survey:
EMPLOYMENT LIBEL AND PRIVACY LAW 2004**

TOPICS INCLUDE: *Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort*

\$175

**For ordering information on the most current editions,
go to www.medialaw.org.**

On-Line Business Has Sufficient Contacts for California Jurisdiction

In *Gator.com Corp., v. L.L. Bean, Inc.*, 2003 WL 22038396 C.A.9 (Cal.), 2003, filed on September 2, the Ninth Circuit Court of Appeals ruled that online retailer L.L. Bean, by way of its internet-based “virtual store,” has sufficient contacts with the state of California to support the assertion of general jurisdiction over the company. The ruling restores a declaratory judgment action initiated by pop-up advertiser Gator.com. against L.L. Bean in the Northern District Court of California.

Gator.com develops and distributes software to consumers who purchase goods on the Internet. When a user visits a website, the so-called “Gator program” analyzes the Uniform Resource Locator (“URL”) associated with that website to determine whether the URL has been pre-selected. If the program identifies the URL as a pre-selected site, it displays a pop-up window offering an advertisement coupon. Gator users who visit L.L. Bean’s website are offered coupons for clothing competitor Eddie Bauer in the form of a pop-up window that partially obscures the L.L. Bean website.

In response to a 2001 cease-and-desist letter sent by L.L. Bean, Gator filed a declaratory judgment action in the Northern District Court of California requesting a judgment that Gator’s program does not infringe or dilute any trademark held by L.L. Bean and that it does not constitute unfair competition, fraud or false advertising. L.L. Bean countered by filing a motion to dismiss for lack of personal jurisdiction. District Court Magistrate Judge Maria-Elena James granted the motion. *Gator.com, Corp. v. L.L. Bean, Inc.*, 2001 WL 1528393 (N.D.Cal. Nov 21, 2001). Gator appealed.

Now, in a decision written by Judge Warren J. Ferguson, the Ninth Circuit has overturned the district court dismissal. The Circuit court held that L.L. Bean’s contacts with California through mail-order and internet-based commerce in the state are sufficient to support the assertion of general personal jurisdiction.

Relying on, while simultaneously distinguishing this case from, *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082 (9th Cir. 2000), the court applied a “sliding

scale” test for internet companies. This test requires that the party in question clearly does business over the internet and that the internet business contacts with the forum state be substantial or continuous and systematic. The standard is one of “approximate presence” rather than actual presence; factors to be considered in this analysis include whether defendant solicits or engages in business in the state, serves the state’s markets or makes sales in the forum state.

In this case, the Ninth Circuit based its decision on the collection of several facts: in 2000, L.L. Bean’s website accounted for over \$200 million, or 16 percent of the company’s total revenue. Although L.L. Bean is not authorized to do business in California, the company generated about six percent of its total sales there.

The court, however, accentuated that mere sales, regardless of magnitude, did not justify asserting jurisdiction over the case. The court pointed out that in addition to selling products to California residents, L.L. Bean: maintains online accounts for customers residing in Cali-

fornia; advertises in national print and broadcast that include California; and maintains relationships with numerous vendors in California.

Counsel: For Plaintiff-appellant (Gator.com): Michael Traynor (argued), SF, California. Cooley Goodwood (appeared only), Reston, Va. And Brian E. Mitchell, SF, Cal. For Defendant-appellee (L.L. Bean): Peter J. Brann, Lewiston, Maine.

The Circuit court held that L.L. Bean’s contacts with California through mail-order and internet-based commerce in the state are sufficient to support the assertion of general personal jurisdiction.

2004 NAA/NAB/MLRC CONFERENCE

Alexandria, Virginia
September 29, 30 and October 1, 2004

**Sponsorships for the 2004
Conference are being solicited.**

Any firm interested in providing
underwriting for the Conference
should contact Sandy Baron at MLRC.

Survey Seeks to Identify Concerns Over Internet Jurisdiction

By Jon Hart and Steve Blumenthal

In August 2003, the American Bar Association and the International Chamber of Commerce, an international business organization based in Paris ("ICC"), distributed an Internet jurisdiction survey to hundreds of companies in 29 countries. The goal of the survey is to examine the practical effects of Internet jurisdiction concerns on companies worldwide.

Survey participants have expressed their intention to provide the survey results to the European Commission ("EC") and the Hague Conference on Private International Law. The EC and the Hague Conference are pursuing legislative initiatives on jurisdiction and international law. The ICC and others who helped craft the survey want these legislative initiatives to apply the "country of origin" principle of jurisdiction, under which the law of the country in which a company is established governs non-contractual disputes arising from online content or services provided by the company.

Background

Rome II

On July 22, 2003, the EC approved a regulation concerning the applicable law for non-contractual obligations in situations involving a choice between the laws of different countries (the so-called Rome II regulation). The EC has submitted the Rome II regulation to the European Council for adoption as a European Union regulation.

The Rome II regulation provides that, in general, the law applicable to a non-contractual obligation arising out of a tort is the law of the country in which the loss is sustained. The Rome II regulation further provides that the law applicable to a non-contractual obligation arising from a violation of private or personal rights (including defamation) is the law of the country in which the loss is sustained.

The EC adopted the Rome II regulation over the objections of the Media Law Resource Center (MLRC), the ICC and a large number of other media and business organizations. In its October 16, 2002, comment letter to the EC,

the MLRC said that the Rome II regulation would chill public discourse and allow the most restrictive defamation laws in Europe to dictate the way publishers operate through the European Union.

In an open letter to the member states of the European Union posted on the ICC website, the ICC has requested that the member states urge the EC to re-evaluate the Rome II regulation.

Hague Convention

Since 1997, the Hague Conference has been negotiating and drafting a multilateral treaty entitled "the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters" (the Hague Convention). The Hague Convention is intended to establish international principles on jurisdiction and applicable law.

Under the latest draft, the Hague Convention applies to all civil and commercial matters, with certain delineated exceptions. With respect to actions arising in tort, Article 10 of the draft Hague Convention provides that a plaintiff may bring an action in the jurisdic-

tion in which the act or omission that caused injury occurred or in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of such nature in such jurisdiction.

The draft Hague Convention also provides that a plaintiff may bring an action in tort in a jurisdiction in which, or towards which, the defendant has engaged in frequent or significant activity, provided that the claim arises out of that activity and the overall connection of the defendant to that jurisdiction makes it reasonable that the defendant could be subject to suit in that jurisdiction. The draft Hague Convention includes an exception that provides that the foregoing jurisdiction provisions do not apply when the defendant has taken reasonable steps to avoid acting in or directing activity into the jurisdiction.

In an August 19, 2003 letter, the Hague Conference Secretary General, Hans van Loon, announced that the draft Hague Convention will be submitted to a special

(Continued on page 44)

The ICC and others who helped craft the survey want these legislative initiatives to apply the "country of origin" principle of jurisdiction.

Survey Seeks to Identify Concerns Over Internet Jurisdiction

(Continued from page 43)

commission to be convened in December 2003. Comments on the Hague Convention must be submitted before November 1, 2003.

The Survey

Scope

The Internet jurisdiction survey seeks to identify when Internet jurisdiction issues emerge as serious concerns for companies operating online, which issues pose the greatest concern and how companies are responding to these issues. The survey is being distributed to small, medium and multinational companies in 29 countries in North America, South America, Europe, Asia, Africa and the Middle East.

The survey asks in-house counsel and their advisors to identify jurisdictional concerns and to identify how their companies have adjusted the way they do business in response to these jurisdictional concerns. Each respondent is asked to describe her company's presence on the Internet (for example, whether the website is global or country-specific and whether products and services are actively promoted and sold through the website); whether her company has altered or blocked the content or services offered by its website in certain jurisdictions; if applicable, how and why her company actively refrains from interacting with certain jurisdictions (for example, through user registration); and whether the terms of use of the company website specify a choice of law and choice of forum.

Use of Survey Results

At the 2003 Winter Working Meeting of the Cyberspace Law Committee of the Business Law Section of the ABA, those orchestrating the Internet jurisdiction survey project stated their expectation that the survey results will help steer the Rome II regulation and the Hague Convention towards adopting the country of origin jurisdictional princi-

ple in non-contractual disputes. Michael Hancock, a co-chair of the project and co-chairman of the ICC task force on jurisdiction and applicable law, said that the ICC expects the survey results to demonstrate the chilling effect caused by the aggressive assertion of jurisdiction and applicable law in business-to-consumer e-commerce. The ICC intends to present the survey results to the EC.

