

# MLRC Media Law Resource Center MEDIALAWLETTER

Associate Member Edition

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## UK Appeals Court Affirms Libel Award to British MP

### *Tone of Articles, Lack of Comment from Plaintiff Defeat Qualified Privilege*

The Court of Appeals of England & Wales affirmed a £150,000 verdict in favor of George Galloway, a controversial left-wing member of the British Parliament, in his libel suit against the *Daily Telegraph* newspaper. *Galloway v. Telegraph Group Ltd.*, [2006] EWCA Civ 17 (Jan. 25, 2006) (Clarke, Chadwick, Laws, JJ.).

At issue in the case were articles published in April 2003 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.”

#### ***Bench Trial***

The case was tried without a jury in December 2004 before High Court Justice Mr. Eady. The newspaper did not attempt to prove that the allegations against Galloway true, but argued that publication was privileged under the *Reynolds* defense and privileged under a theory of neutral reportage.

In a lengthy opinion Mr. Justice Eady rejected both defenses, finding instead that the publications constituted an irresponsible “rush to judgment.” [2004] EWHC 2786 (High Court Dec. 2, 2004).

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.

And he went on to find that the tone adopted by the newspaper had not been neutral; not only did they adopt the allegations, they “embraced them with relish and fervour. They then went on to embellish them...”

#### ***Appeals Court Affirms***

Affirming the Court of Appeals, largely adopted Mr. Justice Eady’s reasoning. It did not dispute that the documents recovered in Baghdad were of great interest to the public, but it faulted the newspaper for adopting the allegations in the documents as true.

It appears to us that the newspaper was not merely reporting what the Baghdad documents said but that, as [Mr. Justice Eady] held, it both adopted and embellished them. It was alleging that Mr Galloway took money from the Iraqi oil-for-food programme for personal gain. That was not a mere repeat of the documents, which in our view did not, or did not clearly, make such an allegation. We agree with the judge that, although there were some references to allegations, the thrust of the coverage was that The Daily Telegraph was saying that Mr Galloway took money to line his own pockets.

[2006] EWCA Civ 17 at ¶ 59.

The Court also found that there “was no great urgency” to publish and the newspaper’s scoop would still have been available if it made further investigation or allowed Galloway to address all the allegations made in the articles. The articles did not, according to the court, contain “the gist of the claimant’s side of the story in response to the allegations of personal gain.”

The Court of Appeal also rejected the newspaper’s argument that recent European Court of Human Rights decisions required a more lenient standard for reporting allegations.

In *Selisto v. Finland*, No. 56767/00 (ECHR Nov. 16, 2004), for example, the European Court of Human Rights (“ECHR”), reversed a libel judgment against a Finish reporter who wrote a series of articles suggesting serious misconduct by a doctor.

The court found that the articles covered an important matter of public interest and were protected notwith-

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standing the fact that they selectively drew from public documents and did not report that the doctor was never charged with criminal wrongdoing.

“[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.”

The Court of Appeal noted that “Strasbourg cases are of course relevant” but concluded that specific cases like *Selisto* were fact specific and therefore of “limited assistance” in deciding cases. In fact, the Court concluded

that the recent ECHR cases cited by the *Telegraph* essentially incorporated “the same principles as identified by the House of Lords in Reynolds.” Thus there was no need to alter the balance struck by the trial court.

Finally, the court found not reason to lower the damage award of £150,000 given the seriousness of the allegations against Galloway.

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.

## Financial Times Settles Libel Suit With London Brokerage Firm

On the eve of trial, the Financial Times newspaper this month agreed to pay London-based brokerage firm Collins Stewart Tullett £2.5 million and issue an apology over an article published in 2004 that recounted a former company employee’s allegations of misconduct by the firm.

The brokerage firm was seeking £37 million in damages for losses allegedly caused by the article. In October 2004, Mr. Justice Tugendhat issued a decision rejected the company’s claim for £230.5 in special damages based on the decline in the value of stock after the Financial Times’s article was published. See *Collins Stewart Ltd v. The Financial Times Ltd*. [2004] EWHC 2337 (QB).

### ATTENTION MEMBER REPS:

**Please keep an eye out for your 2006 DCS Member Directory arriving by mail in the next few weeks.**

*The online Directory, accessible to all MLRC members, is updated frequently, so view the most current information at:*

**WWW.MEDIALAW.ORG/DIRECTORY**

*\*Directory includes DCS Member representatives and branch office contacts*

## UK Court Holds Biography Violates Right of Privacy

### *An End to Unauthorized Biographies?*

By David Hooper

A recent decision of Mr Justice Eady has extended the law of privacy to apply to unauthorized biographies. *McKennitt v. Ash* [2005] EWHC 3003 (Dec. 21, 2005). The law of privacy had hitherto been largely applied to intrusion by the tabloid press.

