

MILRC Media
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CANADA / US CROSS BORDER MEDIA LAW ISSUES

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The European Union's "Rome II" Approach to Choice of Law Moves Forward *MLRC/Others Urging "Country of Origin" Approach*

By Kurt Wimmer

The battle for international jurisdiction and choice of law in content liability cases proceeds on a country-by-country basis, from Australia to Zimbabwe. One organization that could have a positive impact is the European Union, which now counts 25 countries among its member states. The EU has provided a document that might be the only bright spot on the choice-of-law horizon in its E-Commerce Directive, which generally provides that the law applicable to the activities of an online business should be the law of the country in which it is organized — the "country of origin" principle. However, a newer document, the so-called "Rome II" approach to choice of law in European libel and privacy disputes, continues in its newest iteration to be a disappointment.

In June 2002, the Justice and Home Affairs Council of the European Commission commenced a consultation proposing to apply the law of the country in which the plaintiff resides to any defamation or privacy action. This approach, if adopted, could have broad repercussions for publishers not only in Europe but throughout the world. The MLRC filed comments before the European Commission urging the application of a "country of origin" approach, an approach that was echoed by European publishing organizations.

The Current Draft

The Commission then published a new draft of its "Rome II" regulation, which provides as follows:

Article 3 — General Rule

1. The law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage

occurs, the non-contractual obligation shall be governed by the law of that country.

3. Notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.

In addition, the Commission added a separate section which was meant to address the comments of the publishing industry, which had uniformly opposed a rule favoring the application of the law of the plaintiff's country. That section provides as follows:

Article 6 — Violations of Privacy and Rights Relating to the Personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.
2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

Draft Article 6(1), although not clear, apparently intends to provide that the forum need not apply the law of another country if the application of that country's law would violate the fundamental law of the forum state. In that case, the law of the forum would apply. But this would lead to the result that the publishers were seeking only if the claimant happens to sue in the publisher's forum and the forum has a fundamental law that would be offended by application of the law of the claimant's country. This article would be very little assistance in the clearly dominant type of case in which the claimant files in his or her own country.

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The European Union's "Rome II" Approach to Choice of Law Moves Forward

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UK Lords Support Country of Origin Rule

Support for a "country of origin" approach for Rome II is not solely the province of the publishing industry. The United Kingdom House of Lords issued a report in April 2004 stating its preference for a 'country of origin' rule to govern choice of tort law for defamation and privacy actions:

A country of origin rule would have certain advantages, notably simplicity and certainty. It would point to one law . . . To adopt a country of origin rule would also accord with, though not necessarily in all cases replicate, the host country/place of establishment regimes found in the E-Commerce and other Single Market measures. A country of origin rule would encourage enterprise, education and the widest dissemination of knowledge, information and opinion.

House of Lords European Union Committee, *The Rome II Regulation, Report with Evidence* [2004] 8th Report of Session 2003-04 at ¶¶ 117-130.

Next Steps

The Rome II regulation falls under the procedures of the relatively recent Treaty of Nice, which requires the EU's

"co-decision" procedure to be used. This means that the European Commission's final proposal, quoted above, is its last word on the topic, and the process now will move to the European Parliament. The Parliament will be required to propose amendments to the rule drafted by the Commission.

After that, the process moves to the Council of Ministers, which will prepare a revised version of the proposal (called a "common position") that is satisfactory to the Member States. The common position may or may not take on board Parliamentary amendments. If there is a disagreement between the Council and Parliament, the proposal will then move back to Parliament for a second reading.

The publishing industry currently is attempting to persuade the European Parliament to change the approach adopted by the European Commission. A final decision is unlikely to be entered until 2005. The MLRC will continue to be active in opposing the Commission's proposed rule.

Kurt Wimmer is a partner with Covington & Burling in Washington, D.C.

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The Princess, the Paparazzi and the Press

Privacy Law Marches Forward Through Europe

By Matthew Nicklin

Princess Caroline of Monaco's recent victory over the paparazzi in the European Court of Human Rights has serious implications for the media in the UK. See *von Hannover v Germany*, ECHR June 24, 2004. The full Judgment (and a case summary) is available at www.5rb.com/casereports/detail.asp?case=267.

Background

For some 10 years the Princess has been taking legal action in an effort to stop a number of magazines in Germany from printing paparazzi photographs of her going about her daily life: collecting her children from school, shopping or exercising. Save for winning some limited protection from intrusion into the life of her children, her actions have failed.

While German law does provide protection from intrusion into a "secluded place," the German courts were not satisfied that the places where the Princess had been photographed qualified. Princess Caroline was a "figure of contemporary society *par excellence*"; she had to accept publication of photographs of her taken in public.

In contrast, the European Court of Human Rights ("ECHR") in Strasbourg upheld her complaint that this did not adequately protect her privacy rights under Article 8 of the European Convention on Human Rights. Germany has three months to appeal the decision to the full court.

Impact on UK Law

As it stands, the decision is significant not just because the ECHR has recognised that her privacy rights were infringed by photographs taken in public and semi-public places, but also because the domestic law of Germany (which had at least attempted to strike a balance between privacy and freedom of expression) was found wanting in its protection for privacy.

Across Europe, the ECHR's decision is indicative of a significant shift towards the French model of protecting privacy. As the Association of German Magazine Editors had submitted to the ECHR, the German domestic law had tried to set careful boundaries around the private life of public figures and that the resulting law was somewhere between the very restrictive French privacy laws and the comparatively permissive position in the UK.

Nevertheless, the ECHR felt that this compromise position provided insufficient protection for Article 8 rights.

Unlike Germany, the UK Parliament has not even attempted to provide legislation to strike a balance between privacy and freedom of expression. The Human Rights Act

1998 was proffered by Parliament as a protection for the media against the Courts, but has proved to be a modern day Trojan Horse. It was used by the Court of Appeal in *Douglas v Hello! Ltd* [2001] QB 967 to

recognize and give effect to "privacy rights" by importing Article 8 rights via the qualifications on freedom of expression set out in Article 10(2) (see §§134-136).

Courts Interpreting Scope of Privacy Rights

Instead of grappling with this undoubtedly difficult issue and attempting to set a balance between these competing rights, UK Parliament has abdicated responsibility and simply left it up to the Courts. Indeed, in June 2003, the Government firmly rejected calls by the House of Commons Select Committee for Culture, Media & Sport that privacy legislation should be introduced.

The failure to legislate (and the consequent privacy void) has ushered in a period of judicial activism. Yet, the Courts are not acting unconstitutionally. Under the Human Rights Act 1998, Parliament has required the courts to take into account the jurisprudence of the ECHR and act consistently with it.

Practically, this means they must give effect to ECHR decisions when interpreting English law. Consistent with the

Across Europe, the ECHR's decision is indicative of a significant shift towards the French model of protecting privacy.

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UK's Convention obligations, the English courts must respect and give effect to privacy rights and, in default of Parliament providing such protection by legislation, they will fashion the common law in order to fill the void.

This state of affairs presents the judiciary with an almost completely blank canvass. According to their temperament, some judges are enthusiastic about this, others are more cautious. Granted, they have the law of breach of confidence to work with as a guide, but confidence and privacy are not the same, and the effort to "shoe-horn" the latter into the former is neither satisfactory nor, in the long run, likely to be successful. See Lord Phillips MR at §69 in *Campbell v MGN Ltd* [2003] QB 658.

In particular, as the Princess Caroline decision, and the *Peck* decision before that shows, the ECHR does not accept that the fact that some event may have taken place in public necessarily places it outside the sphere of an individual's private life. In *Peck v United Kingdom* (2003) 36 EHRR 41, the ECHR held that a right of privacy could apply in favor of a man whose failed suicide attempt on a public street was captured by a municipal video surveillance camera.

The ECHR prefers to look at whether the person was carrying out an official or public duty or whether they were simply going about their daily life. The latter instance would give rise to a legitimate expectation of privacy; the former would not.

It is interesting to note that, a few weeks before the ECHR judgment in the Princess Caroline case, the House of Lords in *Campbell* decided that under the common law:

"the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

See *Naomi Campbell v MGN Ltd* [2004] 2 WLR 1232 per Lord Nicholls at §21, cf §§84 and §111 per Lord Hope; §§134-137 per Baroness Hale. The "reasonable expectation of privacy" test is also used in the Code of Conduct of the Press Complaints Commission - <http://www.pcc.org.uk/cop/cop.asp>.

Their lordships expressly rejected any higher test of whether publication of the information would be "highly

offensive." See §22 per Lord Nicholls and §135 per Baroness Hale. (The test was originally introduced by the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 §42 and then picked up by the English Court by Lord Woolf CJ in §11(vii) *A v B (Flitcroft v MGN Ltd)* [2003] QB 195. The "highly offensive" test will be familiar to US lawyers as an essential ingredient in the tort of intrusion. See *Restatement (Second) of Torts* 2d (1977) vol 3, §652B at 378.)

Indeed, and as the *Campbell* decision re-emphasized, under the Convention freedom of expression (Article 10) has no presumptive priority over privacy (Article 8). Where they come into conflict, the Court has to balance between the competing (yet equal) rights.

This process involves assessing the extent and justification of the interference with the subject's privacy interests as compared with the extent and justification of the interference with the media's freedom of expression.

In Princess Caroline's case this balancing process came down firmly on the side of privacy. The ECHR was fairly dismissive of the suggestion that the media's Article 10 rights should outweigh her privacy rights:

"... the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public...."

von Hannover v Germany at §§65-67.

The equal ranking of privacy and freedom of expression under the European Convention requires the Court to assess the value of the speech against the invasion of privacy. In Princess Caroline's case, freedom of expression came a very poor second.

Of course, in the US the position would be very different. Such privacy rights that the law recognises are subordinate to the constitutional protection for free speech.

While the ECHR and the US Supreme Court would agree on the self-evident value and importance of freedom of expression, the Convention of Human Rights ranks this alongside the right to respect for private life.

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The Princess, the Paparazzi and the Press

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Impact on UK Media

What does this mean for the UK media? First, it would appear that the English courts are likely to (indeed they must) give effect to the *Caroline* judgment.

While this is likely first to bite those sectors of the media that are dependent upon snatched celebrity photographs as their staple output, the decision is by no means limited to photographs.

Next in the firing line will be the familiar “*kiss and tell*” stories. See e.g. the discussion in Lord Hoffman’s speech in *Campbell* (§56). It is difficult to imagine that revelations about the sexual conquests and prowess of celebrities and similar trivialities, which have so entertained newspaper readers in the UK for many years, will be found to be anything other than unjustifiable invasions of privacy from now on.

Put simply, this speech is of such low value that it will usually be outweighed by the subject’s privacy rights.

Second, the interpretation of privacy given by the press regulatory body, the Press Complaints Commission (“PCC”) will have to be adjusted. Hitherto, the PCC has taken the orthodox approach that a person cannot have a reasonable expectation of privacy in matters that take place in public.

For example, Elton John’s former wife, Renate, complained that publication of photographs of her going about her daily life in a car park and petrol station forecourt were invasions of her privacy. Her complaint was rejected by the PCC:

“The Commission could not consider that a public car park or a petrol station were places where anyone could have a reasonable expectation of privacy. The complainant was outdoors in places where any number of people were entitled to be without restriction... The Commission understood that the attention that the complainant had received was clearly unwanted but recognised that the photographs had been taken in a public place

while she was not engaged in any private activity. Furthermore, they could not be held to illuminate any aspect of her private life.”

Complaint of 6 April 2000.

Adjudication <http://www.pcc.org.uk/reports/details.asp?id=280>.

Following the Princess Caroline decision, the PCC would have to accept that privacy rights do extend to the mundane activities of one’s daily life, even in public places, so that intrusion by the media requires proper justification. Without proper justification there is a breach of privacy.

Equally, it is likely that the PCC’s victory in Judicial Review proceedings brought by the newsreader Anna Ford, [2002] EMLR 95, would be decided differently in the light of the Princess Caroline decision. Like Princess Caroline, Ms Ford complained about the publication by *The Daily Mail* newspaper and *OK!* magazine of photographs

showing her on a beach.

The PCC rejected her complaint on the grounds that the beach in question was publicly accessible and that Ms Ford could not therefore have any “*reasonable expectation of privacy*.” Decisions of the PCC that are not consistent with the ECHR’s interpretation of privacy are likely to be susceptible to Judicial Review.

Decision May Spur Parliament to Act

Finally, the effect of the *Caroline* decision is to suggest that the UK media ought to now give thought to asking the UK government for a statutory privacy law. Although this might seem the equivalent of suggesting that turkeys should vote for Christmas (or Thanksgiving), it is the only practical way in which the media could swing the pendulum back towards freedom of expression.

Without legislation, the reality is that, in the shaping of privacy law, the UK courts have little to work with other than the jurisprudence of the ECHR.

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The Princess, the Paparazzi and the Press

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Unless there is some framework of domestic law (beyond the self-created common law protection for privacy), there is little room for the application of the important concept of the margin of appreciation.

This doctrine – which allows individual countries a limited amount of discretion as to how convention rights will be protected in their domestic law - is discussed in *Caroline*. See *von Hannover v Germany* at §57.

Although the German law was eventually found wanting, the UK has no legislation to offer at all. (The ECHR accepted the UK Government's submission in *Spencer v United Kingdom* (admissibility decision, 16 January 1998: Application No. 28851/95) (1998) 25 EHRR CD 105 that there were various remedies provided under the common law which might provide adequate protection for privacy rights.) Eventually,

though, the common law will develop a set of parameters, but are the media content to allow the Judges to fix them?

If, as it appears, the Princess Caroline decision represents a significant tilt towards restriction of press freedom in pursuit of privacy rights, then the only really effective remedy is for the UK Parliament to legislate where it wants the balance to be struck.

At least in that political process the views and concerns of the media can be expressed and, if accepted, accommodated in the resulting legislation. Such a step would put the media in a much stronger position to utilize arguments based on the margin of appreciation. Without legislation, the media enjoy no real protection from what may prove to be an inexorable march towards ever more stringent privacy laws.

Matthew Nicklin is a Media Barrister at 5 Raymond Buildings in London.

Germany Will Not Appeal ECHR's Princess Caroline Privacy Ruling

In September 2004 the German government announced it will not appeal a June ruling by the European Court of Human Rights that the country's courts failed to adequately protect Princess Caroline's right to privacy. See *von Hannover v. Germany*, No. 59320/00 (June 24, 2004).

The decision is available through the Court's website www.echr.coe.int.

In a statement delivered on September 1, Germany's Justice Minister, Brigitte Zypries, explained that the German cabinet opted against appealing the ruling for two reasons. First, it strengthens the privacy rights of "prominent persons who do not hold public office or otherwise play a role in public life and, as such, should not have to tolerate uncontrolled reporting about their private lives."

Second, the ruling causes "no change in the current legal situation" because it "does not affect reporting on persons who have positions of responsibility in society, in particular persons who hold public office."

Not all interested parties agreed with the cabinet's narrow reading of the ruling. Various groups urged the German government to file an appeal to the ECHR's Grand Chamber, which must be done within three months of a ruling.

Under Article 43 of the ECHR, parties can seek reconsideration of a seven-judge ECHR decision to an 18-judge Grand

Chamber in "exceptional circumstances."

German news organizations penned an open letter to Chancellor Gerhard Schroeder, arguing that the ruling constituted censorship and would restrict reporting on the private lives of public figures and on issues of public interest, such as their business dealings and contacts.

Media lawyers in the United Kingdom also lodged a request that the government seek reconsideration. In a proposed petition for the German government requesting appeal, the Olswang law firm wrote that the ruling now requires member states to apply the European court's standard on balancing privacy and freedom of expression, one which favors privacy, instead of the standard established by the democratic institutions of a member state.

The Olswang petition is available online at: www.olswang.com/pdfs/hanover_petition.pdf.

Almost two weeks after the announcement that the government would not appeal the ruling, the World Association of Newspapers and the World Editors Forum (writing on behalf of 18,000 publications in 100 countries) sent a letter to Minister Zypries urging Germany to file an appeal. It argued that the requirement that there be a "public interest" curtails the press and abridges freedom of expression. See <http://www.wan-press.org/article5405.html>.

Naomi Campbell Wins Media Privacy Case in UK's Highest Court

By Kevin Bays

On May 6, 2004, the five Judges in the House of Lords delivered their Judgments in the case brought by Naomi Campbell against MGN Limited, publishers of The Mirror newspaper, for breach of confidence. *Campbell v MGN Ltd* [2004] UKHL 22 (6 May 2004). Available online at: www.bailii.org/uk/cases/UKHL/2004/22.html

Naomi Campbell had been successful at the trial court level, but the decision of the Trial Judge was overturned by the Court of Appeal last year. By a split decision of three to two, the House of Lords upheld Naomi Campbell's appeal and reinstated the Trial Judge's award of damages of £3,500. In addition, the newspaper must pay the substantial costs of the case.

Background

The facts of the case are now well known. Naomi Campbell is of course a world famous fashion model whose face is instantly recognizable. Over the years in interviews with journalists and on television, Naomi Campbell has claimed, falsely, that unlike many of her colleagues in the fashion business she had not succumbed to the temptation to take illegal drugs.

However, in January 2001, The Mirror newspaper obtained information that Naomi Campbell had acknowledged her drug dependency by going regularly to meetings of Narcotics Anonymous ("NA"). In particular, the newspaper learned that she would be going to a meeting of NA at an address in the Kings Road, London as a result of which a photographer was sent to take photographs of her as she left the meeting.

The Mirror published an article on its front page under the headline "Naomi: I am a drug addict." The article was accompanied by a photograph, the caption to which read "Therapy: Naomi outside meeting." The article said that she had been attending NA meetings regularly for three months, often attending twice a day.

A second picture was published which showed Naomi Campbell in the doorway of the building where the NA meeting took place. The address was not identified but someone very familiar with that part of the Kings Road could no doubt have recognized it.

From general knowledge, the newspaper described the way group counselling works at NA meetings. There were other people in one of the photographs whose faces had been blanked out to preserve their anonymity. The information contained in the article could be broken down into five categories:

- (1) The fact that Naomi Campbell was a drug addict;
- (2) The fact that she was receiving treatment for her addiction;
- (3) The fact that the treatment was provided by NA;
- (4) Details of the treatment – for how long, how frequently and at what times of day she had been receiving it, the nature of it and extent of her commitment to the process; and
- (5) A visual portrayal by means of photographs of her when she was leaving the place where treatment had been taking place.

Naomi Campbell's legal advisers accepted that in light of her public lies about drugs, the newspaper was entitled to publish the fact that Naomi Campbell was a drug addict and was having therapy. As she had chosen to present a false image and make untrue pronouncements about her life, the press were entitled to put the record straight.

It was also entitled – perhaps obliged – to tell its readers that she was addressing the problem by having therapy. Thus, it was recognised that Naomi Campbell was precluded from claiming any protection for the information in categories (1) and (2) above.

The dispute in the case therefore centred around the question of whether The Mirror was also entitled to publish the material comprised in the third, fourth and fifth categories as the Court of Appeal had found – or whether that information went beyond the subject of legitimate comment and was still to be treated as private.

Naomi Campbell is of course a world famous fashion model whose face is instantly recognizable. Over the years in interviews with journalists and on television, Naomi Campbell has claimed, falsely, that ... she had not succumbed to the temptation to take illegal drugs.

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The Law

Although there were different opinions on the outcome of the appeal, with minor differences of language all five Law Lords were unanimous as to the principles of law to be applied to the facts.

It is clear that it is still the case that in English law there is no general all-embracing cause of action for invasion of privacy. However, the longstanding common law action for breach of confidence has now been extended to protect the unjustified publication of confidential or private information.

The action for breach of confidence, though, has been given a new strength and breadth so that it accommodates the rights of privacy and freedom of expression given by Articles 8 and 10 of the European Convention on Human Rights which was incorporated into English law by the Human Rights Act 1998.

It is also clear that an individual now has the right to control the dissemination of information about his or her private life unless there is justification for such dissemination. As Lord Nicholls said in this case, the essence of the cause of action is now better described as misuse of private information rather than breach of confidence. However named, the elements of the tort are the same:

- (a) Was the published information within the sphere of the complainant's private or family life?
- (b) If - and only if - that is the case, the intrusion into the complainant's private life will be capable of giving rise to liability unless the intrusion can be justified.

Private Information

It is necessary to answer the first question in the affirmative in order for Article 8 of the European Convention on Human Rights to be engaged at all. Article 8 of the Convention states that everyone has the right to respect for his private and family life, his home and his correspondence. The question to be asked is whether in respect

of the disclosed information, the complainant had a reasonable expectation of privacy. In order to satisfy this test, it is not necessary in every case for the disclosure to be highly offensive to a reasonable person. It is merely necessary that, viewed objectively, the complainant should have a reasonable expectation of privacy in relation to the information.

There is no doubt that information relating to health, personal relationships or finances will easily be found to be private.

The Balancing Exercise

If the disclosed information has been identified as private by satisfying the test of reasonable expectation of privacy,

a Court must then balance the individual's right to keep the information private against any competing justification for publication. In particular, the Court must consider the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights. Article 10(1) states

It is still the case that in English law there is no general all-embracing cause of action for invasion of privacy. However, the longstanding common law action for breach of confidence has now been extended to protect the unjustified publication of confidential or private information.

that everyone has the right to freedom of expression which includes the freedom to hold opinions and to receive and impart information and ideas.

Neither of the rights under Articles 8 and 10 of the Convention take precedence over the other - they are of equal value and there is no presumption in favor of one rather than the other. As they are competing rights, the Court must determine the extent to which it is necessary to qualify the one right in order to protect the underlying value protected by the other.

The Lords' Opinions

The question for the Lords to consider on the facts of this case was whether, having regard to the fact that The Mirror was entitled in the public interest to publish the facts of Naomi Campbell's drug dependency and that she was seeking treatment, the newspaper should have confined itself to these bare facts or was it entitled to reveal more of the circumstantial detail and print the photographs.

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In other words, The Mirror being entitled to print the information comprised in categories (1) and (2) above, did the further information in categories (3), (4) and (5) retain its character of private information and if so, could the infringement of privacy be justified after balancing Naomi Campbell's rights with those of The Mirror under the Convention.

The Court of Appeal in overturning the Trial Judge's decision held that, given it was legitimate for the newspaper to publish the facts that Naomi Campbell was a drug addict and was receiving treatment, it was not significant to add that the treatment consisted of attendance at meetings of NA.

The Court of Appeal unanimously thought that the information in categories (3), (4) and (5) was peripheral information which faded into insignificance compared to the central fact that she was receiving treatment for drug addiction. The Court of Appeal considered that these details and the photographs were a legitimate, if not an essential, part of the journalistic package designed to demonstrate that Naomi Campbell had been deceiving the public when saying that she did not take drugs.

In the House of Lords however, opinions were divided. The majority decided that publication of the third, fourth and fifth categories of information contained in the article constituted an unjustified infringement of Naomi Campbell's right to privacy.

The Majority Decision

The three Judges who formed the majority in the House of Lords, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell, considered that the information comprised in categories (3), (4) and (5) above was private. The information related to an important aspect of Naomi Campbell's physical and mental health and the treatment she was receiving for it.

Had it not been for Naomi Campbell's false public statements, the newspaper would not have been permitted to publish any of the information about her addiction or treatment. It was information in respect of which she had a reasonable expectation of privacy.

As it was, Naomi Campbell's false public statements served to justify the publication of some of the informa-

tion. However, the publication of the details of her treatment at NA and the photographs, taken surreptitiously, of her emerging from a meeting went significantly beyond what it was necessary for the newspaper to publish in order to set the record straight.

An important consideration was the effect which the majority thought that the disclosure would have upon Naomi Campbell, a recovering drug addict, and the risk of disruption to her therapy and the distress and uneasy feelings which this would engender in such a person.

The majority also took the view that the publication of the photographs was an infringement of Naomi Campbell's right to privacy. They felt that the photographs had to be viewed in conjunction with the captions and the article as a whole.

Although it was said expressly that the mere fact of covert photography is not sufficient to make the information contained in the photograph confidential, the accompanying text transformed the photographs into more than a mere street scene, and they added greatly to the intrusion which the article as a whole made into her private life.

They showed her arriving at or leaving the NA meeting in the company of others and added to the potential harm by deterring her from going back to the same place again.

Once they had decided that the further information was private, it was necessary to carry out the balancing exercise of Naomi Campbell's right to privacy with the newspaper's right to freedom of expression.

In considering The Mirror's rights under Article 10 of the Convention, it was acknowledged that journalists should be accorded a reasonable margin of appreciation in taking decisions as to what details need to be included in an article to give it credibility. The press should be allowed a degree of latitude in the way in which it chooses to present a story.

The factors to be weighed in the balance are, on the one hand, the newspaper's duty to impart information of public interest which the public have a right to receive and, on the other hand, the degree of privacy to which Naomi Campbell was entitled as to the details of her therapy. However, the right of the public to receive information about the details of her treatment was said to be of a much lower order than the undoubted right to know that she was misleading the public.

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The majority of the Court did not believe that there was any compelling need for the public to know the name of the organization that Naomi Campbell was attending for therapy or for the other details of it to be set out. It was also thought that the publication of the photographs was more concerned with a wish to publish an interesting story rather than to maintain credibility.

Lord Hope thought that it was the publication of the photographs which tipped the balance in favor of Naomi Campbell's right to privacy. However, although stating expressly that the real issue was not the taking of the photographs in a public place but whether publicizing the content of the photographs would be offensive, the Judge then placed reliance on the fact that the photographs were taken deliberately, in secret with a view to publication in conjunction with the article.

