

**MULRC** Media Law Resource Center  
**MEDIA LAW LETTER**

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December 2004

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**MLRC 50-STATE SURVEY 2005:  
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**TOPICS INCLUDE:** *Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort*

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## **Storms Across the Border: Canada/United States Cross-Border Issues**

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**Presented jointly by Media Law Resource Center and  
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*The first seminar devoted to media law issues affecting Canadian and American publishers and broadcasters. Intended for counsel advising media on risks under Canadian law and procedure when their content is distributed in Canada – or is simply accessible on the Internet. Recent cases, such as *Bangoura v. Washington Post* provide a wake-up call for U.S. publishers and broadcasters. There may be more to fear just to the north, across the world's longest undefended border, than across the oceans in England or Australia.*

### **What you will learn?**

- When will Canadian courts take jurisdiction over claims against U.S. media?
- Can access on the Internet be enough for Canadian lawsuits against U.S. media defendants?
- What are the key differences under Canadian libel and privacy law?
- What advantages do plaintiffs have under Canadian law and procedure?
- Is it true that publishing a photograph taken in public can result in liability under Quebec law?
- What special defences are available under provincial libel legislation?
- What standards of fault apply?
- When can covering Canadian court cases get you into trouble?
- How to reduce the risks of being at the wrong end of Canadian lawsuit? Why is pre-publication/broadcast review different in Canada?
- What does Canadian litigation mean for discovery, protection of sources, trial conduct, damage awards and legal costs?

*In under two days, get a handle on exposure under Canadian law from top media counsel and position yourself to steer your clients through challenges north of the border.*

**Save the date – more information to follow.**

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## MLRC's William J. Brennan Jr. Defense of Freedom Award Presented to Ted Turner

It was the hottest spot north of Havana at Manhattan's Copacabana restaurant and nightclub on Wednesday November 17th as close to 600 MLRC members and their guests gathered together for this year's Annual Dinner.

The highlight of the evening was the presentation of the William J. Brennan Jr. Defense of Freedom Award to Ted Turner, Chairman of Turner Enterprises and founder of the Cable News Network ("CNN"), the first 24-hour news channel.

Since CNN officially launched on June 1, 1980, its combined branded networks and services have become available to more than 1.5 billion people in more than 212 countries and territories around the world, changing forever the global media landscape.

As noted in a speech before the Radio-Television News Directors Association in 2000, Christiane Amanpour, CNN's chief international correspondent who joined CNN in 1983, said:

We were thrilled and we were privileged to be part of a revolution, because make no mistake about it, Ted Turner changed the world with CNN. Not only did he create 24-hour news, and all that that has meant, but he truly created the global village. And as corny as that sounds, nothing has been the same since.

Ted Turner has also continually been recognized for his philanthropic activities, which have included the establishment of the Better World Society in 1985, as well as the Turner Foundation in 1990.

MLRC honored Ted Turner for starting the Cable News Network, and, in so doing, changing the way news is delivered and used, here and abroad. He realized, before anyone else in the cable industry, the power of telecommunications to bring people together.

Tom Johnson, the former Chairman and Chief Executive Officer of CNN who began working at the company the day before the Iraqi invasion of Kuwait, introduced Turner and recalled his longstanding dedication to providing his audience with

comprehensive coverage of news from around the globe.

Tom Brokaw, Anchor and Managing Editor of the "NBC Nightly News," conducted an hour-long interview with Turner that covered topics as diverse as Turner's dedication to environmental issues and his views of reality television. In characteristic candor and hu-

mor, Turner discussed the impetus behind the founding of CNN, as well as his views on the importance of the dissemination of global news.



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

*MLRC would like to thank all those who helped make this year's Annual Dinner such a success, and looks forward to seeing everyone again next year!*

Photos by Julienne Schaer



Hal Fuson and Ted Turner



Ted Turner



Tom Johnson introducing Ted Turner



Tom Brokaw and Ted Turner

## European Court of Human Rights Reverses Libel Judgment *One-sided Reports on Matter of Public Interest Protected*

In an interesting and potentially important case for the media, the European Court of Human Rights (“ECHR”), reversed a libel judgment against a Finish reporter who wrote a series of articles on the death of a patient who was operated on by an allegedly drunk surgeon. *Selisto v. Finland*, No. 56767/00 (ECHR Nov. 16, 2004).

In a 6-1 decision, the ECHR found that the articles covered an important matter of public interest and were protected notwithstanding the fact that they selectively drew from public documents and did not report that the doctor was never charged with criminal wrongdoing.

The decision is available online at: <http://portal.nasstar.com/75/files/Selisto-v-Finland%20ECHR%2016%20Nov%202004.pdf>.

### **Background**

In 1996, the defendant, a reporter with a regional daily newspaper in Vaasa, Finland, wrote a series of articles discussing the 1992 death of a hospital patient who was operated on by an unnamed “Doctor X,” who was allegedly drunk during the surgery.

The patient died from a burst vein and internal bleeding during a procedure to shorten a rib that was pressing against an artery. Later investigations concluded that the patient’s death was not caused by doctor error, but that the rib punctured her artery.

Doctor X’s identity was apparently a matter of public record, but the newspaper chose not to reveal his name.

The first article quoted the patient’s widower: “How is it possible that a surgeon is allowed to conduct surgery with alcohol in his blood – is it not a fact that pilots only get to maneuver a plane when they are absolutely sober?” The reporter also stated the “surgeon cost the life of [his] wife.”

A second article made no reference to Doctor X, but described the need for sober surgeons and pilots.

A third article took up the theme of the first report and issues of patient safety. It quoted statements by hospital staff members made during investigations of Doctor X that followed the patient’s death.

Among other things it republished statements that:

“Often he had a visible hangover, which showed in his not being neatly dressed, in his reddish and swollen face, in his shaking hands and in his breath which smelled freshly of alcohol.” “The patients operated on by surgeon X have suffered from more post-operative complications.” “During the round, surgeon X came over to my left side. Then I noticed that he was clearly drunk.”

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### ***The European Court reversed a libel judgment against a Finish reporter who wrote a series of articles on the death of a patient who was operated on by an allegedly drunk surgeon.***

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The article also reported that following the patient’s death, Doctor X was not allowed to operate for two years and required to take regular breathalyser tests.

The article was illustrated with a drawing depicting a seemingly drunk surgeon using a pen to mark where to cut open a patient’s stomach.

The article did not include statements from these records that might have balanced the report and there was a factual dispute as to whether the reporter sought comment from Doctor X before publication.

### ***Procedural History***

Upon complaint from Doctor X, the reporter was charged with two counts of intentional defamation; the editor-in-chief of the newspaper was charged with negligent abuse of the press for failing to supervise the publication of the articles.

Both were apparently charged under criminal code provisions that parallel Finland’s civil libel – a common feature in civil law jurisdictions in Europe. Generally, these actions filed by prosecutors at the behest of the libel victim result in monetary fines only, although in some countries, such as Italy, courts have ordered reporters jailed.

The journalist was convicted of one count of intentional defamation and the editor was convicted of negligent abuse of the press. The court found that Doctor X

*(Continued on page 8)*

## European Court of Human Rights Reverses Libel Judgment

(Continued from page 7)

was sufficiently identified by the articles and that they implied he was drunk while operating on the patient and responsible for her death.

In addition, the court found that the articles were not a fair report of the post-mortem investigations because the reporter “selected only those elements that supported her [own] opinion without clearly stating that the National Medico-Legal Board” ... and the “County Prosecutor had made a reasoned decision not to bring charges.”

The reporter and her editor were fined approximately 1,400 euros and assessed an additional 3,500 euros in costs. The convictions were affirmed on appeal and the fines were almost doubled.

### Article 10

Article 10 of the European Convention on Human Rights guarantees freedom of expression and is incorporated into Finland’s domestic law. Interference with the right of free expression may stand only if (1) it corresponded to a “pressing social need,” (2) it was proportionate to the legitimate aim pursued, and (3) the reasons for the interference are relevant and sufficient.

In the libel context, this results in a balancing test that weighs under the circumstances the interest in protecting reputation against the newsworthiness and accuracy of the publication.

In her appeal to the ECHR, the reporter argued that her articles involved important matters of public interest, that they were based on accurate facts, and that her reporting was responsible and in good faith.

### ECHR Decision

The ECHR reversed the conviction, holding that it did not strike a fair balance between the public’s interest in the articles and the interests of X.

The Court first noted that it is appropriate for the press to use an individual case, such as the patient’s death, to discuss a broader matter of public concern – here, the problem of alcohol abuse.

Second, the Court noted that the articles were factually accurate and that the conviction was essentially based on libel by omission. In language that may prove very helpful to the press the Court stated:

“[I]t is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists.”

And in a strong endorsement of the principle of the fair report defense, the Court reasoned that there is “no general duty to verify the veracity of statements contained in [public documents].” Even though the articles were “one-sided,” the Court gave great weight to the fact that they were based on public records that supported the reporter’s view that there were grounds to press charges against Doctor X.

The Court also gave weight to the newspaper’s decision not to identify

Doctor X. And it found that Doctor X was given sufficient opportunity to respond to the articles *after* publication. Both these facts supported the conclusion that the reporter acted responsibly.

Finally, the Court noted that the relatively minor fine imposed on the reporter was not relevant to determining whether her conviction violated Article 10. “What is of greater importance,” the Court concluded, “is that the journalist was convicted.”

### UK Judge Dissents

Interestingly, the one dissent on the Court was by Sir Nicolas Bratza, the UK judge. Noting that “the more serious and damaging the allegation made, the stronger the obligation to confirm the truth of the information” (the traditional English standard), he would have upheld the domestic courts’ finding of liability.

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***“It is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists.”***

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## Don King's Libel Suit Against New York Lawyer Goes Forward in London

By William Bennett

On October 19, 2004, the English Court of Appeal upheld the first trial level decision of Mr Justice Eady that a libel suit brought by boxing promoter Don King against New York lawyer Judd Burstein could be heard in England. *King v. Burstein*, [2004] EWCA Civ1329 (Oct. 19, 2004) (The decision is available online through [www.courtservice.co.uk](http://www.courtservice.co.uk))

### Background

King alleges that statements made by Burstein on U.S. boxing websites that he is an anti-Semite defamed him. The Court of Appeal considered whether the trial level judge was right to conclude that England had jurisdiction to hear King's complaint regarding those publications which took place in the jurisdiction because Burstein's statements were allegedly downloaded in England.

The Court of Appeal decision by Lord Justice Laws, Mummery and Lord Chief Justice Woolf, considered "four strands in the learning" arising from the relevant case law.

### Libel Committed in England

The first three strands concern matters in the trial court's discretion which should rarely be disturbed on appeal. The initial presumption will be that the appropriate forum for trial will be where the tort was committed, i.e., where the libel was published, for instance, where libelous material was downloaded from the internet.

There was some evidence at the trial level court that the relevant boxing websites were accessed in England. And the defendant did not choose to contest that this constituted publication in England under traditional common law rules.

### Plaintiff's Connection to England

The second strand concerns plaintiff's connection with England and the extent of publication of the same material outside England

The initial presumption will be weakened and possibly rebutted depending upon the extent to which the plaintiff is connected to England and the extent to which the same material was published outside the jurisdiction. The more tenuous his connection with the jurisdiction and the greater the publication of the same material outside the jurisdiction, the stronger the case for rebuttal.

The first instance judge had concluded that Don King had a "substantial" reputation in England (he conducts business there and of "particular concern" was that he had friends in the English Jewish community).

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***The Court of Appeal approved the statement in *Gutnick v. Dow Jones* to the effect that a publisher who has chosen to use the internet as its vehicle of dissemination "must accept" that it thereby runs the risk of being sued in jurisdictions where that publication is not lawful.***

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### Internet Publication

Where the defendant has chosen the "ubiquitous/global" medium of the internet to publish defamatory material it will make it more likely that the court will accept jurisdiction

The Court of Appeal approved the statement in *Gut-*

*nick v. Dow Jones* to the effect that a publisher who has chosen to use the internet as its vehicle of dissemination "must accept" that it thereby runs the risk of being sued in jurisdictions where that publication is not lawful.

Thus, all other things being equal, where a defendant has published an article on the internet rather than in a domestic newspaper (which is then distributed abroad by an independent third party) the court will be more likely to accept jurisdiction.

The defendant's lack of intention to publish in the jurisdiction was irrelevant.

### Juridical Advantage

The fourth factor was identified by the Court of Appeal as a question of law. If the trial level judge concludes that a forum other than England would be most appropriate, he can then consider whether there is a juridical advantage for the plaintiff such that "trial in England is required if substantial justice is to be done between the parties."

(Continued on page 10)

### **Don King's Libel Suit Goes Forward in London**

*(Continued from page 9)*

The defendant argued that in determining the first three factors Eady improperly considered the substantive legal difficulty King would face if the the libel action were transferred to New York.

#### ***England is Proper Forum***

The Court of Appeal found that Mr. Justice Eady did not abuse his discretion in concluding that England is the appropriate forum. As to the juridical advantage factor, the Court found Eady's mention of the difficulties Don King would face in the U.S. were little more than an ironic aside.

#### ***Practical Effect***

U.S. based internet publishers beware! An English court will not look to your actual intention to publish to a U.S. audience but to the fact that you have employed a "ubiquitous/global" means of publication.

Furthermore, beware of the fact that while you believe that the person against whom you are making allegations only has a reputation and connection with the U.S., a lesser reputation and a lesser connection with England may nevertheless allow him or her to bring a libel action here (London isn't called the world capital of libel for nothing).

*William Bennett is a barrister at 5 Raymond Buildings in London.*

#### ***Now Available***

### **MLRC BULLETIN 2004:4 PART 2 MEDIA ACCESS AND NEWSGATHERING IN HIGH PROFILE CASES**

**CHALLENGES TO THE CORE: PRIOR RESTRAINTS AGAINST PUBLICATION OF  
LEGALLY OBTAINED INFORMATION IN HIGH PROFILE CRIMINAL CASES**

*By Joel Kurtzberg and Kayvan B. Sadeghi*

**JUDICIAL PROCEEDINGS AND RECORDS "ANCILLARY TO THE GRAND JURY" IN  
HIGH PROFILE CASES: TOWARD A MORE MEANINGFUL RULE-BASED STANDARD FOR ACCESS**

*By Theodore J. Boutrous, Jr., and Michael H. Dore*

**SEARCH WARRANTS: A QUALIFIED RIGHT OF ACCESS**

*By Stephanie Abrutyn*

**GAG ORDERS: SPEAKING FREELY AND HIGH PROFILE CASES**

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**WHEN THE MEDIA COME TO TOWN: PROTOCOLS AND PRACTICES**

*By Rochelle L. Wilcox*

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## House of Lords Lifts Prior Restraint Against Two Newspapers

### *Discusses Standard for Restraints in Breach of Confidence Cases*

In an important decision, the House of Lords, the UK's highest court, lifted a prior restraint against two English newspapers defending a breach of confidence action. *Cream Holdings Ltd & Ors v. Banerjee & Ors* [2004] UKHL 44 (14 October 2004).

The court ruled that a plaintiff seeking to restrain publication of allegedly private information has to show that he is more likely than not to succeed at trial. Moreover, in making that determination a court can consider whether the information is of public interest.

#### **Background**

The plaintiffs, the Cream group of companies, began in 1992 as a Liverpool nightclub and later expanded internationally franchising their brand name and logo and merchandising clothes and other items.

In June 2002, the *Liverpool Echo* and *Daily Post* published articles about alleged corruption involving a Cream company director and a Liverpool government official. The newspapers obtained the underlying financial information from a former Cream company accountant.

In July 2002, a trial court granted an injunction prohibiting the defendants until trial from publishing, disclosing or using any further information from the source, as defined in a sealed schedule.

#### **Standard for Injunctions**

The standard for prior restraints is addressed in the Human Rights Act of 1998 which incorporates the European Convention on Human Rights into UK domestic law. Section 12(3) states that:

No such relief [which might affect the exercise of the Convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

The trial judge interpreted the term "likely" in Section 12(3) to require that an applicant for injunctive relief have "a real prospect of success." The newspapers argued that this standard – which had been interpreted in commercial

contract cases as preserve the status quo until trial – was insufficient to protect the press.

The newspapers argued that plaintiffs must show that they are "more likely than not" to succeed on their breach of confidence claim at trial.

The Court of Appeal affirmed the trial court ruling, highlighting the relative ease with which plaintiffs in breach of confidence cases can obtain prior restraints. See *Cream Holdings v. Liverpool Post* [2003] EMLR 323.

The breach of confidence claim in UK law imposes a fiduciary-style obligation on the recipients of confidential information not to disclose such information. The duty not to disclose confidential information can be constructively imposed on third parties, such as the press.

#### **House of Lords Decision**

In a decision by Lord Nicholls, the court held that under Section 12(3) "the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are *sufficiently favourable* to justify such an order being made in the particular circumstances of the case."

The general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will *probably* ("more likely than not") succeed at the trial– though courts should still retain some flexibility to depart from this formula "where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

As to the claim against the newspapers, the Court found that the plaintiffs did not have a sufficiently likely chance of success at trial, particularly given the newspapers claims that publication was of "serious public interest."

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

Call us, or send us an email.  
Media Law Resource Center, Inc.  
Ph: 212.337.0200,  
ldrc@ldrc.com

## **Saudi Bank Withdraws Claim in London against the Wall Street Journal**

The Wall Street Journal announced in an editor's note on October 19 that Al Rajhi Banking & Investment Corporation had dismissed its claim filed in London against the Wall Street Journal Europe for an article published on February 6, 2002.

The bank, one of the biggest retail banks in Saudi Arabia, claimed that the article suggested it supported terrorism.

The newspaper did not pay any damages or costs to the bank or make any apology, but it published (also on October 19) the bank's response to the article in a letter to the editor, an offer originally made by the newspaper to the bank several times prior to filing of the lawsuit, and even after the lawsuit had been filed.

In the same edition, the newspaper also published a clarification in its "Corrections & Amplifications" box that "The article did not report, and did not intend to imply, an allegation that Al Rajhi Banking & Investment Corp. supported terrorist activity, or had engaged in the financing of terrorism."

Again, the newspaper had made this point to the bank on a number of occasions before and after the lawsuit had been filed. While the newspaper had actively defended the case for 30 months, it had never alleged that the bank had supported or financed terrorism.

*JUST PUBLISHED!*

## **MLRC 50-STATE SURVEY 2005: EMPLOYMENT LIBEL AND PRIVACY LAW**

Updated and published annually, **Employment Libel and Privacy Law** is an easy-to-use compendium of the law used by journalists, lawyers and judges, and law schools nationwide. Each state's chapter, prepared by experts in that jurisdiction, is presented in a uniform outline format.

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# SAVE THE DATES!

**Toronto  
May 12-13, 2005**

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MEDIA LAW ISSUES

*Advocates in Defence of  
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**London  
September 19-20, 2005**

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2005

## Uniform Libel Laws for Australia? New Majority Increases Chance of Legislation

By Peter Bartlett

The Australian Government was earlier this month reelected for a further three year term, with an increased majority in Parliament. For the first time since 1981, the Government of the day will have a majority in the Upper House, the Senate.

The result is that the Government will be able to pass legislation without having to negotiate with minor parties that have previously controlled the Senate.

### *Uniform Law Initiative*

Australia presently has eight separate sets of libel laws in the various States and Territories. Earlier this year, the Australian Attorney General Philip Ruddock announced that if the states and territories cannot agree on uniform libel laws, he would introduce legislation covering the whole of Australia. This was the first time that an Australian government had seriously contemplated using its limited constitutional powers to introduce national libel laws. See *MediaLawLetter* April 2004 at 45.