The survey's initial findings are anticipated to be released in the middle of November 2003. The survey findings will be used to develop a Internet jurisdiction issues best-practices guide for companies and their advisors. A workshop on Internet jurisdiction issues is currently slated for the ABA Business Section Spring Meeting in April 2004.

For more information, see:

- The ABA press release regarding the Internet survey: <http://www.abanet.org/media/aug03/080403.html>
- The ICC request for re-evaluation of the EC Rome II regulation proposal: <http://www.iccwbo.org/law/jurisdiction/rome2/index.asp>
- The EC press release regarding the Rome II regulation proposal: http://europa.eu.int/comm/justice_home/news/intro/news_220703_1_en.htm
- The home page of the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters: <http://www.hcch.net/e/workprog/jdgm.html>

Jon Hart is a member in the Washington, D.C. office of Dow, Lohnes & Albertson, PLLC. Steve Blumenthal is an associate in the Atlanta office of Dow, Lohnes.

The survey asks in-house counsel and their advisors to identify jurisdictional concerns and to identify how their companies have adjusted the way they do business in response to these jurisdictional concerns.

**TO RECEIVE THE
MEDIALAWLETTER BY E-MAIL
(Or Add Others From
Your Organization to Our List)**

**Please Contact
Kelly Chew
kchew@ldrc.com**

UPDATE:**Pennsylvania Attorney General to Halt Secret Prior Restraint Orders**

Confronted with a federal lawsuit filed by the Washington-based Center for Democracy & Technology (“CDT”), the American Civil Liberties Union (“ACLU”) of Pennsylvania, and Plantagenet Inc., a Pennsylvania based ISP, Pennsylvania’s attorney general has elected to stop sending secret censorship orders that force Internet service providers (“ISPs”) to block access to child porn Web sites. Under the court-approved agreement between the two civil liberties groups and state Attorney General Mike Fisher, the attorney general’s office must now notify the plaintiffs no less than five days before requesting a court order to block a website.

A Pennsylvania statute passed in 2002, entitled “Internet Child Pornography,” sets forth a formal procedure that requires the state attorney general to apply for a court order before sending notice to an ISP that it should block access to that website that contains child pornography. Pursuant to the statute, if an ISP fails to remove access to the website that ISP faces misdemeanor charges and a fine. Upon subsequent offenses, an ISP may face felony charges along with stiffer fines and possible imprisonment. *See MLRC MediaLawLetter*, July 2003, at 51.

Despite these state regulations, Attorney General Fisher developed an informal system whereby his office would bypass seeking a court order and send notices to ISPs without first taking judicial action. According to CDT, the Attorney General has issued over three hundred orders to date requiring that specific web sites be blocked.

On September 9, the CDT, ACLU of Pennsylvania and Plantagenet filed a request for a temporary restraining order in the Eastern District Court of Pennsylvania to stop the Pennsylvania Attorney General’s practice of imposing secret censorship orders. The court granted the TRO based on an agreement between the parties. The Attorney General has promised to continue pressuring suspect websites, but this time he will adhere to the statutes as written.

Litigation on the matter is still pending, however. Plaintiffs are seeking to have the 2002 Pennsylvania statute declared unconstitutional. The challenge argues that the Pennsylvania law is a prior restraint on speech that violates the First and Fourteenth Amendments and the Commerce Clause of the Constitution.

To Be Published Early 2004!

MLRC 50 State Survey:**EMPLOYMENT
LIBEL AND
PRIVACY LAW 2004**

TOPICS INCLUDE: *Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort*

\$175

**For ordering information
on the most current
editions, go to
www.medialaw.org.**

Courts Continue Trend Toward Limiting Personal Jurisdiction In Internet Cases

Fourth Circuit and New York Federal District Court Follow Reasoning of Young v. New Haven Advocate

By Robert D. Lystad

In July, both the U.S. Court of Appeals for the Fourth Circuit and the U.S. District Court for the Southern District of New York followed the reasoning of the Fourth Circuit's decision in *Young v. New Haven Advocate*, 315 F.3d 256, 262 (4th Cir. 2002), in holding that maintaining jurisdiction based on an out-of-state defendant's Internet activity requires that the activity be intentionally targeted at or directed to the forum state.

The Fourth Circuit decision of *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers*, 2003 U.S. App. LEXIS 13443 (4th Cir. July 2, 2003), 334 F.3d 390 (C.A.4 (Md.), 2003) affirmed the dismissal of a trademark infringement action for lack of personal jurisdiction. The court de-

termined that the plaintiff, a Maryland corporation, could not satisfy its burden to establish jurisdiction in Maryland over the defendant, a Chicago corporation, based solely on the fact that the defendant's website was accessible in Maryland and that the defendant maintained a business relationship with a Maryland-based web hosting company.

In *Realuyo v. Villa Abrille*, 2003 U.S. Dist. LEXIS 11529, 2003 WL 21537754 (S.D.N.Y. July 8, 2003), the Southern District held that it could not assert personal jurisdiction in a libel action over the defendants, all residents of or corporations in the Philippines, based merely on the posting of an article that allegedly defamed a New Jersey resident who practiced law in New York. The court found that publication on the Internet alone was insufficient to assert jurisdiction because there was "no prima facie showing that the defendant[s] posting was directed towards the potential New York audience so as to defame the plaintiff in the forum state." *Realuyo*, 2003 U.S. Dist. LEXIS 11529 at *31 (citing *Young*, 315 F.3d at 263).

When it issued its *Young* decision in December 2002, the Fourth Circuit became the first federal appeals court to hold that the fact that allegedly defamatory information is accessible in a specific geographic location via the Internet is not by itself sufficient to support jurisdiction against out-of-state defendants. Mere weeks after the *Young* decision was issued, the Fifth Circuit held similarly in *Revell v. Lidov*, 317 F.3d 467, 475-76 (5th Cir. 2002), concluding that in order to establish specific jurisdiction in an Internet defamation case, a plaintiff must have knowledge of the particu-

lar forum in which the plaintiff's reputation will be harmed, and the allegedly defamatory article or its sources must in some way connect with the forum state.

The decisions in *Carefirst* and *Realuyo* signal that the trend that began with *Young* and *Revell* is con-

tinuing, paving the way toward establishing more definitive, consistent answers to jurisdictional questions in Internet-related cases.

Carefirst: The District Court Decision

Carefirst of Maryland ("Carefirst"), one of the country's largest health care insurance companies, is incorporated in and has its principal place of business in Maryland. Carefirst brought suit in the U.S. District Court for the District of Maryland, alleging infringement and dilution of its trademark by Chicago-based Carefirst Pregnancy Centers ("CPC"), a non-profit, evangelical pro-life advocacy organization, which has its principal place of business in Illinois. Carefirst alleged that CPC selected the name "Carefirst" despite having notice of both Carefirst's federal registrations for the "Carefirst" name as well as its common law use of the name.

(Continued on page 47)

The decisions in Carefirst and Realuyo signal that the trend that began with Young and Revell is continuing, paving the way toward establishing more definitive, consistent answers to jurisdictional questions in Internet-related cases.

Personal Jurisdiction In Internet Cases

(Continued from page 46)

By the time the suit was filed, CPC had entered into a contract with a web hosting and development company, NetImpact, Inc., incorporated in Delaware and headquartered in Maryland, from which CPC purchased several Internet domain names used to direct Internet users to CPC's own website. Carefirst also named NetImpact as a defendant in its suit.

In granting CPC's motion to dismiss for lack of personal jurisdiction, District Judge Catherine C. Blake found that CPC operated primarily in Chicago; had no office, telephone listing, employees, agents or sales representatives in Maryland; had never directly solicited funds from Maryland residents; and had received minimal charitable contributions from Maryland residents, nearly all of which had been received by mail rather than via CPC's website. Thus CPC's sole contact with Maryland, the court found, stemmed from its operation of an Internet website accessible from anywhere in the world through any one of several web addresses.

In sum, the District Court found that CPC's only connections with Maryland arose from the fact that its website could be accessed from Maryland, and that the website's host was a Maryland-based corporation. On the basis of those two factors alone, the court concluded that CPC did not have sufficient contacts with Maryland to support personal jurisdiction in a Maryland court.