Taking the photographs and the article as a whole, this was considered by the majority to be a gross interference with Naomi Campbell's right to respect for her private life and outweighed the newspaper's right to freedom of expression.

The three Law Lords thought that in this case there was a risk that publication of the information in categories (3), (4) and (5) would cause harm and it was unnecessary to publish this information for the newspaper to exercise its right to impart information to the public in order to set the record straight.

Publication of the details about Naomi Campbell's attendance at NA, highlighted by the photographs, constituted a considerable intrusion into her private affairs which was capable of causing substantial distress and constituted an unjustifiable infringement of her right to privacy.

The Minority

The other two Law Lords took a very different view of the three categories of information which were in dispute in the case. Lord Nicholls considered that given the extent of the information (the facts that she was a drug

addict and receiving treatment) which could properly be disclosed to put the record straight, the additional information relating to her attendance at NA meetings was so unremarkable that it would be applying too fine a tooth comb to divide it from the information which could be published. The reference to the way Naomi Campbell was treated at NA meetings was no more than common knowledge.

Lord Hoffmann made the point that Judges are not newspaper editors and he agreed with the observations of the Court of Appeal that it is harsh to criticize the editor of the Mirror for painting a somewhat fuller picture in order to show Naomi Campbell in a sympathetic light.

Lord Hoffman said that a newspaper should be allowed some latitude or "margin of choice" in the way it presents an article where the main substance of the story can legitimately be published. He felt that the additional details as to frequency of attendance were relatively anodyne and could not be said to be discreditable or embarrassing.

Even if they went further than a Judge might deem necessary to satisfy a newspaper's legitimate interests in putting the record straight, they were within the margin of judgement which the press should be allowed.

Lord Nicholls also felt that the disclosures complained of were within the latitude to be accorded to journalists. He thought that the revelation that Naomi Campbell had chosen to attend NA was no more significant than saying that a person with cancer is undergoing a course of chemotherapy.

As to the photographs, rightly no complaint had been made by Naomi Campbell about the covert taking of the photographs of her outside the building where she had attended an NA meeting. Although in general photographs can be more vivid than text – worth a thousand words – the same principles apply to photographs as any other information.

The publication of a photograph revealing someone in a situation of humiliation or severe embarrassment – even if taken in a public place – may be an infringement of privacy. Likewise, the publication of a photograph taken by

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Taking the photographs and the article as a whole, this was considered by the majority to be a gross interference with Naomi Campbell's right to respect for her private life and outweighed the newspaper's right to freedom of expression.

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intrusion into a private place (for example by a long lens camera) may in itself be an infringement even if the picture does not disclose anything embarrassing.

In this case, the pictorial information in the photographs of Naomi Campbell conveyed no private information beyond that contained in the written article. There was nothing embarrassing about the pictures, nor did they involve any intrusion into private space. Again, the decision to publish the pictures was considered by the two minority Judges to be within the margin of editorial judgement.

The Future

As the House of Lords were at pains to point out, the Campbell case did not raise any new issues of principle. The differences of opinion were the result of disagreement, in the unusual circumstances of the case, as to where the law should strike the balance between the right to privacy and the right to freedom of expression. The result may have been otherwise had just one different Lord heard the appeal.

It is however the application of legal principles to the facts of a particular situation with which journalists, editors and their lawyers must deal every day. Often it is easy to state the law, but not so easy to apply it to the factual situation which has arisen so as to predict the outcome. It is for this reason that in principle the law allows the press some latitude in deciding how to exercise its right to freedom of expression.

But at the end of the day, it is the Judges who decide where the balance between privacy and freedom of expression is to be struck in any given case. It is therefore very difficult for journalists and editors to know where Judges – perhaps a long time after the event – will draw the line. If the facts in Campbell occurred again, would any editor know how much information to publish safely – would he decide not to publish the photographs?

So what of the future? We believe that as a result of this case, there will be an increase in the number of com-

plaints of misuse, or unjustified publication, of private information. There will be many more claims that information has been published in respect of which the complainant has a reasonable expectation of privacy which cannot be justified on public interest or freedom of expression grounds.

This may be particularly so in the case of photographs – whether taken in a public place or not – which contain information in respect of which the complainant considers he or she has a reasonable expectation of privacy.

Of course, if there are strong public interest reasons to publish the information – such as the exposure of a hypocritical or dishonest politician – there will be no problem.

However, it is in the grey areas where the Campbell decision may have a seriously negative impact upon the ability of the press to impart information.

The development of English law in this area, which has been confirmed by the House of Lords in this case, will have a significant effect on the publication of photographs and information which reveal the private activities of public figures. The difficulty for the press will be where to draw the line between an individual's privacy rights and freedom of expression.

The reason for the difficulty is that under the European Convention on Human Rights, both privacy and freedom of expression are of equal value and neither takes precedence over the other. In all cases therefore, once the information in question engages the right to privacy, a balancing exercise of these two equal rights must be undertaken and different people may easily come to different conclusions. This lack of certainty is bound to restrict freedom of expression.

Naomi Campbell was represented by solicitor Keith Schilling of Schillings and Andrew Caldecott QC, Antony White QC and Katrin Evans.

Kevin Bays is a partner at Davenport Lyons in London. He represented MGN Limited, publishers of The Mirror Newspaper, together with barristers Desmond Browne QC and Richard Spearman QC.

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More than 50 Media Organizations Urge the Ontario Court of Appeal To Reverse The Finding of Jurisdiction in *Bangoura v. Washington Post*

By Kurt Wimmer

In *Bangoura v. The Washington Post*, 235 D.L.R. (4th) 564 (Jan. 27, 2004), the Ontario Superior Court of Justice exercised jurisdiction over the Washington Post for an article that reached only seven subscribers in Ontario when it was published and was accessed only once over the Internet — by the plaintiff's lawyer. In sweeping language, the Canadian court found that the Washington Post should anticipate being sued in any court in the world.

Superior Court Decision

The plaintiff, Cheikh Bangoura, was the head of a United Nations program in Kenya when the Washington Post published three articles in 1997 alleging mismanagement of the program. Bangoura moved to Canada in 2001 and sued the Washington Post in Toronto, some four years after the article was published, alleging that the article damaged his reputation in his new country. The Washington Post moved to dismiss the case.

Although the court conceded that the Post had “no connection to Ontario,” it noted that

“the Washington Post is a major newspaper in the capital of the most powerful country in the world now made figuratively smaller by, *inter alia*, the Internet. . . . Frankly, the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided.”

The court further reasoned that it would be fair for the case to be tried in Canada because “the Post is a newspaper with an international profile.” The court noted that it “would be surprised if [the Post] were not insured for damages for libel or defamation anywhere in the world, and if it is not, then it should be.”

The court cited the decision of the Australian High Court in *Gutnick* with approval, and specifically noted that “those who publish via the Internet are aware of the global reach of their publications.” Under Canadian law, a “real and substantial connection” between the forum and the action must be found to support jurisdiction, and the court concluded that such a connection existed.

Intervening Brief

The Washington Post appealed to the Ontario Court of Appeal. On July 30, 2004, more than 50 newspaper, magazine and Internet publishers, trade associations, and non-governmental organizations promoting free expression intervened to file a brief in support of the appeal. The brief pointed out the dangers of the trial court's decision, noting that Internet publishers faced with the prospect of universal worldwide jurisdiction will either restrict the availability of content online or be forced to write for the lowest common denominator of national protection for speech; in either case, the result will be greatly diminished freedom of speech on the Internet.

The brief argued that traditional principles of Canadian law favor a Washington, D.C. venue for the case. It also argued in favor of the application of one of three alternative approaches, all of which would reject jurisdiction in Canada —

- (1) the “targeting” approach exemplified by *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), *cert. denied*, 538 U.S. 1035 (2003);
- (2) the “active/passive” approach exemplified by the *Zippo* case and its Canadian progeny, *Braintech, Inc. v. Kostiuik*, [1998] B.C.J. No. 3201 (C.A.), or
- (3) the “country of origin” approach applied by the European Union's E-Commerce Directive and favored by a recent report in the U.K. House of Lords.

Cheikh Bangoura is represented by Charles C. Roach, Roach, Schwartz & Associates, Toronto.

The intervenors are represented by Brian MacLeod Rogers in Toronto and Kurt Wimmer of Covington & Burling in Washington. The Washington Post is represented by Paul Schabas and Ryder Gilliland of Blake, Cassels & Graydon, LLP in Toronto. Lee Levine, Levine, Sullivan, Koch & Schulz, LLP, filed an affidavit on American law on behalf of the Washington Post.

UK Court of Appeal Decision May Curb No Win No Fee Libel Costs

By Keith Mathieson

Claimant libel lawyers in England have received a sharp reality check from the Court of Appeal. For the last few years a small number of specialist law firms have been earning large fees out of libel cases funded by no win no fee arrangements, also known as conditional fee agreements or CFAs.

In England the loser pays the winner's legal costs. Successful cases against the media where CFAs are involved can result in the media having to pay vast sums in legal fees. The appeal court has decided this is unfair to defendants and has imposed a new regime that will involve costs being capped in advance. The implications of this new regime are explored below.

The Judgment

The Court of Appeal's judgment has been given in the case of *Adam Musa King v Telegraph Group Limited*, [2004] EWCA (Civ) 613 (CA May 18, 2004). The decision is available online at: www.bailii.org/ew/cases/EWCA/Civ/2004/613.html

At issue in the underlying libel action are two newspaper articles in the *Telegraph* reporting that UK and US law enforcement were investigating claimant for suspected terrorist links.

The well known firm of Peter Carter-Ruck & Partners is charging Mr King £375 an hour for partners, £265 for other solicitors and £150 for trainee solicitors, in all cases subject to a success fee, which would double these rates to £750, £530 and £300 plus VAT.

Except, of course, that Mr King will never have to pay these fees because his lawyers are doing the case under a CFA. If Mr King wins, the fees will be payable by the *Sunday Telegraph* newspaper. If he loses, he will pay nothing.

The Court of Appeal expressed its concern over the potentially chilling effect on the media of disproportionate claims for costs by claimants' lawyers. It said it was unjust in cases where freedom of expression is at stake to submit defendants to a costs regime where they have to pay unreasonable and disproportionate costs if they lose and have no prospect of getting their own costs back if they win.

In the *Musa King* case, the maximum compensation the claimant could expect to recover at trial was £150,000. Yet the claimant's lawyers had estimated that their fees, excluding

the success fee, would be not less than £360,000. Once the success fee was added and the defendant's own costs taken into account, the defendant, if it lost at trial, was facing a total bill of around £1 million.

The Court of Appeal noted "the gulf between the value of this action to the claimant and its value to the lawyers instructed in the case" and observed that "something seems to have gone seriously wrong".

The Court of Appeal recognised that defamation cases possess certain features that distinguish them from other kinds of litigation. First, legal costs assume particular significance in libel cases where the damages recoverable are often a fraction of the costs. Second, after the event (ATE) insurance covering the claimant's liability for the defendant's costs is often not available in libel cases.

Since the claimant is rarely rich enough to pay the defendant's costs if he loses, this means the defendant will be left to pay its own costs even if it wins. That prospect naturally encourages the defendant to buy the claimant off even where the claimant's case is devoid of merit.

In the Court of Appeal, the *Sunday Telegraph* recognised that Mr King, like anyone else, had a right to pursue his case with the benefit of a CFA. But it argued that where it was unlikely that he would be able to pay the newspaper's costs if he did lose, and there was no insurance to cover those costs, it was especially important that the court should control the manner in which the claimant's lawyers conducted the case, particularly when its rates were so high.

Law Firm's Tactics

The newspaper referred the Court of Appeal to various instances of what they considered to be disproportionate conduct. This included a 10 page letter of claim, swiftly followed by Particulars of Claim drafted by a barrister for which 54 hours of partner's time and 48 hours of trainee solicitor's time had been charged; and 150 partner hours, 120 solicitor hours and 96 trainee hours for work on witness statements and disclosure of documents. Before the newspaper even had an opportunity to respond to the claim, it was facing an exposure of as much as £64,000.

The Court of Appeal was not impressed by the extravagant and vituperative manner in which Carter-Rucks had handled the case. In Lord Justice Brooke's words:

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UK Ct. Decision May Curb No Win No Fee Libel Costs

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“... the claimant’s lawyers appear to have advanced their client’s claim from time to time in a manner that is wholly incompatible with the philosophy of the Civil Procedure Rules.”

The judge remarked that the letter of complaint “departed markedly” from the requirements of the Pre-Action Protocol for Defamation and said that he expected a costs judge to “take an axe to certain elements of their charges.”

The New Regime

The Court of Appeal’s solution is for judges to impose in advance a limit on the amount of costs that lawyers may recover when acting for libel claimants on a Conditional Fee Agreement without ATE insurance. The Court of Appeal recognised that its “novel cost-capping regime” could disadvantage libel claimants, who might no longer be able to consult QCs or “very expensive” law firms. But it thought such a disadvantage was a small price to pay compared to the potential price to be paid by allowing the present state of affairs to continue.

It will take time for the new cost capping regime to develop and while the Court of Appeal has said that the detailed operation of the regime is for others, it has provided some general guidance as to what it expects.

First, Lord Justice Brooke has recommended that a Master (a judge dealing mainly with procedural issues) should be specially assigned to defamation cases. That designated Master would handle case management applications and in time would develop specialist experience in the field.

Second, in CFA cases where there is no ATE cover, the Master *should*, according to Brooke LJ, make an order that the recoverable costs of the case should be limited to a specified amount. Such an order would be made at the allocation stage and would in most cases, presumably, limit the recoverable costs to those stated in the allocation questionnaire. However, if the Master considers it appropriate, he may refer the case to a costs judge in order that a specific cap or budget may be imposed.

Third, and this is of considerable significance, the total amount of recoverable costs prescribed should include any success fee and insurance premium payable even though the court has no power to compel a claimant’s lawyer to dis-

close the level of success fee or insurance premium. It appears that Brooke LJ envisages that the court should simply take a view as to what in the circumstances would represent a reasonable and proportionate amount and set that as the limit of what will be recoverable.

Fourth, the starting point for costs in most cases should be the amount of damages likely to be recovered. In these days of modest libel damages, that may, of course, not amount to very much.

Fifth, the Court of Appeal clearly envisages that once a cap on costs is imposed, it should not be easy to increase it. Brooke LJ has suggested that the Master ought to consider making the capping order subject to a condition that before either party may make an application which could significantly increase the costs of the action, it should first apply to the court for a direction varying the costs cap.

Such an application would be made on notice and would be supported by up to date costs estimates. It will then be for the court to decide whether and to what extent the costs cap needs to be varied before it allows the proposed application to proceed.

Conclusion

These are potentially major changes to the way in which libel cases are run. The Court of Appeal’s decision should benefit media companies but if real gains are to be achieved it is going to be particularly important that defendants in defamation cases give careful consideration to the operation of the new regime in the early days since the early cases are likely to determine the success or otherwise of the Court of Appeal’s bold initiative.

Much will also depend upon the availability of insurance to cover the costs of a successful defendant. Such insurance is becoming more readily available. While that provides security for a defendant’s costs in a winning case, it represents a further significant expense for defendants wishing to settle.

The Telegraph was represented by Farrer & Co. and barristers Andrew Caldecott QC and Godwin Busuttill. Peter Carter-Ruck and Partners instructed barristers Richard Rampton QC and Harvey Starte.

Keith Mathieson is a partner in Reynolds Porter Chamberlain in London.

9th Circuit Holds Yahoo! French Judgment Bar Premature

On August 23, the Ninth Circuit ruled that Yahoo! must wait until French litigants try to enforce a French court order on American soil before it can properly seek a declaration that the foreign judgment violates the First Amendment. *Yahoo! Inc. v. LICRA and UEJF*, No. 01-17424, (9th Cir. 2004)(Ferguson, J.). A split three-judge panel ruled that California lacks personal jurisdiction over two French groups that sought to prevent the Internet service provider from hosting Nazi propaganda discussion groups and Nazi paraphernalia auctions on its American website, www.yahoo.com.

In April 2000, the French groups, "LICRA" and "UEJF", filed suit in France alleging that Yahoo! violated French law, Section R645-2 of the Criminal Code, which prohibits the sale of Nazi propaganda. Although a Yahoo! subsidiary, Yahoo! France, operates www.yahoo.fr in France and removes all Nazi material from its site, French users can still access the American Yahoo! website that carries the Nazi-related discussions and paraphernalia.

In May 2000, the French court ordered Yahoo! to destroy "all Nazi-related messages, images and text stored on its server" under penalty of a daily fine of 100,000 Francs for noncompliance. Yahoo! chose not to appeal in France opting instead to seek — and receive — a declaration from the Northern District of California district court that the French order was not recognizable or enforceable in the United States.

The Court of Appeals decision reverses the 2001 district court decision in which Judge Jeremy Fogel held California had specific jurisdiction over the French groups and granted summary judgment in favor of the Yahoo! on First Amendment grounds.

In reversing, the Ninth Circuit held that California law under *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082 (9th Cir. 2000) requires that a defendant engage in *wrongful conduct* targeted at a plaintiff whom the defendant knows is a resident of the forum state in order to justify haling that party into the forum jurisdiction. Distinguishing the case at bar from *Bancroft & Masters* (where defendant engaged in subterfuge in an attempt to wrongfully convert intellectual property), the 9th Circuit concluded that LICRA and UEJF acted within their legitimate rights by pursuing a claim under valid French law.

In a lengthy dissent, Judge Brunetti argued that (1) wrongful conduct by defendants was sufficient, but not necessary, to satisfy jurisdiction requirements and (2) LICRA and UEJF targeted Yahoo! in California by moving a French court to issue an order requiring Yahoo!'s American website to comply with French law and serving Yahoo! with the order in the United States.

Richard Jones, Coudert Brothers, San Jose, CA represented LICRA. Neil Jahss and Robert C. Vanderet, O'Melveny & Myers, Los Angeles, CA represented Yahoo!.

Paris Appeals Court Upholds Acquittal of Princess Diana Photographers

On September 14, a French appeals court affirmed the acquittal of three photographers who took photographs of the August 31, 1997 car crash that killed Princess Diana and her companion Dodi al Fayed.

The decision upholds the November 2003 verdict of a lower court, which cleared Jacques Langevin, Christian Martinez and Fabrice Chassery of breaking French privacy laws on the grounds that they did not photograph any intimate moments and that the inside of a car does not constitute a private place.

The appeals court similarly found that the inside of a car following a crash is not a private place and that the photographers did not capture images of al Fayed's private life. See "French Appeals Court Confirms Acquittal of

Diana Photographers," Yahoo News, Sept.15, 2004 (available online at <http://sg.news.yahoo.com/040914/1/3n470.html>).

The case stems from a criminal complaint for invasion of privacy brought by Mohamed al Fayed, Dodi's father. As such, only the photographs of Dodi were at issue before the court. The prosecutor's office supported the appeal, but in June requested that the photographers be acquitted with respect to pictures taken at the scene of the crash in recognition of freedom of the press.

Fabrice Dubest, Mohamed al Fayed's lawyer, told the press that his client would appeal the decision to France's highest court, the Cour de Cassation.

London's "Indecent Proposal" Slander Case Ends in Loss for the Claimant

By Dominic Ward

For media lawyers adept at handling the customary travails and uncertainties of litigation, the field of slander usually provides the greatest challenges – how to prove to a jury what was said, how the words were spoken and what they mean.

When the slander concerns allegations of sex and adultery in the orthodox Jewish community the result is unsurprisingly incendiary. So it was in *Maccaba v Lichtenstein* in London's High Court, which has provided enough twists and turns to justify the many inches devoted to it in news columns.

On 25 June 2004, after a 41-day trial spread over 2 months (the longest slander trial in English history), and after deliberating over 6 days, the jury rejected Brian Maccaba's claim that Rabbi Dayan Lichtenstein had spread slanders that he was a sexual predator and a serial adulterer with married Jewish women.

Maccaba, chief executive officer and founder of Cognotec, was alleged to have offered \$1 million to buy the wife of a friend in order to marry her.

The judgment is presently *ex tempore* and not yet available to the public. However, what can be said at this stage is that the jury found that those words which Lichtenstein had spoken were unlikely to have disparaged Maccaba; moreover, those statements were deemed substantially true and that Lichtenstein was not actuated by malice.

Maccaba had failed in April 2004 in his interim application to have the case taken away from the jury (for hearing by judge alone) on the ground that parts of the Claimant's evidence – lengthy transcripts of the allegedly slanderous statements including certain Hebrew phrases made by Lichtenstein in conversation, which Maccaba had covertly recorded – would be incomprehensible to a jury.

A more detailed examination will follow in a subsequent issue once the judgment becomes available to the public.

The claimant was represented by Clive Freedman QC. The defendant was represented by solicitor-advocate David Price.

Dominic Ward is a media lawyer and libel specialist with Finers Stephens Innocent, London.

UK High Court Refuses to Enjoin Newspaper Reports of Affair

A London High Court last month refused to enjoin two Sunday tabloids from publishing reports that Sebastian Coe, the former Olympic gold medalist and Member of Parliament, and current head of the UK Olympic bid committee, had a 10 year extramarital affair.

The ruling is the first significant media privacy decision handed down following the House of Lords' decision last month in *Campbell v MGN Ltd* [2004] UKHL 22 (6 May 2004). Available online at: www.bailii.org/uk/cases/UKHL/2004/22.html. See also *MLRC MediaLawLetter* May 2004 at 39.

In *Campbell*, the House of Lords reinstated a damage award to model Naomi Campbell for newspaper articles that revealed she was attending Narcotics Anonymous meetings for a drug addiction. While declining to create a new tort of privacy, the House of Lords extended the law of breach of confidence to protect what it deemed the unjustified publication of confidential or private information.

Relying on the decision in *Campbell*, Coe sought to enjoin *The Mail on Sunday* and the *Sunday Mirror* from publishing articles based on paid interviews with his former mistress, Vanessa Lander. In the articles, she described intimate details of their relationship, including that she had an abortion.

In a Saturday night ruling, Mr. Justice Fulford held that any privacy right was outweighed by Lander's right to tell her story to the public and the newspapers' right to publish it.

According to a report in the Guardian Newspaper, the judge found that under the circumstances this was not a situation in which Coe could expect his privacy rights to be protected. Among other things, the judge noted that Coe is a high profile public figure, the relationship was an extramarital affair and some details were already publicly known.

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Canadian Radio Station Loses License for Offensive Broadcasts

By Florence Lucas

Quebec's French-language commercial radio station "CHOI-FM" is set to cease broadcasting August 31, 2004 – though the station owner Genex Communications, Inc. plans to petition the Federal Court of Appeal to stay the August 31 deadline pending an appeal.

On July 13, 2004, the Canadian Radio-Television and Telecommunications Commission (CRTC) denied the station's license renewal application for what it deemed the licensee's numerous failures to comply with the *Radio Regulations, 1986* and CHOI-FM's Code of Ethics. During the license term, the radio station had received several complaints about offensive comments and contests, personal attacks and harassment.

The CRTC's decision and public notices are available through at <www.crtc.gc.ca>.

CRTC Regulations

The CRTC is an independent public authority that regulates and supervises Canadian broadcasting and telecommunications. It has the authority to suspend an revoke broadcast licenses.

According to the *Canadian Broadcasting Act*, the Canadian broadcasting system should serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada, encourage the development of Canadian expression and serve the needs and interests, and reflect the circumstances and aspirations of Canadian men, women and children, and the CRTC has the role of ensuring that programming by broadcasting enterprises be of a high standard.

The *Act* is also to be construed and applied consistent with the right of free expression set out in the *Canadian Charter of Rights and Freedoms*.

In 1986, the CRTC adopted the *Radio Regulations Act, 1986* which states in relevant part:

3. A licensee shall not broadcast ... (b) any abusive comment that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

The CRTC denied CHOI-FM's license renewal application for violating this provision.

Background

Since the station began operating in 1997, the CRTC had received several complaints about it. In 2002, at the time of the station's first license renewal, the CRTC called Genex Communications to a public hearing because of its apparent failure to comply with the *Radio Regulations, 1986*.

On July 16, 2002, the CRTC renewed CHOI-FM's license for a short term of 24 months, from 1 September 2002 to 31 August 2004, subject to the following:

At the same time if, in the future, it considers that Genex has again failed to comply with the Radio Regulations or any of the conditions attached to CHOI-FM's license, including the code of ethics in Appendix II to this decision, the Commission may call Genex to a public hearing to show cause why the Commission should not issue such a mandatory order or apply any of its enforcement measures including revocation or suspension of the license of CHOI-FM.

This decision renewed CHOI-FM's license for a period of only 24 months due to

the licensee's repeated failure to comply with the Regulations regarding, among other things, abusive comment, contrary to section 3(b), the submission of logger tapes, insufficient French-language vocal music content and the condition of its license related to sex-role portrayal.

The CRTC also noted the licensee's failure to meet the objective set out in section 3 of the Act regarding high programming standards.

In 2004, while considering Genex Communications' subsequent renewal application, the CRTC conducted an analysis of CHOI-FM's programming, examined the new complaints brought during the short-term license and concluded that the licensee had again failed to comply with section 3 of the *Regulation* and the requirements of the Decision in 2002.

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Canadian Radio Station Loses License

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Freedom of Expression and the Radio Act

In its decision, the CRTC reiterated that the right to freedom of expression on broadcasting stations is not absolute and that it is expressly limited by various laws aimed at protecting other values, a statement it had made on a number of occasions in the past.