In July 2004, the Australian Attorney-General circulated a revised outline for a possible uniform national libel law for Australia. The outline is available online at: [www.ag.gov.au/defamation](http://www.ag.gov.au/defamation).

With the government's strengthened hand the Attorney General's proposal is back on the legislative agenda.

### *Reform Proposals Mixed*

As readers familiar with *Gutnick v. Dow Jones* know, Australia's libel laws are weighted far more towards protecting reputations than in the United States.

The Attorney General's proposals would not greatly change that position. While there are practical benefits to uniformity, there are also some provisions that are far worse for the media.

The proposal would create a cause of action for defamation of the dead. This would create additional exposure for the media, but is unlikely to be used often. The action would be available for three years after death and the only remedies are correction orders, declarations and injunctions. No money damages could be awarded.

The Attorney General wants to add to the truth defense an additional requirement that the publication is in the public benefit. This is intended to introduce a privacy element to libel laws.

According to the Attorney General's outline, the absolute truth defense "does not recognize that certain statements can be true but profoundly damaging or hurtful, while conferring little or no benefit to recipients. In other words, by elevating truth-telling to a supreme good, it allows no room for privacy or any other countervailing interest no matter how strong."

The Attorney General's proposal includes nothing that addresses jurisdiction at issues arising from publication on the Internet.

On the positive side, the limitation period for bringing an action is reduced from as high as six years in some States, to one year. There is an encouragement to speedy resolution of claims and alternate dispute resolution.

The proposals move the qualified privilege defense closer to the United Kingdom *Reynolds* defense, but still not far enough.

### *Media Comments*

The media and other groups have been submitting comments on the proposal. Notably, Kurt Wimmer of Covington & Burling in Washington, D.C., is organizing a coalition of international media companies to address Internet jurisdiction and the single publication rule.

The coalition will recommend that the publication of defamatory material would be deemed to occur in the country of origin, defined as the country in which the publisher of the content exercises final editorial control. In addition, it is recommended that the publication would give rise to a single cause of action.

This would overcome the difficulties created by *Gutnick v. Dow Jones*.

### *Outlook*

In addition to the Australian Attorney General's attempts at reform, the Attorney Generals of each of the

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### Uniform Libel Laws for Australia?

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eight States and Territories are trying to agree on a uniform model law. This could preempt federal legislation, but I doubt that they can succeed. Even if they agree on a uniform model law, I fear that as the legislation goes through eight separate Parliaments, it could be amended. In addition, as state governments change in the future, there could be moves away from uniformity.

Because the Australian Attorney General will likely be able to pass through Parliament any legislation the

Government supports, the media's efforts to weigh in on the proposals should be directed to the Federal Attorney General.

A draft bill will likely be introduced in early 2005 and could be considered by the Australian Senate in July 2005.

*Peter Bartlett is Chairman of Minter Ellison in Melbourne, Australia and head of the firm's Media Group.*

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## Gutnick v. Dow Jones Internet Libel Case Settled

Dow Jones and Company Inc. has settled *Gutnick v. Dow Jones*, the high profile internet libel suit that was being litigated in Melbourne, Australia.

Dow Jones did not pay any damages or make a formal retraction, but it did pay approximately \$150,000 of plaintiff's legal costs, a fraction of the total.

In addition, *Barron's* magazine published a clarification in its "Corrections & Amplifications" box stating that it did not intend to criminally link plaintiff to a convicted money launderer discussed in the article (The clarification is available online at: )

The lawsuit by an Australian resident against the American publication, brought into sharp relief the potential global liability publishers face over material accessible over the Internet.

The plaintiff, Joseph Gutnick, is a citizen of Australia, with substantial business dealings in the United States. He sued over a 2000 article in *Barron's* entitled "Unholy Gains," which reported on the possible role played by American religious charities in questionable trades of publicly-owned securities. Gutnick was associated with several of the companies examined.

In December 2002, Australia's highest court decided it had jurisdiction over Dow Jones because several of plaintiff's acquaintances had downloaded the article in Australia. *Dow Jones & Company, Inc. v. Gutnick*, [2002] HCA 56. The court also held that in trying plaintiff's libel claim, the law of Australia would be applied in judging the New York-based journalists, not that of the United States.

In an interesting editor's letter, entitled "Kafka Lives, Down Under," *Barron's* took aim at Australia law in explaining the settlement.

Simply put, because we believed the article didn't carry the meaning Gutnick alleged, the law didn't allow us to defend ourselves meaningfully in court. The verdict, had we gone to trial, would have been foregone. Result: a settlement.

Kafka and Pirandello are alive and well and chuckling in Victoria."

(The letter from the editor is available online at: <http://online.barrons.com/public/article/SB109848511439553629.html>)

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## Inter-American Court Rules for Defendants in Two Criminal Defamation Cases

### *A Step Forward for the Press in Latin America*

By Erik Bierbauer and Pablo Valverde

Two recent unanimous decisions by the Inter-American Court of Human Rights promise to improve journalists' odds of fending off criminal defamation prosecutions in courts throughout Latin America.

Some of the advantages may carry over to civil defamation lawsuits as well. The opinions in *Herrera Ulloa v. Costa Rica* ("La Nación" Newspaper Case), decided on July 2, 2004, and *Canese v. Paraguay*, decided on August 31, 2004, include some of the clearest statements ever made by an international tribunal about the conflict between defamation laws and principles of freedom of speech.

In *La Nación*, the court ordered Costa Rica to annul the conviction of a reporter for allegedly defaming a diplomat. The court emphasized that public officials and public figures must be more open to criticism than private individuals – a tenet that many Latin American

legal systems have been slow to recognize – and held that the Costa Rican trial court had wrongly forced the reporter to prove the truth of statements that originally appeared in another publication.

In a concurring opinion, the president of the Inter-American Court strongly questioned whether defamation should ever be criminalized.

In *Canese*, which involved the criminal defamation conviction in Paraguay of a presidential candidate, the Inter-American Court held that the Paraguayan courts had improperly failed to consider whether the allegedly defamatory statements were made on an issue of public concern.

In holding that the defendant's free speech rights were violated and awarding him damages, the Inter-American Court determined that criminal punishment was an excessive and disproportionate penalty where the defendant had made the challenged statements during an electoral campaign and on an issue of public concern.

### *The Inter-American Human Rights System*

By way of background, the Inter-American Court is the arm of the Organization of American States (OAS) that is charged with authoritatively interpreting the American Convention on Human Rights. Article 13 of the Convention guarantees the rights of freedom of expression and of the press.

Twenty-four nations in South and Central America and the Caribbean, including Argentina, Brazil, Chile, the Dominican Republic, Mexico, Panama, Peru and Venezuela, have bound themselves to abide by the Inter-American Court's rulings. A judgment by the Inter-American Court does not mean that all the member nations will necessarily

conform their laws to the court's ruling, but it does mean that they can expect the court to apply its holding to their actions in future cases.

Cases come to the Inter-American Court after a party has exhausted the appeals available in the national judicial system. At

that point, the party claiming a violation of his rights can submit his case to the Inter-American Commission on Human Rights, another arm of the OAS.

If the Commission decides that a right has been violated, it issues a recommendation to the national government to cease and redress the violation. The Commission may also decide to bring the case before the Inter-American Court.

### *Criminal Defamation in Latin America*

Criminal defamation charges are common in many Latin American countries. For example, almost half of Panamanian journalists were facing at least one criminal defamation charge in 2003, according to the Committee to Protect Journalists (CPJ), and prosecutions of prominent journalists in Mexico and Brazil are also underway.

In many cases, the charges are brought by or on behalf of public officials. While Cuba is the only Latin American

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***The opinions include some of the clearest statements ever made by an international tribunal about the conflict between defamation laws and principles of freedom of speech.***

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## Inter-American Court Rules for Defendants in Two Criminal Defamation Cases

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nation where any journalists are currently in prison for their work, according to CPJ, defamation charges carry the risk of incarceration in a number of Latin American countries.

Even when a conviction does not lead to imprisonment, it often entails fines, travel and work restrictions, and other civil disabilities. Moreover, many journalists throughout Latin America say that the threat of arrest and ensuing criminal proceedings for defamation deters them from aggressively covering controversial stories.

### *La Nación*

*La Nación* and *Canese* were the first defamation cases ever to come before the Inter-American Court. In *La Nación*, the Court reviewed the November 1999 criminal defamation conviction of Mauricio Herrera Ulloa, a reporter for the San José-based daily *La Nación*. The charges stemmed from a series of 1995 articles that Herrera wrote in *La Nación* about possible corruption by Félix Przedborski, who was then Costa Rica's representative to the International Atomic Energy Agency in Vienna.

The articles in *La Nación* reported on allegations circulating in leading Belgian newspapers and magazines that Przedborski was involved in arms smuggling, tax evasion, business fraud and other illegal activity. In response, Przedborski instituted criminal defamation proceedings in Costa Rica against Herrera and demanded the payment of damages from Herrera and *La Nación*. Przedborski also brought a civil defamation suit in Belgium against one of the newspapers that had originally published the allegations.

In May 1998, a Costa Rican trial court acquitted Herrera of criminal defamation for lack of intent and rejected Przedborski's claim for damages. Przedborski appealed the judgment to the Costa Rican Supreme Court and, in May 1999, the Supreme Court annulled the trial court's judgment and remanded the case for retrial.

Meanwhile, a court in Brussels granted judgment to Przedborski in his civil suit against the Belgian newspaper. In November 1999, the Costa Rican trial court convicted Herrera of defamation because he could not establish the truth of the allegations about Przedborski.

The trial court ordered Herrera to pay a fine equivalent to 120 days' wages, inscribed his name in an official list of

convicted criminals and ordered Herrera and *La Nación* to pay legal fees and approximately \$140,000 in damages to Przedborski. Herrera and *La Nación* appealed the November 1999 judgment.

In January 2001, the same five justices who had annulled the May 1998 acquittal affirmed the November 1999 conviction. After the Costa Rican Supreme Court rejected the appeal in January 2001, the newspaper and the reporter filed a petition with the Inter-American Commission. In February 2003, the Commission submitted the case to the Inter-American Court, asking it to order Costa Rica to annul Herrera's conviction.

Several international news organizations, CPJ, and a group of Latin American newspapers argued in an *amicus* brief to the Inter-American Court that the American Convention and international norms require defamation to be decriminalized. The brief was accompanied by declarations from Latin American journalists whose lives and work have suffered as a result of criminal defamation prosecutions. A number of human rights groups also filed *amicus* briefs.

The *amicus* brief is available on CPJ's website at: [www.cpj.org/news/2004/Costa19feb04\\_AmicusBrief.pdf](http://www.cpj.org/news/2004/Costa19feb04_AmicusBrief.pdf)

In holding that Herrera's conviction violated the Convention, the court described the close link between democracy and freedom of expression, stating that [w]ithout an effective freedom of expression, realized in its entirety, democracy vanishes, pluralism and tolerance begin to fracture, the mechanisms of control and social denunciation begin to turn nonfunctional and, on the whole, a fertile ground begins to develop for authoritarian systems to root in society.

The court recalled its observation in a previous case that journalism is "the primary and principal manifestation" of freedom of expression. For the first time, the court stated that "expressions concerning public officials or other persons exercising functions of a public nature must enjoy ... leeway in order for an ample debate to take place on matters of public interest."

The court's suggestion that public officials must meet a higher standard to prove defamation is a watershed in Latin American press freedom jurisprudence. Until the last several years, it was widely accepted in Latin America that

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### Inter-American Court Rules for Defendants in Two Criminal Defamation Cases

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government officials received *greater* protection from criticism by the press than private individuals.

In several Latin American countries, this position remains enshrined in *desacato*, or “contempt,” laws that punish offenses against the “honor” of public officials, often without regard to whether the challenged statement was true. The court’s opinion in *La Nación* gives strong support to efforts by the Inter-American Commission, human rights advocates and legal reformers to eliminate *desacato* laws and to change the mindset of Latin American legislators and judges on public official defamation cases.

The Inter-American Court went on to hold in *La Nación* that Costa Rica excessively limited freedom of expression by criminally punishing Herrera on the basis that he had not proved the truth of the allegations reported in the Belgian press. The court reasoned that such a requirement results in “a dissuasive, frightening and inhibiting effect on all who carry out the journalistic profession, which, in turn, prevents public debate on topics of interest to society.”

The Court also held that Costa Rica violated the defendants’ right to a fair trial. The Court reached this holding on two grounds. First, the appeal filed against the November 1999 judgment did not allow for the examination of all issues that had been raised before the trial court. Second, the Supreme Court justices who decided the appeal of the November 1999 judgment were not impartial because each of them had participated in the review of the May 1998 judgment and had already considered part of the merits of the case then.

The Inter-American Court ordered Costa Rica to annul the judgment against Herrera and *La Nación* and pay \$30,000 to Herrera in damages and costs.

The court’s president, Judge Sergio García Ramírez, wrote a separate concurring opinion that went beyond the court’s main opinion by stating that defamation laws must require a showing of specific intent by the defendant to harm the alleged victim’s reputation and place the burden of proving falsity on the accuser, and should also provide for a defense for practicing journalism with reasonable due care.

Judge García then questioned whether defamation should be criminalized at all:

*[D]ecriminalization ... seems especially appropriate in the case of (some or all) injuries to honor, good reputation, the prestige of individuals.*

...  
*[T]he civil solution does not bring the problems that the criminal solution raises in the face of national and international rules on human rights, nor does it have the intimidating character that is inherent in a criminal threat and which, as the court has seen, inhibits the exercise of freedom of expression.*

### Canese

By deciding *La Nación* on grounds of the burden of proof and the right to a fair trial, the majority of the Inter-American Court avoided taking up the issue of whether Costa Rica violated the American Convention by allowing Herrera to be charged criminally with defamation.

But the court addressed criminal defamation head-on less than two months later in *Canese*, where the court built on the principles in the main opinion and concurrence in *La Nación* to hold that Paraguay had violated Article 13 of the Convention when it permitted the criminal defamation prosecution of a presidential candidate.

The defendant, Ricardo Canese, was an author and crusader against government corruption who ran for Paraguay’s presidency in 1993. One of Canese’s presidential rivals was Juan Carlos Wasmosy, the president of a company, CONAMPA, that helped build the Brazil-Paraguay Itaipú dam, one of the world’s largest hydroelectric projects.

Canese had long been a critic of alleged corruption in the building of the dam and had advised a congressional commission that investigated allegations of corruption by CONAMPA in connection with Itaipú. During the 1993 presidential campaign, Canese said in newspaper interviews that Wasmosy had used the Itaipú project to improperly enrich himself and that CONAMPA had illegally fun-

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***The court’s suggestion that public officials must meet a higher standard to prove defamation is a watershed in Latin American press freedom jurisprudence.***

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neled dividends to Paraguayan dictator Alfredo Stroessner. Three directors of CONAMPA then filed criminal defamation charges against Canese on behalf of the company.

Canese was convicted in March 1994 and sentenced to four months in prison (he remained free during his appeals), fined approximately \$2,500, prohibited from traveling abroad, ordered to pay costs and subjected to civil liability to CONAMPA. In November 1997, an appeals court reduced Canese's prison term to two months and his fine to \$490. Further appeals by Canese were rejected by the courts. In May 2001, Paraguay's Supreme Court affirmed the 1997 judgment of the appeals court.

In June 2002, the Inter-American Commission brought Canese's case to the Inter-American Court. In August 2002, Canese submitted one more appeal to Paraguay's Supreme Court on the basis that the Commission's application to the Inter-American Court represented a new fact in his case.

The Supreme Court upheld this appeal, annulling Canese's conviction and sealing the records of his prosecution. The Supreme Court based its decision on the fact that a

new Criminal Code, enacted in 1998, exempted speech on matters of public concern from criminal liability, as well as on the need to avoid a violation to Article 13 of the American Convention.

Despite the Supreme Court's ruling, the Inter-American Court took up Canese's case. The court reasoned that once a case has been submitted to the Inter-American Commission, a subsequent ruling by a national court does not strip the Inter-American Commission or Court of its power to address the alleged violation of the Convention.

The Inter-American Court found that Canese's challenged statements were on matters of public concern and deserved the same high level of protection that the court had afforded to Herrera's articles in *La Nación*. The court noted that free expression in the context of an election campaign is an "essential tool" for the formation of voters' opinions, and that the challenged statements concerned the building of the Itaipú dam, Paraguay's largest public work.

The Court then held that the criminal proceeding, sentence and travel restrictions imposed on Canese violated Article 13 of the Convention because they were "an unnecessary and excessive punishment" for statements made during an electoral campaign on matters of public concern and no countervailing social interest justified Canese's criminal punishment.

The court also held that the travel restrictions violated Canese's right to freedom of movement under the Convention. The court ordered Paraguay to pay approximately \$40,000 in damages and costs to Canese and to publish the court's judgment to the public.

### *What Comes Next?*

Latin American tribunals and legislatures have just begun to consider the Inter-American Court's decisions in *La Nación* and *Canese*, and it will be some time before the full effect of the decisions is clear.

One question is whether, after *Canese*, Article 13 of the American Convention will be interpreted to effectively bar criminal defamation charges in any case involving a matter of public concern. A clue

may come from decisions of the European Court of Human Rights, whose decisions influence the Inter-American Court.

The European Court generally does not take a categorical approach to restrictions on free speech and a free press, including criminal defamation prosecutions. Instead, the court applies a largely ad hoc balancing test to determine whether free speech and free press protections are violated in a given case.

But if the *Canese* court intended to adopt an ad hoc approach along European lines, it left open the issue of what circumstances could ever tip the balance in favor of allowing criminal prosecution in a case involving a matter of public concern, or whether any other factors (such as whether the defendant is shown to have published false statements with some level of fault) should enter into the balancing test.

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***Canese's challenged statements were on matters of public concern and deserved the same high level of protection that the court had afforded to Herrera's articles***

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### Inter-American Court Rules for Defendants in Two Criminal Defamation Cases

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Another question is to what extent the holdings of *La Nación* and *Canese* will affect civil defamation cases. The court's holding in *La Nación* that Herrera could not be forced to prove the truth of allegations originally reported in European publications would seem to apply equally in civil defamation cases.

The reasoning behind the *Canese* court's ruling that criminal punishment was "unnecessary and excessive" could also pertain to disproportionately large civil damage awards.

This much is clear: the *La Nación* and *Canese* decisions are good news for journalists and news organizations

that report in Latin America and represent a strong endorsement of free press principles in international law.

*Erik Bierbauer and Pablo Valverde are with Debevoise & Plimpton. Together with James Goodale, Jeremy Feigelson and Ellen Hochberg they represented the Associated Press, CNN, the Committee to Protect Journalists, the Hearst Corporation, The Miami Herald Publishing Company, Reuters, and Tribune Company as well as several of Latin America's largest newspaper publishers – El Comercio, El Nuevo Día, La Prensa, Grupo Reforma and El Tiempo – as amici curiae in La Nación. The amicus brief is available on CPJ's website at [http://www.cpj.org/news/2004/Costa19feb04\\_AmicusBrief.pdf](http://www.cpj.org/news/2004/Costa19feb04_AmicusBrief.pdf).*

## European Leak Investigation Threatens Confidential Source Protection

By Christoph Arhold

In an interesting European case with parallels to the Plame investigation, European courts are considering whether and to what extent a reporter's right to protect a confidential source gives way to the government's interest in identifying and punishing officials who leak information to the press.

In this case, the reporter's files and documents have already been seized, and three courts have given little or no weight to protecting confidential sources.