4th Circuit Applies Young In Carefirst

In its ruling, a three-judge panel of the Fourth Circuit unanimously affirmed the District Court's dismissal of the case for lack of personal jurisdiction. The court said that under *Calder v. Jones*, 465 U.S. 783 (1984) and its decision in *Young*, Internet communication must be purposefully directed into a forum with the express intent of engaging in business or other interactions within that state in particular.

Carefirst argued that CPC expressly aimed its trademark-infringing conduct at the forum state of Maryland by setting up a semi-interactive website that was accessible in Maryland and maintaining a relationship with a Maryland-based web hosting company. It further argued that CPC possessed the requisite intent, under *Calder*, of conducting commercial activities or directing business toward Maryland CPC's acceptance of donations from Maryland residents, its submission of e-mails to Maryland residents who make contributions, and its establishment of a toll-free telephone number over which Maryland residents could make donations or obtain other counseling services.

The court rejected Carefirst's arguments, however, finding that under *Young*, the fact that CPC engages in

these activities alone was not enough, and CPC must have also acted with the "manifest intent" of targeting Marylanders via these activities in order to be subject to personal jurisdiction in Maryland. *Carefirst*, 2003 U.S. App. LEXIS 13443 at *24 (citing *Young*, 315 F.3d at

Extending Calder to the present case, wrote Judge Koeltl, "would result in a defendant who simply places allegedly defamatory information on a passive internet web site being 'subject to personal jurisdiction in every State...'"

264). The court determined that whether CPC actually intended to target Maryland residents could be determined only from examining the character of CPC's website. In so doing, the court found that the only concrete evidence of online exchanges between CPC and Maryland residents was a single donation initiated by Carefirst's counsel, and that the website had a "strongly local character," targeting Chicago residents.

The court concluded, therefore, that CPC could not have reasonably anticipated being haled into a Maryland court on the basis of setting up a "generally accessible" website and doing business with a web hosting company that "merely facilitated the purchase of CPC's domain names and rented CPC space on its servers," which were not even located in Maryland. The *Carefirst* decision was written by Judge Robert B. King and joined by Chief Judge William W. Wilkins and Judge Diana Gribbon Motz.

(Continued on page 48)

Personal Jurisdiction In Internet Cases

(Continued from page 47)

The Realuyo Decision

In *Realuyo*, the U.S. District Court for the Southern District of New York considered whether the plaintiff, a New Jersey resident with place of business in New York, could establish personal jurisdiction in New York over several foreign defendants, including the writer of the allegedly defamatory article, the speaker (a former Philippine ambassador to Argentina) of the allegedly defamatory statements contained in the article, the Philippine newspaper that published the article, and the Internet news service that posted the article online. All defendants were citizens of the Philippines or companies incorporated and headquartered in the Philippines. The defendants moved to dismiss the complaint for lack of personal jurisdiction.

District Judge John G. Koeltl found that none of the defendants were subject to jurisdiction in the New York courts. With regard to the Internet news service, INQ 7, the court noted that its website was maintained on computer servers located in the Philippines and that all of the content for the site was prepared in the Philippines. In addition, INQ 7 owned no property, employed no agents, and maintained no bank accounts in New York. Of the more than 6,000 registered users of the website, 332 listed a New York state address, and INQ 7 itself maintained business contacts with only two New York state corporations: an advertising agency that occasionally purchased space on the website and a media company that purchased news content from INQ 7 for distribution to other news companies.

Judge Koeltl determined that the actual business transactions that INQ 7 maintained with New York businesses were not such that the claim of defamation could be said to arise from those relations sufficient to establish a "substantial relationship between the transaction and the claim asserted" under *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 43 (N.Y. 1988).

The court next considered whether the mere availability of the article on INQ 7's website, where it could be downloaded in New York at no cost, and the existence of 332 non-paying New York site registrants, could be considered transaction of business in New York and whether a claim of defamation arose from those contacts.

The court held that the passive nature of the website, the comparatively few interactions of INQ 7 with subscribers

located in New York, and the lack of any allegation of purposeful contact on the part of the Internet news service with New York or its residents all contributed to a finding that INQ 7 could not reasonably have expected to be haled into court in New York based on the posting of an allegedly defamatory article. Extending *Calder* to the present case, wrote Judge Koeltl, "would result in a defendant who simply places allegedly defamatory information on a passive internet web site being 'subject to personal jurisdiction in every State...'" *Realuyo*, 2003 U.S. Dist. LEXIS 11529 at *31-32 (quoting *Young*, 315 F.3d at 263).

In *Carefirst*, the plaintiff was represented by Ruth Mae Finch of Stevens, Davis, Miller & Rosher LLP of Washington, D.C. The defendants were represented by Frederick Christopher Laney of Niro, Scavone, Haller & Niro of Chicago. In *Realuyo*, the plaintiff was represented by Kenneth F. McCallion of McCallion & Associates LLP of New York. The speaker of the allegedly defamatory statement was represented by John R. Keough of Wawsche, Sheinbaum & O'Regan PC of New York. The Philippine media defendants were represented by Meichelle R. MacGregor of Cowan, Liebowitz & Latman PC of New York.

Robert D. Lystad is a partner in the Washington office of Baker & Hostetler LLP and served as counsel to the Tribune Co. media defendants in Young v. New Haven Advocate. Michael Powell, a Baker & Hostetler LLP summer associate and current Harvard Law School student, assisted with this article.

MLRC 2003 Annual Dinner Transcript Now Available

**"In the Trenches Revisited"
11/12/03**

***To view, please visit our
web site***

www.ldrc.com

Supreme Court Considers Scope of Freedom of Information Act Exemption

By Elaine J. Goldenberg

In the upcoming months, the U.S. Supreme Court will hear and decide *Office of Independent Counsel v. Favish*, No. 02-954, an important Freedom of Information Act (“FOIA”) case that raises issues of serious concern to journalists, writers, and other members of the public who wish to use the FOIA to obtain information in the possession of the federal government. At issue in the *Favish* case is a FOIA request for a number of photographs of the body of former Deputy White House Counsel Vincent Foster taken at the scene of his death – photographs that were an important part of the various government inquiries into the death, which occurred at a time when Foster was in possession of information involving ongoing investigations of high-level government officials. In deciding this case, the Court may well decide a number of questions that will have implications reaching far beyond the facts of the case itself:

- how broadly the “public interest” served by FOIA should be construed,
- whether the “personal privacy” interest protected by the statute extends beyond individuals actually discussed or depicted in government records to cover family members or other third parties, and
- how courts should go about balancing public and private interests in a particular case.

Exemption 7(c)

Although the FOIA embodies a general principle in favor of disclosure, it also includes nine specific exemptions that permit the government to withhold requested information under certain narrowly defined circumstances. One of these exemptions, exemption 7(C), protects from disclosure

“records or information compiled for law enforcement purposes, . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

5 U.S.C. § 552(b)(7)(C). This exemption requires the court to undertake a balancing of the public interest in disclosure of requested information against the countervailing interest in keeping that information private. See, e.g., *United States Dep’t of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 497 (1994). Under existing Supreme Court precedent, the public interest in this context is whether disclosure

“would she[d] light on an agency’s performance of its statutory duties or otherwise let citizens know what their government is up to.” *Id.*

In *Favish*, the government is relying on exemption 7(C) as the basis for its refusal to disclose the requested photographs. Supported by members of the Foster family, the government claims that the release of the photographs

Supported by members of the Foster family, the government claims that the release of the photographs would constitute an “unwarranted invasion” of the “personal privacy” not of Foster himself, but of Foster’s surviving relatives.

would constitute an “unwarranted invasion” of the “personal privacy” not of Foster himself, but of Foster’s surviving relatives, 5 U.S.C. § 552(b)(7)(C) – and, indeed, that there is no cognizable public interest at all in such a release. To support its argument, the government is urging the Court to adopt a restrictive test for determining whether there is a public interest to be weighed in the exemption 7(C) balance. According to the government, in cases in which the asserted public interest is one in exposing government misconduct, there is simply no interest in learning what the government is up to unless the requester has “identif[ied] new (as opposed to already refuted), credible, and objectively reasonable evidence of [government] misfeasance.” Gov’t Br. at 38, *Favish* (No. 02-954).

According to the government, in cases in which the asserted public interest is one in exposing government misconduct, there is simply no interest in learning what the government is up to unless the requester has “identif[ied] new (as opposed to already refuted), credible, and objectively reasonable evidence of [government] misfeasance.” Gov’t Br. at 38, *Favish* (No. 02-954).