The CRTC placed all of the complaints against the licensee on the licensee's public examination file and in its decision, focused on 10 of the 92 complaints received between 1997 to 2002. It found that several on-air comments were in violation of the *Regulations* and CHOI-FM's Code of Ethics, including but not limited to:

- Comments that compared children with disabilities to animals, in reference to the Latimer case (a case brought before the Supreme Court of Canada, in which a father was charged with murdering his disabled daughter);
- Comments that tended or were likely to expose black or Muslim students at Laval University in Quebec City to hatred or contempt on the basis of race, ethnic origin, religion or color, regardless of their country of origin;
- Comments that ridiculed and insulted a complainant by broadcasting numerous abusive remarks about her physical and sexual attributes and claiming that she otherwise has no talent or intelligence (the CRTC reiterates that equality between men and women is one of the values referred to in section 15 of the Charter);
- Gratuitous, repeated and relentless personal attacks on individuals or groups, that the CRTC considered unresearched or inaccurate reporting and unprofessional on-air behavior as examples of failure to meet the high programming standards required of each licensee.

The CRTC observed that these sort of comments appeared to be part of a pattern of behavior by the station that continued, and even grew worse, despite clear, unequivocal warnings from the CRTC.

Genex Communications' Response

The CRTC noted that the station adopted an inflexible and unresponsive position in its responses to the written

complaints and to questions at the public hearing pertaining to them. The CRTC considered that Genex Communications' behavior called into question its credibility and that of its controlling shareholder, sole director and chief executive officer, Mr. Patrice Demers, regarding Genex Communications' ability to understand and exercise its responsibilities under the Act as the holder of a broadcasting license.

Citing the seriousness and frequency of the violations, the fact that they were not first violations, the licensee's general attitude of denial, and the stalling tactics that the licensee used in dealing with complaints throughout the current license term, the CRTC concluded that the station did not accept its regulatory obligations and was not committed to meeting them.

Measures

Citing the licensee's inflexible behavior, its lack of acceptance of its responsibilities and the lack of any demonstrated commitment to rectify the situation, the CRTC concluded that Genex Communications would almost certainly not comply with the Act, the *Regulations* and its Code of Ethics if its license were renewed or temporarily suspended.

Even though the CRTC recognized that nonrenewal is rarely used, in view of the gravity of Genex Communications' repeated violations and the fact that none of the other available measures would appear to be effective, it decided to deny the renewal application.

In a Broadcasting Public Notice released the same day, the CRTC invited interested persons to submit an application to operate a new French-language radio station in Québec City, underlining that it would serve to maintain the diversity of radio service in the Québec region.

In late August 2004, the Federal Court of Appeal ruled CHOI-FM can continue broadcasting until March 2005 pending appeal.

Florence Lucas is an associate at Gowling Lafleur Henderson LLP in Montreal, Canada.

German Court Enjoins Publication of Novel Depicting Assassination of Chancellor

By Jörg Soehring

In June, a German Court of Appeal enjoined the publication of a crime novel on petition from German Chancellor Gerhard Schröder. The novel depicted the political assassination of a purportedly fictitious German Chancellor who bore striking similarities to the real Chancellor.

While the court order will strike US media lawyers as unconstitutional censorship, viewed against the background of German law it is far less unusual a result than the reader might suppose.

The court found that the novel violated the personality rights of Chancellor Schröder, which under German law must be balanced against free expression rights.

Background

The provocatively titled book “The End of the Chancellor – The Final Rescue Shot” tells the story of a fictitious drugstore operator’s successful assassination plan against a less fictitious German Chancellor. The book was written under a pen name and published by Betzel Verlag.

The Chancellor in the novel is strikingly similar to Gerhard Schröder in physical description. His private domicile is in Hanover, Chancellor Schröder’s hometown. And, like the real Chancellor, he is on his fourth marriage. In addition, the setting for the novel is Germany’s contemporary social and political environment.

The novel’s fictitious Chancellor leaves the reader without the slightest doubt that the author intended to portray the real Gerhard Schröder, whose image was depicted on the cover of the book’s first edition – in the cross hairs of a rifle scope. In April, the Court of Appeal enjoined publication of the book based on this cover. The book was reissued with a new cover, but Chancellor Schröder renewed his objections based on the book’s content.

Why the assassination plan? The Chancellor’s Government and the majority supporting it in Parliament have sponsored a number of laws over the last two years that have cut deeply into Germany’s social welfare benefits – both in reality and in the purported fiction.

Many people have to live on smaller budgets these days and naturally, they (and the fictitious protagonist in the

book) do not like it. This is reflected in recent election results. The governing German Social Democratic Party has suffered landslide losses in each of the various State and local elections over the last eighteen months, as well as in the recent election for the European Parliament.

Moreover, the German government recently implemented, as a reaction to international terrorism, the statutory justification of a “final rescue shot” – the intentional shooting down of hijacked airplanes or the intentional killing of hijackers or other terrorists by the police.

Why, asks the book’s fictitious drugstore operator, should I not be entitled to exercise the right to kill in my devotion to rescue my country from what I consider to be a dangerous, if not criminal Chancellor, if the police are justified in doing the same to fight “other criminals?”

The protagonist kills the Chancellor at an election campaign event with one well aimed gun shot. He gets away with it. And the reader of the book will find sufficient language in its text leaving him or her with the conviction that the author applauds the assassination.

This is the background for Chancellor Schröder’s application for an injunction prohibiting distribution of the book after a few copies of the two editions had been sold to the public.

The Legal Framework

The German Constitution has incorporated the concept of free expression in its bill of basic human rights, a right encompassing freedom of the press, broadcasting, and also literature, music, and art.

The German Federal Constitutional Court has always shown a high regard for this centerpiece of constitutional freedom over the fifty years of its existence. There is no other area of individual freedom that the Court has so actively defended against interference by government authorities.

But unlike the Bill of Rights in the US, the German Constitution itself provides some limitations to the free expression concept. The dignity of the human being is also a basic right granted by the Constitution, translated as a right to an unharmed personality for the purposes of civil law.

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German Court Enjoins Publication of Novel Depicting Assassination of Chancellor

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Since its early days the Federal Constitutional Court established the principle that these rights must be balanced against each other in cases where conflicts arise. In fact, where freedom of expression is outweighed by personality rights, the reaction of German law is undisputed: The plaintiff is entitled to a cease and desist order issued by the courts to prevent the violator from publishing the infringing language again.

A detailed analysis of the principles that the courts have developed over time to deal with these conflicts is beyond the scope of this article. But readers should be alert to the fact that enjoining speech or literature to protect personality rights is something German law has known and accepted for many decades.

Against this background, it may be easier to understand how the Hamburg Court of Appeals could arrive at its decision to prohibit further distribution of the novel, and that such prohibition would not generally be regarded as censorship in Germany.

The prominence of Chancellor Schröder was not a driving factor in the Court's analysis. It is obvious that only a prominent person could have been the focus of such a politically oriented book designed to draw public attention. The lower court had nevertheless dismissed the petition for the injunction, based on the theory that the novel was constitutionally protected and the Chancellor's dignity did not outweigh this constitutional right.

The Court of Appeal, however, only touched on the delicate issue whether the novel enjoys the specific "literature" protection of the Constitution and left this question undecided. Instead, in a very brief opinion, the court found that the novel was about a living and identifiable person – Chancellor Schröder – and concluded that describing and applauding his assassination violated Schröder's dignity rights. While this is not expressly stated in the written reasons, it may well be that the court concluded the book could inspire a real assassination attempt on Schröder.

And the intentional violation of a person's dignity is exactly where the freedom of literature as well as the freedom of speech have hit their limits in a long series of cases over the last fifty years in the German legal environment.

What's Next?

The Hamburg Court of Appeal rendered its decision in an ex-parte ruling, as is the practice in many German cases dealing with defamation or violations of personality rights.

It is by no means necessarily the end of the legal battle. It is now for the book's publisher, Betzel Verlag, to decide whether it will contest the ruling. If so, the case will be taken to ordinary civil litigation, possibly all the way up to the Federal Constitutional Court.

If that happens, we'll see the final result in some two or three years, in all likelihood. It's a borderline case, as the differing decisions of the two courts show. The final outcome is hard to predict, but it would not be surprising if the Hamburg Court of Appeal's injunction stands.

Dr. Jörg Soehring is a partner with Latham & Watkins LLP in Hamburg, Germany.

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ISPs Acting Passively Are Not Liable For Copyright Infringement According to Canadian Supreme Court

Canadian Copyright Act May Apply Extraterritorially

By **Damion K.L. Stodola & Jason Crelinsten**

On June 30, 2004, the Supreme Court of Canada held that a group of internet service providers ("ISPs") acting exclusively as "internet intermediaries" are not liable to pay royalties on music files exchanged over their systems. *Canadian Association of Internet Providers v. Society of Composers, Authors and Music Publishers of Canada*, 2004 SCC 45 ("CAIP v. SOCAN").

The Court agreed unanimously that ISPs are exempt from the exigencies (and thus royalty payments) of the *Copyright Act* ("the Act") by virtue of § 2.4(1)(b), which provides protection for those ISPs who provide the conduit for information communicated by others but who lack actual knowledge of infringing content.¹

Of particular interest to American readers is the Court's discussion of the Act's potential extraterritorial effect. Citing *Dow Jones v. Gutnick* and decisions from American, French, and Canadian courts, the Court held that liability for infringement of the Canadian Copyright Act might attach to communication of infringing material originating outside of the country.

Copyright Law's Extraterritorial Effect

Justice Binnie, writing for the majority, found that for purposes of the Act, a communication occurs within Canada when it has a "real and substantive connection" to Canada, regardless of its geographic point of origin. This reverses the initial holding by the Copyright Board, which had held that "[t]o occur in Canada, a communication must originate from a server located in Canada on which content has been posted."

This decision is an important announcement from the Court regarding its willingness to apply the "real and substantial connection" test as a means of statutory interpretation.

According to the Supreme Court, "a telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, is 'both here and there.'" Justice Binnie stated that

"[i]n terms of the Internet, relevant connecting factors [justifying jurisdiction in Canada] would include the *situs* of the content provider, the host server, the intermediaries and the end user." However, "the weight to be given any particular factor will vary with the circumstances and the nature of the dispute."

This effectively extends the potential reach of the *Copyright Act* extraterritorially, and has the potential to make foreign parties liable under Canadian law.

Justice Binnie cited to American caselaw for the proposition that this approach is consistent with American jurisprudence. See *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2nd Cir. 2000); *Los Angeles News Service v. Conus Communications Co.*, 969 F.Supp. 579 (C.D. Cal. 1997).

While highlighting the potential for cross-border liability in copyright cases, Justice Binnie was careful to mention that this liability is not automatic and must be determined with reference to the facts. Furthermore, in addressing the issue of potential duplicated liability (for copyright duties in both sending and receiving nations), he suggested that the solution lies in international or bilateral agreements not unlike current tax treaties.

Providers of "Means of Communication" Exempted

However, in light of the Court's decision, the issue of jurisdiction should be less worrisome to American ISPs, as the Canadian standard for ISPs' liability is substantively similar to the American approach in the *Digital Millennium Copyright Act* ("DMCA"), the European attitude in their *E-Commerce Directive*, and the WIPO Copyright Treaty, 1996.² This standard is based on a distinction between passive transmission of information and active involvement in the content being transmitted.

In Canada, the Act provides an exemption to liability for those entities whose only activity "consists of providing the means of telecommunication necessary for another per-

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ISPs Acting Passively Are Not Liable For Copyright Infringement According to Canadian Supreme Court

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son to ... communicate.” In other words, a provider of only the *means* of communication is exempt from liability.

SOCAN argued that by engaging in “caching,” the storage of pieces of data to facilitate transmission speed and decrease transmission cost, the ISPs were actively communicating material in violation of authors’ rights.

The Court ruled that since “caching” is content neutral and “necessary to maximize the economy and cost-effectiveness of the Internet ‘conduit,’” its existence should not eliminate the protection of § 2.4(1)(b). However, the Court specified that caching does not attract copyright liability only if it is done for technical reasons related to delivery speed and cost.

The shelter provided by § 2.4(1)(b) is related only to certain functions of an ISP, namely the provision of means of communication. The Court stated that insofar as an ISP engages in the provision of content, or the creation of embedded links which “automatically precipitate a telecommunication of copyrighted music from another source,” it will not be able to claim the benefit of the exemption.

Notice and Take Down

Another potential head of liability in the Canadian context is the act of “authorizing a communication” under s. 3 (1) of the Act. The Court, however, dismissed SOCAN’s argument that ISPs were authorizing copyright infringement. The Court stated that one “does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright.”

The Court indicated that courts should presume that “authorization of an activity occurs only so far as it is in accordance with the law.” While not expecting ISPs to police the totality of content on their servers, the Court explained that if a host server provider (an ISP in most cases) receives notice of copyrighted material on its server, then it may take appropriate steps to eliminate such content.

These steps include compelling the offending party to remove the content via a “take down notice.” Failure to do so, the Court writes, could result in a finding that the ISP had “authorized” an infringing communication within the meaning of the Act.

This “notice and take down” approach has already been adopted in the United States and in the European Community.³ In this case, Justice Binnie explicitly suggested this method be enacted by Parliament for the Canadian copyright context as well.

Clarifying Copyright Infringement

This decision will also have the likely benefit of clarifying the law as to whether peer-to-peer (P2P) file sharing is legal in Canada. As was reported in the March 2004 issue of the *Media Law Letter*, a Canadian court held that ISPs were not obligated to provide the names of 29 alleged file-swappers, in part because P2P file sharing was held not to be copyright infringement. *BMG Canada Inc. v. John Doe et al.*, No. T-292-04 (Ont. Fed. Ct.). This decision is currently being appealed.

BMG suggests, contrary to the Supreme Court’s decision, that an ISP need not concern itself with an author’s notice of infringing activity when the infringing material is being communicated through P2P file sharing (as opposed to being displayed on an ISP subscriber’s website). Moreover, it will be difficult to uphold *BMG* in the face of the Supreme Court’s determination concerning “notice and take down.”

If an ISP is obligated to remove copyrighted material from its server when it has been given notice of the material’s existence, then an individual maintaining similar files in a shared directory would likely be in a similar, if not identical, position. The Supreme Court’s latest decision provides further ground for resolving these inconsistencies when the appeal on *BMG* is heard.

Conclusion

The Supreme Court has provided important guidance for ISPs operating in Canada. However, due to the Court’s adoption of the “real and substantial connection” standard for determining whether a communication has occurred “in Canada,” ISPs operating outside Canada with end-users in Canada have an interest in this decision.

The Court has brought Canada’s legal treatment of ISPs in line with other national and international standards, like the American DMCA and the EU’s *E-Commerce Directive*.

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ISPs Acting Passively Are Not Liable For Copyright Infringement According to Canadian Supreme Court

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The Canadian approach insulates ISPs from liability for copyright infringement where their only function is the provision of means of communication. Furthermore, when given notice of infringing material present on their hardware, the Court indicates that the ISPs must take steps that can include removal of such material.

Development of a Canadian legislative scheme for these issues has yet to be completed, though the Court suggested the "notice and take down" provisions enacted in other countries as an "effective" remedy.

SOCAN was represented by Gowling Lafleur Henderson, Ottawa. Appellant ISPs were represented by McCarthy Tétrault

Damion K. L. Stodola is an associate and Jason Crelinsten is a summer associate at Coudert Brothers LLP in New York.

¹ In 1988, the Copyright Act was amended to provide to copyright holders the sole right to "communicate the work to the public by telecommunication, and to authorize any such acts." §3(1)(f). The Society of Composers, Authors and Music Publishers of Canada argued before the Copyright Board that ISPs were liable under this provision of the Act whenever allegedly infringing material was transmitted across their networks or stored on their servers. Although the Copyright Board ruled in favor of the ISPs, an intermediate court of appeal held that the ISPs' "caching" of material was sufficient to bring ISPs within the ambit of the Act.

² Digital Millennium Copyright Act, 17 U.S.C. §512 (1998); EC, E-Commerce Directive 2000/31 of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), [2000] O.J.L. 178/1, Preamble, clause 42; WIPO Copyright Treaty, 1996, CRNR/DC/94, art. 8, Agreed Statements, art. 8.

³ *Ibid.*

The Bashford Case: A Cause for Dancing in the Streets?

Peter Bartlett & Nadia Banno

In *Bashford v Information Australia (Newsletters) Pty Ltd*, (2004) 204 ALR 193, a divided High Court of Australia opened the door for publishers of subscription services to avail themselves of the defense of qualified privilege in defamation actions.

While one dissenting justice wrote the decision will have far reaching implications, it would be a stretch to see the defense applying to the daily media, even where many readers are regular subscribers. The decision has already been raised and rejected by the trial court hearing the *Gutnick v. Dow Jones* case.

Newsletter Sued for Libel

Information Australia published a subscription newsletter, the *Occupational Health and Safety Bulletin* (the "Bulletin"). In its May 28, 1997 issue, it printed an article which reported that in a Federal Court case, the Court found "R.A. Bashford," rather than R.A. Bashford Consulting Pty Ltd, liable for misleading and deceptive conduct.

Mr Bashford, a director of R.A. Bashford Consulting, instituted defamation proceedings against Information Australia after Information Australia refused to print a correction or offer an apology.

At the defamation trial in the New South Wales Supreme Court, the jury of four found that Information Australia, by publishing a false report of the Federal Court case, defamed Mr Bashford. However, Mr Bashford's claim ultimately failed as Information Australia successfully relied on the defense of qualified privilege. Both of Mr Bashford's appeals to the New South Wales Court of Appeal and the High Court were unsuccessful.

The High Court Decision

In upholding the defense of qualified privilege, there were several factors that the High Court majority identified in support of the existence of a reciprocal duty or interest between Information Australia and its 900 subscribers.

The subject matter of the Bulletin and its readership had a narrow focus. The subscribers to the Bulletin were persons responsible for occupational health and safety in the workplace. By accepting subscriptions, Information Australia "undertook to publish a periodical of the kind it described - a guide to workplace health and safety."

The dissemination of information about occupational health and safety to those responsible for it advanced "the common convenience and welfare of society" by assisting oc-

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The Bashford Case

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occupational health and safety practitioners comply with and implement the relevant laws and regulations.

Finally, the reporting of the Federal Court decision was of intrinsic interest to Information Australia's subscribers as the subject matter was evidently connected to occupational health and safety.

Majority Focused on Special Nature of the Publication

It is important to note however that the majority's decision in this case did not signal a significant expansion of the scope of the defense of qualified privilege for the benefit of media defendants. In their joint judgment, Chief Justice Gleeson and Justices Hayne and Heydon emphasized that:

What set the respondent's Bulletin apart from some other paid publications was the narrow focus of both its subject matter and its readership. Because its subscribers were only those responsible for occupational health and safety matters, and because it dealt only with those subject matters, there was that reciprocity of duty or interest between maker and recipient which attracted qualified privilege. The circumstances were, therefore, very different from those in which the general news media deal with matters of political or other interest.

Dissenter Sees Wider Impact

Justice McHugh, one of the dissenting Judges, believed the majority's judgment had more far reaching implications and was of the view that the decision would apply to at least all subscription journals.

According to Justice McHugh, occasions of qualified privilege may now include:

- 1) a medical journal that falsely stated a person had died because of a particular doctor's negligent diagnosis;
- 2) a legal journal that falsely reported the professional misconduct of a practitioner or judge or the incompetence of a journalist writing on legal matters;
- 3) any subscription magazine concerning general health and consumer matters if the subscribers are mainly persons who have responsibilities in respect of health and consumer matters;

- 4) specialist publications concerning companies sent to investors, credit officers and other persons responsible for financial matters;
- 5) the publication of a trade union or trade association journal to members of organizations responsible for advancing and protecting the interests of those members.

Justice McHugh concluded:

It may not cause any dancing in the streets, but it is likely to be celebrated in the offices of the publishers of subscription magazines dealing exclusively with subjects of public interest and it will almost certainly be celebrated beyond that newly privileged group of publishers.

Bashford Decision Raised in Gutnick Case

The *Bashford* decision was recently raised in the Supreme Court of Victoria in the high profile defamation case of *Gutnick v Dow Jones & Co. Inc. (No. 4)*, [2004] VSC 138.

Justice Bongiorno considered the effect of *Bashford* and emphasised that:

In *Bashford* the narrow focus both of the subject matter of the publication and its readership were essential to the High Court's holding that there was the necessary reciprocity of duty and interest between publisher and subscriber to give rise to an occasion of qualified privilege. The decision rests upon the confined nature of the publication and its distribution "... to persons responsible for occupational health and safety, and not to a wider audience."

In applying *Bashford*, Justice Bongiorno concluded that "full weight must be given" to the requirement that "a narrow focus both as to subject matter and audience" be present.

The subscribers to Dow Jones' publications, *Barron's Online* and *Barron's* included brokers, financial advisers, the media, financial analysts and others connected to or working in the broking, finance, investment, and mining industries.

Justice Bongiorno ultimately found that the potential recipients of the information and the nature of the information conveyed were too broad to establish an occasion of quali-

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fied privilege. He compared the publications to two major Australian daily newspapers and a well known periodical, all of which publish business content and are obtainable by subscription, and stated:

There is nothing in the defendant's [Dow Jones] pleading which would distinguish Barron's in either of its forms from The Age, the Financial Review, or the BRW as far as availability to the general public is concerned...Taken as a whole they [the published subject matters] would define the contents of any newspaper or magazine one could imagine which dealt with business or financial matters.

Conclusion

The narrow approach adopted by Justice Bongiorno in applying *Bashford* to the defense of qualified privilege signifies that there will be no dancing in the streets, at least for the time being.

Although the High Court's decision has opened the door for publishers of subscription services to avail themselves of the defense of qualified privilege in defamation actions, the door has certainly not been left wide open.

Peter Bartlett and Nadia Banno are with Minter Ellison in Melbourne, Australia.

New Zealand MP and Media Convicted of Contempt for Reports on Child Custody Case

By William Akel

The New Zealand High Court recently issued an interesting contempt decision involving media reports of a contentious family court proceeding. *Solicitor General for New Zealand v Smith, TV3 Network Services Limited & Anor* (March 24, 2004).

As in the UK, the media in New Zealand can be charged with contempt for publishing reports that *might* impact ongoing court cases. Here the court found that "one-sided" news broadcasts improperly impacted a litigant and the public perception of the court process.

MP and Media Reported on Custody Dispute

Nick Smith is a high-profile opposition Member of Parliament and former high-ranking cabinet minister. He is energetic, hardworking and tries to help constituents. However, in this instance he overstepped the mark, and got himself a television channel and a radio broadcaster into difficulty under New Zealand's law of contempt.

The case involved actions by Smith, TV3, and Radio New Zealand relating to a Family Court dispute over the custody of a child between the child's birth parents, and another family member into whose care the parents had put the child.

Smith took up the cause of the child's birth parents who wanted to have the child back. The Family Court held that the child should remain with the caregiver. Smith seemed to

think that this was wrong and went public about it on TV3 and RNZ.

Some of Nick Smith's language was extreme. He referred to the court's interim decision as "blatantly wrong" and "a travesty of justice" and the result as almost "state sanctioned child stealing." He described what had happened as "obscene," "a fiasco," and "an indefensible situation." He also referred to a court order as "a warrant for the child to be ripped out of his family's arms."

The Solicitor General charged that Smith, TV3 and RNZ committed a serious contempt of court by improperly pressuring the caregiver "to forego her legal rights, or to alter her approach to the proceeding," and attempting, or having the appearance of attempting, to "improperly influence the Family Court," and diminishing the validity of the Court's decision and standing in the eyes of the public.

This was a decision of two High Court judges sitting together because of the importance of the issues raised and the Court looked at the actions of Nick Smith, TV3 and RNZ separately to see if they had committed contempt.

MP in Contempt for Statements to Media

Nick Smith was found in contempt by putting improper pressure on litigants by a telephone call that he made to the caregiver. The Court said Smith had an "actual intention of persuading the caregiver to give up the case and surrender

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New Zealand MP and Media Convicted of Contempt for Reports on Child Custody Case

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custody of the child.” The Court found his public statements on Radio New Zealand, and his media release were “one-sided, emotive and extreme in terms of their language, and inflammatory and intimidating (particularly of the caregiver) in their effect.”

The Court also found that Smith intended to influence the Family Court decision and to lessen public acceptance of its decision on the case. Smith undermined public confidence in the Court by the language he used. It amounted to an assault on the authority and integrity of the Court and the fairness and legitimacy of its decision.

It is important to stress that the focus was on the *probable tendency* of the publication, rather than its actual effect.

TV3 in Contempt for Pressuring Litigant

TV3's 20/20 documentary *Tug of Law* on the custody dispute was found to be in contempt by intending to put pressure on the caregiver to forego her claim to custody.

The Court found that the documentary contained “implicit if not explicit bias” from the outset, citing its opening:

If you are one of the country's two million parents you might find the following programme disturbing. It is about parents' rights or lack of rights to have custody of their own children

The Court also cited the documentary's selection of images and scenes, including 1) a picture of the whole family with the child's face pixillated, and then the removal digitally of the child leaving a gap in the family group; 2) the depiction of the child relaxing and playing happily with his birth family contrasted with the somewhat barren scenes of the caregiver and a child entertaining itself bouncing a ball down a street. The comparison was seen as deliberately odious.

The Court also found the documentary depicted the birth parents as healthy, hard working and closely knit, versus depiction of the caregiver as a poor parent with quite explicit suggestions that she has seriously neglected the child's education, development and health and exposed him to violence through living with a partner who has criminal convictions for violence. There was an image of an uniden-

tified document in which the caregiver conveyed a threat to shoot the parents if they attempted to take the child.