#### **Background**

The case was born of the bitterness that had grown up between the Canadian folk singer Loreena McKennitt and her former friend Niema Ash. Ash wrote a privately published book about the singer, somewhat ironically entitled *Travels with Loreena McKennitt, My Life as a Friend*.

Understandably Ash refused to let McKennitt see the book before it was published. McKennitt who was said to protect her privacy with "the iron safeguard of a chastity belt" sued for breach of privacy basing her claim on the European Court of Human Rights' decision in *Von Hannover v Germany*, 50 EHHR 1, a German case arising out of the taking of photos and general harassment of Princess Caroline by the tabloid press.

In *McKennitt*, Mr Justice Eady had no doubt that the *Von Hannover* principles did apply to unauthorized biographies, that the passages which crossed the threshold of privacy should be restrained by injunction and that McKennitt should recover £5,000 damages.

Only 350 copies had been published by a company set up for the purpose but tellingly 140 copies had been circulated for review. The judge recognized the tension between the freedom of speech provisions of Article 10 and the right to respect for one's private

and family life, one's home and correspondence under Article 8 of the European Convention of Human Rights.

Neither right automatically prevailed over the other. The conflict was largely to be resolved by the principle of proportionality. The question was whether Ash could be stopped from publishing materials about McKennitt's personal relationships, her feelings after the death of her fiancé, her health and diet, her emotional vulnerability and a property dispute with Ash which had been settled on confidential terms.

The threshold was whether this was private information and whether the complainant could be said to have a reasonable expectation of privacy if the answer to both questions was yes, the issue then arose as to whether there was any limiting principle or legal justification for publishing such private information.

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**Mr Justice Eady had no doubt that the passages which crossed the threshold of privacy should be restrained by injunction.**

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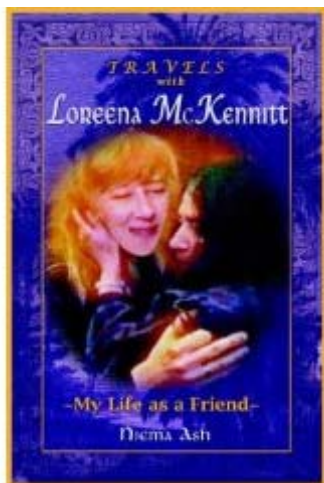
#### **What is Private?**

The way Mr Justice Eady suggests that this quandary should be resolved is by inquiring and adopting the *Von Hannover* test: whether the intrusion contributed to a debate of general interest in a democratic society.

This threshold might be met in the case of public officials or politicians exercising their public functions but it seems unlikely to be met when reporting details of the private life of an individual who exercises no official functions. Indeed in the *McKennitt* case one of the defenses raised by the defendant was one of hypocrisy. Ash claimed McKennitt had not lived up to the standards McKennitt had listed on her website. The argument was given short shrift by the judge.

While there is a defense of public interest involving the exposure of wrongdoing or iniquity, it is clear that the threshold for this defense is a high one and the tendency of the court will be to protect private information where there is a reasonable expectation of privacy.

Trivial matters or shortcomings would not be sufficient to justify exposing everyday foibles or peccadilloes.



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## UK Court Holds Biography Violates Right of Privacy

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loes on the part of celebrities. There was stated to be a wide difference in the role of celebrity between what it was interesting to the public to know as opposed to what can be shown to be a public interest to be made known.

Where the private information relates to the performance by a public official of his duties public interest will be that much easier to establish. In the case of people with no public position it will be necessary — even in the case of celebrities — to produce some evidence that the revelation of such private information adds to the debate of matters of public interest — a high threshold to surmount.

Mr Justice Eady doubted the correctness of the Court of Appeal decision in *Woodward v. Hutchins* [1977] 1WLR 760. There an employee had been allowed to publish an account of the singer, Tom Jones's private antics on an airplane on the basis that it was in the public interest to have a counter-balance to the output of Tom Jones's public relations people.

Henceforward a lot will depend on the taste of and exercise of discretion by the trial judge. In the *McKennitt* case the judge felt that her expectation of privacy was infringed by the publication of private and intimate conversations with the author and of details of McKennitt's relationship with her dead fiancé, her feelings about her bereavement, details about her home and an incident in a hotel room and a property dispute between McKennitt and the author.

The judge's decision that any part of the publication which crosses the line of reasonable expectation of privacy can be enjoined is alarming for publishers. It depends largely on the judge's subjective view.

Whereas in libel cases the offending words are published with the result that lawyers can advise their clients what phrases to avoid, in privacy cases, such as *McKennitt*, the Judge for understandable reasons does not publish the words he finds to be covered by a reasonable expectation of privacy. Instead one reads simply of the offending topic.

It will however make it that much more difficult for publishers' lawyers to advise what is likely to fall on the wrong side of the line. The pressure on publishers to show the potentially offending passages to complainants before publication will be considerable and is another worrying aspect of the decision in terms of freedom of speech.