Broad Exemption Would Impede the Press

The issues raised by the case are of significant importance to the news media, for which the FOIA is an important tool in ferreting out information found in government records. The government frequently asserts exemption 7(C) in response to requests for law enforcement records, a category that encompasses a wide variety of information that may be

(Continued on page 50)

Supreme Court Considers Scope of FOIA Exemption

(Continued from page 49)

of interest to the media and to the public at large. Although the FOIA is intended to ensure the “informed citizenry” that is “vital to the functioning of a democratic society,” a broadly interpreted exemption 7(C) could present a considerable obstacle to journalists, investigators, and writers who seek to disseminate such information to the citizenry. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also id.* (noting the need to “check against corruption and hold the governors accountable to the governed”). *See generally Estes v. Texas*, 381 U.S. 532, 539 (1965) (recognizing that the news media have been “a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences”).

Due to the importance of the issues involved, a number of media-related organizations filed amicus briefs in support of respondent Favish, arguing in favor of a narrow interpretation of exemption 7(C). The Reporters Committee for Freedom of the Press, along with seven other amici (including an organization that supports freedom-of-information coalitions in more than 30 states and a number of associations that represent reporters, editors, news executives, and communicators), filed a brief contending that the government’s proposed public interest test is inconsistent with the FOIA and that the significant public interest in disclosure of the photographs outweighs any privacy interest of Foster’s family, which is diminished by the extensive release of information about Foster’s death that has

already taken place. In addition, the Silha Center for the Study of Media Ethics and Law filed an amicus brief contending that the privacy interests protected by the FOIA do not encompass the third-party “survivor” interests upon which the government relies in this case.

The Court’s decision in the case is expected in 2004.

Theodore B. Olson, Solicitor General, Washington, D.C., for Petitioner.

Allan J. Favish, Santa Clarita, CA, for Respondent Favish.

James Hamilton, Swidler Berlin Shereff Friedman, LLP, Washington, D.C., for Respondents Sheila Foster Anthony and Lisa Foster Moody.

Deanne E. Maynard and Elaine J. Goldenberg, Jenner & Block, LLC, Washington, D.C., for amici Reporters Committee for Freedom of the Press, American Society of Newspaper Editors, Radio-Television News Directors Association, Society of Professional Journalists, Association of Alternative Newsweeklies, National Press Club, Investigative Reporters and Editors, Inc., and National Freedom of Information Coalition.

Jane E. Kirtley, Minneapolis, MN, for amicus Silha Center for the Study of Media Ethics and Law.

Parker D. Thomson, Hogan & Hartson, Miami, FL, for amicus Teresa Earnhardt.

Elaine J. Goldenberg is with Jenner & Block, LLC in Washington, D.C., and filed the amicus brief in this case on behalf of the Reporters Committee et al.

Now Available

50 State Survey 2003-2004: MEDIA PRIVACY AND RELATED LAW

With a special report on privacy and related law in the Federal Courts of Appeals.

TOPICS INCLUDE: *False Light • Private Facts • Intrusion • Eavesdropping • Hidden Camera • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Damages and Remedies • Relevant Statutes*

\$175

UPDATE: Kasky, Nike Settle After Supreme Court Revokes Cert.

Two months after the U.S. Supreme Court dismissed its grant of certiorari in the case as improvidently granted, the parties in *Nike v. Kasky* have reached a settlement of the litigation.

In May 2002, the California Supreme Court held that activist Marc Kasky could proceed with his suit alleging that statements, letters, press releases and other materials produced by Nike, Inc. in response to critics of its employment policies abroad constituted unfair competition and false advertising. See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002); see also *LDRC MediaLawLetter*, May 2002, at 3.

The U.S. Supreme Court agreed to hear the case on the question of whether such a suit was precluded by the First Amendment. *Nike, Inc. v. Kasky*, 537 U.S. 1099 (Jan. 10, 2003) (granting cert.). But after full briefing and oral argument, the court issued a *per curiam* order dismissing the appeal. *Nike, Inc. v. Kasky*, 123 U.S. 2554 (June 26, 2003) (dismissing cert. as improvidently granted); see *MLRC MediaLawLetter*, July 2003, at 7. Justices Breyer, Kennedy and O'Connor dissented.

This would have sent the case back to the California Superior Court for trial. But on Sept. 12 the parties announced that they had reached a settlement under which

Nike agreed to donate \$1.5 million to the Fair Labor Association, which will use the funds for training to improve workplace monitoring, education and economic development programs for workers, and development of international corporate responsibility standards. The programs will not specifically be targeted to Nike's workers. But Nike also agreed to continue its education and micro-loan programs for its workers.

The case had drawn interest from media and other groups because of its First Amendment implications. A brief from a coalition of 40 newspapers, magazines and media organizations, written by Kelli Sager, Bruce E.H. Johnson, P. Cameron DeVore, Eric M. Stahl, and Jeffrey L. Fisher of Davis Wright Tremaine LLP, was among several submitted to the Supreme Court by *amici* in the case.

Nike vice president and general counsel Jim Carter acknowledged the interest in a press release announcing the settlement, and stated that Nike would not issue its 2002 corporate responsibility report because of the continued threat of litigation under the California statute under which Kasky sued. See Cal. Bus. & Prof. Code §§ 17200 *et seq.* The release added that Nike "will continue to limit its participation in public events and media engagement in California."

Order now!

MLRC 50-STATE SURVEY 2003-04: MEDIA LIBEL LAW

With updated reports on libel law in the Federal Circuits and an outline of English libel law.

MEDIA LIBEL LAW TOPICS INCLUDE: *Defamatory Meaning • Opinion • Truth/Falsity • Fault • Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/Statutory Provisions*

\$175

For ordering information on the most current editions, including the 2002-2003 edition currently in stock, go to www.medialaw.org

“The Best” Websites for Media Lawyers

By Steven D. Zansberg

Even though the bursting of the dot.com bubble has caused Wall Street to question the economic viability of certain segments of e-commerce, the Internet remains a vast and ever-growing resource of information on *all* topics. For lawyers hoping to benefit from this seemingly boundless universe of free information, the task can be overwhelming. Moreover, because the Internet is continuously evolving, it is often difficult to “keep current” with the latest and best means by which to access this treasure trove of digital data.

This article has the ambitious objective of identifying, as of the time of publication, the best websites for media attorneys to find case law and other useful resources for use in our daily practice. Of course, this survey of sites is more selective than comprehensive (which is literally impossible). Identified below are a set of sites you may wish to “bookmark” or add to your list of “favorites.”

1. First Amendment Precedents:

The First Amendment Center at Vanderbilt University has assembled an extremely helpful First Amendment library that contains links to Supreme Court cases and other primary resources organized by topic. The index to the topics is available at <http://www.firstamendmentcenter.org/faclibrary/index.aspx>. A listing of Supreme Court cases relating only to press issues, organized by topic, can be found at http://www.fac.org/press/cases_resources_summary.aspx and by case name at http://www.firstamendmentcenter.org/faclibrary/libraryexpression.aspx?topic=press_freedoms.

2. More First Amendment Precedents:

Another helpful set of links to seminal First Amendment case law, organized by topic, can be found at http://www.bc.edu/bc_org/avp/cas/comm/free_speech/decisions.html. This is an internal page hosted by Boston College in connection with the book, *Freedom of Speech in the United States*, by Thomas L. Tedford and Dale A. Herbech. An overview of the book, including updates to its Table of Contents for the past three years, can be found at http://www.dc.edu/dc_org/avp/cas/comm/free_speech/.

3. Best One-Stop Shopping Site:

Without question, one of the most useful sites on the Web for the whole host of topics that are the focus of media

lawyers’ daily pursuits is the website of the Reporters Committee for Freedom of the Press at <http://www.rcfp.org/>. The Reporters Committee has made a tremendous investment of time and money to make its website extremely user-friendly and to provide invaluable resources including: a fully searchable guide to open records and open meetings laws; its First Amendment Handbook; “Can We Tape?,” a guide to surreptitious taping of conversations (organized by state); and its most recent addition, a state-by-state, and circuit-by-circuit guide to the reporter’s privilege. If you’re wondering if anyone has recently (or ever) encountered the same problem you’re facing (even in an unreported decision), simply enter the appropriate words in a search of the organization’s news archives at <http://www.rcfp.org/news/search.cgi>.