The Court specifically rejected TV3's attempt to excuse the one-sidedness of the program by relying on the caregiver's refusal to participate in it. The Court said that the caregiver must not be placed in the position of having to make her case on television rather than in Court in an effort to prevent public obloquy.

The Court referred to the fact that television is widely acknowledged to have a more powerful reach than radio or the print media. That follows from its ability to depict people and places in a way that can manipulate the emotions of viewers.

Accordingly the Court found that TV3 also intended to influence the decision of the Court, or at least create a risk of such influence. Although the program may not have intended to undermine public confidence in the Court, it carried a real risk of this.

The public interest defense did not apply. Nor was it a defense to which the Chief Family Court Judge had opened the gate by commenting on the case.

The Court said that the 20/20 *Tug of Law* program was a report of proceedings because “it describes the nature of the dispute, reports on the Court's decision and identifies the parties by their first names. It also identifies the locality of the parties.”

Thus TV3 was found to have breached the Guardianship Act which prohibits reporting on the proceedings of Family Court matters, unless leave of the Court is obtained. Nick Smith was also found to have breached the Act.

Finally Radio New Zealand was found to have put improper pressure on the caregiver by broadcasting the interview with Smith. The Judges were critical of Radio New Zealand's program for talking about details of the case, and for the inadvertent release of the name of the child. It also said that there was a real tendency to influence the Family Court in its decision.

Conclusion

The decision is a restrictive one as far as the media are concerned. Contempt by scandalizing the Court is alive and well. The decision also highlights that news reports on con-

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New Zealand MP and Media Convicted of Contempt for Reports on Child Custody Case

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controversial cases can be construed as attempting to dissuade a litigant from having a dispute decided by a Court.

On April 2, 2004, the High Court fined Nick Smith \$5,000 but also praised his generosity to the birth family and said his intentions were worthy. The Court fined TV3 \$25,000. They described its documentary about the Family Court as opportunistic, cynical and wrong. Radio New Zealand

was fined \$5,000. Its offense was in broadcasting the live interview with Nick Smith.

As a final note, the High Court recently confirmed the Family Court decision that the child should remain with the caregiver but granted generous visitation to the birth parents.

William Akel is a partner at Simpson Grierson, Barristers & Solicitors, in Auckland, New Zealand.

Canadian Appeals Court Ups Damages in Cyberlibel Case

By Roger D. McConchie

On June 4, 2004 the Ontario Court of Appeal ruled that one of the largest gold mining companies in the world was entitled to \$75,000 general damages and \$50,000 punitive damages for "a systematic, extensive and vicious campaign of libel" conducted over the Internet. *Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329. The decision is available online at: www.ontariocourts.on.ca/decisions/2004/june/barrickC39837.htm

The campaign involved the postings of hundreds of false and defamatory statements concerning the corporation on various websites. The lower court judge had awarded only \$15,000 in damages, but the Court of Appeal increased damages eight fold.

The lower court judge had awarded only \$15,000 in damages, but the Court of Appeal increased damages eight fold.

Default Judgement

When the defendants failed to defend Barrick's lawsuit, the Ontario Superior Court granted the plaintiff default judgment but awarded only \$15,000 general damages. Among other things, the lower court reasoned the defendant Lopehandia's statements were unlikely to be taken seriously by a reasonable reader and the defamatory words had not caused any serious damage to the corporation's reputation. The lower court judge also rejected the company's claim for punitive damages.

8x Damages Increase on Appeal

When appellate courts in the common law provinces interfere with damage awards, the result is usually a reduction.

This is one of the few cases which go the other direction. In fact, this award skyrocketed.

This case is probably the largest proportionate increase in damages by an appellate court (in a common law province) since the Supreme Court of Canada released its landmark libel damages decision in *Hill v Scientology* in 1995.

Cyberlibel Held To Be Specially Damaging

The decision sends a clear message that Internet defamers will not get off lightly on the theory that website rants are

commonplace, expected by Internet users, and therefore less likely to be taken seriously than publications in the mainstream media.

To the contrary, under this decision damages may be increased by the following special factors:

"Communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching ... Internet defamation is distinguished from its less pervasive cousins [other media of communications] in terms of its potential to damage the reputation of individuals and corporations ... [by] ... its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility."

Corporations Receiving Large Awards?

In the common law provinces, there have been very few libel damage awards of any significance to corporations – as opposed to individuals – over the last ten years. Corporations thinking of bringing suit have worried that doing so would be

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Canadian Appeals Ct. Ups Damages in Cyberlibel Case

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counterproductive – it would merely stir the web community to counteraction by spawning mirror sites that republish the defamation.

A fascinating element of the appeal court's judgment in *Barrick Gold Corp. v Lopehandia* is the following discussion [at paragraph 63]:

Barrick is not "the powerful party" in the context of the Internet. The impact of the Internet is to neutralize whatever "power" Barrick may have had, in terms of a communication battle with Mr. Lopehandia. In reality it is Barrick that is vulnerable to publications of this nature, and Mr. Lopehandia who is abusing his power. The Internet is one of the most powerful tools of communications ever invented and, as ...[Collins, *The Law of Defamation and the Internet*] ...indicates, it is "potentially a medium of virtually limitless international defamation."

In effect, if you libel a corporation on the Internet, the David v Goliath argument is going to get short shrift in the courtroom. The Internet is likely to enhance defendants' prospects of being tagged with punitive damages.

Conclusion

Barrick Gold Corp. v Lopehandia makes it clear that it is no longer safe – if it ever was – for individuals or groups in Canada to engage in malicious campaigns of unjustifiable vilification of large corporations on the Internet.

In the past, some may have thought that corporations would not sue either because companies rarely received significant damage awards, the fear of bad publicity in the Internet community was a deterrent, or courts would discount damages awards on the theory Internet attacks have little credibility and therefore cause little damage. These considerations may be outdated in light of this decision.

Mainstream publishers, who are less likely to be stung by findings of persistent malice, should also take notice of the appeal court's comments about the propensity of Internet communications to increase the size of the general damages award.

The reasoning in *Barrick Gold Corp* is almost certain to have an inflationary effect on future awards, in part because more plaintiffs' counsel will consider it worthwhile to plead the companion Internet defamation when suing over hard-copy/normal broadcast publication.

Roger D. McConchie is the head of McConchie Law in Vancouver, Canada.

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New Zealand Court of Appeal Recognizes Invasion of Privacy Tort

By William Akel

The New Zealand Court of Appeal issued a major media law decision explicitly recognizing for the first time a tort for invasion of privacy. *Hosking v Runting, Pacific Magazines NZ Limited & Ors* [2004] NZCA 34 (March 25, 2004). The decision is available online through: www.austlii.org/

The pecking order in New Zealand is as follows. The High Court deals with major cases at first instance. There is a right of appeal to the Court of Appeal. The final court of appeal was, up until very recently, the Privy Council sitting in London. The Privy Council judges were in the main the judges who make up the House of Lords judges. Appeals to the Privy Council have been abolished. New Zealand now has its own Supreme Court as the final court of appeal. It commences work in July this year.

Now down to business.

Magazine Photos Bring Privacy Claim

The Court of Appeal was called on to decide whether there is a tort of invasion of privacy in New Zealand law. Previous decisions of the High Court have held that there was such a tort. However it would be fair to say that all the issues had not been fully canvassed in any of these decisions.

Along came the *Hosking* case. The facts were simple. Mike Hosking was a well known broadcaster. He and Mrs Hosking jealously guarded the privacy of their twin girls born in June 2001. They declined all interviews about them, and didn't allow photographs to be taken. The Hoskings separated in August 2002.

Pacific Magazines commissioned Simon Runting to take photographs of the twins to supplement an article. He took photographs of the children in a well known shopping street in Auckland, the biggest city in New Zealand. They were taken without Mr and Mrs Hoskings' consent. They objected to their publication when they found out about them. The magazine said it was going to publish regardless.

Trial Court Rejects Privacy Claim

The Hoskings applied to the High Court for an injunction to stop publication of the photographs. After a very full hearing the High Court judge held there was no law of invasion of privacy in New Zealand.

The judge referred to the state of play in Australia, Canada, England, the European Court, the United States, and extensive writings on the topic. He was swayed very much by the UK approach, that no separate tort of invasion of privacy exists. If there was going to be any developments in this area of the law it had to be via law of confidence.

This of course was all pre-*Naomi Campbell* in the House of Lords.

Court of Appeal Considers Right of Privacy

Although the Hoskings lost their appeal, the five Court of Appeal judges took time to consider privacy law developments world wide and fully considered the conflict between freedom of expression rights and the encroachment of privacy values on these rights. Four powerful separate opinions were delivered. In the end, three judges supported the tort of invasion of privacy while two opposed it.

A little bit of constitutional background is required. New Zealand has a bill of rights – The New Zealand Bill of Rights Act 1990 (“NZBOR”). Section 14 provides for freedom of expression:

“Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”

Thus the right is broad based. However, it is far from absolute. Section 5 of the NZBOR provides that:

“the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

There is no express right to privacy in the New Zealand Bill of Rights. However, the Court of Appeal has often said that privacy is the underlying value in other freedoms, particularly as relates to unreasonable search and seizure.

In the leading judgment in *Hosking*, Gault P and Blanchard J jointly upheld a tort of invasion of privacy. They said that there are two fundamental requirements for a successful claim for interference with privacy:

- (a) The existence of facts in respect of which there is a reasonable expectation of privacy; and
- (b) Publicity given to those private facts that would be

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New Zealand Court Recognizes Invasion of Privacy Tort

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considered highly offensive to an objective reasonable person.

These two Judges agreed that no Court can prescribe all the boundaries of a privacy cause of action in a single decision and that the claim will evolve through future decisions as courts assess the nature and impact of particular circumstances.

Invasion of Privacy Claim Recognized

They emphasized however that they are concerned only with wrongful publicity given to private lives – *not* an unreasonable intrusion into a person's solitude or seclusion. In many instances this aspect of privacy will be protected by the torts of nuisance or trespass or by laws against harassment, but this may not always be the case.

These two Judges say that private facts are those that may be known to some people, but not to the world at large. There is no simple test for what constitutes a private fact. They further say that the right to privacy is not automatically lost when a person is a public figure, but his or her reasonable expectation of privacy in relation to many areas of life will be correspondingly reduced as public status increases.

Involuntary public figures may also experience a lessening of expectations of privacy, but not ordinarily to the extent of those who willingly put themselves in the spotlight. They say the special position of children must not be lost sight of.

The concern of these two Judges is widespread publicity of very personal and private matters. Similarly publicity, even extensive publicity of matters which, although private, are not really sensitive should not give rise to legal liability. The concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned.

Most important there should be available in cases of interference with privacy a defense enabling a publication to be justified by a legitimate public concern in the information.

Judge Tipping also held that a tort of invasion of privacy exists. To him the first and fundamental ingredient of the tort should be that the plaintiff must be able to show a reasonable expectation of privacy in respect of the information or material which the defendant has published or wishes to publish.

The necessary expectation can arise from the nature of the information or material or the circumstances in which the defendant came into possession of it or both. In most cases that

expectation is unlikely to arise unless publication would cause a high or substantial level of offence. It should be a defence to an action for invasion of privacy that the information or material published about the plaintiff's private life is a matter of legitimate public concern.

Two Judges Reject Privacy Tort

Judges Keith and Anderson in separate judgments rejected a tort of invasion of privacy. Judge Keith based his conclusion on the central role of the right to freedom of expression; the existing protections of privacy interests under the Privacy Act, Broadcasting Act, Press Council Rules and the like; and the lack of an established need for the proposed cause of action.

He found it significant that a general provision on privacy was deliberately excluded from the Bill of Rights.

Judge Anderson emphasised the concern that the right to freedom of expression, affirmed by s14 of the New Zealand Bill of Rights Act 1990, is now to be limited because publication of truth, might be "*highly offensive to an objective reasonable person.*"

Anderson considered that cases such as *Douglas and Zeta Jones* could have been dealt with on conventional bases of contract and trespass. The photographs could only have been taken by a person who was either not invited and therefore a trespasser, or by an invitee who breached a significant stipulation of the license to be present.

Magazine's Photos Not Offensive

As stated the Hoskings lost their appeal. The majority judges said there could be no reasonable expectation of privacy when Mrs Hosking went shopping with the girls. The publication of the photos of the two girls would not be considered highly offensive to the average New Zealander. The fact that the claimant was a celebrity did not mean that privacy did not apply. Each case had to be decided on its own facts. In this respect the law of privacy will develop on an incremental basis. Each case will be very much fact driven.

Since the decision, the House of Lords has given its split decision in *Naomi Campbell*. The *Hosking* decision is referred to by the House of Lords.

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New Zealand Court Recognizes Invasion of Privacy Tort

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As a final point, having won the appeal the magazine has decided not to publish the photographs. It was all a matter of principle.

Plaintiffs were represented by Chen Palmer & Partners,

Wellington. Defendants were represented by Bell Gully, Auckland.

William Akel is a partner at Simpson Grierson, Barristers & Solicitors, in Auckland, New Zealand.

Truth and Public Interest Insufficient to Protect Against Defamation Claim Says Canada's Supreme Court

By Marc-André Blanchard

In a case arising out of the civil law province of Quebec in *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 C.S.C 53, and decided on July 29, 2004, the Supreme Court of Canada, in a 6 to 1 judgment, rendered what many believe is a chilling judgment for freedom of expression. This final judgment from the highest court in Canada states that truth and public interest are not elements that will, in themselves, enable a defendant in a libel action to win.

It is important to note that this judgment was rendered under Quebec law, which is a civil jurisdiction, contrary to the rest of Canada where common law, of British influence, is enforced.

As we all know, at common law, and consequently for the whole of Canada except Quebec, the defense of truth is an absolute defense against a claim in defamation.

The troubling consequence of this decision of the Supreme Court of Canada is that the citizens of Quebec are now left with a freedom of expression and a freedom of the press, which are enshrined in the Canadian Constitution, that have a lesser value in Quebec.

The following text is taken from the summary provided by the Supreme Court of Canada.

The facts, as resumed by the court, are:

“The French network of the Canadian Broadcasting Corporation (“CBC”) aired on the show *Le Point* a report on delays by the Chambre des notaires du Québec (“CNQ”) in dealing with disciplinary complaints against notaries and compensation claims made to its indemnity fund. The CNQ set out to counter the negative effects of the broadcast and the respondent N, who acted as a communications consultant for the CNQ, drafted a handwritten letter to request a meeting with the director of the show. In the letter, he lamented the prejudicial effect that the

broadcast had had on the CNQ and pointed out certain errors. When contacted by a journalist of the CSC, N explained that the letter was nothing more than a request for a right of reply and that it was not meant for publication. The journalist pointed out to N two errors in the letter concerning two disgruntled complainants seen in the broadcast. N said that he was going to verify the information, which he had received from the CNQ, and respond within three days. A day before N's requested time was to expire, *Le Point* broadcast a report crafted as a response to N's letter, but quoted only the erroneous portions of the letter. Following this broadcast, a rash of letters were received from notaries who expressed indignation and dismay about the CNQ's communication policies. In a communique sent to all notaries and all professional corporations, the Interprofessional Council, the media, the Office des professions and the Minister of Justice, the CNQ asserted that N had sent his letter on his own, without its authorization. Soon thereafter, the CNQ terminated contractual relations with N and his corporation. N lodged a complaint with the CBC's ombudsman who acknowledged that one of the grievances was well-founded in that the second broadcast seriously compromised the principle of fairness by failing to mention the five grievances that were central to N's letter and only reporting on the two errors. N and his corporation initiated a claim for damages against the CBC and the CNQ. The Superior Court found the CBC liable in defamation, solidarily with the CNQ. The majority of the Court of Appeal dismissed the CBC's appeal, concluding that the trial judge had correctly found fault in this case.”

Justice LeBel, for the majority, stated in its summarized opinion:

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“Freedom of expression, and its corollary, freedom of the press, play an essential and invaluable role in our society. These fundamental freedoms are protected by s.3 of the Quebec Charter of Human Rights and Freedoms and s. 2(b) of the Canadian Charter of Rights and Freedoms. However, freedom of expression is not absolute and can be limited by the requirements imposed by other people’s right to the protection of their reputation. This right also receives protection under s. 4 of the Quebec Charter and under art. 3 C.C.Q. In an action in defamation, the two fundamental values of freedom of expression and the right to reputation must be weighed against each other to find the necessary equilibrium.

An action in defamation in Quebec is grounded in art. 1457 C.C.Q. Like any other action in civil, delictual and quasi-delictual liability, the plaintiff must establish, on a balance of probabilities, the existence of injury, a wrongful act and a causal connection between the two. Furthermore, in order to prove injury, the plaintiff must demonstrate that the impugned remarks were defamatory. Here, the thrust of the CBC’s argument is the absence of fault. The other elements are not seriously at issue. The determination of fault in an action in defamation involves a contextual analysis of the facts and circumstances. Truth and public interest are factors to consider but they are not necessarily the determinative factors. It is insufficient in this case to focus merely on the veracity of the content of the second broadcast report. One must look globally at the tenor of the broadcast, the way it was conducted and the context surrounding it. The guiding principle of liability for defamation is that there will not be fault until it has been shown that the journalist or media outlet in question has fallen below professional standards. The conduct of the reasonable journalist becomes the all-important guidepost.

In holding the CBC liable for defamation, the Superior Court and the Court of Appeal achieved the correct balance between freedom of expression and N’s right to respect for his reputation. Even though N’s handwritten

letter cannot be considered private, in focussing only on the two errors in that letter, the second broadcast was misleading, giving the impression that the substance of N’s letter was limited to these two erroneous statements. The letter discussed other concerns relating to the image of notaries created by the broadcast. A person viewing the report in question, would not be aware of these other concerns. Nor would the viewer be aware, from the structure of the report, that the letter was really just a request for a meeting and a right of reply. By leaving out vital pieces of information the CBC misrepresented N’s letter as a disingenuous attempt to mislead the CBC, and thereby the public. Moreover, the CBC intentionally and deliberately broadcast the errors in the letter before N

could attempt to set things straight.

The tone and tilt of the second broadcast pointed to its being more of a response to N’s criticism than an exercise in protecting the public interest. Lastly, the CBC’s own ombudsman found one of N’s complaints to be quite serious and considered the second broadcast to have the appearance of a settling of accounts. This is highly detrimental to the CBC’s case. The Ombudsman also openly implied that the journalists did not live up to proper journalistic standards, given the selective use of certain portions of the letter. These factors lead to the conclusion that the CBC intentionally defamed N and did so in a manner that fell below the professional standards of a reasonable journalist. By not respecting professional standards in this case, and given all the other surrounding circumstances, the CBC was at fault.”

Justice Binnie, the sole dissenter, stated, as summarized:

Justice Binnie, the sole dissenter, stated, as summarized:

“A legal rule that awards \$673,153 in damages to N and his corporation on the basis of a broadcast which stated true facts, the publication of which was undoubtedly in the public interest, just because other lesser matters might also have been mentioned but were not, or further context might have been provided but was not, is inconsistent with s. 3 of the Quebec Charter of Human Rights and Freedoms including the public’s right to have access

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to true and accurate information about matters of legitimate interest and concern. In this case, despite the journalists' boorish refusal to meet promptly with N and the poor quality of presentation evident in the second broadcast, civil fault should not be attributed to the appellant when all the relevant public interest issues are taken into account.

The first broadcast relied in part on two complainants, T and L, who agreed to be interviewed on the air. On learning about the broadcast, the CNQ (without checking its facts) leapt to the attack, alleging (erroneously) that L had lied about his complaint because the CNQ had in fact reimbursed him for a loss suffered at the hands of one of its members, and that T's brother was the leader of a bizarre and violent cult. It was appropriate to bring these allegations to the attention of viewers, together with the journalists' response.

First, while the second broadcast ought to have presented N's letter in a more complete and balanced fashion, the lack of balance did not subvert the truth of the real matter of interest to the public, namely the truth of the CNQ's allegations pertaining to the complainants. Second, although N ought to have been given time to verify the errors in the letter, the allegations against the

complainants were demonstrably false whether or not N took the opportunity to verify them. Had N publicly acknowledged the falsity of the allegations, it would simply have added to the impression that the CNQ had responded impetuously to the original broadcast with a misinformed attack on the complainants, for which it should justly be called to account. Furthermore, it would not have improved N's reputation for the CBC to report that he wanted time to find out about the truth of the CNQ's allegations only after they were made. Third, the CBC was entitled to consider the information it had received to be public. There was no indication in N's letter to the contrary. Fourth, the criticism of some aspects of the second broadcast by the CBC's ombudsman cannot be equated with a finding of civil fault. He was not concerned with balancing the values of a free press and the respect for reputation. Had the other points made in N's letter been broadcast they would not have pulled the sting, or served the public interest in any substantial way, or for that matter, have helped to save N's reputation."

The full text of the decision can be accessed at: www.lexum.umontreal.ca/csc-scc/en/index.html.

Marc-André Blanchard is a partner with Gowling Lafleur Henderson LLP in Montréal.

International Media Law Round-up

By Charles J. Glasser, Jr.

France: Burying Mitigating Facts

On May 5th, a French trial court ordered *Paris Match* to pay 15,000 Euros (appx. \$18,000 USD) and publish an apology for defaming Ivory Coast President Laurent Gbagbo. In February 2002, the magazine published a story repeating allegations that the head of the African nation had stolen cars belonging to a political opposition leader.

The court found that the magazine could not prove the truth of the statements and that the statements were not covered by a rough equivalent of the "fair comment" defense. French law recognizes a defense on matters that serve the public interest and are published in "good faith." Under

French law, however, bad faith is presumed. (*article 35 bis of the Law of 29 July 1881*).

The source of the allegations was the wife of the opposition party leader who had an admitted political bias against the president and a motive to defame him. The article disclosed this, but these facts appeared at the end of the story, which the court found "particularly insidious" and evidence of bad faith.

This decision serves to remind counsel vetting publications in non-US jurisdictions that courts may not consider an article in its entirety in assessing a defamation claim. Thus a court may find bad faith where an article discloses – but does not emphasize – facts that challenge the credibility of a source who makes defamatory allegations.

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International Media Law Round-up

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Korea: Internet Anti-Libel Law Delayed

The Korean National Election Commission (NEC) has withdrawn revisions to that nation's election laws that would have made it illegal to post anonymous messages on Internet chat rooms that slander politicians or political parties. The law was scheduled to have taken effect on April 12.

Politicians argued for the new rule because Internet anonymity makes it difficult – if not impossible – to track down the putative defendant. The Korean Civil and Criminal Codes protect statements that are true; and false statements predicated upon “an exercise of due care” (Korean Civil Code, Articles 751(1), 764; Korean Criminal Code, Articles 305(1) and (2), 309).

Enactment of the NEC rule was not challenged in court, but instead was delayed in part because the Korean Ministry of Government Administration does not yet have the technical means in place to trace the identities of Internet posters. In the meantime, the NEC has said it has sent official requests to webmasters for all political websites asking for voluntary cooperation.

Australia: Journalist's Bad Behavior Brings Breach of Confidence, Contempt Charges

A recent non-media case in Australia should remind lawyers everywhere of the old adage that “bad facts make bad law.” In a wild case, the Queensland Supreme Court ruled in early March that freelance journalist John Macgregor assisted in the theft of computer documents belonging to Elan Vital, a quasi-religious group he claimed to be investigating.

Macgregor was a former member of Elan Vital, and had sold freelance articles in the past about his disillusionment with the group. Hoping to sell investigative pieces about the group, Macgregor convinced a computer technician repairing Elan Vital computers to steal computer files belonging to the group and send them to him.

The scheme fell apart when Macgregor posted bits and pieces of the stolen files – including private financial data about the group's individual donors – on the Internet.

The religious group obtained an ex parte “*Anton Pillar*” order. Pillar orders allow the owner of proprietary information to effectuate a seizure of a computer that may contain stolen data. Like a temporary restraining order in the U.S., a “Pillar” order is a drastic remedy that requires immediate and irreparable harm and is not outweighed by public policy.

Elan Vital traced the files back to the computer technician, who admitted the scheme, and on that basis obtained another order allowing them to seize Macgregor's computer to prevent further distribution.

Seizures under a Pillar order are supervised by an independent court-appointed solicitor. When the order was being served, Macgregor grabbed his computer, ran out of the back door of his house, and fled service, which is considered contempt under Australian law. Macgregor now faced two claims: the underlying breach of confidence claim, and contempt of court for fleeing service.

At a hearing on the contempt claim, Macgregor submitted affidavits denying that he had been served, and stating that the independent solicitor threatened him with rape in prison while trying to effectuate service. The trial level court rejected his affidavits as lacking credibility, and held that Macgregor was liable for contempt and indemnity costs to the group totaling more than \$100,000AU (appx. \$75,000USD).

In March, the Elan Vital filed an application for summary judgment on the underlying breach of confidence claim. Unlike U.S. law, Australian law will not allow reporters to publish proprietary documents knowing they 1) contain proprietary data; and 2) were most likely obtained illegally.

Australian common law provides a narrow exception to breach of confidence liability, when the documents stolen are of “dire and urgent” need for a matter of public health or safety.

The court examined the documents stolen by Macgregor and found that they were merely expense reports and showed no wrongdoing by the group, especially wrongdoing that would rise to the level of an “urgent” public need to know.

In a ruling from the bench, Macgregor was found liable for breach of confidence. Although Macgregor distributed the documents to several newspapers in Australia, the group did not pursue injunctions against any publishers, and the publishers did not publish the documents.