### Background

Early in 2002 the German magazine *Stern* published articles by its Brussels-based EU correspondent Hans Martin Tillack on allegations by an EU official of fraud and mismanagement in the Community Institutions, and the investigation of those allegations by the EU's Anti-Fraud Office (OLAF).

OLAF, an independent investigation body within the European Commission (the executive body of the EU), was established in reaction to the resignation of the Commission in 1999 following numerous internal scandals.

OLAF's task is to investigate fraud to the financial detriment of the EU.

Tillack's articles relied on copies of internal OLAF documents, so in March 2002 OLAF began to investigate the source of the leak. Because of internal rumours that Mr. Tillack might have paid for the documents, the Commission even considered withdrawing Mr. Tillack's accreditation to the European Union, but eventually decided not to.

However, OLAF suggested in press releases that a journalist (evidently Mr. Tillack) might have bribed an EU official to obtain the documents. Following a complaint by Mr. Tillack, the European Ombudsman decided in November 2003 that OLAF had committed an act of maladministration by publicly accusing Mr. Tillack of bribery in the press releases and elsewhere, with no supporting evidence other than rumors and hearsay.

Undeterred, Mr. Tillack continued to publish articles critical of the Commission, including a general article in November 2003 on OLAF's Director-General. In January 2004, OLAF complained officially to the Belgian and German judicial authorities that Mr. Tillack had bribed Commission officials to procure documents, and asked them to launch investigations against him.

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**Belgian police searched Mr. Tillack's home and office, and sealed or seized nearly all his and Stern's archives, working documents and computers.**

## European Leak Investigation Threatens Confidential Source Protection

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The German authorities (*Untersuchungsrichter*) found the evidence insufficient to justify a search warrant.

The Belgian *Procureur du Roi* (Public Prosecutor), thought otherwise. Perquisitions (searches) are covered in Belgium by the *Code d'instruction criminelle* (the Criminal Investigation Code or "CC"), and except in cases of *flagrante delicto*, they may only be carried out at the request of the *Procureur du Roi* or a *partie civile* (a victim complainant).

Once the *Procureur du Roi* is aware of an alleged offense, he takes charge of gathering information and then decides either to close the file or to ask for a *perquisition* in order to obtain additional evidence. In the latter case he appoints a *juge d'instruction* (examining magistrate) who is then obliged to investigate the case. In this case OLAF filed a complaint with the *Procureur du Roi* of Brussels, who then requested the *juge d'instruction* Daniel Fransen to investigate the case.

On March 19 the Belgian police searched Mr. Tillack's home and office, and sealed or seized nearly all his and *Stern's* archives, working documents and computers. He was detained for a day of questions while his lawyer tried to make contact with him.

No one in Brussels seriously believes that *Stern* or Tillack was in the habit of buying copies of official correspondence for large sums of cash.

The suspicion arose because a then Commission spokesman claimed that he had heard a rumor to that effect from a former colleague. But the supposed source subsequently denied making the allegation.

By contrast "everyone" in Brussels believes the goal of OLAF was to identify its own employee who leaked the documents. As the victim of the alleged bribery, OLAF (i.e. the Commission) might become a *partie civile* to the Belgian proceedings. It may therefore request access to the seized documents at any time, and thus identify officials who acted as Mr. Tillack's sources.

### ***No Protection of Sources in Belgian Law***

Following the seizure of his journalistic resources, Mr. Tillack fulfilled his ethical duty by trying to protect his sources.<sup>1</sup>

He petitioned the Belgian *juge d'instruction* to release the seized documents, arguing that the investigation had disre-

garded the principle that journalistic sources are protected, as specified in Article 10 (freedom of expression) of the European Convention on Human Rights ("the Convention").<sup>2</sup>

Under the case law of the European Court of Human Rights ("ECHR"), interference with this fundamental principle is only permissible on three conditions: it must be provided by law, the aim of the interference must be legitimate, and the interference must be necessary in a democratic society to attain that legitimately pursued aim.

It is doubtful whether the Belgian Criminal Code constitutes a sufficiently detailed "law," as it does not explicitly define the limits of possible interference.

Indeed, the ECHR recently held that Belgium violated Article 10 of the Convention by searching a journalist's home for evidence in a third party criminal investigation. *Ernst v. Belgium*, No. 33400/96 (ECHR July 15, 2003) (unpublished).

Belgium now intends to adopt new legislation which will specify the exceptional circumstances in which such interference is possible. They do not include investigation of the making of payments for information.

Identifying leaks by public officials cannot as such justify interference with a journalist's right to protect his sources. That right would otherwise depend on any authority's arbitrary definition of what information was confidential. Vague allegations of bribery based solely on convenient rumor should not justify interference either, or the right would effectively cease to exist whenever the sources were officials.

### ***Belgian Court Said Search Was Justified***

However, in April 2004 the *juge d'instruction* declared Mr. Tillack's petition unfounded. The Judge refused to acknowledge a breach of Article 10 ECHR, arguing that:

*in view of the supposition that the plaintiff had obtained secret documents, a search of the premises where he works was justified even though he is a journalist, bearing in mind his probable involvement in the matters under investigation, which by their nature are particularly serious.*

The Judge's decision was based mainly on the alleged breach of confidentiality by EU officials, which he considered sufficient to override the interest in protection of

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## European Leak Investigation Threatens Confidential Source Protection

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sources. He added that *the plaintiff might be personally implicated, alone or with others, in a case of corruption*, and went on to conclude that it would in general be unacceptable to use the right to keep sources secret in order to conceal offences, since this would be likely to endanger public safety by creating a state of impunity.

Mr. Tillack challenged the order by a petition to the *Chambre des mises en accusation*, which on September 22, 2004 confirmed the order and its reasoning. He then appealed to the *Cour de Cassation* (the supreme appellate instance in this case) on September 28, 2004. A judgment is expected for December 1, 2004.

### European Court of First Instance

As Belgian law did not offer him effective legal protection, Mr. Tillack also filed an application for interim measures with the European Court of First Instance in Luxembourg (“CFI”), asking it to order OLAF not to obtain, inspect, examine or hear the contents of the documents and information seized by the Belgian judicial authorities.

Applications for interim measures, which are heard by the President of the CFI, are only admissible if they are linked to a substantive action before the Court, and their granting is subject to three basic conditions:

- A *prima facie* case (*fumus boni juris* – “likelihood of good law”) in the main proceedings;
- Urgency, owing to possible irreparable harm without the interim measure requested (*periculum in mora* – “danger in delay”); and
- The balancing of the interests involved must favour the granting of interim measures.

Prima facie case: Mr. Tillack’s first task was to frame the terms of an appropriate substantive action. The EC Treaty offers only limited possibilities for legal action by individuals against acts of the EU Institutions.

In this case he had two claims: an action for annulment of OLAF’s decision to address a complaint to the Belgian authorities, under Article 230(4) EC Treaty; and an action for damages under Article 288(2) EC Treaty to compensate for injury resulting from that decision.

Annulment of an official act may only be sought if the act has produced binding legal effects which affect the applicant’s interests by bringing about a distinct change in his legal position.

As there is little case law on acts by OLAF, it was uncertain whether the decision to demand action by the Belgian authorities was such an act. Mr. Tillack also filed an action for damages.

Both actions were based mainly on the fact that OLAF had infringed most of its few procedural obligations during its investigations. Above all, under Article 11(7) of Regulation 1073/1999, the Director of OLAF must inform OLAF’s Supervisory Committee: (i) of cases which require forwarding to the judicial authorities of a Member State; and (ii) when internal investigations take longer than nine months.

Although both these conditions were fulfilled, OLAF did not inform the Committee. Moreover, OLAF sent the national authorities misleading information, presumably to induce them to act immediately: it said Mr. Tillack was about to move to Washington and take important evidence with him, which was not the case.

National authorities are obliged to cooperate with OLAF and would feel bound to execute its requests. Mr. Tillack also argued that the complaints were the culmination of a veritable defamation campaign which harmed his reputation as a journalist and citizen.

To support the *urgency* of his application, Mr. Tillack argued that the identification of his sources would cause serious prejudice not only to his ability to function as a professional journalist, but also to the fundamental right of press freedom on which he depends. Discovery could not be undone: the damage would therefore be irreparable.

The application claimed that the *balancing of interests* favoured the granting of interim measures, as OLAF’s interest in identifying the informants was in contradiction to Article 10 of the Convention. There was no need to examine whether, in principle, the prosecution of crimes such as bribery might be of sufficient interest to prevail over the protection of sources, since only the Belgian authorities and not OLAF had competence to prosecute bribery.

As long as the national authorities had found no evidence of bribery, there was no justification for disclosing

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## European Leak Investigation Threatens Confidential Source Protection

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any information to OLAF which could lead to the identification of informants.

On October 15, 2004, the President of the CFI dismissed Mr. Tillack's application for interim measures on the ground that a *prima facie* case was lacking in the main proceedings. *Tillack v. Commission of the European Communities*, Case T-193/04 R. (The decision is available online through [www.curia.eu.int](http://www.curia.eu.int)).

The action for annulment was considered manifestly inadmissible, and the action for damages manifestly unfounded, for the same reason - the discretion of the Belgian authorities:

*"Any decision by the national authorities to take action on information forwarded by OLAF flows from the independent exercise of the powers vested in those authorities. [...] They remain free to decide what action should be taken on OLAF's investigations."*

As OLAF's requests were not legally binding, they did not constitute challengeable acts, and since the Belgian authorities therefore had discretion in responding to them, there was no direct causal link between OLAF's complaints and the injury resulting from the search of Mr. Tillack's home and office. In other words, the President viewed OLAF as merely a complainant offering information, with no decisive influence on the actions taken by the Belgian authorities.

### Conclusion

This is the first case to deal with both the powers and duties of the exceptionally autonomous OLAF and the fundamental right to protection of journalistic sources in the European Institutions.

So far, both the Belgian and the European Courts have failed to protect that fundamental right. The Belgian courts have hidden behind the current Belgian legal situation which admittedly breaches the Convention.

The CFI has relied on the discretion of the Belgian authorities as to whether they should fulfill OLAF's requests. OLAF must respect fundamental rights, both directly and when it seeks assistance from other authorities. The Court could have effectively protected those rights by ordering OLAF not to take advantage of fruit from the poisoned tree,

without deciding whether OLAF or the Belgian prosecutor who willingly executed OLAF's request had administered more.

Everything now depends on the Belgian Supreme Court: if it fails to protect Mr. Tillack's sources, the ECHR might again rule against Belgium; but by then it may be too late for Mr. Tillack's sources.

*Christoph Arhold is a senior associate with White & Case LLP in Brussels and represents Hans-Martin Tillack before the EC courts with Ian Forrester QC and Nathalie Flandin of the firm. Thierry Bosly and Juliette Siaens, also with White & Case in Brussels, represent Mr. Tillack in the Belgian court proceedings.*

<sup>1</sup> Under ethical standards, journalists must actively protect their sources: see *inter alia* (i) the Declaration of the Rights and Duties of Journalists signed in Munich on November 25, 1971 by the International Federation of Journalists or (ii) Resolution No. 2 "Journalistic Freedoms and Human Rights," Fourth European Ministerial Conference on Mass Media Policy, *The Media in a Democratic Society*, Prague, December 7-8, 1994, DH-MM (2000).

<sup>2</sup> Under Belgian law anyone injured by a *perquisition*, including search and seizures, can apply to the *juge d'instruction* to have them lifted. The decision may be appealed to the *Chambre des mises en accusation*. See Article 61<sup>quater</sup> CC.

<sup>3</sup> See the European Parliament's Resolution A3-0434/93 on confidentiality for journalists' sources and the right of civil servants to disclose information, OJ C 44, 14.2.1994, p. 34, especially point 2. See also Recommendation No. R (2000) 7 of the Committee of Ministers to member states of the Council of Europe on the right of journalists not to disclose their sources of information, adopted on 8 March 2000.

<sup>4</sup> Proposal by Geert Bourgeois - *Doc. parl., Sénat*, n/51 0024/017- Session 2003. The proposal was adopted by the Belgian Chamber of Representatives on May 6, 2003 and is now being examined by the Senate.

<sup>5</sup> Article 4 of the proposal, *Doc. Parl.*, No 51 0024/017.

<sup>6</sup> Italics: own translation of the original order in French.

<sup>7</sup> See Articles 230 *et seq.* EC Treaty.

<sup>8</sup> The Supervisory Committee is OLAF's sole supervisory body. Its five members, chosen from outside, and totally independent of, the Community Institutions, are experts in investigation matters. It is currently chaired by Raymond Kendall, Honorary General Secretary of Interpol.

## Defamation Claim Against Schwarzenegger Aide Can Proceed in London

On October 29, 2004, the High Court in London ruled that a libel case could go forward against Sean Walsh, an aide to California Governor Arnold Schwarzenegger. *Richardson v. Schwarzenegger et al.*, [2004] HQ 04X01371 (Oct. 29, 2004) (Eady, J.).

Walsh, Schwarzenegger, and Sheryl Main, a Hollywood publicist, were all sued by UK television presenter Anna Richardson for statements they made, or authorized, in last Fall's recall election campaign disputing Richard's account of an episode with Schwarzenegger.

The decision only addresses Walsh's motion to set aside service abroad. The Governor and his publicist were served later and their time to object has not yet run.

### Background

On October 2, 2003, the *Los Angeles Times* ("Times") published an article entitled "Women Say Schwarzenegger Groped, Humiliated Them." Among other things, the article recounted a story about an interview Richardson conducted with Schwarzenegger four years ago.

According to her account, she interviewed Schwarzenegger in London in December 2000 during his promotional tour for the movie "The Sixth Day." At the end of the interview he grabbed her onto his knee, asked her "if your breasts are real" and "circled" her nipple with his finger.

But, according to Sheryl Main, a longtime publicist for Schwarzenegger, who said she was at the interview, it was Richardson who approached Schwarzenegger provocatively, cupping her breast and asking "what do you think of these?"

The article also includes general comments from Walsh that Schwarzenegger had not engaged in appropriate conduct with women and that Democrats were using this to try and hurt the campaign.

### Libel Claim

The libel suit is based both on hard copies of the article published in the jurisdiction as well as publication of the article on the Internet. Mr. Justice Eady found that the natural and ordinary meaning of these statements is that

Richardson "deliberately and dishonestly fabricated" her allegation against Schwarzenegger.

Walsh denied that he told the *Times* that Schwarzenegger had "not engaged in inappropriate conduct towards women" and claimed that his comment was in any event not specifically about Richardson.

Mr. Justice Eady, however, accepted an alternate theory of publication liability – that Walsh authorized Sheryl Main's statements.

He also considered and found premature the argument that Walsh's statements would be privileged under the circumstances.

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**While expressing some sympathy that a spokesman for a foreign politician should not have to answer in England Judge Eady concluded that this position "would seem to ignore the clear and recently stated principles of English law."**

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Citing to the Australian High Court's decision in *Gutnick v. Dow Jones* and the English Court of Appeal's recent decision in *King v. Burstein*, Judge Eady stated that:

"it is well settled now that an internet publication takes place in any jurisdiction where the relevant words are read or downloaded... There is no 'single publication rule' applying to trans-national libels."

As to concerns over forum, Judge Eady found that the scales come down strongly in favor of England because claimant is a UK citizen with an established reputation in the country. Moreover, English law should govern because there was publication and injury in England.

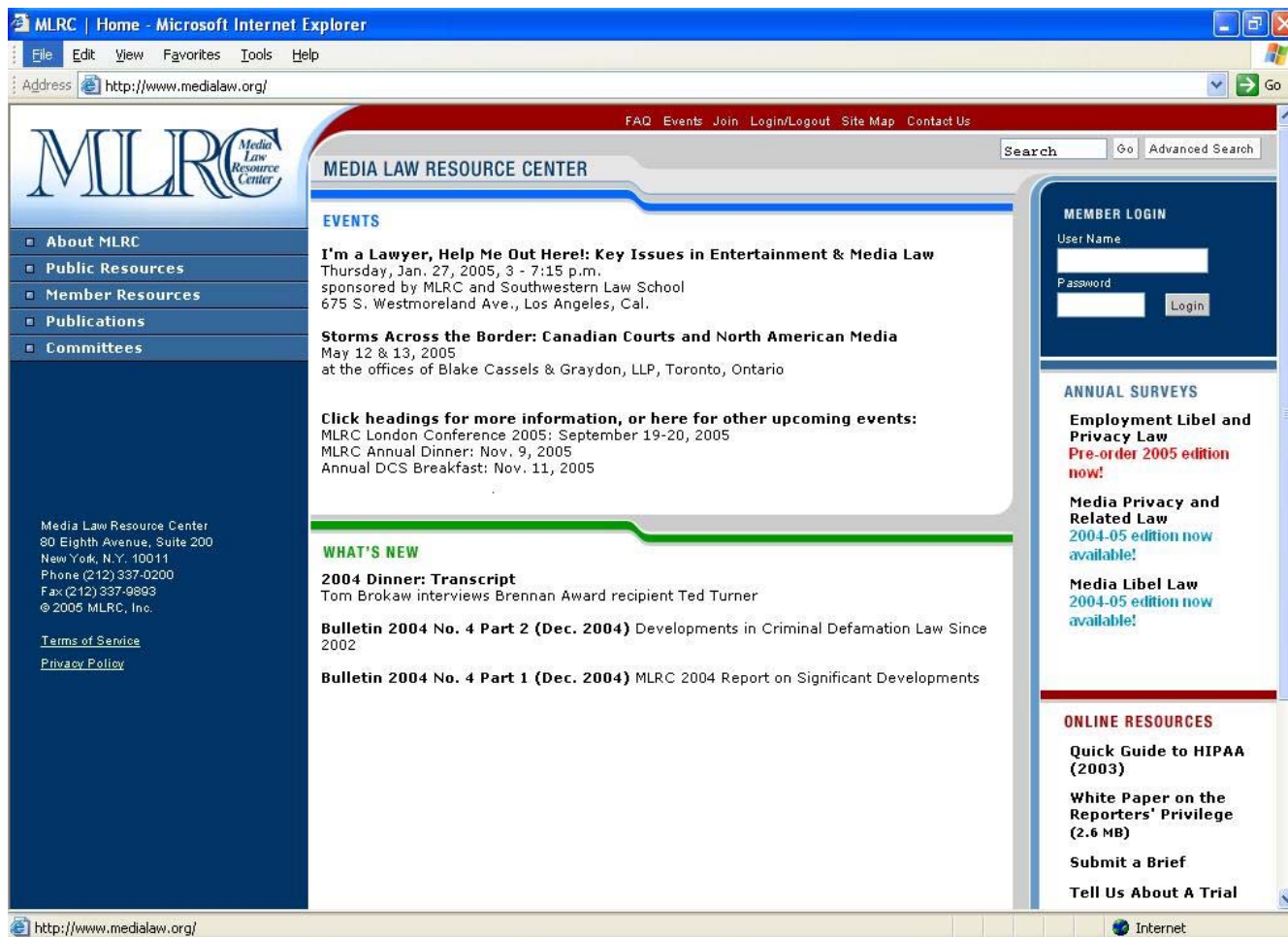
While expressing some sympathy to Walsh's argument that a spokesman for a foreign politician should not have to answer in England for statements made in the foreign press, Judge Eady concluded that this position "would seem to ignore the clear and recently stated principles of English law."

Claimant is represented by barrister David Sherborne of 5 Raymond Buildings and the solicitors firm Campbell Hooper. Sean Walsh is represented by barristers Richard Spearman QC and James Strachan and the solicitors firm Schillings.