4. Helpful Narrative Annotations, Annual Update & Case Law:

FINDLAW, a general legal research and information site, contains a helpful set of annotations to the First Amendment, which are organized by topic and include hot links to Supreme Court cases, at <http://caselaw.lp.findlaw.com/data/constitution/amendment01/> - annotations. A helpful annual survey of media law developments can be found at The Media Institute’s website at <http://mediainstitute.org/ONLINE/FAM2003/toc.html>.

5. Supreme Court Cases, etc. on Media Law:

The Legal Information Institute at Cornell University also has a media law page at <http://www.law.cornell.edu/topics/media.html> which includes links to recent media law cases from the United States Supreme Court and from U.S. Circuit Court of Appeals. This site also has a search form for Supreme Court syllabi on free press issues from 1990 to the present, which can be found at <http://www4.law.cornell.edu/cgi-bin/empower?DB=SupctSyllabi&TOPDOC=0&QUERY00=media%20or%20newspaper%20or%20broadcast%20or%20internet&PROP00=t=b>.

6. Historical Texts:

For serious history buffs, there is a wonderful collection of historical documents (that you may use to pepper your brief to curry favor with Justice Scalia) at the Founders’

(Continued on page 53)

“The Best” Websites for Media Lawyers

(Continued from page 52)

Constitution website, http://press-pubs.uchicago.edu/founders/tocs/amendI_speech.html. Another wonderful collection of historic free speech documents can be found at the Boston College website at http://www.bc.edu/bc_org/avp/cas/comm/free_speech/historicdocuments.html.

7. **Broaden the View Finder:**

For general legal research, (not limited to First Amendment or free press case law), my personal favorite is American Law Sources Online, which lists all U.S. law at: <http://www.lawsource.com/also/usa.cgi?us1>. This extremely well-organized site allows access to case law from the United States Supreme Court & lower courts, United States Code, Code of Federal Regulations, rules of civil and criminal procedure, etc. Another helpful general legal research site is hosted by Washburn University School of Law at <http://www.washlaw.edu/searchlaw.html>. Ready access to federal law and all federal courts can be found at <http://www.thecre.com/fedlaw/default.htm>. A set of links to all federal courts, organized by circuit, can be found at the Federal Judiciary’s website at <http://www.uscourts.gov/allinks.html>. All 50 states’ statutes are available at <http://www.prairienet.org/~scruffy/f.htm>.

8. **FOIA:**

For lawyers interested in a free, online guide to the federal Freedom of Information Act and its exemptions, including case law applying and interpreting those exemptions, the U.S. Department of Justice “Guide to the Freedom of Information Act” is available at <http://www.usdoj.gov/oip/foi-act.htm>. Two other helpful guides to the FOIA can be found at the University of Missouri website at <http://foi.missouri.edu/laws.ht> and at the Reporter’s Committee website at <http://www.rcfp.org/foiact/index.html>.

“Website of the Month”

A “Website of the Month” column will be a regular feature of upcoming editions of the MediaLawLetter. Please send your suggestions for helpful websites to be featured here to szansberg@faegre.com. Thanks.

9. **Journalism Ethics:**

The two best websites for journalism ethics codes and materials are the Society of Professional Journalists site, <http://spj.org/ethics.asp> and the American Society of Newspaper Editors site, <http://www.asne.org/index.cfm?ID=387>.

10. **News About News Companies:**

To keep up with the latest developments within the news industry, you can visit the Associated Press’ Media News page at <http://www.ap.org/pages/indnews/>, *Editor and Publisher*: <http://www.editorandpublisher.com/editorandpublisher/index.jsp>, or [journalism.org](http://www.journalism.org/): <http://www.journalism.org/>. A collection of links to numerous other sites offering information and articles about the media can be found at http://dmoz.org/News/Media/Industry_News/.

11. **All The News That Fits:**

Although there are numerous wonderful sites that offer breaking news from all over the world, the following websites are particularly useful compendiums of existing news outlets’ websites: <http://www.crayon.net/using/links.html>. Other similar collections of news links are: <http://www.socsciresearch.com/r8.html>; and <http://www.blacksheepnews.com/>.

This list only scratches the surface of the “best” websites available for media law information. There are countless other extremely helpful sites, including those of the Media Law Resource Center <http://www.ldrc.com/>, the ABA Forum on Communication Law <http://www.abanet.org/forums/communication/home.html>, the Poyntner Institute <http://www.poynter.com>, and myriad other publications and organizations devoted to press freedoms and free speech issues more broadly defined. This is not to mention the plethora of other websites collecting actual newspapers and broadcast media sources, and information about related legal topics such as intellectual property, privacy, cyberlaw, censorship, FCC practice, etc.

My objective here was, in part, to inspire *you* to pass on your personal favorites to the MLRC.

Steven D. Zansberg is a partner in the Denver office of Faegre & Benson LLP.

Television Association Study Reports on Influence of TV

The Media Comparisons Study 2003, conducted by the Television Bureau of Advertising (the trade association for local television broadcasters), reported — not surprisingly — that television is the most watched, most relied upon, and most influential news source in terms of advertising when compared to the other major media — newspapers, Internet, magazines, and radio. See <www.tvb.org/rcentral/index.html> for Media Trends Study link (accessed on July 30, 2003).

Reach

The percentage of people reached by TV was in the high 80s-90% for all demographic breakdowns (including age, gender, education level, occupation, household income). In a total comparison with other media, 90% of those adults (18+ years of age) polled were reached by TV, 65.2% by newspapers, 72.8% by radio, 48% by magazines, and 51.1% by Internet. Both men and women tune into TV each day more than any other medium.

Time Spent

Adults spend many more minutes per day (258.4) watching TV than they do with any other major medium, with radio coming in a distant second at 120.7 minutes (32.4 minutes for newspapers, 18.3 minutes for magazines, and 65.8 minutes for Internet). Gender does not account for much of a difference.

Advertising

Adults find advertising on television to be significantly more authoritative than advertising in the other major media (48.5% said television ads were authoritative, with newspapers coming in a distant second at 26.3%).

81.8% of adults find television advertising to be much more influential than ads in other media, with newspapers a distant second at 8.5%.

Primary Source of News

43.6% of adults cite broadcast television as their primary source of news. 28.0% cite cable news networks, and newspapers came in third with 12.1% (radio with 9.2%, public TV with 3.9%, and Internet with 3.2%).

Broadcast and cable television were neck-and-neck for which medium is the most influential news source, with

46.6% citing broadcast television and 36.9% citing cable news networks. Newspapers came in third with 6.4%, public TV with 4.4%, radio with 3.7%, and Internet with 1.9%.

Broadcast and cable television are also neck-and-neck for which source adults turn to most for breaking news, with 45.6% citing broadcast television and 40.7% citing cable news networks. Radio came in third with 5.4%, Internet at 4.0%, public TV at 3.4%, and newspapers last at 0.9%.

As for the most exciting news source, 46.1% of adults cited broadcast television and 38.6% cited cable news networks. Radio came in third with 4.7%, followed closely by public television with 4.5%, newspapers with 3.3% and Internet with 2.8%.

Community Involvement

50.4% of adults cited broadcast television as the medium most involved in the community. Newspapers were second with 22.4%. Radio was third with 14.1%. Cable news networks were fourth with 6.3%, followed closely by public television with 5.3% and Internet with 1.5%.

Methodology

1,017 adults were surveyed via telephone (randomly selected using telephone number), 51.6% female and 48.4% male. To determine what occurs on a typical day, respondents were asked about their media usage “yesterday.” The following is a sample question:

Which of the following would you say is: (1) your primary news source (2) the source you turn to first for information about local weather, traffic and sports, (3) the information source you turn to first when a breaking news story is in progress, (4) the most influential source of news, (5) the most exciting source of news, (6) the media outlet that is most involved in your community? Major broadcast networks (such as ABC, CBS, Fox, NBC) and their affiliated stations, local independent television stations, cable news channels (such as CNN, CNBC, MSNBC, Fox News Channel and Headline News), public television stations, newspapers, radio stations, Internet.

[The order of the media was rotated in “all cases”.] See www.tvb.org/rcentral/index.html (accessed on July 30, 2003).

Survey Finds Increased Support for First Amendment Rights

The First Amendment Center, funded by the Freedom Forum, released the results of its State of the First Amendment Survey 2003, conducted by the Center for Survey Research and Analysis at the University of Connecticut. The Survey polled 1,000 adults nationwide in an effort to extrapolate the level of public support for First Amendment rights. Given the timing of the survey, it sheds light on post-9/11 views of civil liberties, especially in the midst of the war on terrorism and the war in Iraq. In addition, questions were asked regarding the FCC's vote to further deregulate media ownership rules.