South Africa: “Reverse Immunity” Case on Appeal in South Africa

We are all familiar with the doctrine that government officers are generally immune from suit for defamation for statements made in the course of their official duties. South Africa is deciding an unusual twist on the doctrine: that a cabinet minister does not have the right to sue for libel over statements that concern his or her work as a member of parliament.

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International Media Law Round-up

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In 1997 the Pretoria *Mail & Guardian* published its annual “report card” which criticized the performance of Housing Minister Sankie Mthebu and raised questions about a housing scheme that favored a friend of the minister’s.

Although the defamatory meaning was apparent – it implied corruption or dishonesty at the least – the Rand High

Court held that under the South African Constitution the right to freedom of speech outweighs a minister’s right to sue for libel.

The Appeals Court will decide whether to hear Mthebu’s appeal by the end of May.

Charles J. Glasser, Jr. is Media Counsel at Bloomberg News LLP.

ISP Liability: Canada Proposes Copyright Reforms

By Andrew Bernstein and Tyson Dyck

Canada has no similar legislation to the *Digital Millennium Copyright Act* (the “DMCA”). Faced with uncertainties about copyright infringement and ISP liability, the Canadian federal government has begun reforming the *Copyright Act*. On June 22, 2001, it released its *Consultation Paper on Digital Copyright Issues* (the “Consultation Paper”). See Canada, Industry Canada and Canadian Heritage, *A Framework for Copyright Reform* (June 22, 2001), at: [http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/\\$FILE/digital.pdf](http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf).

In its section on the liability of network intermediaries, the Consultation Paper acknowledges that Canadian copyright law does not specifically deal with the role of ISPs. It therefore recommends a system similar to that set out in the DMCA.

Background

The leading case on ISP liability in the copyright context, *Tariff 22*,¹ dealt predominantly with whether ISPs can be liable for communicating copyright-infringing works to the public (by letting them “flow” through their networks), copying the works (by caching them) or authorizing infringement and indirectly infringing copyright (by permitting users to use the Internet to infringe).

In *Tariff 22*, the Federal Court of Appeal found that the person who posts the work, and not the ISP, communicates it to the public. The Court also found that to authorize an infringement, the ISP must “have enough control over the infringer to prevent the infringement and behave in a way that would lead a reasonable person to conclude that [the ISP] had approved or countenanced infringement.”

According to the Court, such a circumstance would be rare; it would require the ISP not only to approve the use of its equipment and transmission service for the infringing activity but also to purport to grant customers permission to infringe copyright.

On the other hand, the Court held that ISP caching constituted copying, a finding that attracted a dissent at the Court of Appeal. An appeal is pending to the Supreme Court of Canada, and it will be interesting to see how the Court decides comes down on this controversial issue.

Indirect Infringement Standards

The potential liability for indirect infringement remains less clear. The Canadian court in *Apple Computer, Inc. v. Mackintosh Computer Ltd.* (1986), 28 D.L.R. (4th) 178 (F.C.T.D.) at 225, suggested that once someone has actual or imputed knowledge that a particular work may be infringing copyright, he or she is obligated to ensure that it does not continue to do so.

This thinking parallels the notice and take-down provisions in the DMCA; however, its application in Canadian law is vague. The issue has not been considered in the context of ISP liability and leaves potential for liability.

Copyright Reforms Proposed

The Consultation Paper proposes a complaints-driven notice and take-down procedure that recognizes both the interests of copyright holders and the infeasibility of requiring ISPs to monitor all their online content. This proposed procedure would have the following features: an ISP would not be liable for the copyright infringements of third parties who use its facilities to disseminate copyrighted information to the

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ISP Liability: Canada Proposes Copyright Reforms

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public. Nor would an ISP be liable for reproducing copyrighted material for caching or website hosting.

An ISP could, however, be liable if it failed to block access to the infringing material after receiving proper notice from the copyright holder. *Id.* at 37. Proper notice would be written, would identify the copyright holder and would provide a clear description and location of the infringing material.

Finally, an ISP that acted in good faith to comply with this notice and take-down procedure would not be liable for the economic harm suffered by the copyright owner or by the infringer. Like that in the DMCA, this procedure would recognize ISPs' role as intermediaries but encourage them to fill this role responsibly.

Debate on Proposals Continues

The Canadian debate on copyright reform continues today. ISPs have submitted their opinions to the House Standing Committee on Canadian Heritage. They agree with limiting ISP liability but propose a notice and notice, rather than a notice and take-down, process. Canadian Association of Internet Providers, *Re: 'Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act'—Review by the House of Commons Standing Committee on Canadian Heritage* (September 15, 2003), at <http://www.caip.ca/issueset.htm> (accessed April 22, 2004) at 5-6.

The Canadian Association of Internet Providers (CAIP), a collection of ISPs that provide about 80% of Internet connections in Canada, states that its ISP members will not knowingly host illegal content. If a copyright holder gives an ISP clear notice of an infringement, the ISP will then relay this notice to its customer and advise the Canadian Recording Industry Association (CRIA) that it has done so. ISPs will take down the infringing material only upon a court order if the notice and notice does not result in voluntarily removal. *Id.* at 6-7.

The federal government is considering these proposals, and new legislation is likely to be introduced during 2005. Canada, Canadian Heritage and Industry Canada, "Supporting Culture and Innovation: Report on the Provisions and Operation of the *Copyright Act*" (October 2002), at <http://strategis.ic.gc.ca/pics/rp/section92eng.pdf> (accessed April 27, 2004) at 43.

In the federal government's March 24, 2004, *Status Report on Copyright Reform*, it considers two directions for this reform: first, to exempt ISPs from liability when they act as intermediaries, but to leave the possibility of civil sanctions if they do not help remove infringing material, perhaps using a notice and notice procedure; and second, to subject ISPs to liability for the infringing material on their facilities, which they could escape by meeting certain conditions, such as responding to the requests of copyright holders to remove infringing material or to collect royalties.

Canada, Canadian Heritage and Industry Canada, *Status Report on Copyright Reform* (24 March 2004) at [http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/statusreport.pdf/\\$FILE/statusreport.pdf](http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/statusreport.pdf/$FILE/statusreport.pdf) (accessed April 23, 2004) at 4-8.

In practice, these approaches might function similarly; in both cases, ISPs have some duty to respond to the requests of copyright holders. The difference lies in the initial presumption of liability. Whether ISPs will be prima facie liable for hosting infringing content will most likely depend on the Supreme Court's decision in *Tariff 22*. The federal government will also consider the systems established in other jurisdictions, including the United States.

Whatever direction it chooses, the federal government is likely to follow the Federal Court of Appeal's analytical framework in *Tariff 22*, and grant ISPs some type of protection from liability. The outstanding issues concern the process by which ISPs will enjoy this protection. The Canadian federal government has reacted more slowly to the issue of ISP liability than has the U.S. government, but in doing so, it seems to have gained from the American experience. It will undoubtedly incorporate that experience into new Canadian copyright legislation that will deal with the rights of copyright holders in a new digital environment.

Andrew Bernstein is a lawyer at Torys LLP in Toronto and member of the firm's Intellectual Property and Technology Groups. Tyson Dyck is an articling student at Torys LLP.

¹ *Re: SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet)* (1999), 1 C.P.R. (4th) 417 (C.B.D.), varied by *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers* (2002), 19 C.P.R. (4th) 289, 215 D.L.R. (5th) 188, [2002] F.C.J. No. 691 [hereinafter *Tariff 22*] and leave to appeal to S.C.C. granted in [2002] S.C.C.A. No. 289.

Five Reporters Held in Contempt in Wen Ho Lee Lawsuit

By Nathan Siegel

Washington, D.C. federal judge Thomas Penfield Jackson held five journalists from major news organizations in civil contempt for refusing to identify confidential sources they used to report about the investigation of Dr. Wen Ho Lee, an Asian-American scientist once suspected of espionage. *Lee v. United States Dep't of Justice*, 2004 WL 1854138 (D.D.C., August 18, 2004). Judge Jackson fined each journalist \$500 a day until they comply with his disclosure orders, but stayed the fine pending an appeal.

The journalists involved are James Risen and Jeff Gerth of *The New York Times*, Bob Drogin of the *Los Angeles Times*, Josef Hebert from the *Associated Press* and Pierre Thomas, who reported for *CNN* and is now with ABC News. A sixth journalist, Walter Pincus of *The Washington Post*, also refused to identify his sources, but his case has proceeded more slowly than the others and contempt proceedings against him have not yet been initiated.

Lawyers for all the journalists have stated they plan to appeal. The case is unprecedented in the sheer number of prominent journalists involved and will likely prove to be a major test of the continued viability of the federal constitutional and common law reporter's privilege in civil proceedings.

Motions to Quash Subpoenas to Journalists

The subpoena battle that led to the contempt orders began almost two years ago. The dispute arises out of a lawsuit brought by Wen Ho Lee against several federal government agencies for allegedly leaking information about him to the media in violation of the Privacy Act, 5 U.S.C. § 552a. After taking roughly 20 depositions of government witnesses, Lee's attorneys subpoenaed the journalists to sit for depositions and identify the confidential sources of leaks they reported.

All of the journalists moved to quash the subpoenas, relying heavily on the journalist's privilege articulated in

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981). *Zerilli* was also a Privacy Act case in which the D.C. Circuit rejected a plaintiff's effort to depose a reporter to learn the sources of alleged leaks. The D.C. Circuit articulated a relatively rigorous definition of the First Amendment reporter's privilege that has effectively shielded reporters from civil discovery of their confidential sources in Washington, D.C. federal court for the past quarter century.

However, last year Judge Jackson found that Dr. Lee made a showing sufficient to overcome the qualified First Amendment privilege and denied the motions to quash. *Lee v. Department of Justice*, 287 F.Supp. 2d 15 (D.D.C. 2003). He found that the journalists' sources were crucial to the maintenance of Dr. Lee's case because proof that the defendant agencies were the source of leaks about him was

an essential element of his *prima facie* case under the Privacy Act. *Id.* at 19-20. Though most of the journalists argued that Dr. Lee's counsel had asked virtually no questions about their news reports during discovery, Judge Jackson also

found that Dr. Lee had made "reasonable efforts" to exhaust alternative sources of the information he sought from the journalists. *Id.* at 20-23.

Moreover, in *dicta* Judge Jackson expressed doubt that recognition of any First Amendment privilege in civil proceedings is consistent with *Branzburg v. Hayes*, 408 U.S. 665 (1972), at least where a source may have violated the law by passing information to the press. As a result, he ordered the each journalist to appear for a deposition and to "truthfully answer questions as to the identity of any officer or agent of defendants, or any of them, who provided information to them directly about Wen Ho Lee, and as to the nature of the information provided." *Id.* at 25.

The Journalists' Depositions

All of the journalists subsequently sat for depositions. Most answered the vast majority of questions put to them, but all asserted the reporter's privilege to questions that ei-

The case is unprecedented in the sheer number of prominent journalists involved and will likely prove to be a major test of the continued viability of the federal constitutional and common law reporter's privilege in civil proceedings.

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Five Reporters Held in Contempt in Wen Ho Lee Lawsuit

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ther directly or indirectly asked them to identify confidential sources. The extent to which each journalist found it necessary to invoke the privilege varied considerably. For example, Jeff Gerth from *The New York Times* only declined to answer one question, while his colleague James Risen – whose reporting helped break the Lee story – asserted the privilege on more than 100 occasions. Upon Plaintiff's Application, the court then initiated civil contempt proceedings.

The Contempt Proceedings

The journalists raised varying defenses to civil contempt. One theme emphasized was that up to his point the court had lumped all the journalists together and treated them as one, rather than making findings about the merits of the privilege asserted in each individual case. Most of the reporters argued that when the relatively small number of questions to which they asserted a privilege were specifically examined, the reporter's privilege should apply and therefore no finding of contempt would be warranted.

Two of the reporters – Jeff Gerth and Bob Drogin – argued that they could not be held in contempt because they had not violated the specific terms of the court's order at all. Though they invoked a privilege on a few occasions, both argued that the specific questions put to them potentially asked them to identify sources beyond agents of the government defendants who provided information about Dr. Lee. Indeed, Gerth maintained that his contributions to the relevant *New York Times* articles did not involve Wen Ho Lee at all and therefore he never had any sources that would be responsive to the order.

For different reasons, all of the reporters also argued that the specific information they learned from the sources at issue was not the kind of information protected by the Privacy Act. As a result, they maintained the identities of their sources could not be crucial to the Plaintiff's case.

For example, Drogin argued that the principal confidential source at issue in his reporting merely voiced an opinion about the Lee investigation and opinions

are not protected by the Privacy Act. Josef Hebert maintained that his use of confidential sources was limited to confirming information that was already in the public domain and confirmed on the record by several of the government defendants themselves. Pierre Thomas demonstrated that his reporting focused solely on the conduct for which Dr. Lee ultimately accepted criminal responsibility (i.e., unauthorized downloading of classified national security information).

In his Application, the Plaintiff also asked that contempt sanctions include compensatory damages and attorneys' fees payable to Dr. Lee, in addition to any fines the court might impose. All of the reporters vigorously contested the propriety of any sanctions payable to the Plaintiff and also urged the Court to impose a nominal fine.

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Five Reporters Held in Contempt in Wen Ho Lee Lawsuit

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The Contempt Order

Following a hearing, Judge Jackson held all of the journalists in civil contempt and issued a 12-page Memorandum & Order laying out his findings. Most of those findings addressed the issue of whether each journalist had violated the literal terms of his order. He appeared to take an expansive view of what his order required and he found that all the journalists were in violation of it.

Otherwise, Judge Jackson rejected the contention that the scope of the Privacy Act was relevant to the issue of contempt, noting that

“The Order did not allow the journalists to make *ad hoc* determinations about whether information responsive to questions about identity would or would not implicate the Privacy Act.” *Lee*, 2004 WL 1854138, *3.

On appeal, however, the merits of the privilege the reporters asserted in their depositions will again be a central focus, since they may not be held in contempt for asserting a privilege if they were legally entitled to invoke it.

As to the penalty for contempt, Judge Jackson explained that he settled upon a fine of \$500 a day by “splitting the difference” between the nominal fines of \$1 per day occasionally issued in some past cases involving journalists and the more punitive \$1,000 assessed more recently in *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004) and Judge

Thomas Hogan’s recent contempt orders arising out of the Valerie Plame investigation. *In re Special Counsel Investigation*, Nos. 04-296, 04-379 (D.D.C., August 9, 2004).

Judge Jackson also declined, for the time being, to award the plaintiff any form of compensatory sanctions. However, he denied the application for such sanctions without prejudice, thus leaving open the possibility that the Plaintiff might attempt to seek additional sanctions at some future juncture. *Lee*, 2004 WL 1854138, *5-6.

Finally, Judge Jackson found that “the journalists undoubtedly have a good faith belief in the appropriateness of their constitutional arguments,” *Id.* at *5, and remarked from the bench that the privilege issue presented a serious legal question that should be resolved by the Court of Appeals. As a result, he stayed the fine pending the completion of any appeal.

Lee Levine, Nathan Siegel and Chad Bowman of Levine Sullivan Koch & Schulz LLP represented Bob Drogin and Josef Hebert in the *Lee* contempt proceedings. Floyd Abrams, Joel Kurtzberg and Karen Kaiser of Cahill Gordon & Reindel LLP represented James Risen and Jeff Gerth. Charles D. Tobin and Jennifer M. Mason of Holland & Knight LLP represented Pierre Thomas. Kevin T. Baine and Kevin Hardy of Williams & Connolly LLP represent Walter Pincus in the *Lee* case.

Nathan Siegel is of counsel to Levine Sullivan Koch & Schulz, LLP in Washington, D.C.

TIME Inc. and Reporter Held in Contempt in Plame Leak Investigation**Contempt Cleared When Reporter Agrees to Interview by Prosecutors**

On August 9, Federal District Court Judge Thomas F. Hogan, of the District of Columbia, issued an Order holding TIME Inc. and its reporter, Matthew Cooper, in contempt for refusing to comply with grand jury subpoenas for testimony and documents in the federal investigation into the leak of the identity of CIA operative, Valerie Plame. *In Re: Special Counsel Investigation*, Misc. No. 04-296 and 04-297 (TFH)(DCDC 2004)

On August 24th, the order of contempt was lifted by Judge Hogan after Cooper agreed to and was interviewed

by the prosecutors in the matter on August 23rd. TIME issued a press release stating that:

Mr. Cooper, who has been held in contempt of court for refusing to disclose his confidential sources, agreed to give a deposition because the one source specifically asked about by the Special Counsel, I. Lewis Libby, the vice president’s chief of staff, gave a personal waiver of confidentiality for Mr. Cooper to testify. Mr. Libby also gave TIME permission to release this information to the public.

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TIME Inc. and Reporter Held in Contempt in Plame Leak Investigation

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According to the TIME release, the deposition of Cooper took place in the Washington, D.C. office of Floyd Abrams, Cooper's counsel on the matter, and

“focused entirely on conversations Mr. Cooper had with Mr. Libby, one of Mr. Cooper's sources for the articles he helped author about the leak in July 2003.”

Following Up on Report by Robert Novak

Ms. Plame's employment with the CIA was first reported by Robert Novak in a column on July 14, 2003. [Neither Mr. Novak nor his counsel have indicated whether Mr. Novak has been subpoenaed by the prosecutors in this investigation and if he has, the status of such subpoena.]

The leak to Novak was reported in Cooper's article, which appeared in TIME on July 17, 2003, as well as in other news reports in and around the time period. There was discussion at the time about whether the Administration was leaking Ms. Plame's name and CIA connection in order to discredit her husband, Administration critic, Ambassador Joseph C. Wilson. True or not, the disclosure may have put Ms. Plame at risk, and those with whom she had dealt as a CIA operative.

A criminal investigation was ordered into the leak with the Department of Justice appointing United States Attorney Patrick Fitzgerald as Special Counsel to investigate allegations that one or more Executive Branch officials unlawfully disclosed the name of a CIA undercover operative, Ms. Plame.

No Reporter's Privilege in Grand Jury

In a Memorandum Opinion written and issued to the parties on July 20, 2004, but not released publicly until August, the District Court denied motions to quash by Matthew Cooper and NBC's Tim Russert. Tim Russert, it was later reported, had no confidential information to impart, and sat down for an interview with the investigators. It has been reported that Russert also told prosecutors about conversations he had with Scooter Libby.

TIME Inc. and Matthew Cooper initially filed an appeal.

In his Memorandum Opinion, Judge Hogan categorically rejected the idea that there is a reporter's privilege rooted in the First Amendment or otherwise with respect to a grand jury acting in good faith. Relying upon *Branzburg v. Hayes*, 408 U.S. 665 (1972), the court refused to adopt the balancing test that the newsmen argued was the drawn from Justice Powell's concurring opinion in *Branzburg*.

Instead, he accepted the Government's position that Justice Powell's concurrence in *Branzburg* is consistent with the opinion that Justice White wrote for himself and three other justices and that constitute the majority. Although Justice Powell refers to the necessity of “proper balance of the society interests involved,” Judge Hogan states that Powell is referring to a test that would screen out bad faith on the part of prosecutors and improper interrogations of the press.

While acknowledging that courts around the country “have chipped away at the holding of *Branzburg* by ruling that a court shall apply a qualified privilege in certain limited contexts[,] [t]hese courts have done so by carving out various factual scenarios different than those presented in *Branzburg*.”

Branzburg's factual context was grand jury subpoenas and as to those, the court found that there is a consistent approach in the federal courts in finding no qualified reporter's privilege. Judge Hogan also rejected the argument that *Branzburg* dealt not with confidential sources, but with eyewitness testimony of criminal conduct, and thus testimony on confidential sources, as was at issue here, was not directly at issue.

The court found inapplicable the District of Columbia shield law and DOJ guidelines – the latter of which if they did apply, he concluded, relying upon *ex parte* affidavits by the prosecutor, were met by the conduct of the prosecutor in this inquiry.

TIME Inc. and Matthew Cooper were represented by Floyd Abrams and Joel Kurtzberg, Cahill Gordon & Reindel, New York.

Federal District Court Quashed Subpoena for Reporter's Testimony in its Entirety Under Federal Reporter's Privilege and Under Rule 45

A Positive Legacy for a Defunct Magazine: Reporter Does Not Have to Confirm Published Quotations from Witness

By Devereux Chatillon Joshua Akbar

Neatly filling a gap in the current law on federal reporter's privilege in the Second Circuit, Judge Alan Nevas of the United States District Court for the District of Connecticut granted a non-party journalist's motion to quash a subpoena in its entirety. Holding that the plaintiffs had not met the test under *Gonzalez v. NBC*, 194 F.3d 29 (2d Cir. 1999), for divesting the reporter's privilege where non confidential sources are at stake, and that to the extent that the defendants were insisting on intrusive cross-examination should the reporter testify at all, satisfaction of the subpoena would be an undue burden under Rule 45 of the Federal Rules of Civil Procedure, the Judge declined even to require the reporter to testify concerning published statements. *Concerned Citizens of Belle Haven v. Belle Haven Club, Inc.*, No. 399CV1467 (D. Ct. June 21, 2004).

The Underlying Lawsuit and the Reporter's Article

The reporter, Leah Nathans Spiro was not a party to the underlying lawsuit, which is based on claims that the Belle Haven Club in Belle Haven, a residential community in the Town of Greenwich, Connecticut, engaged in anti-Semitic membership practices and thus violated federal and state law.

From November 1999 to November 2001 Ms. Spiro was a journalist employed by *Talk Magazine* as its Business Affairs Writer. *Talk* was a general interest magazine circulated throughout the United States. *Talk* suspended publication in January 2002.

While working for *Talk*, Ms. Spiro prepared an article entitled *The Thin Blue-Blood Line*, which appeared in the March 2001 issue. The article addressed the issue of continuing discrimination against Jews by country clubs in the United States and focused particularly on a country club in Florida that has had an ongoing controversy over its admissions policies and possible discrimination against Jews. Included in the March 2001 Article was a sidebar entitled "Other Hot Spots," in which Ms. Spiro devoted approximately one and a half paragraphs to a discussion of the Belle Haven Club and the law-

suit. In this sidebar, Ms. Spiro referred to a conversation she had with an individual named John Lyddane, who was the Treasurer for the Belle Haven Club at the time they spoke. The sidebar stated that "Lyddane told Talk that his litigating Jewish neighbors should just 'sell their homes and move out.' He says the three Jewish couples were rejected by the Belle Haven Club because they were litigious, . . . not because they were Jewish."

In January of 2004, the plaintiffs served a subpoena duces tecum on Ms. Spiro with an extensive list of documents requested. The documents demanded from Ms. Spiro and the testimony sought related only to the article in *Talk* and Ms. Spiro's newsgathering in preparation for that article. The parties did not dispute that the material sought to be discovered was not obtained under a promise of confidentiality.

The District Court Quashes the Subpoena

On June 21, 2004, Judge Nevas found that, under *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999), the plaintiffs had not made a clear and specific showing requiring divestiture of the qualified reporters' privilege for non-confidential information. Specifically, Judge Nevas found the plaintiff's explanation for how the requested information was relevant to be "weak and unconvincing." (Order at 3). Furthermore, the evidence would "be of little or no substantive probative value" because the plaintiffs had failed to prove that Mr. Lyddane's statements could be attributed to the Belle Haven Club since they had not shown that Mr. Lyddane "was authorized to speak to Spiro either on behalf of the Club regarding membership issues or on the specifics of the plaintiffs' claims, or that the matters he spoke about were within the scope of his authority as treasurer of the Club." (Order at 4). Because the statements were therefore inadmissible hearsay, the only possible purpose they could serve was to impeach Mr. Lyddane at trial, and Judge Nevas, citing *Holland v. Centennial Homes, Inc.*, No. 3:92cv1533T, 1993 WL

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Federal Court Quashed Subpoena for Reporter's Testimony in its Entirety

(Continued from page 45)

755590 (N.D. Tex. Dec. 21, 1993), held that impeachment of a witness is "an insufficient reason to vitiate the privilege." (Order at 4).

Judge Nevas also found that the requested information, confirmation by Ms. Spiro that statements attributed in the Talk article to a witness were accurate, was available from the article itself. (Order at 4).

The defendants in the case had supported quashing of the subpoena in its entirety, but as a backup position stated that if Ms. Spiro were to answer any questions, even ones limited to confirming the accuracy of what had been published, they would require full discovery and cross-examination. Addressing this under Rule 45, Judge Nevas further held that, "given the extensive cross-examination of Spiro anticipated by the defendants, the burden of compliance with the subpoena would exceed the marginal benefit the plaintiffs would gain from such information." (Order at 4). Judge Nevas cited the Seventh Circuit's recent decision in *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004), in support of this holding.

The plaintiffs are represented by David N. Rosen of Rosen & Dolan in New Haven, CT. The Belle Haven Club, Inc. is represented by Carolyn R. Linsey of Owens, Schine & Nicola, P.C. in Trumbull, CT. The other defendants are represented by Charles W. Pieterse of Whitman Breed Abbott & Morgan LLC in Greenwich, CT.

Ms. Spiro was represented by Devereux Chatillon and Joshua Akbar of Sonnenschein Nath & Rosenthal LLP in New York. Ms. Chatillon and Mr. Akbar can be reached at (212) 768- 6700.

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Magazine Product Tester Is Covered by New York's Reporters Privilege

A New York trial court held that a magazine product tester is protected by the state Shield Law. *In re Huddy*, No. 100431/04 (N.Y. Sup. May 5, 2004). The court quashed a subpoena seeking the tester's testimony as a third party witness in a products liability action against a clothing manufacturer.