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**Contact Debby Seiden, [dseiden@medialaw.org](mailto:dseiden@medialaw.org), for details.**



## Right of Reply Update: Council of Europe's Recommendation Moves Forward but the UK Has Reservations

By Timothy Pinto and Max Remington-Hobbs

The Council of Europe has recently agreed on a final draft Recommendation on the Right of Reply in the New Media Environment (the "Recommendation"). As previously reported, the Recommendation is intended to extend the right of reply to online publications that are equivalent to traditional news media. See *MediaLawLetter* Feb. 2004 at 41.

The latest draft of the Recommendation applies to "any means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services."

According to the draft explanatory notes "the aim of the definition is to cover those types of new services available on publicly accessible networks which are similar to traditional media." However, its scope is not entirely clear and the definition could possibly extend to certain political or commercial websites if they are edited in the journalistic sense.

The draft is likely to be adopted by the Council of Europe at a meeting of the Committee of Ministers on 15 December 2004. At this meeting, almost all the 46 Member governments of the Council of Europe are likely to vote in favor of the draft Recommendation.

However, two countries, the United Kingdom and Slovakia, have concerns about the proposed Recommendation. It is understood that the UK, for example, will not vote in favor or against the Recommendation, but will instead reserve its position. This would still enable the Recommendation to be passed in December.

### ***The UK Position***

In the summer, the UK government sought views within the UK to gauge the attitude towards the draft Recommendation. The responses they received were overwhelmingly negative, with all those responses from within the UK media industry expressing concern at the possible implications of the Recommendation.

It is believed that the UK government supports the concept of a right of reply, but feels that the current system in the UK works well. The Office of Communications (Ofcom) and the Press Complaints Commission already provide for a right of reply on a voluntary basis. The UK government feels that this is a sensible and sufficient system which should not be augmented.

The UK government's main concern with the Council of Europe's draft Recommendation is that, by imposing a right of reply on online publications, the draft will create an impractical and unenforceable system.

It also feels that it would discourage new online publications being set up, which would be detrimental to freedom of speech. The UK position is that the public already has a form of right of reply on the internet: namely that if a person feels aggrieved at material fea-

tured on a website, he/she is able to easily create their own website with a link to the offending website, rebutting the offending material.

The UK government also has reservations about applying the right of reply to specific types of websites, e.g. news service providers. It is concerned that it would be difficult to limit the right of reply to specific types of online publications, as any definition of "media" could encompass information service providers such as small magazine sites, which the UK government feel should be excluded.

Although it looks like the Council of Europe will adopt its Recommendation by the end of 2004, it will be up to member governments to decide whether to follow the non-binding text. In the light of the UK government's current position, the Recommendation is unlikely to result directly in any new UK laws implementing the right of reply.

### ***European Union Developments***

A similar non-binding recommendation on the right of reply is also under discussion at the European Union level and representatives of the UK government have raised

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***In the light of the UK government's current position, the Recommendation is unlikely to result directly in any new UK laws implementing the right of reply.***

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(Continued on page 26)

### Right of Reply Update

(Continued from page 25)

similar concerns to those mentioned above. The recommendation is currently under review in the European Parliament, but it is thought that it will be similar to the Council of Europe's Recommendation.

As the EU has the power to require member states to adopt its proposals into domestic law, the right of reply discussions within the EU bear close watching.

*Timothy Pinto and Max Remington-Hobbs are media lawyers with Taylor Wessing in London.*

## British MP Wins Libel Trial Against Telegraph Newspaper

George Galloway, a controversial left-wing member of the British Parliament, won a £150,000 bench trial verdict on his libel claims against the *Daily Telegraph* newspaper over a series of articles and editorials that claimed Galloway had been receiving secret payments from Saddam Hussein. *Galloway v. Telegraph Group Ltd.*, [2004] EWHC 2786 (High Court Dec. 2, 2004).

The articles published in April 2003 were based on documents discovered by a *Telegraph* reporter in the Iraqi foreign ministry in Baghdad. They appeared to show that Galloway had been receiving £375,000 annually from Iraq, had obtained lucrative oil-for-food program contracts and was using a charity he established for personal gain.

The articles reported on the content of the documents and also reported that Galloway denied their authenticity and denied that he had taken money from Saddam Hussein. But the paper also published an editorial on the subject headlined "Saddam's little helper," which included the remark that "there is a word for taking money from enemy regimes: treason."

The case was tried without a jury to High Court Justice Mr. Eady. The newspaper did not attempt to prove that the allegations against Galloway were true, but argued that they were privileged.

In a lengthy opinion Mr. Justice Eady ruled that the articles were not entitled to the protection of the *Reynolds* privilege, but instead constituted an irresponsible "rush to judgment." He faulted the newspaper for not giving Galloway more time to review and respond to all the charges made by the paper and for not taking steps to verify the documents. He concluded that the paper was under no social or moral duty to report the allegations against Galloway.

MLRC will publish a more detailed report on the case next month.

Galloway was represented by barristers Richard Rampton QC and Heather Rogers and the firm Davenport Lyons. The *Daily Telegraph* was represented by barristers James Price QC and Matthew Nicklin and the firm Dechert.

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## Contempt Ruling Against Canadian Reporter

By Brian MacLeod Rogers and Melissa Kluger

An Ontario Superior Court judge has found a reporter in contempt of court for refusing to answer a question that would reveal a confidential source and penalized the reporter \$31,600 (Cd) for costs “thrown away” by the parties in the civil trial over which the judge was presiding.

This is the highest penalty ever awarded against the media for contempt of court in Canada and is the first time in decades that a reporter has been found in contempt for refusing to answer a question in court over a confidential source. An appeal is being launched.

In fact, by the time the contempt hearing was held, the identity of the source had already been revealed. The source had stepped forward to testify and had released the reporter, Ken Peters of *The Hamilton Spectator*, from his obligation to maintain confidentiality. While he considered these developments to be “mitigating factors”, Mr. Justice David Crane was extremely critical of what he termed the “oppressive” culture of the newsroom that forces journalists “to break the law and endure the punishment” or face “never again be[ing] employed in a newsroom.”

### Background

The issue arose at the end of the plaintiff’s case at trial in a civil action brought by a retirement home against the local municipality alleging abusive conduct and defamation. Ten years ago, the municipality had imposed orders to comply and a regime of inspections at the home located in Hamilton, Ontario; these steps followed a damning report by a consultant hired by the home to look into allegations that had been made by former employees.

The municipal officer of health also sought a coroner’s investigation into a high rate of mortality at the home. The whole matter had been treated as confidential for months and had been discussed at an in-camera meeting of a municipal council committee. Then, in April 1995 a confidential source turned over some of the documents about the matter to Mr. Peters, an experienced city hall reporter for the *Spectator*.

Major coverage in the newspaper soon followed, and a lengthy coroner’s inquest was eventually held resulting in recommendations critical of the home. As finally revealed last month, the source was a local alderman, who had been on the committee and handed over the documents in the presence of another alderman at City Hall. He said he was very disturbed by the allegations about the home and made the usual request, “You didn’t get them from me”, which the reporter accepted after reviewing the documents and establishing their importance and public interest.

The action by the retirement home was started in 1997 but only reached trial last Spring. By the time Mr. Peters was subpoenaed to testify, the plaintiff had taken some 60 days to put in its evidence and was at the end of its case. The home sought to show that the orders to comply should never have been issued and that any problems at the home were under control but city staff failed to apprise council members of this.

What really caused its damages, the home alleged, was publication of the erroneous confidential information in the media. To establish liability, the home sought to show that the municipality was responsible for the leak that triggered the damaging coverage. Therefore, the nature of the confidential documents and the identity of Mr. Peters’ source were found by the judge to be critical elements for the plaintiff’s case.

### Motion to Quash Denied

On November 15, a motion was brought on behalf of the newspaper and reporter to quash the subpoena or, alternatively, limit the scope for questioning. The judge required Mr. Peters to testify but delimited areas for questioning; he specifically reserved his decision on whether the reporter’s confidential source had to be identified.

Accordingly, Mr. Peters took the stand and soon revealed there had been two persons present when the undertaking of confidentiality had been made. The judge ruled that the identity of the second person should be disclosed by Mr. Peters because he had not made any under-

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***This is the first time in decades that a reporter has been found in contempt for refusing to answer a question in court over a confidential source.***

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### Contempt Ruling Against Canadian Reporter

(Continued from page 27)

taking of confidentiality to that person. However, the reporter declined to answer on the basis that naming the second person “would have the effect of identifying” his source and put him in breach of his undertaking. However, the judge directed him to answer and immediately cited him for contempt when he refused. The contempt hearing was then scheduled to take place before the same judge in a week’s time.

Before the hearing could take place, a current municipal councillor went public with an allegation he knew one of those present when the confidential documents were handed over. In court, he named a former alderman, and soon the two former aldermen present when Mr. Peters was given the confidential documents were subpoenaed to testify.

The source renounced any further claim of confidentiality and described in court the entire event and his motivation for turning over the documents. As well, the source had already been contacted by Mr. Peters to discuss whether he still wished the confidentiality that had been promised nearly ten years ago. By the time of the contempt hearing, which had been adjourned to permit the evidence of the former aldermen, all had been revealed, and both had specifically released Mr. Peters from his commitment.

In view of this, the judge determined to proceed with a civil, not criminal, contempt hearing so that Mr. Peters would not end up with a criminal record. The contempt hearing took more than a day, and testimony was heard from Mr. Peters, *Spectator* editor-in-chief Dana Robbins (who had been city editor for the original coverage) and Vince Carlin, former chair of the Ryerson University School of Journalism and news media veteran.

### Judge Finds Reporter in Contempt

None of the parties in the civil action sought a finding of contempt and refrained from making submissions. However, within minutes of closing arguments by Mr. Peters’ counsel, the Judge pulled out written reasons that he read out to the court. These included the following:

Society is about limits and citizenship is about subjecting ourselves to the law...It is my finding that Mr. Peters’ undertaking had a limit in law. When he was required to answer by the court, he had reached that limit...

Based on the evidence of this hearing, I am obliged to conclude that those who are in the business of selling “the news” employ journalists to search out newsworthy information using as one means, the undertakings of confidentiality to sources.

The evidence of Mr. Robbins and of Professor Carlin is that there is a culture of the newsroom, that is the employer’s place of employment, that the undertaking to a source is personal to the journalist in the service of which that journalist, at the limits, is to break the law and endure the punishment.

It is all very well for the employer and the educator to say that the protection of a source is a matter for the individual conscience of the journalist, when they also say any journalist that has revealed the source will never again be employed in a newsroom.

The oppressive nature of this culture on the individual has been the cause of the very real turmoil that Mr. Peters has been in for the last two weeks. The pressures on him have been enormous. ...

I conclude from my earlier reasons that Mr. Peters was a pawn in a much larger game. This court has sympathy for Mr. Peters in his dilemma, which is an ethical one, as he sees it. He has suffered in anguish between the court and what he has been told is the role of a journalist.

The judge noted that in refusing to answer the question, Mr. Peters may have relied on the fact that the court had not yet ruled on whether it would be necessary to identify the confidential source; he found this was a mitigating factor. However, the judge made no mention of submissions made about the need for a reporter in these circumstances to be given an opportunity to discuss the matter with his source after the court has found disclosure is necessary.

Such an opportunity would help determine whether there might be some means of reconciling the rights in conflict – the protection of the source on the one hand and the administration of justice’s interest in all evidence ruled necessary for a civil trial on the other. Indeed, from the judge’s point of view, once he had ruled that the question should be answered, any refusal would amount to contempt, even without any time to appeal the issue.

(Continued on page 29)

### Contempt Ruling Against Canadian Reporter

(Continued from page 28)

However, the various mitigating factors were relied on by the court to determine that no imprisonment or fine would be imposed, as permitted even for civil contempt. Instead, the court evaluated the costs of the parties that would not have been incurred but for the contempt. He substantially moderated the claims made by the parties but still awarded \$31,600.00. The *Spectator*, which supported Mr. Peters throughout, made it clear that it would pay the monetary penalty.

The judge's approach contrasts sharply with that of fellow Superior Court judge, Madam Justice Mary Lou Be-  
notto, in *R. v. National Post*, [2004] O.J. No. 178, where she quashed a police search warrant and assistance order to obtain evidence from a reporter of his confidential source. The judge found that:

To compel a journalist to break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information. ... Insofar as the documents may reveal the confidential identity of a source, they are privileged.

Outside court, both Mr. Peters and the *Spectator* rejected the following recommendation by the judge:

In my view, the most salutary consequence of this hearing would be a directive by the *Spectator* to its employees, that all undertakings of confidentiality to sources are to contain the condition that the journalist will protect the anonymity of the source to the full extent of the law. Or, put another way, that the journalist's undertaking will be to exert all lawful means to protect the confidence.

Editor Dana Robbins responded in a column: "When sources request anonymity, they do so for a reason; they are looking for a promise of absolute protection, not one with a best-before date."

Instructions to appeal have been given. Numerous media and journalists' associations expressed alarm at the judge's ruling and have indicated they may seek to intervene on the appeal.

*Brian MacLeod Rogers and Melissa Kluger represented Ken Peters and The Hamilton Spectator in the case.*

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## Ninth Circuit Allows Idea Theft Case to Proceed Under California State Law

In a recent decision, the Ninth Circuit held that a screenwriter's state law claim for alleged idea theft against a movie studio and others could proceed, notwithstanding the dismissal of plaintiff's copyright claim. *Grosso v. Miramax Film Corp.*, 383 F.3d 965 (9th Cir. Sept. 8, 2004) (Schroeder, Thompson & Graber, JJ.).

Plaintiff, the author of a poker-themed screenplay entitled *Shell Game*, alleged his screenplay was later used as the basis for the Miramax movie *Rounders*, a film about a law school student entangled in a series of high stakes poker games.

Plaintiff alleged that *Rounders* violated his copyright by lifting characters and plot points from his screenplay and constituted a breach of an implied contract.

In a short four page opinion written by Chief Judge Schroeder, the court affirmed dismissal of plaintiff's copyright claim, finding that while both works have poker settings, "the only similarities in dialogue between the two works come from the use of common, unprotectable poker jargon."

But the court held that the district court erred in dismissing plaintiff's implied breach of contract claim as preempted by the Copyright Act, distinguishing the court's decision in an earlier case that an unjust enrichment claim was preempted by the Copyright Act. See *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987), *overruled on other grounds by, Fogerty v. Fantasy, Inc.*, 114 S.Ct. 1023 (1994).

The court reasoned that the breach of implied contract claim "seeks compensation not for the actual written script, but for the idea allegedly embodied in the script and shared with Miramax." Thus, plaintiff's allegation that there was an implied promise to pay for the script created the "extra element" to avoid preemption under the Copyright Act on a motion to dismiss – a "bilateral expectation of compensation."

Plaintiff was represented by Manning & Marder, Kass, Ellrod, Ramirez, Los Angeles. The defendants were represented by Nelson, Thompson, Pegue & Thornton, Santa Monica.

*Available in January 2005*

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## Senator Dodd Introduces Federal Shield Law Bill

On November 19, Senator Christopher Dodd (D-Conn.) introduced a reporters shield bill in Congress. The “Free Speech Protection Act of 2004” would establish a federal reporters’ shield law.

The proposed legislation would create absolute protection against compelled disclosure of sources, whether or not the source was promised confidentiality. And it would create a qualified privilege against compelled disclosure of news and information, such as unpublished notes and outtakes.

The privilege on news and information could be overcome where the information is critical and necessary to the resolution of a significant legal issue; the information could not be obtained by any alternative means; and there is an overriding public interest in the disclosure.

In his remarks on introducing the bill, Senator Dodd cited the Taricani case, as well as the host of subpoenas issued to reporters in the Plame investigation. He called the subpoena issued to New York Times reporter Judith Miller “Perhaps the most alarming instance in recent months of the growing threat to the sacred right to freedom of speech in America.”

Senator Dodd also noted that “a strong and uniformed Federal law on shielding would provide uniformity and consistency to the patchwork of inconsistent court decisions and State statutes currently in place.”

The bill will not be acted on in the current session of Congress, but Senator Dodd will reintroduce the bill in next year’s new Congress.

**An MLRC Task Force is examining proposals for a federal shield law. For more information contact MLRC Executive Director Sandy Baron, sbaron@medialaw.org.**

## Senator Dodd’s Proposed Federal Shield Law

108<sup>TH</sup> CONGRESS  
2d Session

### IN THE SENATE OF THE UNITED STATES

Mr. DODD introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

## A BILL

To establish protections against compelled disclosure of sources, and news or information, by persons providing services for the news media.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Free Speech Protection Act of 2004”.

### SEC. 2. DEFINITIONS.

In this Act:

- (1) COVERED PERSON—The term “covered person” means a person who –
  - (A) engages in the gathering of news or information; and
  - (B) has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public.

(2) NEWS OR INFORMATION—The term “news or information” means written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national, or worldwide events, or other matters.

(3) NEWSMEDIA—The term “the news media” means—

- (A) a newspaper;
- (B) a magazine;
- (C) a journal or other periodical;
- (D) radio;
- (E) television;
- (F) any means of disseminating news or information gathered by press associations, news agencies, or wire services (including dissemination to the news media described in subparagraphs (A) through (E)); or
- (G) any printed, photographic, mechanical, or electronic means of disseminating news or information to the public.

### **SEC. 3. COMPELLED DISCLOSURE PROHIBITED.**

(a) IN GENERAL—Except as provided in section 4, no entity of the judicial, legislative, or executive branch of the Federal Government with the power to issue a subpoena or provide other compulsory process shall compel any covered person who is providing or has provided services for the news media to disclose —

- (1) the source of any news or information procured by the person, or any information that would tend to identify the source, while providing services for the news media, whether or not the source has been promised confidentiality; or
- (2) any news or information procured by the person, while providing services for the news media, that is not itself communicated in the news media, including any —

- (A) notes;
- (B) outtakes;
- (C) photographs or photographic negatives;
- (D) video or sound tapes;
- (E) film; or
- (F) other data, irrespective of its nature, that is not itself communicated in the news media.

(b) SUPERVISORS, EMPLOYERS, AND PERSONS ASSISTING A COVERED PERSON—The protection from compelled disclosure described in subsection (a) shall apply to a supervisor, employer, or any person assisting a person covered by subsection (a).

(c) RESULT—Any news or information obtained in violation of the provisions of this section shall be inadmissible in any action, proceeding, or hearing before any entity of the judicial, legislative, or executive branch of the Federal Government.

### **SEC. 4. COMPELLED DISCLOSURE PERMITTED.**

(a) NEWS OR INFORMATION—A court may compel disclosure of news or information described in section 3(a)(2) and protected from disclosure under section 3 if the court finds, after providing notice and an opportunity to be heard to the person or entity from whom the news or information is sought, that the party seeking the news or information established by clear and convincing evidence that—

- (1) the news or information is critical and necessary to the resolution of a significant legal issue before an entity of the judicial, legislative, or executive branch of the Federal Government that has the power to issue a subpoena;
- (2) the news or information could not be obtained by any alternative means; and
- (3) there is an overriding public interest in the disclosure.

(b) SOURCE—A court may not compel disclosure of the source of any news or information described in section 3(a)(1) and protected from disclosure under section 3.

### **SEC. 5. ACTIVITIES NOT CONSTITUTING A WAIVER.**

The publication by the news media, or the dissemination by a person while providing services for the news media, of a source of news or information, or a portion of the news or information, procured in the course of pursuing professional activities shall not constitute a waiver of the protection from compelled disclosure that is described in section 3.