The Survey can be downloaded at the First Amendment Center's website, www.firstamendmentcenter.org/about.aspx?item=state_of_First_Amendment_2003.

The survey is broken into several sub-categories, corresponding to primarily three of the First Amendment rights: free speech, free press, and freedom of religion. Those polled were asked questions regarding general orientations toward the First Amendment; freedom of speech; civil liberties during wartime; corporate ownership of media; and freedom of religion and the establishment clause.

All in all the First Amendment Center was pleased with the survey results, saying that "public support for First Amendment freedoms may be returning to pre-9/11 levels." *See Survey Foreward*, at 2.

General Attitudes Toward the First Amendment

Disheartening though it may be to those passionate about the First Amendment, most adults surveyed could not name all of the rights guaranteed within the amendment. When asked "Can you name any of the specific rights that are guaranteed by the First Amendment?" 16% were able to name freedom of the press; 63% named freedom of speech; 22% named freedom of religion; 2% named the right to petition; 11% listed the right of assembly/association; 21% named other rights; and 37% did not know or refused to answer.

A much higher percentage of people in 2003 than in 2002 disagreed with the statement, "The First Amendment goes too far in the rights it guarantees," 42% said they strongly disagreed and 18% said they mildly disagreed. Only 19% said they strongly agreed and 15% said they mildly agreed.

In 2002, 41% of those surveyed strongly agreed, 8% mildly agreed, while 32% strongly disagreed and 15% mildly disagreed.

Freedom of the Press

That said, there is less support for press freedom specifically. When asked generally about the press's freedom to do what it wants, 46% said they enjoy too much freedom, 43% said the freedom was about right, and 9% said too little.

Regarding government restrictions on press freedom, 48% said the press has the right amount of freedom, 36% said the press enjoys too much, and 13% said too little.

Indeed, when asked whether they agreed with the statement, "Newspapers should be allowed to publish freely without government approval of a story", 48% of respondents strongly agreed; 22% mildly agreed; 13% mildly disagreed; and 15% strongly disagreed.

War Coverage

Overall, those surveyed thought the news media did a good to excellent job covering the 2003 war in Iraq, with 28% rating the coverage excellent and 40% rating the coverage good. 21% rated it fair, while only 8% rated it as poorly covered.

But, when asked whether they agreed with the statement, "Newspapers should be allowed to freely criticize the U.S. military about its strategy and performance", 32% strongly agreed; 22% mildly agreed; 14% mildly disagreed; and 30% strongly disagreed.

Embedding reporters won a fairly enthusiastic response. 37% of those surveyed strongly favored the use of embedded reporters in war coverage; 28% said they mildly favored the practice; 12% mildly opposed; and 19% strongly opposed the practice.

However, a majority of those surveyed agreed that war reports should be subject to government censors. With regard to the statement, "The government should be able to review in advance what journalists report directly from military combat zones." 44% strongly agreed with the statement; 23% mildly disagreed; 15% mildly disagreed; and 15% strongly disagreed.

Respondents are concerned about the access to informa-

When asked generally about the press' freedom to do what it wants, 46% said they enjoy too much freedom, 43% said the freedom was about right, and 9% said too little.

Survey Finds Increased Support for 1st Amendment Rights

(Continued from page 55)

tion regarding the war on terrorism, with 48% indicating that there is too little access to information; 12% saying too much access; and 38% citing just about the right amount. However, the majority of those surveyed believe the media has not been too aggressive in asking government officials for information regarding the war on terrorism.

Freedom of Speech

Most of those surveyed (63%) think the amount of freedom Americans have to speak freely is just about right. 23% think Americans have too little freedom to speak freely, and 12% think there is too much freedom.

When asked whether they agreed with the statement, "People should be allowed to express unpopular opinions", 74% of those surveyed strongly agreed; 21% mildly agreed; 3% mildly disagreed; and 2% strongly disagreed.

Those surveyed disagree with the notion that law enforcement agencies should be allowed to monitor which books or other materials patrons check out of public libraries, as part of the war on terrorism. 48% strongly disagreed; 19% mildly disagreed; 14% mildly agreed; and 16% strongly agreed with the practice.

When asked whether the Constitution should be amended to prohibit burning or desecrating the American flag, 55% of respondents said it should not, while 44% said it should.

Freedom of Religion/Establishment Clause

Most of those surveyed (66%) believe Americans have the right amount of religious freedom, 24% thought too little, and 8% thought there was too much freedom of religion.

With respect to the recent Ninth Circuit ruling finding the phrase "one nation under God" unconstitutional, respondents were asked whether that school practice violated the constitutional principles of separation of church and state. 68% believed it did not violate the Constitution, while only 26% felt it did violate the constitutional principle.

Most surveyed support voucher programs, where the federal government provides vouchers or credits (to pay for costs) which parents could use to send children to non-public schools, including those with a religious affiliation. 40% strongly agreed with the practice and 22% mildly agreed. In opposition, 23% strongly disagreed while 12% mildly disagreed.

Media Consolidation

Has consolidation of media ownership decreased the number of viewpoints available? 52% said "yes", 24% thought the number was not affected by conglomeration, and 17% actually believe consolidation increases the number of viewpoints.

Overall, the majority of those surveyed (53%) believe consolidation decreases the quality of information available. 24% thought the quality would not be effected, and 19% believe there is an increase in quality. 44% of those surveyed believe the corporate owners have a great deal of control over the content of their news media; 24% think corporate owners wield a fair amount of control; 15% think there is not very much control; and 4% said there is no content control at all.

The FCC ownership deregulation policy met with opposition. 31% said they strongly oppose and 23% said they mildly oppose the policy. 19% said they strongly favor and 19% said they mildly favor the policy.

Public Schools

Overall, most surveyed thought that the American educational system did a fair or poor job of teaching students about First Amendment freedoms. 29% said "poor", 33% answered "fair", 25% thought "good", while only 6% thought the educational system did an excellent job of teaching First Amendment rights.

Results were somewhat mixed when respondents were asked about student expression on a public school campus. 38% strongly disagreed and 27% mildly disagreed that high school students should be prohibited from expressing their opinions about the war on school property during a period of active military combat. 19% strongly agreed and 14% mildly agreed that they should be prohibited.

However, there was nearly an even split as to whether school officials should be allowed to prohibit high school students from wearing T-shirts, armbands or other insignia expressing their opinions about the war on school property during a period of active military combat. 31% strongly agreed that students should be prohibited from wearing such materials, while 31% strongly disagreed. In the middle, 17% mildly agreed that they should be prohibited, while 19% mildly disagreed that they should be prohibited from such activity.

Judge Posner Skeptical About Reporters Privilege

By Eric S. Mattson

Breaking ranks with most Circuit Courts of Appeals, the Seventh Circuit has suggested, without quite saying so, that the First Amendment provides no special protection against subpoenas for reporters or authors. *McKevitt v. Pallasch*, Nos. 03-2753 & 03-2754, ___ F.3d ___, 2003 WL 21847712 (7th Cir. Aug. 8, 2003).

Subpoena From Irish Criminal Trial

The case arose across the ocean, in Ireland, where Michael McKevitt was being tried on terrorism-related charges. The main prosecution witness was David Rupert, the subject of a biography being written by several Chicago newspaper reporters. Seeking fodder for cross-

examination, McKevitt's lawyers requested access to tapes, transcripts and notes from the reporters' interviews with Rupert.

The initial application (filed under 28 U.S.C. § 1782, which authorizes district courts to order the production of information for use in foreign proceedings) said nothing about the reporter's privilege. The lawyers initially sought *ex parte* relief, but Judge Ronald A. Guzman ordered them to give notice to the reporters. Expedited briefing and argument on the privilege issue followed.

Late in the afternoon on July 2, 2003, Judge Guzman issued his ruling. He found that the privilege had been overcome and that the reporters must produce their tapes of the interviews. Among the points considered by the judge was the fact that Rupert, the interviewee, had no objection to disclosure of the tapes.

The reporters were ordered to bring the tapes to court the next morning at 9:30. About half an hour before the deadline, the reporters sought a stay from the U.S. Court of Appeals for the Seventh Circuit. The magistrate judge who was to take custody of the tapes agreed to wait until the afternoon to see what the higher court would do. Around 10:30 a.m. – 90 minutes after the request for stay was filed – the Seventh Circuit issued an unsigned order denying the stay. It promised to give an explanation later.