The tester for *Good Housekeeping* magazine conducted the laboratory work for an article on flame-retardant sleepwear. The court held the tester was a "professional journalist" within the meaning of the Shield Law, Civil Rights Law § 79-h(6), where she had the "intent to disseminate the results of the tests to the public" and developed the story idea for publication in the magazine.

Los Angeles
January 27, 2005

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First Circuit Affirms \$1,000 a Day Contempt Fine Against Reporter

A unanimous First Circuit panel affirmed a \$1,000 a day civil contempt fine against Rhode Island television reporter James Taricani for refusing to reveal the source of a leaked law enforcement surveillance tape. *In re Special Proceedings*, Nos. 03-2052, 04-1383, 2004 WL 1380007 (1st Cir. June 21, 2004).

Citing *Branzburg* and First Circuit precedent, the Court, in a decision written by Chief Judge Boudin, joined by Judges Lipez and Howard, held there was no First Amendment basis for Taricani to resist the district court's order to reveal the identity of a confidential source since it was highly relevant to an ongoing criminal investigation into the leak and the government had made reasonable efforts to obtain the information elsewhere. The Court further found that the fine was not punitive, but well in line with efforts to compel compliance with court orders.

Corruption in Providence

This decision arose out of several federal corruption cases against city officials in Providence, Rhode Island, including then Mayor Vincent "Buddy" Cianci, Jr. and his Administrative Assistant Frank Corrente. In the case against Corrente, the government provided him with copies of law enforcement surveillance tapes under a protective order limiting access to defense counsel.

Approximately six months later in February 2001, Taricani obtained a copy of one of the surveillance tapes from a confidential source and portions were broadcast on WJAR Channel 10 in Providence, an NBC owned and operated station. The tape showed a government witness handing Corrente an envelope allegedly containing a cash bribe.

Following a complaint by the defense, the trial court appointed a special prosecutor to investigate the leak. After interviewing approximately 14 people and deposing five potential witnesses, the prosecutor subpoenaed Taricani, who refused to identify the source of the tape relying on the reporters privilege.

District Court Orders Disclosure

The district court granted a motion to compel. *See* 291 F. Supp.2d 44, 32 Media L. Rep. 1075 (D.R.I. 2003). The court found the source's identity was germane to a good faith criminal investigation, and that the government had made reasonable efforts to obtain the information elsewhere.

Citing Branzburg v. Hayes, 408 U.S. 665 (1972); *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir.1998); *United States v. The LaRouche Campaign*, 841 F.2d 1176 (1st Cir.1988); and *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir.1980).

Following Taricani's refusal to answer questions about the identity of the source at a deposition in February 2004, the district court held a hearing and found him in civil contempt, imposing a \$1,000 a day fine until he complied.

The First Circuit stayed the fine and granted an expedited appeal.

Branzburg and McKeitt

Affirming, the First Circuit first disposed of Taricani's procedural objection that the appointment of a special prosecutor was improper. While acknowledging that "the optimal arrangement for criminal prosecutions is for a government lawyer to take the lead," the Court noted that concerns about conflicts of interest justified the unusual posture of the leak investigation.

Turning to the substantive First Amendment argument, the Court affirmed largely along the lines of the district court. The Court found the information sought "highly relevant to a good faith criminal investigation" and "reasonable efforts were made to obtain the information elsewhere."

The Court noted Judge Posner's recent decision in *McKeitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), which essentially rejected a First Amendment based reporter's privilege, but observed that the First Circuit's "own cases are in principle somewhat more protective."

These cases, *Cusumano v. Microsoft Corp.*, *United States v. The LaRouche Campaign*, and *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, *supra*, require at least a "heightened sensitivity" to First Amendment concerns. But whether this is a constitutional or merely prudential requirement, remains "unsettled," the Court concluded.

Finally, the Court addressed an ancillary matter, rejecting a request by Taricani and WJAR that it unseal documents relating to the leak investigation and provide Taricani with a transcript of his deposition.

James Taricani was represented by Jonathan Albano, Bingham McCutchen LLP, Boston; William Robinson, Edwards & Angell, LLP, Providence; and Susan E. Weiner and Brande Stellings, NBC.

Judge Requires Reporter to Testify at Lynne Stewart Trial

On August 19, 2004 United States District Court Judge John Koeltl denied a motion to quash a trial subpoena directed to Esmat Salaheddin, and ordered the Reuters reporter to testify during the Government's case against New York attorney Lynne Stewart. Stewart and two others are accused of assisting imprisoned Sheikh Omar Abdel Rahman communicate from jail with a terrorist group in Egypt. *United States v. Lynne Stewart*, S1 02 Cr. 395, (S.D.N.Y. August 19, 2004).

The Government wants Salaheddin, an 18-year employee of Reuters stationed in Cairo, Egypt, to authenticate four news articles he wrote between June 2000 and April 2001 relating to Sheik Abdel Rahman. The government declared that it would not seek any testimony beyond the facts contained in the published news reports. It is specifically interested in establishing the accuracy of statements contained in Salaheddin's articles that are attributed to Stewart and other supporters of the Sheikh who are alleged to be in a conspiracy with Stewart.

Stewart supported the motion to quash the Government's subpoena, but indicated that she would broadly seek to cross-examine on issues beyond the published facts if Salaheddin is required to testify. In moving to quash, Salaheddin urged the court to consider the potential scope of cross examination, and argued that the possibility of confidential source issues on cross-examination should increase the Government's burden to demonstrate the necessity of Salaheddin's testimony.

In denying the motion to quash, Judge Koeltl applied only the standard governing requests for non-confidential information, and concluded that the Government had met its burden. Relying on *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999), the court reaffirmed the existence of a reporter's privilege for nonconfidential information, but acknowledged that "the showing needed to overcome the privilege is less demanding than the showing required where confidential materials are sought." The court concluded that the qualified privilege was overcome because the statements sought to be introduced through the reporter were highly relevant to proving a key charge in the case, that Stewart had passed information from the Sheikh to the press in violation of her agreement with the Government, and evidence of her statements made to the Reuters reporter were not reason-

bly obtainable from other available sources

The district court found unpersuasive concerns advanced by Salaheddin that would be perceived as cooperating with the Government, and opening himself and his family to the possibility of retaliation in Egypt. Judge Koeltl considered this to be "important" but "particularly attenuated" concern, given that Salaheddin had resisted the subpoena and would testify only under court order. The court also rejected the suggestion that compelled authentication testimony could "be viewed as posing a threat to Salaheddin's journalistic credibility."

The court also set aside Salaheddin's assertions that the scope of cross-examination should also be weighed in assessing the Government's subpoena. Judge Koeltl found "no reason to believe that defense counsel would exceed the reasonable bounds of cross examination" and noted that the scope of the examination would be no broader than allowed under the Federal Rule of Evidence.

David A. Schulz of Levine Sullivan Koch & Schulz, L.L.P. represented Salaheddin. Assistant U.S. Attorneys Anthony Barkow and Christopher Morvillo represented the government. Michael D. Tigar represented Lynne Stewart

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First Circuit Ruling on Intercepted E-mails Reduces Electronic Privacy

By Robert A. Bertsche

In a decision that the Electronic Frontier Foundation said “dealt a grave blow to the privacy of internet communications,” the First Circuit Court of Appeals recently construed the federal wiretap law in a manner that the court itself admitted eviscerates much privacy protection for e-mails. *United States v. Councilman*, No. 03-1383, 2004 U.S. App. LEXIS 13352 (1st Cir. June 29, 2004).

A panel of the First Circuit ruled 2-1 that the vice president of an internet service provider for dealers in rare books had not violated the Wiretap Act when he created and used software designed to allow him to copy and read all e-mail from Amazon.com that was addressed to his customers.

The case turned on the fact that the software program operated entirely within the confines of the ISP’s computer, during the fraction of a second when the e-mails were in “electronic storage” at the ISP.

In a decision written by Circuit Judge Torruella and joined by Senior Circuit Judge Cyr, the panel said the Wiretap Act protects against interceptions of electronic communications only while they are being transferred, not while they are in electronic storage.

The impact of the decision is to require that interceptions that take place within the ISP’s computer must be prosecuted, if at all, under the federal Stored Communications Act, which contains substantially fewer procedural protections for privacy than the Wiretap Act.

Federal prosecutors had opposed dismissal of the indictment, even though the court’s ruling – while barring prosecution of Councilman – will make it far easier for government investigators to search and seize e-mail.

The dissent ripped the majority’s conclusion as one that “would undo decades of practice and precedent regarding the scope of the Wiretap Act and would essentially render the Act irrelevant to the protection of wire and electronic privacy.” 2004 U.S. App. LEXIS 13352 at *67 (Lipez, J., dissenting).

The Storage-Transit Dichotomy

According to the indictment, Bradford Councilman was vice president of Interloc, an online book listing service for rare and out-of-print books. Interloc acted as the service pro-

vider for certain book dealer customers, who obtained e-mail accounts ending in “@interloc.com.”

Councilman allegedly directed Interloc employees to create a computer code (called “procmail,” short for “process mail”) that would intercept, copy, and store all electronic communications sent from Amazon.com to Interloc’s subscriber dealers. Using that code, Councilman allegedly intercepted thousands of messages, and he and other employees routinely read them for the purpose of gaining competitive advantage.

Critical to the court’s decision was the fact that the procmail operated only on messages at a time when they were contained within the random access memory (RAM) or on hard disks, or both, within Interloc’s computer system. Based

on that fact, the Court dismissed the indictment. It said that because the messages were contained in “electronic storage,” they “could not be intercepted as a matter of law.”

That conclusion arises from the difference between the Wiretap Act’s

definition of a “wire communication” and an “electronic communication.” The Wiretap Act imposes criminal penalties on “any person who – (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.” 18 U.S.C. sec. 2511(1)(a).

A “wire” communication (typically, a telephone call) is defined as “any aural transfer” via wire, cable or other like connection, and the definition specifically includes “any electronic storage of such communication.” The reference to “electronic storage” explicitly extends the Wiretap Act’s protections to telephone calls after they are stored in voicemail.

By contrast, the definition of an “electronic communication” – “transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system” – includes no mention of the electronic storage of such communications.

From that difference, the majority concluded that unlike a voicemail, an electronic communication that is in electronic storage is not susceptible to being intercepted in the manner prohibited by the Wiretap Act. That was particularly so, the

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The dissent ripped the majority’s conclusion as one that “would undo decades of practice and precedent regarding the scope of the Wiretap Act.

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majority said, in light of the Wiretap Act's broad definition of "electronic storage" to include "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof." 18 U.S.C. sec. 2510(17)(A).

Next in a Line?

The majority conceded that its conclusion leaves the scope of electronic communications covered by the Wiretap Act "obviously reduced," but justified its ruling as a next logical step in a line of cases construing the statute.

In *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994), the Fifth Circuit said that seizure of sent but unretrieved e-mail temporarily stored on a company's hard disk drive was not an interception prohibited by the Wiretap Act.

In *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003), the Ninth Circuit said it was not an interception to access messages contained while in electronic storage, and not acquired during transmission.

The electronic communications at issue in *Councilman* are different because Interloc's software obtained e-mails while they were still being transmitted, and before they were received by the intended recipients. The majority found that distinction unpersuasive, however, in light of what it considered the clear language of the statute. It added: "[T]he language may be out of step with the technological realities of consumer crimes, [but] it is not the province of this court to graft meaning onto the statute where Congress has spoken plainly."

Blistering Dissent

The dissent, written by Justice Lipez, took a more functional view of the statute – one that it said "makes sense in the real world" – by discarding the majority's dichotomy between a communication contained in "storage" and one that is "in transit."

It relied on dicta from the First Circuit's decision last year in *In re Pharmatrak*, 329 F.3d 9, 21-22 (1st Cir. 2003), which had in turn quoted the district court's ruling in *Councilman*, 245 F. Supp. 2d 319, 321 (D. Mass. 2003): "As one court recently observed, '[t]echnology has, to some extent, overtaken language. Traveling the internet, electronic communications are often – perhaps constantly – both "in transit" and "in stor-

age" simultaneously, a linguistic but not a technological paradox.'"

The dissent noted that the "electronic storage" part of the definition of "wire communication" was added in order to ensure that voicemails be protected by the Wiretap Act. The absence of that language from the definition of "electronic communication" should not be taken to exclude from the Wiretap Act e-mails that are very briefly contained in electronic storage during the process of transmission from sender to recipient.

Consequences

The *Councilman* decision "will have far-reaching effects on personal privacy and security," according to the dissent, because the level of protection that Congress has afforded to communications under the Wiretap Act is far more comprehensive than that which has been provided to messages contained in storage, which fall under the Stored Communications Act, 18 U.S.C. sec. 2701(a).

Unlike the Wiretap Act, the Stored Communications Act does not require the government to follow the procedures for obtaining a wiretap order before capturing stored e-mail; law enforcement officers "can seize stored records for any crime for which they can get a search warrant; their search can extend to the limits of the Fourth Amendment; they do not need to report the progress of their search to courts; and defendants do not have an extra-constitutional right to suppress evidence from illegal searches."

Thus, the effect of *Councilman* will be to make it easier for the government, as well as private ISPs, to seize e-mails that are temporarily stored while in transit to their destination. Justice Lipez said he found it "inconceivable that Congress could have intended such a result merely by omitting the term 'electronic storage' from its definition of 'electronic communication.'"

The government has requested, and received, until August 27, 2004, to request rehearing by the panel or by the First Circuit *en banc*. Representing the government are Gary S. Katzmann, Michael J. Sullivan, and Richard P. Salgado. Representing Councilman is Andrew Good.

Robert A. Bertsche is a partner at Prince, Lobel, Glosky & Tye LLP in Boston and chairs the firms Media and Intellectual Property Group.

Anti-Cybersquatting Suit Against Consumer Complaint Website Dismissed

In a matter of first impression, the federal district court in New Jersey granted summary judgment in favor of a so-called “cyber-griper” under the Anticybersquatting Consumer Protection Act (“ACPA”), 15 U.S.C. §1125(d). *Mayflower Transit, LLC v. Prince*, 2004 WL 859281 (D.N.J. March 30, 2004).

Judge Jose L. Linares held that the defendant’s decision to purchase Internet domain names similar to plaintiff’s trademark was motivated by dissatisfaction with services rendered by the plaintiff rather than a “bad faith intent to profit,” a distinction that transformed him from a cybersquatter into a “cyber-griper.”

But the court allowed libel and trade libel claims to proceed, holding that a jury could find the complaints false and defamatory.

Background

The case stems from Dr. Brett Prince’s registration of several domain names and postings on his Web sites that are highly critical of Mayflower Transit, a shipping and moving company. Mayflower filed suit on October 30, 2000 against Prince requesting injunctive relief and damages for alleged violations of the ACPA, trademark dilution in violation of Federal Dilution Act (“FDA”), 15 U.S.C. §1125(c), and claims of trade libel and libel under state law.

Prince had contacted Mayflower Transit (“Mayflower”) in September 1997 to arrange a move from West Orange, New Jersey to Freehold, New Jersey. However, because Mayflower is not licensed to engage in intrastate moves in New Jersey, the company relied on agents to conduct such moves. Prince ultimately made an agreement with Lincoln Storage Warehouses (“Lincoln”), purportedly a Mayflower affiliated entity that used boxes and a truck bearing the Mayflower trademark and logo.

During the move, thieves broke into the parked van – which was left unattended overnight – and stole a considerable amount of property.

Domain Names

Prince decided to get even with his moving company by stocking up on Internet Web sites with domain names

similar to the company’s trademark and posting critical commentary warning others against hiring the beleaguered transporter. Prince registered the Internet domain name “mayflowervanlinebeware.com” and posted a website describing his moving incident and provided a link to another page entitled “Don’t let this happen to you” and told readers “Unless you’re willing to risk a total loss of your possessions, do not do business with Lincoln Storage Warehouses or Mayflower Van Lines. What happened to me can and will happen to you!” Prince subsequently registered domain names “mayflowervanline.com” and “lincolnstoragewarehouse.com.”

ACPA Claim

To prevail on an ACPA claim, plaintiff must demonstrate that (1) it has a distinctive or famous mark; (2) defendant’s domain names are identical or confusingly similar to plaintiff’s marks; and (3) the defendant registered its domain name with the bad faith intent to profit from them. 15 U.S.C. §1125(d)(1)(a).

The court found no dispute over whether the first two prongs of ACPA had been met. Mayflower owned a distinctive trademark and Prince’s use of “mayflowervanline.com” was “confusingly similar” to Mayflower’s trademarks.

Rather, the case turned on the court’s scrutiny of the “bad faith” element by analyzing the guiding nine factors as enumerated in the ACPA. Although the majority of the factors favored the Mayflower’s case, the court found that the fourth factor – whether defendant had a bona fide noncommercial or fair use of the mark – to be dispositive. Considering the totality of the circumstances, the court found that Prince’s motivation for registering the domain names was to express his dissatisfaction with Mayflower’s services; an activity referred to in the opinion as “cyber-gripping.”

The court distinguished *Shields v. Zuccarini*, 254 F.3d 476 (3d Cir. 2001), the only previous case in the Circuit to address “protest pages” published on web sites, because the defendant’s in that case used the griping argument as “a spurious argument cooked up purely for the suit” and “did not reflect defendant’s true profit motives.”

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Anti-Cybersquatting Suit Against Consumer Complaint Website Dismissed

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Acknowledging that “excluding cyber-grippers from the scope of the ACPA” could “eviscerate the protections of the bill,” the court suggested that future courts will have to be vigilant in their examination of the entire record to determine whether defendant’s griping defense is merely a “pretext disguising an underlying profit motive.”

Libel and Trade Libel Claims Can Proceed

The court denied summary judgment motions made by both parties on the libel and trade libel claims. The court held that defendant’s Web postings holding plaintiff “at least partially responsible for [his] disastrous moving experience” constituted statements of fact capable of defamatory meaning. Among other things defendant warned readers that “Unless you’re willing to risk a total loss of your possessions, do not do business with Lincoln Storage Warehouses or Mayflower Van Lines. What happened to me can and will happen to you! Don’t be their next victim!”

In addition, questions of fact existed as to whether Mayflower had apparent authority over the local moving company. Therefore the court could not rule on falsity or defendant’s fault as a matter of law.

Negligence Standard Applies

As to fault, the court held, without discussion, that Mayflower was a private figure. Although New Jersey applies the actual malice standard to private plaintiffs where the defamatory statement involves a matter of important public concern, *see Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 410 (1995), the court concluded that negligence was the appropriate standard.

The court reasoned that plaintiff was accused of simple negligence in conducting a move — an “everyday service” rather “than an activity which “intrinsicly involves a legitimate public interest.”

Plaintiff was represented by George Wright and Narinder Parmer of George Wright & Associates, LLC, Hackensack New Jersey; and Mark Sableman and Elizabeth Eastman of Thomas Coburn LLP, St. Louis, Missouri. Defendant was represented by John Pischeriam and Dennis A, Cipriano, in West Orange, New Jersey.

9th Cir. Grants Rehearing En Banc in *Gator.com v. L.L. Bean*

The Ninth Circuit granted a motion for rehearing en banc in *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003), *motion for rehearing en banc granted*, 2004 WL 928247 (9th Cir. April 29, 2004).

In September 2003, a panel consisting of Judges Warren Ferguson, Melvin Brunetti and Wallace Tashima held that California had general jurisdiction over Maine-based clothing retailer L.L. Bean “in light of L.L. Bean’s extensive marketing and sales in California, its extensive contacts with California vendors, and the fact that ... its website is clearly and deliberately structured to operate as a sophisticated virtual store in California.” *See also MediaLawLetter* Sept. 2003 at 42.

In the underlying litigation, Gator, an Internet marketing company now known as Claria, sought a declaratory judgment that its pop-up advertisement computer program does not infringe or dilute L.L. Bean’s trademarks and does not constitute unfair competition, fraud or false advertising.

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COPA Revisited: Supreme Court Rules Again on Child Online Protection Act

By Michael A. Bamberger

On June 29, 2004, the U.S. Supreme Court ruled for the second time on the constitutionality of the Child Online Protection Act ("COPA"). *Ashcroft v. ACLU II*, 124 S.Ct. 2783 (2004).

This was the third time that the Supreme Court had considered the issue of Congress trying to "make the Internet safe for minors by criminalizing certain Internet speech."

In 1997, in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court held the Communications Decency Act of 1996 unconstitutional in relevant part because it was not narrowly tailored to serve a compelling government interest and because less restrictive alternatives were available.

In response to the *Reno* decision, Congress passed COPA in 1998. COPA imposes criminal penalties of a \$50,000 fine and six months in prison for the knowing posting for "commercial purposes" of World Wide Web content that is "harmful to minors." (Prior to COPA, there was no federal statute applying the "harmful to minors" standard.) See 47 U.S.C. § 231.

COPA also provides for an affirmative defense to those who employ specified means to prevent minors from gaining access to the prohibited materials on the website. These affirmative defenses are basically age-verification systems such as credit, other identifying cards or a digital certificate.

The First Trip to the Supreme Court

COPA was challenged in the United States District Court for the Eastern District of Pennsylvania by a wide range of Internet providers and users, seeking a preliminary injunction. In 1999, after a testimonial hearing, the court granted a preliminary injunction on the ground that plaintiffs were likely to prevail on their argument that there were less restrictive alternatives available — one leg of the strict scrutiny that is applied in cases such as this. 31 F.Supp.2d 473, 27 Media L. Rep. 1449 (E.D.Pa. 1999).

In 2000, the Third Circuit affirmed the preliminary injunction, but on a different ground. The Court of Appeals concluded that the community standards component of the harmful to minors standard in COPA by itself rendered the

statute unconstitutionally overbroad. 217 F.3d 162, 28 Media L. Rep. 1897 (3rd Cir. 2000).

The Government sought certiorari, which was granted, and the Supreme Court reversed, holding that the community standards language did not, standing alone, make the statute unconstitutionally broad. 535 U.S. 564 (2002).

On remand, the Court of Appeals concluded that the statute was not narrowly tailored to serve a compelling Government interest, was overbroad, and was not the least restrictive means available for the Government to serve its interest of preventing minors from using the Internet to gain access to materials deemed harmful to them. 322 F.3d 240 (2003).

Supreme Court Again Grants Cert.

Once again certiorari was granted by the United States Supreme Court. After argument, a five-person majority of the Court affirmed the district court's decision to grant the preliminary injunction. The opinion of the Court, written by Justice Kennedy, affirms "for the reasons relied on by the district court," declining to consider the correctness of the other arguments relied upon by the Court of Appeals.

The Court found that the issue before it was whether the challenged regulation is the least restrictive means among available, effective alternatives. Since the primary alternative considered by the district court had been blocking and filtering software, the Supreme Court focused on that alternative. The Court found that filters are less restrictive than COPA and may in fact be more effective.

A concurring opinion by Justice Stevens, joined by Justice Ginsberg, basically states that the statute is unconstitutional and remand is not required.

Justice Scalia dissented, following the argument that he spelled out when dissenting in the *Playboy* case — namely that "commercial pornography," "the sordid business of pandering by deliberately emphasizing the sexually provocative aspects of non-obscene products in order to catch the salaciously disposed," is constitutionally unprotected.

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Finally, Justice Breyer, writing for himself, Chief Justice Rehnquist and Justice O'Connor, argued that the statute is constitutional, contending that the "harmful to minors" category is "only slightly" more expansive than that which is obscene and that therefore COPA's impact is small.

Case Will Return to District Court

Since the issue came up to the Supreme Court in the context of the grant of a preliminary injunction, the matter was remanded to the district court for proceedings consistent with the opinion of the Court — presumably hearings on the present state of the Internet and, as the Court suggests, further evidence on the relative restrictiveness and effectiveness of alternatives to COPA.

The majority opinion in fact specifically states that the opinion does not foreclose the district court from concluding upon a proper showing by the Government that meets the Government's constitutional burden as defined in the opinion, that COPA is the least restrictive alternative available to accomplish Congress's goal.

Analysis

There are a number of particularly interesting issues raised in the various opinions. With respect to the majority opinion, a fair amount of time is spent discussing the effectiveness of alternatives.

The Court both compares the effectiveness of filters to the remedies of COPA, stating that the Government has failed its burden of showing the district court that filtering is less effective.

It concludes, "The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective. [Citing *Reno* at 874.] It is not enough for the Government to show that COPA has some effect. Nor do respondents bear a burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective. The Government has the burden to show that they are less so."

It is not clear how this test works. For one thing, prior case law has not required the less restrictive alternative to

be *more* effective. Further, does the majority mean that even if a governmental restriction is substantially more restrictive than the proposed alternative, were the proposed alternative minimally less effective than the governmental restriction, that the "no less restrictive" portion of strict scrutiny has been met? It is not clear.

And how does one weigh effectiveness? One method might well be more effective against one aspect of the perceived harm while an alternative may be more effective as to a different aspect of the perceived harm. Once again it is not clear. It will be interesting to see how this aspect of the case is handled on the rehearing before the district court.

The opinion of Justice Stevens (joined by Justice Ginsburg) is far more protective of First Amendment speech. Firstly, he supports the position of the previously reversed 2000 decision of the Third Circuit that by applying community standards, the Government is penalizing speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption.

He then points out how restrictive COPA is, stating that it is a criminal statute with significant penalties (including incarceration) with affirmative defenses which can only be asserted after prosecution. He goes on to say, "Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as 'obscene' since 'the line between communications which offend' and those which do not is too blurred to identify in criminal conduct." He finds that criminally punishing harmful to minors material which was not previously part of federal law only compounds the problem.