## UPDATE: Six Month's House Arrest for Criminal Contempt

On December 9, reporter James Taricani of station WJAR-TV in Providence, Rhode Island was sentenced to six months home confinement for criminal contempt for refusing to disclose the identity of a confidential source who leaked to the reporter a surveillance videotape from the criminal corruption trials of several Providence officials. *In re Special Proceedings*, M.C. 01-47 (D. RI 2004).

Rhode Island Federal District Court Chief Judge Ernest Torres sentenced Taricani to home confinement rather than jail because of health concerns. The reporter is a heart transplant recipient and has severe hypertension. The sentence, though, applies some federal prison conditions. Taricani is not allowed to work from home or have Internet access and visitors are restricted. He will be eligible to petition for early termination of the sentence after four months. Taricani announced he will not appeal the sentence.

Interestingly, about ten days prior to sentencing the source came forward and identified himself though it was too late to purge the criminal contempt conviction and played little role in the sentence. James Bevilacqua Jr., a defense lawyer for one of the Providence officials involved in the corruption scandal, confirmed that he leaked the videotape. Bevilacqua now faces possible perjury charges.

A transcript of the sentencing hearing is available online at the district court's website [www.rid.uscourts.gov/](http://www.rid.uscourts.gov/).

### ***Judge Addresses Media "Myths"***

A large portion of the sentencing hearing is a discussion by Judge Torres of the perception of the case – which he found was marked by five media “myths.” Portions are excerpted below, but it is an interesting discussion well worth reading in full. It outlines the case against the reporters privilege in the context of criminal leak investigations and raises issues that will undoubtedly be raised on the road toward a federal shield law.

Myth One, according to Judge Torres, was that the promise of confidentiality enabled Taricani to uncover evidence of corruption. This was false because the tape was already evidence in ongoing prosecutions.

All that it accomplished ... was to provide Mr. Taricani and his station with a scoop during sweeps week, and there's nothing wrong with that .... But at the same time, it did so at the cost of threatening to compromise the ongoing grand jury investigation and threatening to deprive the defendants of their constitutional right to a fair trial by poisoning the jury pool.

Myth Two was that requiring disclosure in this case would deter sources from coming forward with important information. Instead, according to Judge Torres, the real issue in the case was “whether a reporter has a right to conceal the identity of a source who committed a criminal act in providing material to the reporter.” If someone violates the law by revealing to a reporter the identity of an undercover intelligence or law enforcement officer “that person ought to be punished and others tempted to do the same ought to be deterred and a reporter has no right to conceal the identity of that person.”

Myth Three was that Taricani was being punished for “just doing his job.”

There is no question that a reporter's job is a very important and honorable job, but this is still a myth unless one defines a reporter's job by gathering news obtained by others by illegal means and even encouraging and assisting others in doing so, and then concealing the identity of the individual who violated the law in order to provide the information.

Taricani, Judge Torres pointed out, was not found guilty of criminal contempt for airing the tape, but for refusing to comply with a lawful court order that was affirmed by the First Circuit.

Myth Four and Five are the “most troubling” and both involve the media's position on reporter's privilege and the First Amendment.

Myth Four, according to Judge Torres, is that “every reporter has an absolute right to be the sole arbiter of whether and under what circumstances the identity of a source should remain confidential no matter what the law or the court may say.” The media's insistence on absolute protection for sources is “contrary to the public interest.”

*(Continued on page 34)*

## Reporter Sentenced to Six Month's House Arrest for Criminal Contempt

(Continued from page 33)

It defies logic and common sense, as well as the law, to say that a promise of confidentiality made under [competitive pressure] should be absolute and unreviewable by a court or anyone else.... The court is in the position to hear all the facts. The court is in a position to determine the applicable law and to balance any competing public interest ....

The Fifth Myth – the biggest and most misleading one – is that ordering Taricani to reveal his source is “an assault on the First Amendment.”

The assaults we have here are assaults on the rule of law, assault on the effective administration of justice, and assault on the constitutional right to a fair trial.

Moreover, Judge Torres criticized the “implication that it was okay, even laudable for Taricani to refuse to comply with the order because he has what he thinks is a good reason.”

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## D.C. Circuit Hears Miller and Cooper Contempt Appeal

On December 8, Judges David Sentelle, Karen Henderson and David Tatel of the D.C. Circuit Court of Appeals heard the combined appeals of reporters Judith Miller and Matthew Cooper. *In re Grand Jury Subpoenas*, Nos. 04-3138, 04-3139

Miller and Cooper were held in civil contempt in October by District Court Chief Judge Thomas F. Hogan for refusing to answer questions from the special prosecutor investigating whether any government official(s) violated the Intelligence Identities Protection Act of 1982 by leaking to the press the identity of undercover CIA agent Valerie Plame.

Floyd Abrams, representing the reporters, argued that Judge Hogan erred in concluding that no First Amendment or common law-based reporter's privilege existed at all in the grand jury context. The reporters' brief argued that Justice Powell's concurring opinion in *Branzburg v. Hayes* and the case law evolving from it, including in the D.C. Circuit, demonstrate the existence of a privilege that would require some examination and balancing of the need for the reporters' testimony.

Judges Sentelle pressed Abrams to distinguish the case from the *Branzburg*, at one point remarking “if there is an answer to my question, I'd love to hear it. The question is as simple as it can be. I take it you don't have one since you haven't advanced it yet given three, four or five opportunities.” Abrams was also asked whether the reporter's

privilege would extend to Internet bloggers. Abrams agreed it could based on the nature of the publication.

In an intriguing question, Judge Tatel asked the government's lawyer, U.S. Attorney James P. Fleissner, whether a reporter's privilege is much of a step beyond the recently recognized privilege for psychotherapists to maintain the confidentiality of their patients even in the context of criminal grand jury investigations. *See Jaffee v. Redmond*, 518 U.S. 1 (1996). There was no clear indication, though, that Judge Tatel or other members of the panel were prepared to adopt a similar privilege for reporters.

A decision is expected soon.

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## U.S. Supreme Court to Hear Libel Case Addressing the Availability and Breadth of Injunctions

On September 28, 2004, the United States Supreme Court agreed to hear the case of *Tory v. Cochran*, No. B159437, 2003 WL 22451378 (Cal. App. Oct. 29, 2003) (unpublished), *cert. granted*, 73 U.S.L.W. 3060 (No. 03-1488).

This is the first libel case the U.S. Supreme Court has agreed to hear since the Court decided *Masson v. New Yorker Magazine* in 1991. In fact, the 13 years since *Masson* was decided is the longest period of time in which the High Court has not heard a libel case since *New York Times v. Sullivan* was decided.

*Tory v. Cochran* involves a post-trial order permanently enjoining an elderly, indigent couple, Ulysses Tory and Ruth Craft, from ever saying anything about noted attorney Johnnie L. Cochran, Jr., in any public forum, ever again.

The question presented to the Court is:

*Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.*

### **Cochran Sued Former Client For Defamation**

Cochran, who concedes his status as a public figure, represented Tory in connection with a civil rights action in the early 1980's. For a variety of reasons, Tory became dissatisfied with the quality of services provided by Cochran and his law offices.

As a result, Tory began peacefully picketing on the sidewalk in front of Cochran's law office in Los Angeles and later in front of the Superior Court building in downtown Los Angeles, and demanded the return of money he believes Cochran owes to him.

Tory and others carried placards bearing various statements. Some of the statements allegedly included the following: "Johnnie is a crook, a liar and a Thief"; "Unless You have O.J.'s Millions – You'll be Screwed if You USE J.L. Cochran, Esq."; and "Johnnie Cochran I Know WHAT You, the County and city DID to my CASE."

Tory did not personally carry all of the signs, and several of the signs made no mention of Cochran. The purported statements that mentioned Cochran criticized his handling of Tory's case, and generally questioned Cochran's abilities as an attorney.

As a result of the picketing activity, Cochran sued Tory and Does for defamation and false light invasion of privacy. The Superior Court for the State of California issued a preliminary injunction, and then tried the suit without a jury.

Tory represented himself in the proceedings. Ruth Craft, Tory's putative spouse, was not named as a defendant in the lawsuit, nor was she given a chance to defend herself at trial,

but her speech rights were explicitly restrained in the subsequent permanent injunction.

### **The Trial Court's Permanent Injunction**

After finding in Cochran's favor, the Superior Court did not award money damages, but did issue a permanent injunction. The permanent injunction provides, in pertinent part, as follows:

*Unless and until this Court, after notice to JOHNNIE L. COCHRAN, JR. ("COCHRAN") and opportunity for him to be heard, modifies or vacates this order, it is ordered that TORY, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined from engaging in any of the following: ...*

*In any public forum, including, but not limited to, the Los Angeles Superior Court, and any other place at which COCHRAN appears for the purpose of practicing law: (i) picketing COCHRAN and/or COCHRAN's law firm; (ii) displaying signs, placards or other written or printed material about COCHRAN and/or COCHRAN's law firm; (iii) orally uttering statements about COCHRAN and/or COCHRAN's law firm ...*

(Continued on page 36)

## **U.S. Supreme Court to Hear Libel Case Addressing the Availability and Breadth of Injunctions**

*(Continued from page 35)*

Tory and Craft have faithfully abided by the permanent injunction restricting their speech since the injunction was entered by the Superior Court on April 24, 2002.

### ***California Court Of Appeal Affirmed***

Tory and Craft timely appealed from the permanent injunction, and then looked for a lawyer to assist in the appeal. Jean-Paul Jassy (formerly of Davis Wright Tremaine LLP and now with Sheppard, Mullin, Richter & Hampton LLP) was referred the case, and took it on a pro bono basis.

Jassy worked with Davis Wright Tremaine partners Gary Bostwick and Alonzo Wickers IV on the appeal. The appeal focused primarily on the permanent injunction as an overbroad prior restraint on future speech issued in violation of the First Amendment and Article 1, Section 2(a) of the California Constitution, but also raised defenses based on opinion, actual malice, publication and “of and concerning” grounds.

Jassy left Davis Wright to join Loeb & Loeb LLP in May 2003, and took the Tory and Craft case with him. Working with Douglas Mirell, Jassy argued the appeal before Division One of the Second Appellate District of the California Court of Appeal.

On October 29, 2003, the California Court of Appeal issued an unpublished decision affirming the injunction in full and addressing some, but not all, of the arguments raised by Tory and Craft. *Cochran v. Tory*, No. B159437, 2003 WL 22451378 (Cal. App. Oct. 29, 2003).

Specifically, the California Court of Appeal rejected the contention that the permanent injunction represented an overbroad prior restraint in violation of the First Amendment and the California Constitution. The decision states that permanent injunctions on speech are not prior restraints, and that the overbreadth doctrine does not apply to permanent injunctions.

### ***California Supreme Court Denied Review***

On December 8, 2003, Tory and Craft timely petitioned the Supreme Court of California for review. The Petition for Review submitted that the permanent injunction is an overbroad prior restraint, inconsistent with the First Amendment, the California Constitution, decisions of the United States Supreme Court and decisions of the Supreme Court of California. On January 28, 2004, the Supreme Court of California denied review of the California Court of Appeal’s decision, with Justices Kennard and Brown voting to grant review.

### ***U.S. Supreme Court Grants Certiorari***

In 2004, Jassy rejoined forces with Gary Bostwick, who had since moved to Sheppard, Mullin. Jassy invited his constitutional law professor Erwin Chemerinsky to be lead counsel in a cert petition to

the United States Supreme Court.

Working together, Jassy, Bostwick and Chemerinsky crafted a successful petition that could lead to an important decision impacting defamation defendants in a wide variety of contexts.

A strong decision from the Supreme Court could stop a nationwide trend allowing injunctions in defamation cases; thereby reinvigorating the long held maxim that “equity will not enjoin a libel.”

Oral arguments on the matter will likely be held in January 2005.

*Professor Erwin Chemerinsky of Duke University Law School and Gary L. Bostwick and Jean-Paul Jassy is with Sheppard, Mullin, Richter & Hampton LLP’s Century City, California office represent Ulysses Tory and Ruth Craft. Johnnie L. Cochran, Jr. is represented by Jonathan B. Cole, Karen K. Coffin and Susan S. Baker of Nemecek & Cole in Sherman Oaks, California.*

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***A strong decision from the Supreme Court could stop a nationwide trend allowing injunctions in defamation cases; thereby reinvigorating the long held maxim that “equity will not enjoin a libel.”***

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## Supreme Court to Review Grokster Case on Contributory Liability of File-Sharing Services

By Charles Sims

Entering the thicket of secondary liability for copyright infringement in the digital age, the Supreme Court agreed on December 10 to review a Ninth Circuit decision holding that file sharing services are not liable for copyright infringement. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), cert. granted, (No. 04-480).

Petitioners are the major motion picture studios, recording companies, and other copyright owners, including composers of popular songs. A wide array of copyright owners and those opposed to massive unchecked infringement urged the Court to review the case, including forty-five states; such artists as The Eagles, Brooks & Dunn, The Dixie Chicks, Bonnie Raitt, Sheryl Crow, Babyface, and The Grateful Dead!; Major League Baseball and the National Basketball Association; and numerous associations of copyright owners in various fields, such as the American Society Of Media Photographers, Professional Photographers Of America, Directors Guild Of America, Writers Guild Of America (West), Screen Actors Guild, Association Of American Publishers, and the Association Of American University Presses; the American Federation of Television and Radio Artists, the American Federation of Musicians of the United States and Canada, The Country Music Association, Inc., The Gospel Music Association, the Hip-Hop Summit Action Network, Jazz Alliance International, Inc., and the Rhythm & Blues Foundation.

Only one *amicus* brief was filed in opposition to review – by the computer industry association and the Internet Archive. The cert. petition and the supporting and opposing briefs are available at [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster](http://www.eff.org/IP/P2P/MGM_v_Grokster).

The question that the Court will review is whether the Ninth Circuit erred in holding, in conflict with Judge Posner's decision in *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), that "the Internet-based 'file sharing' services Grokster and StreamCast should be immunized from copyright liability for the millions of daily acts of copyright infringement that occur on their ser-

vices and constitute at least 90% of the total use of the services."

Representing Grokster and Streamcast, the Electronic Frontier Foundation had urged the Court not to review the decision because it should be up to congress to depart, if at all, from the "staple article of commerce" rule that those manufacturing or distributing "staple articles of commerce" are not secondarily liable if the product in question "is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial non-infringing uses." See *Sony v. Universal Studios* 464 U.S. 417 (1984) (the "Sony-Betamax" decision).

The studios and recording companies, on the other hand, urged that secondary liability rules have historically been devised by the courts, and that the *Betamax* rule applied to manufactured items, not software programs devised to be used, and overwhelmingly used, for infringement.

They pointed to Judge Posner's decision affirming the preliminary injunction against Aimster, which held that, in assessing whether a file-sharing service is contributorily liable, the court should look at not only whether the software *could be* used for non-infringing purposes, but at whether it actually is being so used, as well as whether the business models of the defendants are in fact based on such infringing use, and whether defendants would have been capable, at the outset, in deterring or preventing infringing uses had they chosen to do so.

The copyright owners advised the Court that the Ninth Circuit radically rewrote the law of secondary copyright liability, "turning it into a blueprint for exploitation that perversely discourages on-line distributors from respecting the intellectual property of others, threatens legitimate on-line innovators, and breeds a culture of contempt for the rights of copyright owners," and that nothing in *Sony-Betamax* supports such a result.

The argument is expected in March or April, and a decision should be rendered by the end of June.

*Charles Sims is a partner at Proskauer Rose in New York.*

## First Circuit to Rehear E-Mail Privacy Decision

The First Circuit has agreed to rehear en banc a controversial e-mail privacy decision issued earlier this summer. *U.S. v. Councilman*, 2004 WL 2230823 (1st Cir. Oct. 5, 2004), *vacating*, 373 F.3d 197 (1st Cir. June 29, 2004).

In June, a panel of the First Circuit ruled 2-1 in a criminal case that a defendant, the vice president of an ISP provider for book dealers, had not violated the Wiretap Act when he allegedly copied and read thousands of messages for the purpose of gaining a competitive advantage.

The majority's decision turned on the fact that the messages were intercepted during the fraction of a second when they were in "electronic storage" at the ISP, as opposed to "in transit."

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.

In a harsh dissent, Judge Lipez wrote that the majority's conclusion "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." Judge Lipez found it "inconceivable that Congress could have intended such a result."

### *Amicus Group Urged Rehearing*

The Electronic Frontier Foundation, The Electronic Information Privacy Center and the American Library Association submitted an amicus brief urging the First Circuit to rehear the decision.

The brief argues that the majority decision guts privacy protections for Internet communications because it would allow government to obtain the functional equivalent of a wiretap, i.e., accessing briefly stored e-mails, without having to satisfy the standards of the Wiretap Act.

A copy of the brief is available at:

[www.eff.org/legal/cases/US\\_v\\_Councilman/20040902\\_Councilman\\_Brief.pdf](http://www.eff.org/legal/cases/US_v_Councilman/20040902_Councilman_Brief.pdf).

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## A New Era of Broadcast Content Regulation?

By Jerrienne Timmerman

On Veteran's Day this year, ABC aired, unedited, Steven Spielberg's Academy Award winning motion picture *Saving Private Ryan* – as the network had done on Veteran's Day in 2001 and 2002. However, the earlier airings occurred before the brouhaha over Janet Jackson's Superbowl wardrobe malfunction and the crackdown on perceived "indecent" by the Federal Communications Commission and Congress.

This year, 66 ABC affiliates preempted *Ryan* due to well-grounded fears that the film's strong language (including multiple uses of the f-word) would generate viewer complaints, an FCC investigation, and fines for airing indecent programming – and consequently even difficulties at license renewal time.

This article summarizes the resurgence in the regulation of broadcast content by the FCC and by Congress. Although the increased restrictions on allegedly indecent broadcast programming have received the most attention, the government has also unfortunately showed renewed interest in restricting violent content on television.

Beyond regulating these types of disfavored broadcast content, the FCC is also actively considering ways to "encourage" (or force) broadcasters to air a range of "good for you" programming, such as locally produced, public affairs, and political/electoral programming. Indeed, in its most recent order regulating broadcast content, the FCC has even come perilously close to regulating content on the Internet.

### ***Indecency: Does the FCC Know It When It Sees It?***

As everyone in the media business must be aware, the past year has seen a significant crackdown on allegedly indecent broadcast programming. In 2004, Congress considered legislation that, among other things, would have drastically increased the fines for airing indecent programming, up to \$500,000 per violation; mandated license revocation proceedings for stations with three or more indecency violations; and made it easier for the FCC to fine persons, including performers, who are not licensees but who utter indecent material aired on a station.

The House and Senate passed differing versions of this legislation in 2004, and the legislation will be reintroduced in the new Congress in 2005.

Even without congressional action, the FCC in 2004 imposed record fines on radio and television stations for airing indecent material.

The FCC, *inter alia*, has (1) increased the amounts of indecency forfeitures by routinely imposing the existing statutory maximum for indecency violations (raised from \$27,500 to \$32,500 to reflect inflation in June 2004); (2) imposed fines for each utterance of indecent material within a single program, thereby greatly further increasing the potential liability of broadcasters; (3) warned licensees that it may begin license revocation proceedings for serious indecency violations; (4) broadened indecency investigations to cover not just the station that is the subject of a public complaint but also co-owned stations that

### ***The FCC in 2004 imposed record fines on radio and television stations for airing indecent material.***

broadcast the same potentially indecent material; and (5) effectively increased the burden on licensees to be able to disprove allegations of indecency made by members of the public.

Purportedly to make its indecency enforcement more effective, the agency has also proposed to require all radio and television stations in the country – even noncommercial educational or religious ones – to make and retain, perhaps for months, recordings of all their programming. *See Notice of Proposed Rulemaking, Retention by Broadcasters of Program Recordings*, FCC 04-145 (July 7, 2004).