On July 4, 2003, after angst and soul-searching, the reporters produced the tapes to the FBI, which was to review them for national security concerns before providing them to McKevitt's counsel. McKevitt's counsel reportedly used the tapes at trial on certain collateral issues, but McKevitt was convicted and sentenced to 20 years in prison.

Posner Explains Stay Denial

On August 8, 2003, Judge Posner, joined by Judges Manion and Rovner, explained the basis for the Seventh Circuit's denial of the request for a stay. Despite the absence of full adversarial briefing on the subject, the court suggested, without unequivocally holding, that there is no reporters' privilege. Because the tapes had been turned over, the court dismissed the appeal as moot.

The court began its analysis by reviewing *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Seventh Circuit noted

UPDATE: 7th Circuit Lets McKevitt Ruling on Reporter Privilege Stand

The Seventh Circuit has denied a petition for rehearing/rehearing en banc in *McKevitt v. Pallasch*, 2003 WL 21847712 (Aug. 8, 2003), a case that cast a shadow over the reporters' privilege in the Seventh Circuit. Last summer, Judge Posner, writing for a panel that included Judges Manion and Rovner, expressed skepticism about whether the First Amendment provides special protection against subpoenas for reporters or authors. Media-LawLetter August 2003 at p. 5.

In September, appellants requested that the decision be reviewed *en banc*. The judges who sat on the original panel voted unanimously to deny the application and, according to the Order dated October 14, 2003, none of the active judges requested a vote on the rehearing en banc. Judge Kenneth Ripple did not participate in the consideration of the petition.

What is particularly distressing about this opinion, and the refusal of the court to rehear the matter en banc, is that the matter was not fully briefed below due to the unusual procedural posture in which the case rose to the Court of Appeals, and it is the first opinion by the circuit on the issue of privilege.

(Continued on page 58)

Judge Rips Reporters Privilege

(Continued from page 57)

that Justice Powell had joined the five-justice majority that rejected a First Amendment privilege (at least under the facts of that case), while also authoring a concurring opinion suggesting that the privilege question “should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings.” Combined with other arguments, the line-up of justices in *Branzburg* has led most Courts of Appeal – “rather surprisingly,” in Judge Posner’s view – to conclude that there is a reporter’s privilege, “though they do not agree on its scope.” The Seventh Circuit is one of the few that had not opined on the subject.

Skepticism Overt

Perhaps because the issue had not been briefed, either in the district court (where the lawyers for McKevitt did not directly challenge the existence of the privilege) or in the appellate court, the Seventh Circuit did not definitively answer the question. But its skepticism was overt. From *Branzburg*, the court concluded that “the interest of the press in maintaining the confidentiality of sources is not absolute.”

As for non-confidential material, the Seventh Circuit stated that courts that allow protection in such cases “may be skating on thin ice.”

In the heart of its opinion, the court said this:

“It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.”

And the court made clear that the compelled disclosure of non-confidential information creates no problems under the First Amendment.

Allows “Reasonable in the Circumstances” Test

What this analysis overlooks, of course, are the very concerns that the court acknowledged earlier in its opinion:

“harassment, burden, using the press as an investigative arm of government, and so forth.” Even the majority opinion in *Branzburg* noted that “grand juries must operate within the limits of the First Amendment as well as the Fifth,” a sentiment that the Seventh Circuit quoted but did not take to its logical conclusion.

Still, the court held out a reed for a quasi-privilege by announcing a “reasonable in the circumstances” test. The “circumstances” could arguably include the “pivotal function of reporters to collect information for public dissemination” and the “paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.” See *Gonzales v. NBC*, 194 F.3d 29, 33 (2d Cir. 1999) (quoting *McGraw-Hill, Inc. v. Arizona (In re Petroleum Prods. Antitrust Litig.)*, 680 F.2d 5 (2d Cir. 1982), and *Baker v. F. & F. Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)).

The “circumstances” might also include the parties’ ability to obtain the same information from a non-journalistic source. In other words, the same factors that are now considered in assessing the journalists’ privilege might still be considered, albeit without the comforting blanket of the First Amendment.

Kathleen L. Roach and Elizabeth W. Milnikel, Sidley Austin Brown & Wood LLP, represented Pallasch and McRoberts.

Damon E. Dunn, Funkhouser Vegosen Liebman & Dunn, Ltd., represented Herguth.

Reuben L. Hedlund and Sarah Jean Deen, Hedlund & Hanley LLC, and John W. Boyd and Nancy Hollander, Freedman Boyd Daniels Hollander Goldberg & Cline P.A., represented McKevitt.

Eric S. Mattson is with Sidley Austin Brown & Wood in Chicago, IL.

**TO RECEIVE THE
MEDIALAWLETTER BY E-MAIL**

**Please Contact
Kelly Chew
kchew@ldrc.com**

Scope of First Amendment Reporter's Privilege in Privacy Act Case Tested in D.C. District Court

By Joel Kurtzberg and Karen Kaiser

Sought Sources' Places of Employment

The reporter's privilege is under attack again, this time in a case before Judge Thomas Penfield Jackson in the District of Columbia District Court involving former Los Alamos National Laboratory scientist Dr. Wen Ho Lee. In the case, *Lee v. Department of Justice*, Civil Action No. 99-3380(TPJ), Dr. Lee has subpoenaed the testimony and newsgathering documents of five journalists — Jeff Gerth and James Risen of *The New York Times*, Robert Drogin of *The Los Angeles Times*, Josef Hebert of *the Associated Press*, and Pierre Thomas of *CNN* — in his Privacy Act case against the Government, seeking not the names of the journalists' confidential sources but rather an identification of the sources' place of employment.

In an October 9, 2003 Memorandum and Order ("Order"), Judge Jackson denied the reporters' motions to quash the subpoenas, and ordered them to produce all documents responsive to the subpoenas and to answer all questions not only about the place of employment of their confidential sources but also about the identity of those sources.

Questions Privilege & Lowers the Bar

The Order, which heavily relied on the critique of the underpinnings of the reporter's privilege in the majority opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972) — without even mentioning Justice Powell's concurrence in that case — marked a radical departure from established First Amendment jurisprudence in the D.C. Circuit, which has confined the principles elucidated in *Branzburg* to criminal cases.

Judge Jackson questioned the worth of the First Amendment interest underlying the reporter's privilege in cases in which, as here, the confidential sources may

have violated the law by unlawfully passing on certain information to the press. *Order* at 14.

The Judge also rejected the reporters' argument that Dr. Lee failed to adequately exhaust alternative sources of information. Dr. Lee had taken only twenty-one depositions in the case, and scores of alternative sources were identified in those depositions. The D.C. Circuit has indicated that it is not unreasonable to expect a party to take as many as sixty depositions in order to satisfy the exhaustion requirement. *See, e.g., Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974). Moreover, the reporters argued that Dr. Lee failed to challenge various assertions of privilege of the Government as a basis for failing to produce Rule 30(b)(6) deponents concerning the alleged leaks.

The ramifications of the Court's Order extend beyond the literal finding that Dr. Lee had sufficiently "tapped" all reasonable alternative sources of information available to him. *Order* at 14. Rather, the Court's

The Court's conclusions implicitly suggest a diminished level of First Amendment protection for journalists who may possess information "without right" by virtue of their sources' unlawful transfer of the information

conclusions implicitly suggest a diminished level of First Amendment protection for journalists who may possess information "without right" by virtue of their sources' unlawful transfer of the information, *id. at 15*, a conclusion squarely at odds with other Privacy Act cases in the D.C. Circuit which have applied and upheld the journalistic privilege. It also raises novel questions regarding the level of exhaustion required to overcome the qualified privilege.

Background of the Subpoenas

An American scientist of Chinese descent, Dr. Lee was at one point the subject of a government investigation into possible espionage of classified U.S. nuclear technology to the People's Republic of China. During the investigation, information identifying Dr. Lee as a suspect in the investigation appeared in various press accounts. *The New York Times* broke the story in March 1999, initially without identifying Dr. Lee by name. Further press coverage re-

(Continued on page 60)

Reporter's Privilege in D.C. District Court

(Continued from page 59)

vealed Dr. Lee's name, his employment history, and the purported results of his polygraph examinations.