Justice Breyer's view of the statute is very different. He finds that moving from *Miller* obscenity and *Ginsberg* "harmful to minors" expands the statute's scope only slightly." In his opinion, material which appeals to the prurient interests of adolescents will almost inevitably appeal to the prurient interests of some group of adults as well, a fact not in the record and found to the contrary by other courts.

Finally Breyer stated that, "One cannot easily imagine material that has serious literary, artistic, political or scientific value for a significant group of adults but lacks such value for any significant group of minors." I disagree.

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COPA Revisited: Supreme Court Rules Again on Child Online Protection Act

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For the last few years I have been representing media and Internet plaintiffs challenging the state law equivalents of COPA. One example that I have used which I think is contrary to Justice Breyer's statement is "The Joy of Sex" which, I have argued, has serious value to an adult and probably an older teenager, but probably does not have serious value to an 11 or 12-year-old boy, although the pictures at least may well appeal to his prurient interests.

Breyer then argues that filtering and blocking software is not an alternative which is less restrictive. Rather, in his view it is part of the status quo, since it is already available. (Plaintiffs argued that the alternative is to create governmentally-supported encouragements to use filtering and blocking.) Breyer contends that since this is part of the status quo, the loaded question which the majority pos-

its is "Would it be less restrictive to do nothing?", the answer to which is self-evident.

Breyer then goes on to attack the efficacy of filtering. One of his points is that filtering "depends upon parents willing to decide where their children will surf the Web and able to enforce that decision." This view of the government as a "superparent" has implications that invite concern.

We are not done with COPA. A factual trial with possible appeals means that there is more to come.

Ann Beeson of the ACLU argued the case on behalf of plaintiffs to the U.S. Supreme Court. Solicitor General Theodore Olsen argued on behalf of the Government.

Michael A. Bamberger, a partner in the New York office of Sonnenschein Nath & Rosenthal LLP.

Fourth Circuit Affirms Dismissal of Direct Infringement Claim Against Website

Finds No Volitional Conduct Despite Screening Procedure

By John Maltbie

Holding that Internet Service Providers ("ISPs"), "when passively storing material at the direction of users in order to make that material available to other users upon their request, do not 'copy' the material in direct violation of § 106 of the Copyright Act," the Fourth Circuit, in a 2-1 decision, affirmed a grant of summary judgment in favor of LoopNet, Inc. ("LoopNet"), an online commercial real estate listing service that permits its subscribers to post textual information and photographs relating to commercial properties on its website. *CoStar Group, Inc. v. LoopNet, Inc.*, 2004 WL 1375732, *10 (4th Cir. June 21, 2004).

The decision reaffirms – and potentially expands – the pre-Digital Millennium Copyright Act ("DMCA") decision in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*"), which held that an ISP serving as a passive conduit for copyrighted material is not liable as a direct infringer. The decision also provides that ISPs are not limited to relying on the "safe harbor" provisions of the DMCA when facing a claim for direct infringement.

Background

The plaintiff, CoStar Group, Inc. ("CoStar"), is a national commercial real estate information provider, which claims to have collected the most comprehensive database of information on commercial real estate markets and commercial properties in the United States and the United Kingdom. CoStar's database, which is made available to customers through the Internet and otherwise, includes a large collection of photographs of commercial properties for which CoStar owns the copyright.

Defendant LoopNet, allows subscribers, generally real estate brokers, to post commercial real estate listings to its website. LoopNet subscribers can submit both textual information and photographs concerning property listings for posting on the LoopNet website.

If a photograph is submitted by a subscriber, the photograph is uploaded to LoopNet's system and reviewed by a LoopNet employee. According to the Court, the "LoopNet employee . . . cursorily reviews the photograph (1) to determine whether the photograph in fact depicts commercial real

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4th Cir. Affirms Dismissal of Direct Infringement Claim

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estate, and (2) to identify any obvious evidence, such as a text message or copyright notice, that the photograph may have been copyrighted by another.

If the photograph fails either one of these criteria, the employee deletes the photograph and notifies the subscriber.” *CoStar Group, Inc.* at *1. Otherwise, the photograph is accepted and made available for viewing.

Beginning in 1998, CoStar discovered that its copyrighted photographs were being posted to LoopNet’s website. Upon receiving notice from CoStar, LoopNet removed the photographs and instituted an inspection policy. *Id.* at *2.

Despite the new policy, CoStar continued to find its images posted to LoopNet’s website and ultimately filed an action for copyright infringement, violation of the Lanham Act, and several state-law causes of action.

The parties subsequently filed cross-motions for summary judgment that resulted in a district court decision that LoopNet had not engaged in direct infringement under the Copyright Act, but allowed CoStar’s contributory infringement claim to proceed. The district court relied on the rule from *Netcom* that an ISP that provides only “passive” or “automatic” Internet services is categorically immune from direct copyright infringement claims based on material posted or displayed by the ISP’s users.

Thereafter, the parties stipulated to the dismissal of all claims except the direct infringement claim and CoStar took the instant appeal.

On Appeal

On appeal, CoStar argued that the district court erred for two reasons. First, CoStar asserted that Congress, in enacting the DMCA, had codified and supplanted *Netcom*, which according to CoStar was a policy-driven liability-limiting decision that did not follow traditional copyright law. Following the enactment the DMCA, however, CoStar claimed that any immunity for the passive conduct of an ISP such as LoopNet must come from the safe harbor immunity provided by the DMCA.

As the district court had already held that LoopNet did not qualify for DMCA immunity for a portion of CoStar’s direct infringement claims, CoStar contended that summary judgment should have been entered in its favor on those claims.

Second, CoStar asserted that even if an ISP that did not qualify for DMCA immunity could still attempt to avail itself of *Netcom* immunity, it would be improper in this case because LoopNet is not a “passive,” “automatic” purveyor of electronic information of the kind involved and contemplated in *Netcom*. Rather, CoStar argued, LoopNet strictly controls the content of all information submitted to its website, and most notably, reviews and approves every single photograph prior to making it available for viewing.

Netcom Immunity Affirmed

In rejecting CoStar’s contentions, the Court of Appeals began by restating the principle underlying *Netcom* — “[a]lthough copyright is a strict liability statute, there should still

The decision reaffirms – and potentially expands – the pre-Digital Millennium Copyright Act (“DMCA”) decision in Religious Technology Center

be some element of volition or causation which is lacking where a defendant’s system is merely used to use a copy by a third party.” *Id.* at *3, quoting *Netcom*, 907 F. Supp. at 1370.

This principle, the Court found, was not as far outside traditional copyright law as CoStar contended. Rather, the Court of Appeals found that the court in *Netcom* “made a particularly rational interpretation of [17 U.S.C.] § 106 when it concluded that a person had to engage in volitional conduct — specifically, the act constituting infringement — to become a direct infringer.” *Id.* at *6.

Likening LoopNet to the owner of a copy machine “whose customers pay a fixed amount per copy and operate the machine themselves to make copies,” and who is not considered a direct infringer even if the customer duplicates an infringing work, the Court found that an ISP “should not be found liable as a direct infringer when its facility is used by a subscriber to violate a copyright without intervening conduct of the ISP.” *Id.* at *5.

As for CoStar’s contention that *Netcom* had been supplanted by the DMCA, the Court of Appeals held CoStar’s position was simply not supported by the language of the DMCA, which provides that the defenses set forth therein are not exclusive. Further, the Court found that the lack of explicit instructions from Congress stating that the DMCA is intended to supplant *Netcom* and the legislative history of the DMCA weighed against CoStar’s position. The Court con-

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4th Cir. Affirms Dismissal of Direct Infringement Claim

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cluded that “Congress intended the DMCA’s safe harbor for ISPs to be a floor, not a ceiling, of protection.” *Id.* at *10.

The Court of Appeals also rejected CoStar’s claim that irrespective of the DMCA, LoopNet’s conduct does not satisfy the passivity requirement of *Netcom*.

While acknowledging that LoopNet’s photograph review policy constitutes “volitional conduct to block photographs measured by two grossly defined criteria,” the Court found that “this conduct, which takes only seconds, does not amount to ‘copying,’ nor does it add volition to LoopNet’s involvement in storing the copy.” *Id.* at *11.

As the Court explained, “The employee’s look is so cursory as to be insignificant, and if it has any significance, it tends only to lessen the possibility that LoopNet’s automatic electronic responses will inadvertently enable others to trespass on a copyright owner’s rights. In performing this gatekeeping function, LoopNet does not attempt to search out or select photographs for duplication; it merely *prevents* users from duplicating certain photographs.” *Id.* [emphasis in original].

Again analogizing LoopNet to the owner of a copy machine, the Court compared LoopNet’s review procedures “to an owner of a copy machine who has stationed a guard by the door to turn away customers who are attempting to duplicate clearly copyrighted works,” and concluded that “LoopNet has not by this screening process become engaged as a ‘copier’ of copyrighted works who can be held liable under §§ 501 and 106 of the Copyright Act.” *Id.*

In dissent, Circuit Court Judge Roger L. Gregory did not disagree with the majority’s discussion of the “direct infringe-

ment doctrine within the cybersphere post-DMCA.” *Id.* at *12. Rather, Judge Gregory took issue with the majority’s comparison of LoopNet to the owner of security guard-protected copy machine. “These ill-fitting characterizations,” Judge Gregory asserted, “lead the majority to the erroneous conclusion that LoopNet is not liable for direct infringement despite its volitional screening process.” *Id.*

Judge Gregory argued “that the majority expands the non-volitional defense well beyond *Netcom* and subsequent holdings, and gives direct infringers in the commercial cybersphere far greater protections than they would be accorded in print and other more traditional media.” *Id.*

To illustrate his point, Judge Gregory creates his own analogy, likening LoopNet to the publisher of a for-profit freely distributed magazine consisting of real estate listings. According to Judge Gregory, applying the same set of facts and circumstances to a different medium – print – would clearly result in a finding of direct infringement liability to his hypothetical magazine because its employees make a conscious choice as to whether a given image will appear in its electronic publication, or whether the image will be deleted from the company’s system.”

CoStar was represented by O’Melveny & Myers, L.L.P., Washington, D.C., LoopNet was represented Perkins Coie, L.L.P., San Francisco, California.

John Maltbie is an associate in the Intellectual Property Department of Torys LLP, New York, New York and a former Staff Attorney with the MLRC.

Cases Consider Scope of Section 230 Immunity

§ 230 Protects Adult Entertainment Website

In a robust application of Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230, a D.C. federal district court held that an adult entertainment website was immune for claims over an advertisement featured on the site. *Ramey v. Darkside Productions, Inc.*, No. 02-730 (D.D.C. April 14, 2004).

The plaintiff, a nude dancer, sued the operator of the website www.eros-guide.com for intentional infliction of emotional distress, unjust enrichment and fraud after her picture was used without consent in an online advertisement for an apparent escort service.

The website contains advertisements for escorts, dancers and massage. Advertisers supplied the website operator with photographs and accompanying text on a prepaid monthly basis. Defendant categorized the advertisements geographically and by subject matter, and added its watermark and web address to the photographs.

Judge Gladys Kessler granted summary judgment to the defendant, holding that the site receives full immunity under Section 230, citing among other cases the Ninth Cir-

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§ 230 Protects Adult Entertainment Website

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cuit's decision in *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (22003) ("so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process").

Judge Kessler concluded that "because Defendant did no more than select and make minor alterations ... it cannot, as a matter of law, be considered the content provider of the advertisement for purposes of § 230."

No § 230 Immunity for Complaint Website

In contrast, a Texas court held that two consumer complaint websites were not immune under § 230 for third party complaints posted on the sites. *MCW, Inc. v. Badbusinessbureau.com*, 2004 WL 833595 (N.D. Texas April 19, 2004) (Fish, Chief J.)

Plaintiff, a career counseling service, sued the operators of the websites www.ripoffreport.com and www.badbusinessbureau.com for trademark infringement, false advertising, unfair competition and disparagement.

The court held that plaintiff failed to state any federal claims because defendants' use of plaintiff's marks was non-commercial. The court dismissed the pendent state law claims for lack of subject matter jurisdiction. But along the way it issued an extremely narrow decision on § 230.

The websites operate in part as consumer complaint forums. They organize consumer complaints geographically, by company name and service. The complaints also appear under various report titles, including "Con Artists," "Scam," and "Corrupt Companies."

In rejecting a motion to dismiss based on § 230 immunity, the court found that certain statements at issue were clearly written by the defendants. For example, defendants allegedly responded to one consumer posting about plaintiff with the comment – "we will not rest until [plaintiffs] either change their fraudulent practices or are run out of business."

But the court further explained that defendants were not entitled to § 230 immunity because the websites' category titles and headings were themselves disparaging in combination with the third party complaints. As the court explained:

The titles and headings are clearly part of the web page content. Accordingly, the defendants are information content providers with respect to the website postings and thus are not immune from [plaintiff's] claims.

Moreover, the court found that the defendants were not entitled to immunity under Section 230 where plaintiff alleged that defendants encouraged a consumer to provide photographs for use on one website. "These allegations ... suggest — at a minimum — that the defendants are responsible for the materials created and developed by the consumer."

As the court explained:

[A]ctively encouraging and instructing a consumer to gather specific detailed information is an activity that goes substantially beyond the traditional publisher's editorial role. The defendants are clearly doing more than making minor alterations to a consumer's message. They are participating in the process of developing information.

In a footnote the court added that under Section 230 a court is required not only to determine whether a party creates or develops content, but whether it is *responsible* for the content.

Citing to § 230 (f) (3) – which defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service" the court concluded that a party may be responsible for information created by a third party "without actually creating or developing the information itself" – a distinction it said the *Carafano* court "ignored."

Plaintiffs were represented by Thomas B. Walsh, IV, of Fish & Richardson, Dallas, TX. Defendants were represented by J. Garth Fennegan, Settle & Pou, Dallas, TX; and Maria Crimi Speth, Grant Williams, Phoenix, AZ.

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California Court of Appeal Holds eBay Not Immune Under CDA *Online Release Effective to Protect Internet Auction House eBAY*

By Jeffrey P. Hermes

In *Grace v. eBay, Inc.*, Docket No. B168765 (Cal. Ct. App. 2d Dist. July 22, 2004) (Croskey, Acting P. J.), the California Court of Appeal for the Second Appellate District overruled a decision of the Los Angeles Superior Court, which had held that internet auction house eBay, Inc. was immune, under the Communications Decency Act of 1996, to a cause of action for libel arising out of negative "feedback" about the plaintiff posted on eBay's internet website by a third party.

The Court of Appeal, diverging from the majority of courts that had analyzed the protection afforded to providers and users of interactive computer services by 47 U.S.C. § 230 (part of the Communications Decency Act), held that § 230 applies only to preempt "publisher" liability for content, and not "distributor" liability, as those terms are defined by the common law.

Thus, the Court of Appeal held that providers and users of interactive computer services could be held liable as distributors of content without offending § 230 if they knew or had reason to know that the information posted was defamatory.

The Court of Appeal nevertheless affirmed the dismissal of the plaintiff's claims against eBay, as it found that the plaintiff had waived his claims by accepting an eBay User Agreement containing a broadly-worded release.

Background

The plaintiff, Roger Grace, was the winner of six auctions for goods offered for sale on eBay's website by Tim Neeley, a dealer in Hollywood memorabilia. eBay encourages buyers and sellers using its service to post "feedback" about the people they have dealt with on eBay's website; this feedback takes the form of a brief on-line comment, with a tag identifying the com-

ment as positive, negative or neutral. Any user of eBay's service can view the collected feedback of any other user.

With respect to three of the auctions that Grace won, he left negative feedback about his experiences with Neeley. In response, Neeley left negative feedback for Grace with respect to all six of the auctions, posting for each auction a comment stating: "Complaint: SHOULD BE BANNED FROM EBAY!!!! DISHONEST ALL THE WAY!!!!"

Grace notified eBay that Neeley's comments were defamatory, but, according to the opinion, eBay refused to remove them.

Grace filed suit against Neeley and eBay, including claims for libel and unfair trade practices against eBay. The libel claim rested on eBay's publication of Neeley's negative comments. eBay demurred to the plaintiff's complaint, seeking dismissal of all claims against it.

In *Grace v. Neeley*, No. BC288836 (Cal. Super. L.A. County Apr. 28, 2003) (Willhite, J.), the Los Angeles Superior Court ruled that Grace's libel claim was precluded by 47 U.S.C. § 230. The court found, however, that the immunity provisions did not necessarily preclude a cause of action for unfair business practices under Section 17200 of the California Business and Professions Code (except inasmuch as the alleged libel was the basis for that claim), but nevertheless held that the plaintiff's claims under Section 17200 failed for other reasons.

On appeal, Grace challenged the Superior Court's ruling under 47 U.S.C. § 230 on his libel claim against eBay (including his claim under Section 17200, to the extent that claim was premised on the libel claim), but did not challenge the dismissal of his other Section 17200 claims. Grace also challenged a ruling of the Superior Court denying him leave to amend his complaint to add a challenge to the constitutionality of 47 U.S.C. § 230.

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The Court of Appeal held that § 230 applies only to preempt "publisher" liability for content, and not "distributor" liability, as those terms are defined by the common law.

CA Court of Appeal Holds eBay Not Immune Under CDA

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47 U.S.C. § 230 Does Not Preclude “Distributor” Liability

The Court of Appeal ruled that the Superior Court erred in sustaining eBay’s demurrer to the plaintiff’s libel claim on the basis of 47 U.S.C. § 230(c)(1), which provides that

“No 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.”

The Court of Appeal agreed with the Superior Court that eBay was within the class of entities protected by this provision, as eBay’s use of an interactive website for its business made it, at the very least, a “user of an interactive computer service.” However, the Court of Appeal disagreed with the Superior Court’s interpretation of § 230(c)(1) as a complete bar to libel claims based upon the publication of “any information provided by another information content provider.”

In its interpretation of § 230, the Court of Appeal focused primarily upon principles of federal preemption. In that regard, the Court found that Congress’ use of the phrase “publisher or speaker” in § 230(c)(1) was significant, because, the Court stated, the common law of libel recognizes a distinction between “publisher[s] or speaker[s]” of defamatory material, and mere “distributors” or “transmitters” of such material.

Specifically, the Court stated, distributors may only be held liable upon proof that they knew or should have known that they have disseminated defamatory content, while publishers are presumed to know of the content that they publish. Relying on the presumption that Congress is aware of common law principles when it enacts statutes, the Court of Appeal held that because Congress focused only on “publishers or speakers” in § 230(c)(1), it did not evince a clear intent to preempt liability for distributors under common law principles.

Court held, § 230(c)(1) operates solely to eliminate a presumption that the provider or user of an interactive com-

puter service knows of the content of statements published on that service. Under the Court’s ruling, a provider or user of an interactive computer service may be found liable as a distributor, if the plaintiff provides proof that the defendant knew or should have known of the defamatory content at issue.

Thus, because Grace could attempt to prove that eBay was liable as a distributor because it knew or should have known of the allegedly defamatory statements, the Court did not sustain a demurrer to the libel claim at the pleading stage on the basis of § 230.

Reliance Upon Legislative History

In support of its ruling, the Court of Appeal relied upon the legislative history of § 230(c)(1). Specifically, the Court considered the conference committee report on the Communications Decency Act of 1996, which stated that § 230 was, in part, intended to overrule cases such as *Stratton-Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N. Y. Sup. Ct. May 24, 1995). See H.R.Rep. No. 104-458, 2d Sess., p. 194 (1996).

In *Stratton-Oakmont*, the New York Supreme Court held that a computer bulletin board operator who took steps to remove offensive postings and otherwise to screen content was a publisher of content rather than a distributor, and could therefore be found liable for defamation without proof that the operator knew or should have known of allegedly defamatory content. 1995 WL 323710, at p. 3.

Based on the committee’s citation of *Stratton-Oakmont*, the California Court of Appeal found that Congress’ intent in enacting § 230 was to ensure that providers of interactive computer services are not treated as publishers or speakers of information provided by others because of the operator’s efforts to control offensive content. But, the court found, there is no indication that Congress intended to preclude liability where the provider “knew or had reason to know” that the matter was defamatory – “that is, common law distributor liability.”

Because Grace could attempt to prove that eBay was liable as a distributor because it knew or should have known of the allegedly defamatory statements, the Court did not sustain a demurrer to the libel claim at the pleading stage on the basis of § 230.

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CA Court of Appeal Holds eBay Not Immune Under CDA

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The Court of Appeal chose to disregard another committee report regarding the enactment of 47 U.S.C. § 941, which relates to the creation of an internet domain limited to child-appropriate material. In that report, the House committee stated that court decisions which had interpreted § 230(c) as providing complete immunity to defamation claims, including *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), had correctly interpreted that statute, and that the same protection would inure to the benefit of websites in the new domain created by § 941. See H.R.Rep. No. 107-449, 2d Sess., p. 13 (2002), reprinted in 2002 U.S. Code Cong. & Admin. News, p. 1749. The Court of Appeal held that the legislative history of § 941 was inapplicable to the interpretation of § 230, finding that the legislative history of a later Congress was unpersuasive as to the intent of the Congress that enacted § 230.

Disagreement with Prior Case Law

In reaching its conclusions, the Court of Appeal expressly disagreed with a developing line of cases holding that 47 U.S.C. § 230 precludes liability for internet “providers and users” of interactive computer services, including the rulings of the U.S. Court of Appeals for the Fourth Circuit in *Zeran v. America Online, Inc.*, and the California Court of Appeal for the Fourth District in *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (Cal. Ct. App. 4th Dist. 2002).

Notably, the Fourth Circuit in *Zeran* held that, if internet service providers could be held liable as distributors, it would inevitably chill protected free speech. The sheer volume of material that is processed by many internet websites would make it impractical to investigate every complaint from any source that particular content is defamatory. The federal court then posited that, in the absence of immunity, internet service providers would be compelled to delete content without investigation in order to avoid liability. *Zeran*, 129 F.3d at 333.

Moreover, allowing for distributor liability would deter internet service providers from self-regulation of offensive material, because the fact of such regulation would give potential plaintiffs a basis to argue that the provider knew or should have known of allegedly defamatory content; thus, the federal court held, distributor

liability for internet publishers of third-party content would defeat Congressional intent. *Id.*

The California Court of Appeal criticized the reasoning of *Zeran*, arguing that the purpose of § 230 was to promote efforts to control objectionable content and remove disincentives to the development of technologies to accomplish that purpose. The *Grace* court opined that complete immunity under § 230, rather than providing adequate safety for technical development, would encourage internet service providers to do nothing; in contrast, a threat of distributor liability would be an incentive to the development of screening technologies.

Flawed Reasoning

The reasoning of the California Court of Appeal in *Grace v. eBay* appears, on balance, to be flawed. As discussed above, the California court effectively reads § 230 to grant limited protection to publishers by eliminating a presumption that publishers know or should know of any allegedly defamatory statements that they publish. However, the court has placed no restrictions on how a plaintiff can prove knowledge as a factual issue.

The precise reason that publishers are presumed at common law to know of the content they publish, while distributors are not, is because publishers exercise traditional editorial functions that bring them into contact with the material published. Even if there is no legal presumption of knowledge, under the California court’s ruling plaintiffs can simply argue that the exercise of editorial functions by website providers creates a factual basis for distributor liability under a ‘should have known’ standard.

This hurdle is even further lowered if the plaintiff notifies the defendant of alleged libel, as with the notice issued by *Grace* to eBay in this case. The elimination of a technical legal presumption is thus a meaningless gesture, that would not give internet providers any greater security in attempting to restrict potentially offensive material (as the Fourth Circuit correctly noted in *Zeran*).

Waiver of Claims in the eBay User Agreement

Notwithstanding its analysis of 47 U.S.C. § 230, the California Court of Appeal affirmed the Superior Court’s decision to sustain eBay’s demurrer, finding that the plain-

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CA Court of Appeal Holds eBay Not Immune Under CDA

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tiff had waived his claims against eBay by accepting eBay's "User Agreement." The User Agreement stated that each user released eBay from claims and demands "of every kind and nature, known and unknown, ... arising out of or in any way connected with ... disputes [with one or more users]," and contained an express waiver of California Civil Code § 1542, which would otherwise limit the scope of a general waiver of liability.

The Court of Appeal found that the User Agreement was specific enough to waive the plaintiff's libel claim against eBay, as that claim arose out of his dispute with another user (Neeley, the seller in the auctions at issue). As the Court of Appeal had affirmed on the basis of the User Agreement, while rejecting the Superior Court's interpretation of 47 U.S.C. § 230, it found that the plain-

tiff's attempt to raise the issue of the constitutionality of § 230 was moot.

Grace v. eBay, Inc., Docket No. B168765 (Cal. Ct. App. 2d Dist. July 22, 2004) (Croskey, Acting P.J.). Roger M. Grace, in pro. per., and Lisa Grace-Kellogg for Plaintiff/Appellant. Michael Rhodes and Andrea Bitar of Cooley Godward LLP for Defendant/Respondent. Samir Jain of Wilmer Cutler Pickering LLP for Amazon.com, Inc., America Online, Inc., Google Inc. and Yahoo! Inc. as Amici Curiae on behalf of Respondent. The slip opinion for this decision is available on-line at <http://www.courtinfo.ca.gov/opinions/documents/B168765A.DOC>.

Jeffrey P. Hermes is an associate with the Boston office of Brown Rudnick Berlack Israels LLP.