Hundreds of broadcast stations opposed this proposed recording mandate as unnecessary, vastly overbroad and burdensome (especially on smaller and noncommercial broadcasters and multicasting stations), as well as constitutionally suspect. *See Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (court invalidated provisions requiring noncommercial educational radio and television stations that receive federal funding to make audio recordings of all broadcasts in which any issue of public importance is discussed, and to retain those audio recordings for 60 days).

Most significantly, the FCC has also altered its interpretation of the indecency rules so that material previously thought acceptable may now be regarded as indecent or profane. According to the FCC's long-standing definition, material is indecent if, in context, it describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activi-

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## A New Era of Broadcast Content Regulation?

(Continued from page 39)

ties or organs. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 732 (1978).

In considering whether material is indecent, the FCC has traditionally considered the following factors:

- (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;
- (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and
- (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value. *Policy Statement*, 16 FCC Rcd 7999 (2001).

Pursuant to judicial decision, the FCC has established a “safe harbor” from 10:00 p.m. to 6:00 a.m. for the broadcast of indecent material (*i.e.*, the times during which indecent broadcasts may be aired). See *ACT v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*).

In recent enforcement actions, the FCC has changed its interpretation of these standards so that even fleeting or isolated utterances of certain words may be found indecent or profane. Which words, you may ask? Well, broadcasters would certainly like to know – but the FCC has only said that the f-word and other words “as highly offensive as the f-word” can get you into trouble. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globe Awards Program*, FCC 04-43 (March 18, 2004) (use of the phrase “f\*\*\*ing brilliant” by the singer Bono during a live broadcast of the Golden Globe awards found to be both indecent and profane).

We’ll find out which other words are deemed sufficiently offensive only after some broadcaster gets fined thousands of dollars for airing them. In addition, the FCC in this case expanded its definition of prohibited “profane language” to include not only blasphemous language but also language that may “provoke violent resentment” or is “grossly offensive.”

In other notable decisions, the FCC has (1) imposed a \$550,000 fine against Viacom for the Janet Jackson inci-

dent at the Superbowl, finding that the glimpse of a breast for a fraction of a second during live programming was “both explicit and graphic” and “designed to pander to, titillate and shock the viewing audience”; (2) proposed a total forfeiture of \$1,183,000 against Fox and its affiliates for an episode of the reality show *Married by America*, even though the nudity involved was obscured; and (3) negotiated multi-million dollar consent decrees with large media entities to resolve multiple pending indecency claims against them.

In the past year, the FCC has also imposed indecency forfeitures reaching hundreds of thousands of dollars against radio broadcasters, generally for sexually explicit language used by “shock jocks.”

What effect has this FCC crackdown had? It has caused the removal of shock jocks like Bubba the Love Sponge from the air. It has led to the announced departure of Howard Stern to Sirius satellite radio, which, like cable/satellite television, has not been subject to the tradi-

tional prohibitions on broadcast indecency. See 18 U.S.C. § 1464 (prohibiting broadcast of “obscene, indecent, or profane language”).

On December 15, the FCC reconfirmed that “subscription-based services,” such as satellite radio, “do not call into play the issue of indecency.” Letter from W. Kenneth Ferree, Chief, FCC Media Bureau, DA 04-3907 (Dec. 15, 2004) (rejecting petition requesting FCC to commence rulemaking to amend satellite radio rules to include a prohibition on indecency).

Stations are also much more leery of airing live programming. The television networks are now imposing delays on major awards programs and sporting events. This trend will only continue, as the FCC is now investigating indecency complaints about NBC’s live coverage of the Summer Olympics Opening Ceremonies in Athens. See Lisa de Moraes, *FCC Wary of Greeks Baring Gifts at Games*, Washington Post at C1 (Dec. 11, 2004).

Local stations are also concerned about broadcasting live from local events where the station cannot completely control what observers and by-standers might say or do. Television stations in Phoenix stopped broadcasting the live memorial service for Army Corporal Pat Tillman, who

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**We’ll find out which other words are deemed sufficiently offensive only after some broadcaster gets fined thousands of dollars for airing them.**

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## A New Era of Broadcast Content Regulation?

(Continued from page 40)

left a pro football career with the Phoenix Cardinals and was killed in Afghanistan, because of the language used by some of the mourners, including family members.

Broadcasters have also edited out the salty language used by Marines in news reports from Iraq. So the FCC's crackdown has not only caused the removal of popular shock jocks from the radio, it is resulting in the censorship of news programming.

How far will this campaign to "clean up" the nation's airwaves go? FCC Chairman Michael Powell reportedly has recommended that the agency reject the indecency complaints filed against the ABC stations that aired *Saving Private Ryan* last month. See Los Angeles Times, *Powell Urges No Action on "Ryan" Airing* (Dec. 14, 2004).

Recent press reports have also cast doubt on the supposedly widespread nature of the public outrage against broadcast indecency. For example, a Freedom of Information Act request by a former TV Guide critic revealed that there were only three actual, discrete complaints against the Fox television show *Married by America* that received a nearly \$1.2 million fine, even though the FCC had initially cited 159 public complaints. See Frank Rich, *The Great Indecency Hoax*, New York Times (Nov. 28, 2004).

Earlier this month, MediaWeek reported that 99.8 percent of the 240,000 indecency complaints filed at the FCC in 2003 were filed by a single conservative activist group, the Parents Television Council. And apart from complaints over Janet Jackson's wardrobe malfunction, 99.9 percent of the indecency complaints filed at the FCC in 2004 again came from the Parents Television Council. Todd Shields, *Activists Dominate Content Complaints*, MediaWeek at 4 (Dec. 6, 2004). Whether these reports will slow the congressional bandwagon to impose even more draconian fines and other punishments on broadcasters may, unfortunately, be doubted.

Regardless of further public or congressional actions, however, one or more of the FCC's recent indecency decisions will almost undoubtedly be the subject of court appeals, perhaps all the way to the Supreme Court.

A large group of broadcasters, media associations, anti-censorship groups, and directors and writers have asked the FCC to reconsider its decision in the *Golden Globe* case about the fleeting and isolated use of the f-word. These parties argued that the FCC's new indecency enforcement policies embodied in the *Golden Globe* decision are unconstitutional and significantly chill protected speech.

Fox has also opposed the FCC's proposed forfeiture in the *Married by America* case on constitutional and other grounds, and Viacom has indicated that it does not accept the FCC's judgment that the Superbowl halftime show was indecent.

Given these multiple controversial indecency decisions

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**One or more of the FCC's recent indecency decisions will almost undoubtedly be the subject of court appeals, perhaps all the way to the Supreme Court.**

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(and likely additional ones in the future), a judicial reevaluation of the rationale for broadcast indecency regulation may be near at hand. It is more than possible that the Supreme Court will, in the relatively near future, be asked to reconsider *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), and

the differential treatment of indecency in the broadcast media in comparison to all other electronic and print media.

Certainly *Pacifica's* premise that the broadcast media are *uniquely* pervasive and accessible (especially to children) seems highly questionable, in light of the development of cable/satellite television and radio and the Internet. See, e.g., *Denver Area Educational Telecomms. Consortium v. FCC*, 518 U.S. 727, 744-45, 748 (1996) (plurality).

But if broadcast media could still somehow be subject to differing First Amendment standards, that does not mean any and all regulation of perceived indecency would pass constitutional muster. See *Pacifica*, 438 U.S. at 750 (Court took pains to "emphasize the narrowness of [its] holding" allowing FCC to regulate as indecent a broadcast in the afternoon of George Carlin's extended "seven dirty words" monologue).

Even assuming that *Pacifica* remains valid, a convincing case can be made that the FCC has recently exceeded the constitutionally permissible scope of broadcast indecency regulation. See *id.* at 759-61 (stating that the FCC does not have "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves," and noting that the Court's holding "does not speak to cases involving the isolated use of a potentially offensive word") (Powell, J., joined by Blackmun, J., concurring).

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## A New Era of Broadcast Content Regulation?

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### **Violence: Regulating Wile E. Coyote and Shakespeare**

As frustrating as broadcasters find the indecency debate, proposals to regulate violence on television are even more problematic. In 2004, the Senate passed legislation directing the FCC to prohibit the distribution of violent video programming during the hours when children are reasonably likely to comprise a substantial portion of the audience.

Raising a host of constitutional issues, this “safe harbor” restriction would apply to cable television, as well as broadcast. In March 2004, 39 members of the House of Representatives requested the FCC conduct an inquiry on violent television programming and its impact on children, and to produce a report to Congress on the subject.

In July, the FCC dutifully released a *Notice of Inquiry* seeking comment on numerous issues relating to violent programming on television, including its effects on children, how violent programming could be defined for regulatory purposes, and the statutory and constitutional limitations on the Commission’s and Congress’ authority to regulate this programming on both broadcast and cable television.

The *Notice* specifically requested comment about a “safe harbor” approach similar to the FCC’s regulation of broadcast indecency, which would restrict violent programming to airing in very limited hours. *Notice of Inquiry, Violent Television Programming and Its Impact on Children*, FCC 04-175 (July 28, 2004).

The practical, legal and constitutional problems raised by proposals to regulate television violence are numerous and clear. Media entities, including the National Association of Broadcasters, Motion Picture Association of America, National Cable and Telecommunications Association, Satellite Broadcasting and Communications Association and several advertising groups, delineated these issues in detail in comments filed with the FCC in October and November.

As an initial matter, these media entities urged the FCC to be skeptical when examining the “evidence” frequently offered to support claims that the government must act to restrict the content of television programming available to all viewers. Claims about the connection between media

violence and aggressive behavior have been greatly exaggerated, hyped and distorted since at least the 1950s when comic books were blamed, at least by some, for a rise in juvenile delinquency.

Moreover, a thorough and detailed examination of all the existing media violence studies (laboratory and field experiments and longitudinal studies) showed in 2002 that the empirical evidence did not support claims of a causal relationship between depictions of violence in the media and “real world” aggression.

Beyond lacking an evidentiary basis for regulating violent content in television programming, these media commenters pointed out that the FCC lacks the necessary, express statutory authority to regulate violent television programming via a safe harbor or other means. See *MPAA v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (FCC’s general regulatory powers do not authorize adoption of rules “significantly implicating program content”).

The media commenters also argued that a safe harbor or similar restriction on violent television programming would be unconstitutional. Regulations restricting speech due to its content are rarely permissible, and must be narrowly tailored to achieve a compelling governmental objective. Particularly due to intractable problems with defining violence, it is highly likely that any regulation of violent television content would not be narrowly tailored and would be vague and overbroad. Thus, a reviewing court would find a safe harbor violative of the First Amendment. See, e.g., *U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 813, 818 (2000); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689-90 (8th Cir. 1992).

Indeed, as pointed out to the FCC in this proceeding, no one – not social scientists, policymakers or members of the public – has been able to define violence intelligibly. Certainly there is no reason to believe that the FCC would be able to succeed in this endeavor.

Defining violence makes defining indecency look simple, and, as recent events have shown, the FCC has not been noticeably successful in applying its indecency definition in a rationale, consistent and predictable manner. Just what would qualify as “violent” programming? Would a single fist fight, or even a car crash, in a program make it violent?

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## A New Era of Broadcast Content Regulation?

(Continued from page 42)

Defined broadly, it would include everything from Roadrunner cartoons to Shakespeare – not to mention football and hockey games and news reports of terrorism and the war in Iraq. Adding qualifiers such as “excessive” or “gratuitous” makes things no clearer. In a crime drama, could a certain amount of blood be shown – say ten drops or, perhaps, half a cup – but would showing 15 drops or a full cup be excessive?

The FCC asked in its *Notice* whether there should be an exception for news or for violent programming of “cultural, historical, or artistic merit.” That the Commission would consider not excluding news and public affairs programs from suppression raises particularly serious First Amendment concerns. But such exclusions would also raise their own practical and legal problems.

In fact, if the FCC were to allow news programs to include violence, but at the same time restrict imaginative portrayals of similar violent acts or events, it would call into question the entire rationale for the proscription in the first place. If children are purportedly harmed by exposure to violence, how are they less harmed by real-life violence shown on a news program?

And how on earth would the FCC define programming with “cultural, historical, or artistic merit?” If there were a dispute as to whether a program had sufficient merit, how would it be resolved? The fact that the FCC even inquired about judging the merit of television programming shows the inherent First Amendment dangers in attempting to regulate depictions of violence. The Supreme Court has in fact already stated that the government may not legitimately make such cultural or artistic judgments:

The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

*Playboy*, 529 U.S. at 818.

The FCC is currently preparing its report on television violence, which the House members requested by January 1, 2005. If the FCC or Congress, however unwisely, then acts to restrict violent portrayals on television, court challenges will inevitably follow.

### “Good for You” Programs

Beyond regulating disfavored broadcast content, including sexually-oriented and violent programming, the FCC is also actively considering proposals to “encourage” (or force) broadcasters to air a range of “good for you” programming.

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***The FCC is also actively considering proposals to “encourage” (or force) broadcasters to air a range of “good for you” programming.***

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In a number of proceedings addressing the public interest obligations of analog and digital television broadcasters, digital audio broadcasting, and broadcast localism, the FCC is considering proposals to encourage or require radio and television stations to air programming in various favored categories, including public service announcements; news programming; locally produced programming; public affairs programming; political and electoral programming; and programming that meets the needs of underserved communities.

Some of these proposals include requirements for broadcasters to carry specific amounts of certain types of programs. As an example of the content specificity of these proposals, the supporters of a quota for electoral programming contend that broadcast programming discussing the strength or viability of a candidate or ballot issue; focusing on a candidate or ballot issue in relation to polling data, endorsements or fundraising totals; or discussing an election in terms of who is winning or losing, is not sufficient to qualify as electoral affairs programming.

Radio and television broadcasters have generally opposed these proposals as unwarranted intrusions into the editorial and programming prerogatives of licensees. While there is no doubt under the Communications Act of 1934 that broadcasters must serve the public interest (*see, e.g.*, 47 U.S.C. § 309(a)), the imposition of new and very specific content regulations – particularly at this time of technological change and increasing competitive and financial pressures on broadcasters – appears neither justified nor prudent.

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## A New Era of Broadcast Content Regulation?

(Continued from page 43)

Broadcasters now face intense, and growing, competition from other electronic media, including cable operators, satellite television and radio providers, the Internet and related broadband services, and even video game providers, which are not subject to traditional public interest regulation. In the past, the Commission has generally reduced regulation on broadcast licensees as the number of outlets and competing services increased. See, e.g., *Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984).

With the development of digital technologies and the growth of the Internet, the need for direct regulation of broadcasters should be reduced, rather than increased. In any event, broadcasters today fulfill their public interest obligations by providing entertainment programming, national and local news and other informational programming, and emergency alerts, and by participating in local community events and activities. See NAB, *A National Report on Local Broadcasters' Community Service* at 2 (June 2004) (in 2003, radio and television stations contributed an estimated \$9.6 billion in community service nationwide, consisting of the value of airtime contributed for public service announcements and amounts raised for charitable causes and for victims of natural disasters).

Given the absence of an express congressional authorization, the FCC's authority to prescribe specific public interest requirements "significantly implicating program content" is, moreover, very much in doubt. *MPAA*, 309 F.3d at 806-07 (concluding that the FCC's general powers under the Communications Act did not authorize adoption of rules "about program content").

Specific content-based programming obligations also raise very serious constitutional questions. The Supreme Court has explicitly stated that the "FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations." *Turner Broadcasting System v. FCC*, 512 U.S. 622, 650 (1994).

Proposals to require specific amounts of particular types of programming would also require the FCC "to oversee far more of the day-to-day operation of broadcasters' conduct," and would "tend to draw it into a continuing case-by-case determination" of whether the programming aired by broadcasters did or did not fit the regulatory definition of, for ex-

ample, electoral affairs programming. *CBS v. DNC*, 412 U.S. 94, 125-27(1973) (finding that "the risk of an enlargement of Government control over the content of broadcast discussion of public issues" was inherently too great in a requirement that broadcasters "accept some editorial advertising").

Besides the constitutional problems, the FCC is not particularly well suited to "ordain" the "particular type[s]" of programming that must be offered by all broadcast stations across the nation. *Turner*, 512 U.S. at 650. Communities and the interest of consumers in them vary from one locality to another, and it borders on the illogical to assume that the regulatory decisions of a government agency in Washington, D.C. would consistently and accurately reflect the interest of viewers and listeners throughout the country. It was such considerations that historically caused the FCC to withdraw from involvement in content regulation. See, e.g., *FCC v. WCNC Listeners Guild*, 450 U.S. 582, 601 (1981).

And it is, after all, the interests of the consumers of programming that should be paramount under the *public* interest standard – not the interests of government regulators or even the interests of various "public interest" advocacy groups. See, e.g., T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 315 (1994) (behind the "persistent demand from critics" of broadcasters for "more and better public affairs programming . . . is the belief that it is the right of elites to dictate tastes to viewers and listeners").

As of the publication date of this article, it is unclear whether the FCC will in fact adopt further regulations requiring broadcasters to air specified types of government-favored programming.

Several of the proceedings involving these proposals have been pending at the FCC for years, while others are still in the comment stage. See *Notice of Inquiry, Broadcast Localism*, FCC 04-129 (reply comments due Jan. 3, 2005). If the Commission were to adopt constitutionally suspect programming mandates without express authorization from Congress, a legal challenge would appear likely.

And because proponents of content-based programming obligations depend on notions of spectrum scarcity to defend their position, such a challenge would likely call into question the continuing validity of the Supreme Court's seminal decision in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (Court sanctioned FCC's now-repealed "fairness doctrine" based on the perceived scarcity of the broadcast spectrum).

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## A New Era of Broadcast Content Regulation?

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### ***The Next Frontier of Content Regulation?***

On November 23, 2004, the FCC released an order increasing the obligations of television broadcasters to air children's educational and informational programming, and extending its regulation of the amount of commercial material in television programming directed to children ages 12 and under. See *Report and Order, Children's Television Obligations of Digital Television Broadcasters*, FCC 04-221.

Beyond directly regulating the content aired by television broadcasters, this order will also likely affect the content of certain Internet websites.

Since 1997, according to FCC processing guidelines, television broadcasters, in order to receive approval of their license renewal applications at the FCC staff level, have been required to air at least three hours of programming per week that serves the educational and informational needs of children ages 16 and younger. 47 C.F.R. § 73.671 and note 2. See also Children's Television Act of 1990, § 103 (in reviewing renewal applications of television licensees, FCC must consider extent to which the licensee "has served the educational and informational needs of children").

In its November order, the FCC expanded this requirement so that broadcasters in the digital environment who choose to multicast multiple programming streams will be required to air an additional three hours every week of children's educational and informational programming per each full-time programming stream.

These additional hours of children's programming will be required even if a broadcaster's multicast programming stream is, for example, a 24-hour news channel or other channel not oriented in any way toward child viewers. Beyond serving as a disincentive for broadcasters to experiment with new, innovative multicasting services, requiring stations to air specific amounts of government mandated programming raises obvious constitutional issues, as discussed above. No broadcaster has ever challenged the "three hour" children's television guideline on First Amendment grounds, and it remains to be seen whether any broadcaster will mount a constitutional chal-

lenge to these new and expanded children's programming requirements.

Perhaps even more notably, however, the FCC, in this children's television order, comes perilously close to regulating content on the Internet by expanding its regulation of advertising. Since 1991, Congress and the FCC have limited the amount and kind of commercial matter that may be aired during programming directed to children ages 12 and under. 47 U.S.C. §§ 73.670; 76.225; Children's Television Act of 1990, § 102. These commercial limits apply to children's television programming shown by both broadcast television licensees and cable operators.