According to Dr. Lee, the unauthorized release of this information to the press resulted directly in the termination of his employment, the loss of his professional and personal reputation and ultimately, his criminal indictment. *Order* at 7-8. Subsequently, Dr. Lee brought the current lawsuit against the Departments of Justice and Energy as well as the Federal Bureau of Investigation, for violations of the Privacy Act, claiming he had never given his assent to the disclosure of any of this information.

Because a Privacy Act violation will stand only if Dr. Lee can conclusively demonstrate that the defendant agencies originally and directly disseminated the critical information about him to the press, Dr. Lee focused his discovery on questions concerning the places of employment of the sources, and not necessarily their names. Dr. Lee attempted to learn the source of the leaks through interrogatories, document requests and admissions, and approximately 20 depositions of agents for the three defendant agencies.

The Government signaled in its discovery responses that its attempts to learn the source of the alleged leaks had produced inconclusive results. It asserted privilege when asked for details about its attempts to do so. Dr. Lee did not challenge the Government's assertions of privilege and accepted at face value the Government's assertion that a Rule 30(b)(6) deposition concerning the source of the leaks would prove fruitless. Instead, Dr. Lee sought discovery from the five journalists.

The Reporters' Motions to Quash

Each of the reporters moved to quash on the basis that the reporter's privilege because (a) the information sought was not central to Dr. Lee's case, and (b) Dr. Lee had failed to exhaust all reasonable alternative sources of information. Dr. Lee responded to these motions principally by arguing that the reporter's privilege protects only the "identity" of a confidential source and that testimony regarding the place of employment of the source does not disclose the source's "identity." The

only case to have addressed the question of whether the reporter's privilege extends to a source's place of employment, *In re Burns*, 484 So. 2d 658 (La. 1986), interpreted the Louisiana Shield Law as covering a source's place of employment.

After full briefing, the Court directed Dr. Lee to file all fact discovery as part of the record. The reporters were then granted permission to submit supplemental briefing in response to Dr. Lee's submissions. The reporters argued that based on the record, Dr. Lee had failed to exhaust obvious alternative sources of information, specifically, by failing to depose individuals identified in various depositions and discovery responses, choosing not to challenge the Government's objections on privilege grounds to sitting for Rule 30(b)(6) depositions, and neglecting to follow up on the Government's failure to provide meaningful responses to interrogatories and admissions. The October 9, 2003 Order followed immediately on the heels of the reporters' supplemental briefing, even before Dr. Lee filed his reply.

The Significance of the October 9, 2003 Order

The Court's conclusion that the reporter's privilege was overcome in this case presents cause for concern. First, the Court ordered not only the place of employment disclosed, but avoided deciding the difficult question of whether the reporter's privilege covers the identification of a confidential source's place of employment by ordering the journalists to disclose the identity of the confidential sources. The plaintiff had not even asked for such a ruling.

Second, the conclusion that Dr. Lee had sufficiently "tapped" all reasonable alternative sources of information, notwithstanding the gaps in the record, raises concern about what must be done to demonstrate reasonable exhaustion. Indeed, the Court acknowledged these gaps in the record, including the Government's assertion of the "law enforcement privilege," its "litany of denials and disclaimers of knowledge or information," and its untested "six pages of 'objections'" to the interrogatories. *Order* at 9-10. However, in holding that the exhaustion requirement of the reporter's privilege cannot be read as a "literal absolute," *Order* at 13, the Court in effect condoned a sort of

(Continued on page 61)

Reporter's Privilege in D.C. District Court

(Continued from page 60)

litigation delinquency on the part of Dr. Lee by permitting him to utilize the Government's denial of knowledge and information as proof of exhaustion.

The Court's statement that it had doubt that "a truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that the Privacy Act says they may not reveal," *Order* at 14, raises a host of concerns regarding the protections in Privacy Act cases, generally. In its ruling, the Court further expressed that "many of the Supreme Court's countervailing considerations [to the rationale underlying the notion of the reporter's privilege] . . . in *Branzburg* are as valid today as they were when *Branzburg* was decided, and some are particularly apposite to this case," *Order* at 14-15, thereby suggesting that a different standard for the privilege may apply in civil cases such as here where maintaining confidenti-

ality necessarily "conceal[s] from the plaintiff possible governmental complicity." *Order* at 16.

This position conflicts not only with cases in the D.C. Circuit which expressly limit the holding in *Branzburg* to the criminal context, but which apply and uphold the qualified reporter's privilege in Privacy Act cases. *See, e.g., Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Tripp v. Department of Defense, No. CIV.A 01-157*, 2003 WL 22239253 (D.D.C. Sept. 30, 2003). Indeed, the Court all but proposed a diminished standard for Privacy Act cases.

The reporters plan to appeal the ruling.

Joel Kurtzberg and Karen Kaiser are associates at Cahill Gordon & Reindel LLP, which serves as counsel to New York Times reporters Jeff Gerth and James Risen in the Wen Ho Lee case.

*MEDIA LAW RESOURCE CENTER and
SOUTHWESTERN LAW SCHOOL,
DONALD E. BIEDERMAN ENTERTAINMENT & MEDIA LAW INSTITUTE
are producing a conference --*

The New Reality: Current Legal Issues in Fact Based Programming

Los Angeles, CA • January 29, 2004 • 4:00 -7:30 p.m.

- A Surreal Reality: Hot Issues in Reality Television
- Private Reality: The Continuing Development of Privacy Law
- The Ethical Reality: Ethics Issues in Advising Multiple Parties on Controversial or Unsettled Areas Of Law

Registration Materials at www.medialaw.org

*This event offers three hours of CLE credit, including one hour of legal ethics.
Southwestern is a State Bar of California approved MCLE provider.*

Guantanamo Bay Press Rules Rescinded

The U.S. military rescinded a rule that barred journalists who were heading for Guantanamo Bay from asking any questions about investigations. The strict reporting limits were imposed on journalists just after the arrests of a Muslim army chaplain and two interpreters at the Guantanamo Bay Navy installation.

Reporters were required to sign a statement in order to board a flight chartered by the military from Florida on October 7th. They found that a new requirement had been added to the old ones:

“Asking questions or perspectives about ongoing and/or future operations or investigations can result in restricted access on Gitmo, removal from the installation, and/or revocation of DoD (Department of Defense) press credentials.”

According to press accounts, reporters for the Associated and The New York Times signed the statement under protest. That protest became quite public and, indeed, was picked up by newspapers around the world.

Within a week, the military conceded that the requirement was “a bit too conservative” (according to a spokesperson at Guantanamo), albeit well intentioned to protect the integrity of the investigations. The current

rules now provide that US officials will not talk about investigations or future operations. And the requirements still provide, among other limitations on coverage, that “civilian personnel are escorted at all times while on DoD installations.”

The ground rules for reporting at Gitmo can be found on the DoD’s Website at <http://www.nsgtmo.navy.mil/jtfgtmo/media>.

Department of Defense Restores Access To Website After Chaotic Week

On October 16, the Pentagon restored computer access to numerous directives it had recently removed from the Internet. In a move that alarmed government watchdog groups and free speech advocates, the Department of Defense blocked public access to a DoD website containing hundreds of unclassified documents relating to various Pentagon procedures. Russ Kick, proprietor of the website TheMemoryHole.com – a site that archives web pages that have vanished from the Internet – quickly responded by posting an exact copy of the entire DoD webpage. Rather than pursue legal action to prevent Kick from making the information available, the Pentagon abandoned its strategy of suppressing the documents from public view and reposted its website.

MLRC 2003 London Conference Transcripts Now Available

Developments in UK, European and International Libel, Privacy & Newsgathering Laws (September 22-23)

To view, please visit our web site

www.ldrc.com

©2004

**MEDIA LAW RESOURCE CENTER, INC.
80 Eighth Avenue, Suite 200
New York, NY 10011**

BOARD OF DIRECTORS

Harold W. Fuson, Jr. (Chair)
Dale Cohen
Stephen Fuzesi, Jr.
Katherine Hatton
Henry Hoberman
Ralph P. Huber
Kenneth A. Richieri
Elisa Rivlin
Susan E. Weiner
Bruce Johnson (ex officio)

STAFF:

Executive Director: Sandra Baron
Staff Attorney: David Heller
Staff Attorney: Eric Robinson
LDRC Fellow: Charles Burger
Legal Assistant: Kelly Chew
Staff Coordinator: Debra Danis Seiden