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Kansas Court of Appeals Affirms Criminal Libel Convictions

The Kansas Court of Appeals affirmed the criminal libel convictions of a fringe newspaper and its editor – the first time in more than 30 years that members of the press have been convicted of criminal defamation in the U.S. *Kansas v. Powers*, No. 90690 (Kan. Ct. App. Aug. 20, 2004) (unpublished) (Marquardt, Malone and Rosen, JJ). See also *MediaLawLetter* Aug. 2002 at 5, Dec. 2003 at 31, May 2004 at 16.

The case is an embarrassment to all those who promote First Amendment law as a model to other countries around the world – and a particular disappointment in light of the Inter-American Court of Human Rights' groundbreaking decision reported in this issue of the *MediaLawLetter* holding that a criminal libel conviction violated international norms of free expression.

Background

At issue were several articles published in *The New Observer*, a free irregularly published newspaper in the Kansas City area. The articles reported that the mayor of Kansas City, Carol Marinovich, and her husband, a sitting Kansas state court judge, lived outside of Wyandotte County in violation of residency rules.

The newspaper had been a persistently strident critic of the Mayor and local officials and regularly leveled charges of incompetence and corruption against her and her administration, including lambasting the district attorney that initiated the criminal libel prosecution against the newspaper.

Interestingly, the articles about the Mayor's residency were among the mildest of the newspaper's attacks and prosecutors never claimed that she or her husband suffered any injury to reputation or other damage.

In March 2001, the newspaper, its publisher and editor were charged with multiple counts of criminal defamation. They were convicted following a jury trial in July 2002. The publisher and editor were both ordered to pay \$3,500 in fines, and sentenced to one year unsupervised probation. The newspaper and its editor appealed and his fine was suspended pending appeal.

Appeals Court Decision

The per curium decision gives scant attention to the First Amendment issues involved due in part to inadequate brief-

ing by defendants' counsel and the court's apparent reluctance to give serious consideration to the constitutional issues surrounding criminal libel. Without comment the court earlier this year denied a motion by a group of media companies seeking permission to file an amicus brief challenging the statute on First Amendment grounds.

The court quickly disposed of two unfocused constitutional arguments raised by the defendants. First, defendants claimed that the statute "is unconstitutional because it reduces the required burden of proof to something less than reasonable doubt." Second, that the state submitted no proof of damages.

Defendants' first argument was based on the language of the statute which defines criminal libel as knowingly false statements about a living person "tending" to expose them to public hatred, contempt, ridicule, etc. Defendants appeared to be trying to sketch out a vagueness argument but it was unclear at best. The court simply concluded that the jury was instructed to find proof of guilt beyond a reasonable doubt and left it at that.

The defendants also claimed that their conviction was unconstitutional because the state offered no proof of damages, but they provided no argument to support this point. A fully developed argument on this point might have educated the court on some of the inherent contradictions involved in trying to protect personal reputation through criminal law. The absence of any requirement of damage to reputation, for example, shows that there are hardly any guidelines to govern enforcement of the criminal libel statute.

Absent any meaningful discussion on this point by defendants, the court simply concluded that damages are not an element of the statute. The bulk of their brief on appeal was mired in arguments on procedure, conflict of interest and prejudice, none of which succeeded with the appeals court.

Kansas Statute

The Kansas criminal defamation statute, K.S.A. 21-4004, provides in relevant part:

- (a) Criminal defamation is communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with

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KS Ct. of Appeals Affirms Criminal Libel Convictions

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actual malice, tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends.

In July 1995, following an unsuccessful civil court challenge in federal court, the statute was amended to expressly include an actual malice standard (viz. "knowing the information to be false and with actual malice"), but it otherwise substantially tracks an 1868 definition of criminal libel.

Press Would Have Challenged Statute

The Associated Press, Dow Jones & Company, Inc., the Kansas Broadcasters Association, the Kansas Press Association and Reuters America LLC has sought to challenge the constitutionality of the Kansas criminal defamation statute on three grounds.

First that the statute violates the First Amendment on its face because the language that attempts to identify what speech is subject to criminal punishment is impermissibly vague and allows for arbitrary and selective enforcement.

Second, that the statute is unconstitutional under a strict scrutiny standard because Kansas has no interest to investigate and prosecute potentially libelous statements about public officials or people of any kind. Moreover, civil defamation law provides an entirely adequate remedy for complaints about alleged harm to reputation.

Finally, amici argue the statute is simply per se unconstitutional under evolved standards of decency and freedom.

Further Appeal?

The defendants may petition for review by the Kansas Supreme Court, but appeals to the court are discretionary. Given the defendants weak constitutional arguments an appeal may draw little interest from the court.

The constitutional objections to the Kansas statute, however, may get a hearing in a separate Kansas federal court action where a § 1983 action has been filed following an attempted criminal libel prosecution.

Federal Court Challenge

On March 13, 2003, criminal defamation charges were filed against Larry Hiatt, publisher of the weekly *Baxter Springs News* in Baxter Springs, Kansas; columnist Ron Thomas, and city council candidate Charles How, Jr. stemming from a column and political advertisement criticizing the Baxter Springs City Clerk. See *MediaLawLetter* June 2004 at 15.

In June 2003, the criminal defamation charges were dismissed *without* prejudice, with the city attorney publicly announcing that he would appoint a special prosecutor to refile the charges. After no action by the prosecutor for a year, Ron Thomas and Charles How filed a § 1983 action against the City of Baxter Springs and town officials. In addition to seeking damages, they are seeking a declaration that the municipal criminal libel ordinance (identical to the state statute) is unconstitutional.

A conference is scheduled for later this month to set a discovery schedule in the case.

At press time, MLRC learned that the Clerk of the Kansas Court of Appeal erroneously designated the decision in *Kansas v. Powers* as a per curiam decision. In fact, Judge Rosen dissented and the decision will be corrected to include a written dissent which reportedly holds that the statute violates the First Amendment.

The defendants in *Kansas v. Carson* were represented by Mark Birmingham in Kansas City. The state of Kansas is represented by J. David Farris of Atchison, Kansas, a private attorney appointed as a special prosecutor in the case. The proposed media amici brief was prepared by David Heller, MLRC; Mike Merriam, Topeka, Kansas; and James Goodale, Jeremy Feigelson and Erik Bierbaur of Debevoise & Plimpton in New York. Sam Colville, of Holman Hansen & Colville, Overland Park, Kansas, represents the plaintiffs in the federal court action.

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Inter-American Court of Human Rights Throws Out Reporter's Criminal Libel Conviction

In what could be a ground breaking decision, on August 4th the Inter-American Court of Human Rights announced that the criminal libel conviction of Costa Rican journalist violated the right to free speech under Article 13 of the American Convention on Human Rights.

The decision is currently available only in Spanish and is on the web at www.corteidh.or.cr/seriec/seriec_107_esp.doc. MLRC will publish a more detailed report on the decision when the Court issues an English translation.

Background

In 1999, Mauricio Herrera, a journalist for the Costa Rican daily newspaper *La Nacion*, was convicted of criminal libel for a series of reports about Felix Przedborski, a former Costa Rican diplomat implicated in an international arms scandal.

Allegations against Przedborski first appeared in several Belgian newspapers. Herrera's articles reported on these allegations and also included interviews with European diplomats.

Przedborski, a Polish national who became a Costa Rican citizen and served as an honorary diplomat to several European countries, filed a complaint under Costa Rica's criminal code which provides criminal penalties for the "dishonoring of" or "spreading [of] information liable to effect" a person's reputation.

Herrera was convicted and he and *La Nacion* were ordered to pay Przedborski approximately \$200,000 in damages, to publish the ruling and to remove all links to the articles on the newspaper's website. Herrera and *La Nacion* were also listed as convicted criminals. In 2001, the Costa Rican Supreme Court upheld the conviction.

The American Convention

Herrera and *La Nacion* then began an appeal process under the American Convention on Human Rights. (The Convention is available online at www.cidh.org/Basicos/basic3.htm).

The Convention has been adopted by 24 nations in Central and South America. Article 13 provides for the right of freedom of thought and expression as limited by

law to the extent necessary to protect reputation, national security, public order, health and morals.

Article 13 of the American Convention is similar to Article 10 of the European Convention on Human Rights. But the Convention's enforcement mechanisms differ. Under the American Convention, individuals are not entitled to bring complaints directly to the Inter-American Court. Instead, they must first file an appeal with the Inter-American Human Rights Commission, based in Washington, D.C. which can refer a case to the Inter-American Court, as well as issue on non-binding opinion on the merits of the complaint.

As required under the Convention, the defendants first filed an appeal with the Inter-American Commission on Human Rights based in Washington, D.C. The Commission issued a non-binding ruling in favor of the defendants which Costa Rica declined to follow. The Commission then allowed the defendants to appeal to the Inter-American Court.

IACHR Decision

According to news reports, the Inter-American Court of Human Rights set aside the conviction in part on the ground that public officials and others who "enter the sphere of public discourse" must tolerate a greater "margin of openness to a broad debate on matters of public interest."

Moreover, the Court reasoned that Costa Rica improperly restricted the defendants' right of free expression by requiring them to prove the truth of the newsworthy allegations first published in the European press.

The Court ordered the convictions and all their effects reversed and required Costa Rica to pay Herrera \$20,000 in moral damages and \$10,000 in legal expenses. Costa Rica has indicated that it will comply with the ruling.

Several international organizations submitted briefs in support of Herrera, including the World Press Freedom Committee, represented by Kevin Goldberg of Cohn & Marks; and the Committee to Protect Journalists, represented by James Goodale, Jeremy Feigelson, Erik Bierbauer, Pablo J. Valverde, and Ellen Hochberg of Debevoise & Plimpton.

Contract and Negligence Claims Over “Who Wants to Be a Millionaire?” Question Dismissed

A California appellate court affirmed the dismissal of a case brought by a former “Who Wants to Be a Millionaire” contestant who claims he was unfairly tossed from the show after failing to answer an “unanswerable” question. *Rosner v. Valleycrest Productions Ltd. et al.*, 2004 WL 1166175 (Cal.App. 2 Dist. May 26, 2004) (marked not for publication).

Richard Rosner filed negligence and breach of contract claims in Los Angeles County Superior Court against Valleycrest Productions and ABC, Inc. following his 2000 appearance on the popular quiz show in which host Regis Philbin asked Rosner: ‘What capital city is located at the highest altitude above sea level?’

The four choices were: (a) Mexico City; (b) Quito; (c) Bogota; and (d) Kathmandu. Rosner picked Kathmandu, which happens to be situated at the lowest altitude of the four options. However, La Paz, Bolivia – which was not an

available selection – is the highest capital city in the world.

The appellate court granted Valleycrest’s motion for summary judgment on the myriad breach of contract claims based on Rosner’s signing a written contract before going on the show that gave the production company an absolute right to interpret questions and answers. The court determined that as a matter of law, “in a game show involving written multiple choice questions...it is...within the reasonable expectation of the parties that issues may arise regarding interpretation.” *Id.* at *9.

The court also affirmed the dismissal of a negligence claim, holding that the contractual release barred any claims over defendants’ failure to better source their questions.

Plaintiff was represented by René Tovar and David J. Cohen of Tovar & Cohen. Defendants were represented by Oliver & Hedges and Quinn Emanuel Urquhart.

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New York Appellate Court Upholds Ban on Cameras in Courtrooms

In a terse four page decision, a unanimous five judge appeals court panel rejected a constitutional challenge to New York State's statutory ban on televising court proceedings. *Courtroom Television Network LLC v. State of New York*, 2004 N.Y. Slip Op. 05386, 2004 WL 1382325 (N.Y.A.D. 1 Dept. June 22, 2004). See also *LDRC LibelLetter* October 2001 at 47; *MLRC MediaLawLetter* July 2003 at 34.

In the first state appellate court decision on the constitutionality of the ban, the court affirmed summary judgment in favor of the state in a declaratory judgment action, holding that there is no federal or New York State constitutional right to televise court proceedings. The court summarily rejected the argument that the public has a right to observe trials on television without physically attending the proceedings.

Background

New York Civil Rights Law § 52 imposes a per se ban on all broadcast coverage of trial court proceedings, providing in relevant part that:

No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken,

A ten year experiment with cameras in courts lapsed in 1997. Nevertheless a number of trial court judges had declared § 52 of the Civil Rights Law unconstitutional under the First Amendment of the U.S. Constitution and Article I, Section 8 of the New York State Constitution. See *People v. Barron*, 30 Media L. Rep. 2120 (Sup Ct. Kings Co. 2002) (holding § 52 unconstitutional and approving television and still camera coverage of the bribery trial against a Brooklyn judge); *People v. Schroedel*, 726 N.Y.S.2d 226 (Co. Ct. Sullivan Co. 2001) ("it is elemental that in a capital case, cameras and photographers ... should be allowed in the courtroom."); *People v. Boss*, 182 Misc. 2d 700, 701 N.Y.S.2d 891 (Sup. Ct. Albany Co. 2000) (camera ban is a barrier to the

"presumptive First Amendment right of the press to televise court proceedings, and of the public to view those proceedings on television"); *Coleman v. O'Shea*, 184 Misc. 2d 238, 707 N.Y.S.2d 308 (Sup. Ct. Nassau Co. 2000) (also finding § 52 a violation of the equal protection clause of the Fourteenth Amendment because "no safeguards were included to ameliorate the effect of denying coverage to a segment of the press in the face of consent").

Trial Court Upholds Ban

None of these decisions were reviewed by the New York Appellate Division or the Court of Appeals. Instead in 2001, Court TV initiated a lawsuit seeking a declaratory judgment that § 52 is unconstitutional.

On July 15, 2003, a New York trial level court denied Court TV's motion for a partial summary judgment and granted defendants' cross-motion for summary judgment, holding that § 52 is constitutional under both the First Amendment and New York Constitution. *Courtroom TV Network LLC v. State*, 769 N.Y.S.2d 70 (N.Y. Sup. Ct. 2003).

In a 26 page decision, the court reviewed in detail the history of the statutory ban and the New York experiment with camera coverage, ultimately concluding that it must defer to the legislature's rational basis for enacting the ban.

Appellate Division Summarily Affirms

Affirming, the Appellate Division briefly concluded that the public right of access to trials recognized by the U.S. Supreme Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) and *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984), did not include television coverage.

The court reasoned that the value of openness outlined in these cases was grounded "not in how many people actually attend (or watch a broadcast of) a trial, but "in the fact the people not attending trials can have confidence that standards of fairness are being observed," quoting *Press-Enterprise*, 464 U.S. at 508.

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NY Appellate Court Upholds Ban on Cameras in Courtrooms

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Further, even assuming that § 52 restricts speech, the court held the statute to be content-neutral and sufficiently tailored to the state's interest in fair trials. Thus the statute would not be invalid if the state's interest could be served by less restrictive alternatives.

Finally, the court affirmed the statute's constitutional-ity under the State Constitution, holding that access under state law is no greater than the rights under *Richmond Newspapers*.

Jonathan Sherman of Boies, Schiller & Flexner LLP represented CourtTV.

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Second Circuit Vacates Injunction Against Penguin Putnam

By Susan Stevens

On May 7, 2004, the Second Circuit reversed summary judgment against Penguin Putnam, Inc. ("Penguin") in a copyright infringement case and vacated a permanent injunction against the publisher that had barred it from distributing a book containing the collected poems of Dorothy Parker. *Silverstein v. Penguin Putnam, Inc.*, 2004 WL 1008314 (2d Cir. 2004).

In an opinion by Judge Jacobs, joined by Judges Winter and Straub, the court held that material issues of fact existed as to whether plaintiff's book of poems by Parker was sufficiently "original" to merit copyright protection and, if so, whether Penguin's infringement of that copyright was more than trivial.

Moreover, the court held that the copyright interest asserted by plaintiff was simply "too slight to support an injunction against publication."

Background

At issue in this case are two books, one published by plaintiff, Stuart Silverstein, in 1996, entitled *Not Much Fun: The Lost Poems of Dorothy Parker* ("*Not Much Fun*") and another published by Penguin in 1999, entitled *Dorothy Parker: Complete Poems* ("*Complete Poems*").

Both works contain so-called "uncollected" poems of renowned poet, screenwriter, critic and short-story author, Dorothy Parker, who published three volumes of her poems in her lifetime, entitled *Enough Rope* (1926), *Sunset Gun* (1928), and *Death and Taxes* (1931).

In 1994, prior to the publication of *Not Much Fun*, Silverstein approached Penguin with his manuscript for publication. Each page included the caption, "Compilation ©1994 Stuart Y. Silverstein. All rights reserved." Silverstein owned no copyright in the underlying poems.

Penguin offered Silverstein \$2,000 dollars for the right to publish the manuscript as part of a larger work, which purported to include all of Parker's previously published poems. Silverstein turned down the proposal and subsequently published *Not Much Fun* in 1996 which contained his subjective arrangement of Parker's "uncollected" poems.

In 1999, Penguin published *Complete Poems*, a compilation of the three volumes previously published by Parker with an additional section entitled "Poems Uncollected by Parker."

This section consisted of all but one of the "uncollected" poems published by Silverstein – but arranged chronologically.

Penguin admitted that the editor of this section photocopied Silverstein's *Not Much Fun*, and rearranged the poems in the Penguin manuscript in chronological order without crediting *Not Much Fun* or Silverstein.

Silverstein sued Penguin for copyright infringement, violation of the Lanham Act, "immoral" trade practices and unfair competition.

District Court Rules for Plaintiff

The federal district court in New York granted summary judgment in favor of Silverstein on his copyright infringement claim holding that his selection of Parker's poems evinced the requisite level of creativity to be considered an "original work of authorship." The court found he had employed "his own taste, judgment, and informed decision-making" in selecting and characterizing Parker's works as poetry and that Penguin had infringed on that copyright by cutting and pasting Silverstein's work into *Complete Poems*. *Silverstein v. Penguin Putnam, Inc.*, No. 01 Civ. 309, 2003 U.S. Dist. LEXIS 5487 (S.D.N.Y. Apr. 4, 2003).

The district court also granted summary judgment on plaintiff's Lanham Act, "immoral" trade practices and unfair competition claims finding that Penguin's failure to credit plaintiff in *Complete Poems* amounted to "willful false designation" and that Silverstein's state law claims for "immoral" trade practices and unfair competition were not preempted by federal law.

The district court then permanently enjoined Penguin from further distributing or selling *Complete Poems*, ordered that Penguin recall all existing copies, and denied Penguin's motion to stay the injunction.

Copyright Infringement Ruling Reversed

On appeal, the Second Circuit vacated the permanent injunction, reversed the district court's grant of summary judgment in favor of Silverstein on the copyright infringement claim and remanded for further proceedings, finding that material facts existed as to whether Penguin appropriated any non-trivial creative input from Silverstein.

The Court declined to rule on the district court's grant of summary judgment as to the Lanham Act and state law claims

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Second Circuit Vacates Injunction Against Penguin Putnam

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for unfair competition and “immoral” trade practices holding that the district court’s rulings and findings on remand might bear upon or obviate the need to address these claims.

Originality of Selection

The Court noted that a compilation of various works may be entitled to copyright protection, even where the underlying works themselves do not enjoy copyright protection, so long as the compilation itself possesses “at least some minimal degree of creativity.”

The Court concluded that here “material questions of fact exist as to whether Silverstein exercised creativity in selecting the works for his compilation” and acknowledged that “[t]hose questions must be answered before the creativity, if any, in his selection can be assessed.”

Among other things, questions of fact existed as to whether differences between Silverstein’s selection of poems and that of a leading Parker scholar evidenced sufficient creativity.

The Court held that, even if the compilation is creative, to merit copyright protection the compilation must include “indicia that principles of selection (other than all-inclusiveness) have been employed” and a question of fact remains as to whether Silverstein simply published all of the uncollected poems by Parker he could find.

Injunction Not Warranted

Finally, the Court concluded that an injunction was not appropriate to bar Penguin from doing what any other publisher assembling a complete works could do.

Even if Silverstein’s creative contribution to the selection of Mrs. Parker’s previously uncollected poems is non-trivial, and even if Penguin’s appropriation of it was deliberate, enforcement of his rights by a preliminary or permanent injunction that stops publication of *Complete Poems* is an abuse of discretion.

Silverstein is represented by Mark A. Rabinowitz of Neal, Gerber & Eisenberg LLP in Chicago, IL. Penguin is represented by Richard Dannay of Cowan, Liebowitz & Latman in New York, NY.

Susan Stevens is an associate with Coudert Brothers LLP in New York.

Second Circuit Considers Impact of Bad Faith in Fair Use Test

In an interesting fair use decision, the Second Circuit was presented “with an opportunity to examine the import of the Supreme Court’s holding in *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985), that ‘the propriety of the defendant’s conduct’ is relevant to the” purpose and character inquiry of the fair use test. *NXIVM Corporation and First Principles, Inc. v. The Ross Institute, et al.*, No. 03-7952 (2d Cir. April 20, 2004) (Walker, C.J., Jacobs, J., and Straub, J.).

While the panel affirmed the trial court’s denial of a preliminary injunction in a copyright infringement case, it found that the lower court erred in “not fully and explicitly” considering the extent to which defendants knew that an unpublished manuscript from which quotations were taken and disseminated on the Internet was wrongfully acquired.

Background

Plaintiff NXIVM provides an expensive training program called “Executive Success.” Participants receive a 265-page seminar manual – and also sign a non-disclosure agreement, purporting to bar them from releasing the manual or the proprietary techniques taught in the seminar program.

Plaintiff sued a “cult de-programmer” and two writers who authored and posted on the Internet a report on plaintiff’s program using quotes from the seminar manual. The defendants obtained a copy of the manual from a former seminar participant – allegedly in violation of the non-disclosure provision of the program.

Fair Use and Bad Faith

The Second Circuit rejected the broad proposition that “to invoke the fair use exception, an individual must possess an authorized copy of a literary work.” See *Atari Games Corp. v. Nintendo*, 975 F.2d 832, 843 (Fed. Cir. 1992). Instead it found that while bad faith must be weighed, it is not dispositive. Here, even assuming bad faith on the part of defendants, the transformative and critical nature of their use was sufficient to sustain the fair use defense.

NXIVM Corporation and First Principles, Inc. was represented by Arlen L. Olsen of Olsen & Watts. The Ross Institute was represented by Thomas F. Gleason of Gleason, Dunn, Walsh & O’Shea. Stephanie Franco was represented by Harold Kofman and Anthony K. Sylvester of Riker, Danzig, Sherer, Hyland & Peretti.

Survey Shows Greater Support for First Amendment Values

Americans support for their First Amendment freedoms, which was shaken by the events of 9/11, appears to be returning to pre-9/11 levels, according to the annual State of the First Amendment survey, published by the First Amendment Center in collaboration with American Journalism Review magazine.

Copies of the survey are available online at: http://www.firstamendmentcenter.org/sofa_reports/index.aspx

In 2002, 49 percent of Americans surveyed agreed that “the First Amendment goes too far in the rights it guarantees.” This year, that number fell to 30 percent. “Two years after the terrorist attacks in New York and Washington, D.C., our nation appears to have caught its breath – and regained some perspective,” said Ken Paulson, former executive director of the First Amendment Center, now editor of USA Today.

The survey, conducted annually since 1997, examines public attitudes toward freedom of speech, press, religion, and the rights of assembly and petition.

The national survey of 1,000 respondents was conducted by telephone between May 6 and June 6, 2004. The age group of the respondents was evenly separated, and the sex roughly divided. Racially, 77% were white, 9% black, and 5% Hispanic. 36% identified themselves as Democrats, while 26% were Republicans. 40% replied that they made less than \$40,000, while 54% made more than \$40,000. 27% were Protestant, 22% Catholic, and 2% Jewish. 20% described themselves as fundamentalist Christian.

According to Paul McMasters, Ombudsman of the First Amendment Center, this year’s survey measured public attitudes about issues in today’s headlines: the effort to amend the Constitution to ban flag-burning; proposals to expand regulation of so-called indecent material in the media; attempts by government officials and private advocates to lower the “wall of separation between church and state;” and scandals involving made-up stories and facts at major news organizations.

McMasters claims that one theme persists over the eight years that the First Amendment Center has con-

ducted the State of the First Amendment survey: “In the minds of many Americans, there is a troubling disconnect between principle and practice when it comes to First Amendment rights and values.”

For example, nearly 8 in 10 believe the press has a government watchdog role, but 4 in 10 believe the press has too much freedom.

Following the sensational fallout from singer Janet Jackson’s Super Bowl halftime show, advocacy groups pressured the Federal Communications Commission and Congress to rein in the media’s perceived excesses by enacting tougher laws, strengthening regulation and dramatically increasing fines for indecent programming.

This survey offers evidence, however, that a large majority of Americans believe that parents, not government, should be shielding children from such material. When asked who should be primarily responsible for keeping inappropriate material away from children, 87% said parents, as opposed to 10% “publishers,” and 1% “government officials.”

Despite 58% responding that the current amount of government regulation of entertainment programming on television is “about right,” 49% would extend broadcast regulations to late-night and overnight programs. Broadcasters and producers should note that these respondents would have current regulations regarding references to sexual activity extended to cover all 24 hours; and 54% would extend those regulations to cable, which currently is not covered by such FCC rules.

McMaster says that when the First Amendment Center began sampling public attitudes toward First Amendment freedoms eight years ago, one goal was to identify areas where more education was needed.

The current survey suggests that much work needs to be done to better educate Americans about the First Amendment. While 58% could name “speech” as one of the specific rights guaranteed by the First Amendment, only 1% could name “petition.” The other rights were similarly vague in the minds of respondents: only 17% could name “religion;” 15% “press;” and 10% “assembly.”

In 2002, 49 percent of Americans surveyed agreed that “the First Amendment goes too far in the rights it guarantees.” This year, that number fell to 30 percent.

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