In its recent order, the FCC expanded its commercial limit rules to prohibit the display of most (and perhaps virtually all) Internet website addresses during broadcast or cable programs directed to children ages 12 and under.

Specifically, a broadcaster or cable operator can display an Internet website address during such programs only if the website:

- (1) offers a substantial amount of *bona fide* program-related or other noncommercial content;
- (2) is not primarily intended for commercial purposes, including either e-commerce or advertising;
- (3) the website's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and
- (4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no links to another page with commercial material).

Given these requirements (especially the last forbidding links to *another* page with commercial material), the Internet websites that may permissibly be displayed during children's programming may be an empty set. Moreover, in a *Further Notice of Proposed Rulemaking* included as part of its November order, the FCC requested comment on how to regulate interactive links to "commercial" Internet sites in children's television programming. Comments on this question of regulating interactivity will be due on March 1, 2005.

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***The FCC, in this children's television order, comes perilously close to regulating content on the Internet.***

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### **A New Era of Broadcast Content Regulation?**

*(Continued from page 45)*

As of the publication date of this article, it remains unclear what, if any, actions broadcasters, cable operators or other media entities may take to challenge these FCC decisions.

Media entities could ask the FCC to reconsider any of the decisions made in its children's television order, or could decide to challenge the FCC's order in court. Clearly, the FCC's decisions raise a host of commercial speech and other First Amendment issues. *See, e.g., Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999) (federal statute and FCC rules prohibiting broadcasters from airing advertisements about casino gambling violated First Amendment).

The decision to regulate strictly the website addresses that can be displayed during children's television programming further raises questions about the extent of the FCC's authority over Internet content. Media entities or advertisers with a significant web presence may be particularly concerned about the FCC's extension of its authority over television programming to affect the form and substance of the home pages, other menu pages, and links of Internet web sites.

The FCC's influence on Internet content may only increase in the future, depending upon the outcome of its

further proceeding on regulating interactive links between television programming and Internet websites.

### ***A Judicial Resolution?***

Just how far will all these efforts to regulate the content of broadcast programming ultimately go? Right now, it's still unclear, and depends in part on expected changes among the FCC Commissioners and the congressional appetite for imposing content regulation on broadcasters in a non-election year.

Certainly many observers expect court challenges to several of the FCC's indecency decisions in the near future. Restrictions on violent programming would in all likelihood be challenged in court, as would mandates requiring broadcasters to air specific amounts of government-favored programming.

Thus, there may be in the relatively near future a landmark Supreme Court case addressing the level of protection afforded broadcasters by the First Amendment and deciding whether broadcast content is uniquely regulable.

*Jerrienne Timmerman is a lawyer with the National Association of Broadcasters.*

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## Court Dismisses Fair Housing Law Claims Against Website

By Timothy L. Alger

Relying on Section 230 of the Communications Decency Act, a federal judge in Los Angeles granted summary judgment to a website operator sued by two local fair housing councils for alleged violation of federal and state housing laws. *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, C.D. Cal. Case No. CV-03-09386 PA (RZx) (Sept. 30, 2004).

In the first court decision addressing the conflict between the federal Fair Housing Act, 42 U.S.C. § 3604 (“FHA”), and the federal Communications Decency Act of 1996, 47 U.S.C. § 230 (“CDA”), the court concluded that plaintiffs’ claims, which were based on website users’ postings indicating discriminatory preferences for roommates, were barred by the CDA.

United States District Judge Percy Anderson did not reach the website’s separate argument that the users’ postings also were protected by the First Amendment because they involved speech relating to the users’ right of intimate association.

### *Roommates.com Website*

Defendant Roommate.com, LLC (“Roommate”) owns and operates Roommates.com, a roommate search service that is accessed through the Internet at <http://www.roommates.com>.

Individuals who are looking for residences to share may post information about themselves and the housing on a searchable database. Users of the website can search the database based on certain criteria, including geographic location and roommate characteristics.

Roommates.com has approximately 150,000 active listings; about 40,000 users are offering rooms for rent at their personal residence, and about 110,000 users are looking for a residence to share. Basic membership is free of charge and allows a user to create a personal profile, conduct searches of the database, and send “roommail” (internal website e-mail) to other users. Members exchange approximately 30,000 “roommails” per day. For a fee, members can read “roommail” and more detailed profile information than the basic members.

To become a member of Roommates.com, a person must author a personal profile. When listing a room for

rent, the user responds to prompts that result in the posting of specific information about the area, rent and deposit information, date of availability, and features of the residence.

Information may be posted about the occupants of the household, as well as roommate preferences. For example, individuals may state whether they are willing to live with a smoker, with pets, and preferred cleanliness level, occupation, and location.

Users who are posting residences to share must disclose their sex and sexual orientation, and they *may* specify a roommate preference on that basis. This preference is optional; the default setting is *no* preference, and the user must alter this setting to indicate a preference.

Users must state whether they are willing to live with children. The questionnaire makes no mention of racial or religious preferences. Users may include additional information about themselves or their residence in the “Additional Comments” section of the questionnaire, which allows free-form essays. Users also may post up to six images to be displayed with their profile.

Roommate does not review or edit the text of users’ profiles. As soon as a new user completes the questionnaire, the resulting profile is made available online to other users.

Members are permitted to change their profiles at any time. These revisions are not reviewed by Roommate. Roommate reviews photographs after they are posted, to make sure they do not contain images that violate the terms of service, such as obscene images or contact information (typically telephone numbers and e-mail addresses) that is normally accessible only to paying members.

### *The Fair Housing Allegations*

The plaintiffs, the Fair Housing Council of San Fernando Valley and Fair Housing Council of San Diego, sued Roommate in United States District Court for the Central District of California, alleging violation of the preferential advertising provision of the FHA, which makes it unlawful

*To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handi-*

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*cap, familial status, or national origin, or an intention to make any preference, limitation, or discrimination.*

42 U.S.C. § 3604(c).

Plaintiffs also alleged violation of the parallel California statute, the Fair Housing and Employment Act, Cal. Govt. Code § 12955, and for alleged violation of the state Unruh Civil Rights Act, Cal. Civ. Code § 51, and unfair business practices statute, Cal. Bus. & Prof. Code § 17200, and for negligence.

Plaintiffs contended that Roommate violated the FHA and state law by asking users their sex, their sexual preference, and whether they lived or would live with children, and by permitting users to indicate discriminatory preferences in the essay portion of their profiles.

Although plaintiffs' search of the Roommates.com database found a few postings indicating an aversion to living with homosexuals or particular racial groups, the vast bulk of preferential postings identified by plaintiffs indicated a desire by some users to find roommates of *similar* lifestyles, ethnicity, and religious beliefs.

Typical of the postings complained of by plaintiffs were devout Christians looking for other devout Christians, and gay or lesbian users looking for other gays and lesbians. Plaintiffs also complained about the use of user nicknames such as "ChristianGrl," "Asianpride," "Whiteboy80," "Latina22," and "Blackboi."

Plaintiffs brought a motion for preliminary injunction; however, Judge Anderson denied the motion without prejudice, choosing instead to set an early trial date. The parties engaged in discovery and then brought cross-motions for summary judgment.

The litigation presents several novel questions, in addition to the conflict between the FHA and CDA, which is discussed in detail below. No reported case has addressed whether the FHA applies to the search for and selection of roommates. Does "rental of a dwelling" include the sharing of housing and its costs?

Also, no case since *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), has addressed the constitutionality of the FHA's prohibition on advertising involving *lawful* housing preferences (more on this later). Does section 3604(c) pass muster under the standards of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557 (1980)?

### ***Motion for Summary Judgment***

As a first line of attack, Roommate argued that plaintiffs' claims were barred by the CDA, which states: "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." 47 U.S.C.

§ 230(c)(1). An "interactive computer service" is "any information service [or] system . . . that provides or enables computer access by multiple users to a computer server." *Id.* § 230(f)(2).

Roommate argued that section 230 precludes liability wherever the complained-of content is posted by third parties

and publication is an element of the plaintiff's claim. The provision "overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law." *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2812 (2004); *accord Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-25 (9th Cir. 2003).

"Under § 230(c), ... so long as a third party willingly provides the essential published content, the interactive computer service receives full immunity regardless of the specific editing or selection process." *Carafano*, 339 F.3d at 1124.

Roommate further argued that the FHA must yield to the CDA because the FHA is not among the enumerated exceptions to the CDA (federal criminal statutes, intellectual property law, state laws consistent with the CDA, and the Electronic Communications Privacy Act of 1986). See 47 U.S.C. § 230(e)(1)-(4); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003), *aff'd*, 2004 WL

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***Plaintiffs contended that Roommate violated the FHA and state law by asking users their sex, their sexual preference, and whether they lived or would live with children, and by permitting users to indicate discriminatory preferences in the essay portion of their profiles.***

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## Court Dismisses Fair Housing Law Claims Against Website

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602711 (4th Cir. 2003) (dismissing civil rights claim based on CDA).

As a second line of attack, Roommate urged the court to hold that plaintiffs' claims were barred by the First Amendment, given that they attempted to punish speech based on content (citing *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

Also, under the intermediate scrutiny of *Central Hudson*, Roommate argued that (1) an individual's choice of roommates is protected by the constitutional right of intimate association, and the FHA was never intended to control roommate selection; and (2) as a consequence, the government does not have a substantial interest in controlling speech relating to the selection of roommates. Given this, section 3604(c) failed the three-prong *Central Hudson* test. (Note: The lawful right of individuals to choose living companions distinguishes this case from *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991), where the court rejected a First Amendment challenge to section 3604(c) because the underlying activity, discrimination in housing sales, was indisputably unlawful.)

Plaintiffs contended that Roommate was not immune under the CDA because it offered users multiple-choice questions regarding sex, sexual preference, and children in its questionnaire; those answers are then used for searches of the database by other users. This, according to plaintiffs, made Roommate an "information content provider" that was not entitled to the protection of the CDA. See 47 U.S.C. § 230(f)(3). Plaintiffs also argued application of the CDA would eviscerate the FHA, and urged the court to adopt a narrow view of the CDA that limited it to obscenity and defamation cases, and did not extend it to civil rights violations.

Plaintiffs also argued that Roommate was, in effect, screening renters through inquiries about sex, sexual preference, and children and, by becoming a "crucial intermediary" in a housing transaction, Roommate was not simply acting as a publisher. In plaintiffs' view, Roommate wanted to use the Internet to "sneak back to the early part of the last century" by permitting users to post statements

that "obviously offend, alienate and humiliate persons who are just looking for a place to live in cities where it is already very difficult to find homes."

Plaintiffs did not squarely address the right of intimate association and the First Amendment; they appeared to concede that an individual's selection of a roommate is not controlled by the FHA, but argued (under *Hunter*) that this did not matter in determining liability under section 3604(c)'s prohibition on preferential advertising.

### *Housing Law Doesn't Trump CDA*

Judge Anderson granted summary judgment to Roommate on the FHA claim, and dismissed the state law claims without prejudice. He agreed with Roommate that the FHA did not trump the broad sweep of the CDA, and he was not troubled by plaintiffs' contention that treating the Internet differently would undermine the FHA and indirectly punish other media, such as newspapers, that comply with the statute.

The FHA, he wrote:

***The FHA did not trump the broad sweep of the CDA.***

*is not among the types of laws which are specifically exempted from the CDA. As such, and without evidence of contrary legislative intent, a court may not create an exemption for the fair housing laws without violating the maxim expressio unius est exclusio alterius.*

Congress, Judge Anderson wrote, made a policy decision to immunize interactive computer services and override traditional treatment of publishers under statutory and common law.

Judge Anderson went on to find that the complained of content was created by Roommates.com users, notwithstanding the website's use of a questionnaire, relying on the Ninth Circuit's decision in *Carafano*.

In *Carafano*, the Ninth Circuit affirmed the dismissal of invasion of privacy, defamation and negligence claims against Matchmaker.com involving a fabricated dating profile: Matchmaker could not be

"considered an 'information content provider' under the statute because no profile has any content until a user actively creates it.... [T]he fact that

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**Court Dismisses Fair Housing Law Claims Against Website**

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Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a ‘developer’ of the ‘underlying misinformation.’”

*Carafano*, 339 F.3d at 1124.

“The Ninth Circuit’s decision in *Carafano*,” Judge Anderson wrote, “compels the conclusion that Roommate cannot be liable for violating the FHA arising out of the nicknames chosen by its users, the free-form comments provided by the users, or the users’ responses to the multiple choice questionnaire.”

Judge Anderson left open the possibility that *users* of Roommates.com who post discriminatory preferences

might be sued under the FHA; while not analyzing the question, he implicitly rejected Roommate’s argument that the FHA does not apply to advertising for shared living quarters.

The court chose not to reach the First Amendment question, finding it to be unnecessary. The court also elected not to reach the merits of the state law claims, exercising its discretion to dismiss them without prejudice under 28 U.S.C. § 1367(a), (c). Plaintiffs’ cross-motion for summary judgment was denied.

*Timothy L. Alger of Quinn Emanuel Urquhart Oliver & Hedges, LLP represents defendant Roommates.com, LLC in this case. He also represented defendant Lycos Inc. and its subsidiaries, Metrosplash.com, Inc. and Matchmaker.com, Inc., in the Carafano litigation.*

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**California Supreme Court to Consider Scope of § 230 Immunity**

The California Supreme Court agreed to hear an appeal in *Grace v. eBay, Inc.*, 2004 WL 2376664 (Cal. Oct. 13, 2004) on the following question:

Does the Communications Decency Act (47 U.S.C. § 230) confer immunity on interactive computer services, such as eBay, from liability for publishing or distributing defamatory statements posted by third parties?

In July, the California Court of Appeal held that eBay was not immune under § 230 for an allegedly libelous negative review, although it affirmed dismissal of the claim under the terms of eBay’s user agreement. *Grace v. eBay, Inc.*, 16 Cal. Rptr.3d 192, 32 Media L. Rep. 2025 (Cal. Ct. App. 2d Dist. July 22, 2004) (Croskey, Kitching and Aldrich). See also *MediaLawLetter* August 2004.

The Court of Appeal decision on § 230 conflicts with the majority of courts that have analyzed the issue. The court 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, disagreeing with the leading decision by the Fourth Circuit in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

## North Dakota Court Upholds Personal Jurisdiction Based on Website

The federal district court in North Dakota ruled that it has personal jurisdiction over an out-of-state defendant who “targeted” her allegedly defamatory website to the state. *Zidon v. Pickrell*, 2004 WL 2549686 (D.N.D. Nov. 8, 2004) (Hovland, J.).

Applying the “effects test,” the court found that a website which complained about an specific identified person in North Dakota sufficiently targeted the state for the court to exercise jurisdiction.

### Background

This Internet defamation case grew out of an online romance gone bad. After the parties’ relationship ended, the defendant created a website at [www.patrickzidon.com](http://www.patrickzidon.com) entitled “Monster of Love: Surviving Love/Sex Adicts and Spiritual Predators.”

Defendant, a Colorado resident, posted allegedly defamatory statements about plaintiff and sent links to the site to people in North Dakota, as well as to the “public at large.”

Among other things the website wrote about plaintiff:

As a businessman and community leader in Bismarck, North Dakota, few would suspect his double life of deceit, lies and the trail of tears he leaves behind him. A warning, this man plans to pursue a career in psychological therapy. If you have a history with this man you'd like to share, please contact webmaster @patrickzidon.com.

The site also revealed where plaintiff worked and concluded “He is a predator.”

Plaintiff brought a claim for defamation and intentional infliction of emotional distress, and defendant moved to dismiss for lack of personal jurisdiction and improper venue.

### Jurisdiction Analysis

The court first recognized that the issue of personal jurisdiction under the North Dakota long-arm statute as well as the federal Constitution would be collapsed into the

question of whether defendant maintained “minimum contacts” with the state of North Dakota so as not to offend “traditional notions of fair play and substantial justice.”

Under Eighth Circuit law, minimum contacts analysis takes into consideration: “1) the nature and quality of [a defendant’s] contacts with a forum state; 2) the quantity of such contacts; 3) the relation of the cause of action to the contacts; 4) the interest of the forum state in providing a forum for its residents; and 5) [the] convenience of the parties.” *Citing Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073-74 (8th Cir. 2004) (additional citation omitted).

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***The district court found that defendant had “deliberately and knowingly directed the website, e-mail, and Internet comments at the State of North Dakota because North Dakota is [plaintiff’s] residence.”***

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### Sliding Scale Test

In determining whether defendant’s website established the contacts necessary to allow for the exercise of personal jurisdiction, the court first applied the *Zippo* “sliding scale” test that distinguishes between “active” and “passive” websites.” *Citing Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

While the court found that the website was “interactive” because it featured an e-mail hyper link, offered detailed information about plaintiff which included his place of residence, contained a bulletin board to exchange information about the plaintiff, and encouraged visitors to contact the webmaster, it concluded that it was unable to exercise general jurisdiction over the defendant based solely on the level of interactivity of the website.

Instead, it would determine whether the website was targeted at the forum state, *citing Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002).

### Effects Test

The court turned to the Supreme Court’s opinion in *Calder v. Jones*, 465 U.S. 783 (1984), in which the Court stated jurisdiction would be based upon whether a defendant in a defamation suit had “aimed” its actions at the forum state, had known of the “potentially devastating impact” the plaintiff would experience in the state, and

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**North Dakota Court Upholds  
Personal Jurisdiction Based on Website**

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had realized the “brunt of the harm” to the plaintiff would be felt in the forum state.

In applying the *Calder* “effects test,” the district court found that defendant had “deliberately and knowingly directed the website, e-mail, and Internet comments at the State of North Dakota because North Dakota is [plaintiff’s] residence.”

The court went on to address the additional factors laid out by the Eighth Circuit. While the court found that the quantity of defendant’s contacts with North Dakota

and the convenience of the parties were not determinative, it ruled that because all of defendant’s contacts were related to Zidon’s claims and North Dakota would have an interest in adjudicating the claims at issue and providing a forum for its citizens to bring suit, defendant was amenable to personal jurisdiction in North Dakota.

Rodney E. Pagel, Pagel Weikum, PLLP, Bismarck, ND, for Plaintiff. Lawrence R. Klemin, David Schweigert, Bucklin, Klemin & McBride, P.C., Bismarck, ND, for Defendant.

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**MLRC BULLETIN 2004:4 PART 2  
MEDIA ACCESS AND NEWSGATHERING IN HIGH PROFILE CASES**

**CHALLENGES TO THE CORE: PRIOR RESTRAINTS AGAINST PUBLICATION OF  
LEGALLY OBTAINED INFORMATION IN HIGH PROFILE CRIMINAL CASES**

*By Joel Kurtzberg and Kayvan B. Sadeghi*

**JUDICIAL PROCEEDINGS AND RECORDS “ANCILLARY TO THE GRAND JURY” IN  
HIGH PROFILE CASES: TOWARD A MORE MEANINGFUL RULE-BASED STANDARD FOR ACCESS**

*By Theodore J. Boutros, Jr., and Michael H. Dore*

**SEARCH WARRANTS: A QUALIFIED RIGHT OF ACCESS**

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## Eighth Circuit Explains Conflict Rules for Internet Defamation Claims

By Mark Sableman

A recent Eighth Circuit non-media libel case provides guidance on choice of law principles in Internet libel actions, finding a strong presumption in favor of applying the law of the plaintiff's home state. The unusual twist in this domestic application of this *Gutnick*-like rule was that the plaintiff lost because his home state's defamation law was stricter than that of the defendants' state. *Fuqua Homes, Inc. v. Beattie*, 2004 WL 2495842 (8th Cir. Nov. 8, 2004) (Arnold, J.).

The decision involved buyers in Iowa of a modular home manufactured by a Missouri company. The buyers, the Beatties, believed the home had various defects, and they set up an Internet website criticizing the manufacturer. They also drove a van with a sign critical of the manufacturer around parts of both Iowa and Missouri.

The manufacturer, Fuqua Homes, sued for libel in the Western District of Missouri. The defendants moved for judgment as a matter of law during trial, because Fuqua had failed to prove any actual damages. At this point, choice of law became determinative, because Missouri law requires proof of actual damage and Iowa does not; the motion was well taken under Missouri law, but not under Iowa law.

The district court applied Missouri law, apparently on the sole basis that the plaintiff had filed the case in Missouri.

### *Eight Circuit Analyzes Choice of Law*

On appeal, the Eighth Circuit noted that the choice of law was far more complex than the simple matter of where the case was filed. It instead reviewed conflict of law rules in the context of libel actions, and ultimately concluded, in agreement with the district court's ruling, that Missouri law would apply.

Missouri's applicable conflict of laws rule was the "most significant relationship" test, under which the contacts of each state are to be evaluated according to their relative importance. In general, courts are to consider where the injury occurred, the place of the conduct

causing the injury, the domicile of the parties, and the center of the parties' relationship.

In defamation cases, under Missouri law, the most important consideration in cases of widespread dissemination is the residence of the party allegedly defamed, because, according to a Missouri Supreme Court decision, "defamation produces a special kind of injury that has its principal effect among one's friends, acquaintances, neighbors and business associates in the place of one's residence" (quoting *Elmore v. Owens-Illinois*, 673 S.W2d 432, 437 (Mo. 1984)).

This is consistent with the Restatement of Conflict of Laws, section 150, which creates a presumption that the plaintiff's home has the most significant relationship in the case of aggregate communications.

The Eighth Circuit concluded that publication of defamatory matter on the Internet is "closely analogous" to the aggregate communications foreseen by section 150 of the Restatement, and hence that under Missouri law, the presumption in favor of the plaintiff's forum would apply.

The court then examined the other considerations – including the initiation of the defamatory statements and some of the underlying transactions in Iowa, but found them insufficient to overcome the presumption in favor of the plaintiff's home state.

Accordingly, the Court affirmed the District Court's application of Missouri law, and the judgment against the plaintiff because of his failure to prove the necessary element of actual damages.

*Mark Sableman is a partner with Thompson Coburn LLP in St. Louis, Mo. James J. Jarrow, Kansas City, Mo. (Chris J. Stucky, Kansas City, Mo. on brief) for appellant. Stephen C. Scott, Columbia, Mo., for appellee.*

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## New York Court of Appeals to Review Ban on Cameras in Courts

The New York Court of Appeals, New York's highest court, has agreed to hear an appeal filed by Court TV challenging the state's ban on cameras in courtrooms.

In June 2004, a unanimous five judge appeals court panel rejected Court TV's constitutional challenge to New York'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; *MLRC MediaLawLetter* June 2004 at 19.

The intermediate appeals court ruled 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), does 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.

Further, even assuming that the ban restricts speech, the court held that it is content-neutral and sufficiently tailored to the state's interest in fair trials. Thus, the statute would not be found invalid if the state's interest could be served by less restrictive alternatives.

Jonathan Sherman of Boies, Schiller & Flexner LLP represents CourtTV.

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### MLRC 50-STATE SURVEY 2004-05: MEDIA LIBEL LAW

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## Federal Courts of Appeal Analyze Scope of DMCA

In two recent important decisions, federal courts of appeal have rejected attempts by product manufacturers to use the Digital Millennium Copyright Act (“DMCA”) against competitors who manufacturer replacement parts. *Lexmark International Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004); *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

The decisions emphasize that the DMCA was intended to prevent pirating of copyrighted digital media works, such as movies, music and computer programs. And they put a brake on manufacturers’ efforts to use the DMCA to create copyright protection for products and parts that use computer program lock-out codes.

### *Lexmark v. Static Control*

The plaintiff in *Lexmark* is a manufacturer of printers and printer toner cartridges. Its toner cartridges are outfitted with a microchip containing a “Toner Loading Program,” a computer program which measures the amount of toner remaining in the cartridge. The program “uses an ‘authentication sequence’ that performs a ‘secret handshake’ between each Lexmark printer and ... Lexmark toner cartridge .... If the two values do not match, the printer returns an error message and will not operate, blocking consumers from using toner cartridges that Lexmark has not authorized.”

Each Lexmark printer is additionally furnished with plaintiff’s “Printer Engine Program.” After the authentication sequence concludes, the Printer Engine Program downloads a copy of the Toner Loading program from the cartridge’s microchip into the printer. If calculations performed after the data is downloaded results in data that does not match information stored on the microchip, the printer will not function.

Defendant Static Control Components (“SCC”) manufactures the “SMARTEK” microchip, which “permits consumers to satisfy Lexmark’s authentication sequence” and is sold to “third-party cartridge remanufacturers, permitting them to replace Lexmark’s chip with the SMARTEK chip on refurbished Prebate cartridges.”

The refurbished cartridges are a low-cost alternative to the Lexmark toner cartridges. To be compatible with Lex-

mark printers, each SMARTEK chip contains a copy of the Toner Loading Program.

Lexmark claimed that defendant’s inclusion of the Toner Loading Program on the SMARTEK chip amounted to copyright infringement. Additionally, it alleged that “SCC’s SMARTEK chip is a ‘device’ marketed and sold by SCC that ‘circumvents’ Lexmark’s ‘technological measure’ [the authentication sequence] ... which ‘effectively controls access’ to its copyrighted works (the Toner Loading Program and the Printer Engine Program)” in violation of the DMCA.

The district court agreed and entered a preliminary injunction against the defendant. *See* 253 F. Supp. 2d 943 (E.D. Ky. 2003). It found that Lexmark had established a likelihood of success on its copyright infringement and DMCA claims because its SMARTEK chip “circumvented” Lexmark’s authentication sequence and enabled consumers to access or “make use of” plaintiff’s copyrighted Printer Engine Program.

### *Digital Millennium Copyright Act*

In relevant part, the DMCA, 17 U.S.C. § 1201, provides:

- (a) Violations regarding circumvention of technological measures.
  - (1) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. . . .
  - (2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that --
    - (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
    - (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

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## Federal Courts of Appeal Analyze Scope of DMCA

(Continued from page 55)

- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.
- (3) As used in this subsection –
- (A) to “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, to otherwise avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; . . .

### ***Sixth Circuit Decision***

In a decision written by Judge Sutton, with Judge Merritt concurring, and Judge Feikens in partial dissent, the Sixth Circuit reversed. The court first held that the Toner Loading Program was not sufficiently original to even qualify for copyright protection since it essentially functioned as a simple lock-out code. Second, the SMARTEK chip did not violate the DMCA even though it made use of Lexmark's Printer Engine Program which enjoys copyright protection.

In entering the preliminary injunction, the district court had found that by “circumventing” the authentication sequence, defendant enabled consumers to access or “make use of” plaintiff's copyrighted Printer Engine Program. The Sixth Circuit disagreed, finding that it was not the authentication sequence that “controls access” to the Printer Engine Program, but instead the consumer's purchase of the Lexmark printer.

In his separate concurrence, Judge Merritt emphasized that:

our holding should not be limited to the narrow facts surrounding either the Toner Loading Program or the Printer Engine Program. We should make clear that in the future companies like Lexmark cannot use the DMCA in conjunction with copyright law to create monopolies of manufactured goods for themselves just by tweaking the facts of this case... If we were to adopt Lexmark's reading of the statute, manufacturers could potentially create monopo-

lies for replacement parts simply by using similar, but more creative, lock-out codes. Automobile manufacturers, for example, could control the entire market of replacement parts for their vehicles by including lock-out chips. Congress did not intend to allow the DMCA to be used offensively in this manner, but rather only sought to reach those who circumvented protective measures “for the purpose” of pirating works protected by the copyright statute.

### ***Chamberlain v. Skylink***

In *Chamberlain v. Skylink*, the Federal Circuit Court of Appeals applied similar reasoning in a claim against the manufacturer of a “universal” garage door opener.

The plaintiff manufactured garage door openers that used a copyrighted “rolling code” security software program to change the transmitter signals that would activate the garage door. Defendant began marketing a “universal transmitter” that could be programmed to work with other garage door opening systems, including plaintiff's.

Plaintiff sued alleging that under the plain language of the DMCA defendant was “circumventing” its rolling code technological measure to access its copyrighted computer programs.

The district court granted summary judgment in favor of defendant. *See* 292 F. Supp. 2d 1040 (N.D. Ill. 2003). The court found that plaintiff's customers had implicit authority to use any brand of transmitter to open their garage doors since copyright law allows them to use the copy of plaintiff's software embedded in the garage door opener they purchased.

### ***Federal Appeals Court Decision***

The Federal Court of Appeals affirmed in a decision written by Judge Gajarsa, and joined by Judges Linn and Prost. The DMCA introduced “new grounds for liability in the context of the unauthorized access of copyrighted material,” but it does not grant a plaintiff any new property rights.

Thus, plaintiff was subject to the presumption under existing copyright law that a consumer who purchased the plaintiff's system was authorized to use the copy of plain-

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## Federal Courts of Appeal Analyze Scope of DMCA

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tiff's software embedded in the product the consumer purchased.

The court explained that plaintiff's:

“proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial ‘encryption’ scheme, and thereby gain the right to restrict consumers’ rights to use its products in conjunction with competing products. In other words, Chamberlain’s construction of the DMCA would allow virtually any company to attempt to

leverage its sales into aftermarket monopolies – a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit.

Chamberlain was represented by Karl R. Fink, of Fitch, Even, Tabin & Flannery, in Chicago. Skylink was represented by Richard de Bodo, Irell & Manella LLP, Los Angeles. Lexmark was represented by Christopher J. Renk, Banner & Witcoff, Chicago. Static Control was represented by Seth D. Greenstein, McDermott, Will & Emery, Washington, DC and W. Craig Robertson III, and E. Christine Lewis, Wyatt, Tarrant & Combs, Lexington, Kentucky.

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## MLRC Bulletin Examines Motions to Dismiss in Media Cases

### *Motion Can Be a Winning Strategy in Libel and Privacy Suits*

This month MLRC released a study of media motions to dismiss in libel, privacy and other content-related claims against media defendants from 1983 to 2003.

The success rate – 72.9 percent (482 cases) – ended with a trial or appeals court granting a motion to dismiss, and partial motions to dismiss were granted in an additional 10.6 percent (70 cases) shows that a motion to dismiss can be a powerful tool in short-circuiting otherwise lengthy, costly litigation in First Amendment-sensitive claims.

The latest study builds upon previous MLRC studies on motions to dismiss in media cases in 1983 and 1996, and shows that results have generally remained consistent in each of the periods between these studies.

The study examines the ultimate disposition of cases, as well as results at both the trial court and appellate

level. It also compares these results by type of plaintiff, type of court, and by jurisdiction. The study also examines defendants’ relative success on motions to dismiss on various claims and issues.

The results of the motion to dismiss study are on par with the findings of MLRC studies on summary judgment in libel and related actions against the media. The most recent summary judgment study, covering cases from 1980 to 2000, found that summary judgment was ultimately granted in full in 77.0 percent of cases, and partially granted in an additional 8.7 percent

MLRC’s 2004 MLRC MOTION TO DISMISS STUDY, 2004 ISSUE No. 3, is available to media and enhanced members on the MLRC website, [www.medialaw.org](http://www.medialaw.org). Others may order the report for \$35 by contacting MLRC at (212) 337-0200.

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### MLRC BULLETIN 2004:4 PART 2 MEDIA ACCESS AND NEWSGATHERING IN HIGH PROFILE CASES

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## Reporters Near Bottom on List of Most Honest and Ethical Professionals

Television reporters beat their counterparts in the newspaper industry by a hair but still trailed far behind nurses, doctors, and clergy in the Gallup Organization's 2004 poll ranking the honesty and ethical standards of various professionals.

The poll, which was conducted by phone from November 19-21, recorded the responses of 1,105 adults age 18 or over. Participants were asked to rate the honesty and ethical standards of the 20 professions.

The list of professionals participants ranked as "very high" or "high" was as follows:

- Nurses (79 percent)
- Druggists, pharmacists (72 percent)
- Military officers (72 percent)
- Medical doctors (67 percent)
- Police officers (60 percent)
- Clergy (56 percent)
- Judges (53 percent)
- Day care providers (49 percent)
- Bankers (36 percent)
- Auto mechanics (26 percent)
- Local officeholders (26 percent)
- Nursing home operators (24 percent)
- State officeholders (24 percent)
- TV reporters (23 percent)
- Newspaper reporters (21 percent)
- Business executives (20 percent)
- Lawyers (18 percent)

- Congressmen (10 percent)
- Advertising practitioners (10 percent)
- Car salesmen (9 percent)

This year's poll found that 5% of those polled gave newspaper reporters very high marks for honesty, 16% ranked them as high, 50% as average, and 28% as low or very low. Newspaper reporters last appeared on the survey in 2000, when they achieved a 16% positive honesty ranking.

Gallup reported that throughout the 1990s, the average positive ranking for the profession was 21%, with an all-time high of 30% reached in 1981.

Nurses, who topped this year's list, have finished first in the poll for five out of the six years they have been surveyed, with firefighters holding the No. 1 spot in 2001. Pharmacists and state officeholders both obtained their highest rankings to date this year, with 72% and 24% respectively.

Car salesmen, who received a 9% positive rating in this year's poll, have held the lowliest position on the list for almost every year since making their debut in the poll in 1977.

Gallup began polling the public on this issue in 1976, and over the years has ranked 57 professions. A rotating list of approximately 20 professions is employed annually, and a core group of 11 professions, including nurses, pharmacists, lawyers, car salesmen, and business executives, are ranked each year.

## Local Television Is Most Popular News Source

A separate Gallup poll released this month surveyed Americans' use of 10 different daily news sources and 3 weekly news sources. This is the sixth time since 1995 that Gallup has conducted a poll on the subject and it shows some interesting trends.

According to the December poll, local television is still the most popular news source for Americans. Fifty-one percent of those polled said they watched local television news every day and another 19% said they watched local news several times a week. The combined total is consistent with earlier polls in 2002 (73%), 1999 (72%) and 1995 (73%).

On the other hand, nightly network news on ABC, CBS and NBC has experienced a large drop, according to the poll. According to the recent survey 36% of Americans watch one of these news shows daily and another 16% watch several times a week, a combined total of 52%. The combined totals in past surveys was: 2002 (56%); 1999 (70%); 1998 (75%); and 1995 (82%). Also notable, in 1995 3% said they never watched one of these programs, a figure which has risen to 22% in the latest poll.

Cable news, radio talk shows and the Internet all showed significant gains as news sources since 1995.

## Update: ALI International Jurisdiction and Judgments Project

By Thomas Leatherbury

The ALI International Jurisdiction and Judgments Project draft federal statute is in the process of being revised, and we anticipate that a new draft will be circulated shortly in advance of the ALI Annual Meeting in May 2005.

The proposed Reporters' Note on the First Amendment cases and the public policy exception, which was reprinted in the *MLRC MediaLawLetter* in January 2003 at 5, continues to raise concerns.

Since the 2004 Annual Meeting, our working group has drafted a proposed substitute Reporters' Note which we believe more accurately reflects the state of the law in a very neutral way.

Our proposed substitute Reporters' Note is reprinted below.

We have recently submitted it to the Project Reporters, Professors Linda Silberman and Andreas Lowenfeld at NYU, and are awaiting their feedback.

We continue to welcome feedback and participation in this effort from you and from any of the members of your firm who are members of the American Law Institute and will keep you posted as we approach a vote on the project at the 2005 Annual Meeting.

*Thomas Leatherbury is with Vinson & Elkins in Dallas, Texas and can be contacted at [tleatherbury@velaw.com](mailto:tleatherbury@velaw.com).*

### PROPOSED SUBSTITUTE REPORTERS' NOTE

(d) *The public-policy exception and the First Amendment.* Recent American cases have invoked the public-policy exception to deny enforcement of libel or other judgments obtained in foreign countries after determining that the libel or other law of those countries was contrary to the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" at the heart of the First Amendment. *Telnikoff v. Matusevich*, 347 Md. 561, 602, 702 A.2d 230, 251 (1997) (declining to enforce a British libel judgment involving core political speech), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998); *see also Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Anti-semitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (barring enforcement of a French injunction requiring Yahoo! to block French internet users from accessing on-line auctions of Nazi paraphernalia on ground of inconsistency with First Amendment), *rev'd on other grounds*, 379 F.3d 1120 (9th Cir. 2004) (holding District Court lacked jurisdiction to reach First Amendment issue prior to an attempt to enforce the French injunction in the U.S.); *Bachchan v. India Abroad Pubs., Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Cty. 1992) (declining to enforce a British libel judgment when British common law imposed strict liability for false statements about matters of public concern, including statements concerning bribes allegedly paid by arms manufacturers to politically well-connected Indians). In a fourth case, *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003), denying an anti-suit injunction against a foreign libel action, a federal district court stated in dictum that it would have no trouble refusing to enforce a judgment not conforming to First Amendment requirements, citing *Telnikoff*, *Bachchan*, and the district court decision in *Yahoo!*.

There has been an academic debate over two issues raised by these American courts' non-enforcement of foreign judgments implicating First Amendment rights. One issue is whether there are some foreign judgments that would not pass muster under the First Amendment that do not rise to the level of "repugnance to the public policy of the United States." Compare EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 1211 n.12 (3d ed. 2000); Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1305-06 (1998) (criticizing the implicit holding in *Bachchan* that even "minor" deviations from American free-speech standards violate public policy and render judgments unenforceable), with Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law*, 16 HASTINGS COMM. & ENT. L.J. 235 (1994) (pointing out that American libel law offers publishers significantly more protections than does British law). The second issue is whether a territorial connection or nexus with American interests other than the presence of

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assets in the United States should be necessary to trigger the public policy exception in American courts. *See generally* Craig A. Stern, *Foreign Judgments and The Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999 (1994) (arguing that *Bachchan* misconstrues the First Amendment by making it a universal declaration of human rights rather than a limitation designed specifically for American civil government).

However these issues are resolved in particular cases, the practical importance of the public policy exception has increased with the advent of the World-Wide Web. *See Don King v. Lennox Lewis*, 2004 WL 2330166, [2004] EWCA Civ 1329 (affirming a decision of the High Court, Queen's Bench Division, to allow American citizen Don King to proceed in a British court with a libel action brought against Lennox Lewis, Lewis's American promotion company, and Lewis's American lawyer for comments made to American boxing publications and then distributed over the internet); *Bangoura v. The Washington Post*, [2004] 235 D.L.R. (4th) 564 (finding that Ontario was an appropriate forum for a libel suit against the Post, based on a single internet download in Canada, even though neither the Post nor the plaintiff had any initial "connection to Ontario" because "the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided," and noting that "[the court] 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."); *Dow Jones & Co., Inc. v. Gutnick*, (2002) 194 A.L.R. 433 (exercising jurisdiction, in an Australian court, over Dow Jones in a case involving an article published on the *Barron's* magazine web site, while observing that "plaintiffs are unlikely to sue for defamation published outside the forum unless a judgment obtained in the action would be of real value to the plaintiff. The value that a judgment would have may be much affected by whether it can be enforced in a place where the defendant has assets.").

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