The fact that the courts will not enjoin the disclosure of private information that is anodyne or trivial or in the public domain is scant consolation. Public domain is likely to be interpreted in a more restricted sense in the UK than in the USA. A limited publication to a small group may not, for example, justify publication to the world at large.

It was further made clear in *McKennitt* that a reasonable expectation of privacy could extend to false information so that a claimant no longer has the potential embarrassment of having to say whether a particular allegation is true or false and, if false, of being able only to sue for libel.

Article 8 (privacy) and Article 10 (freedom of speech) rights are meant to be balanced but in *McKennitt* there is little doubt which prevailed. The defendants who were not represented by lawyers at the trial have now appointed a lawyer who is seeking permission to appeal.

There is an interesting argument to be had whether a judge exercising his subjective view should be disposed to enjoin what he feels crosses the line or whether in the interest of freedom of speech the underlying presumption should be in favor of publication in the absence of a clear breach of confidence.

*David Hooper is a partner with Reynolds Porter Chamberlain in London. The claimant was represented by barristers Desmond Browne QC and David Sherborne of 5RB; and solicitors firm Carter-Ruck. Defendant represented herself in this matter and is represented by David Price Solicitors and Advocates on appeal.*

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***The judge's decision that any part of the publication which crosses the line of reasonable expectation of privacy can be enjoined is alarming for publishers.***

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**From Mr. Justice Eady's decision in *McKennitt v. Ash* [2005] EWHC 3003 (Dec. 21, 2005).**

133. [Regarding] the coverage of Ms McKennitt's relationship with her fiancé and his death in 1998. It seems to me that there is a clear distinction to be drawn between general background, much of which would be anodyne or already in the public domain, and the details of her emotional reaction to bereavement. That is remarkably intrusive and insensitive....

135 [Regarding] Ms McKennitt's Irish cottage. It is not her only house, but it is nevertheless a home. That is one of the matters expressly addressed in Article 8(1) of the Convention as entitled to "respect." Correspondingly, there would be an obligation of confidence. Even relatively trivial details would fall within this protection simply because of the traditional sanctity accorded to hearth and home. To describe a person's home, the décor, the layout, the state of cleanliness, or how the occupiers behave inside it, is generally regarded as unacceptable. To convey such details, without permission, to the general public is almost as objectionable as spying into the home with a long distance lens and publishing the resulting photographs....

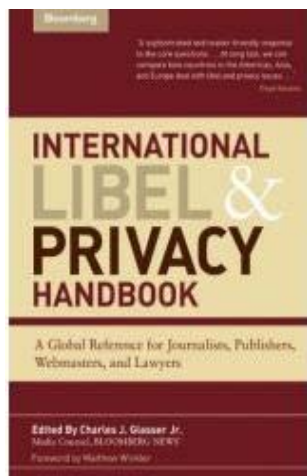
137. The fact that the work on the cottage was part of Ms Ash's own life does not mean that she is excused from "respecting" Ms McKennitt's entitlement to privacy. Likewise, it seems to me that the right to "respect" for one's privacy at home would cover not merely the physical descriptions of the building or contents but also conversations, communications or disagreements taking place in the home environment. People feel, and are entitled to feel, free in their homes to speak unguardedly and with less inhibition than in public places. Accordingly, it will be rare indeed that the public interest will justify encroaching upon such goings on. Naturally if criminal acts are committed, such as child abuse or the cultivation of illegal drugs, there would be a public interest to override the normal protection, but nothing of the sort is alleged here.

138. For obvious reasons I am not going to regurgitate the minute details to be found in the book about what was under the lino, the sanitary arrangements, or how many bunk beds were put up when visitors came to stay; suffice to say, it is intrusive and distressing for Ms McKennitt's household minutiae to be exposed to curious eyes and it is utterly devoid of any legitimate public interest. Applying, therefore, the "intense focus" to the parties' respective rights, I have no hesitation in concluding that the complaint is well founded and that the detail rehearsed on pages 55, 56, 59, 231, 233, 234-239, 243-244, 246-251 should not have been published.

139. Item 10 deals with the shopping trip in Italy. There is reference on page 226 to buying furniture and other household items for Ms McKennitt but the description is in very general terms. It does not seem to me to be intrusive. It is trivial and of no consequence, and unlike relatively trivial but intrusive descriptions of a person's home, there is no need for the law to step in and offer protection. Nor is it likely to cause significant distress or other harm to say, of a celebrity or anyone else, that a friend accompanied her on a shopping trip and managed to bargain with vendors to save money. It is anodyne, and not such as to attract any obligation of confidence. I do not even need to ask whether there is any public interest — although, of course, there is not....

143. [Regarding] the aftermath of Ms McKennitt's bereavement and ... dealing with, again, Ms McKennitt's fragile state at that time and details of a visit to Tuscany. This is intimate information gained from communications made at that time by Ms McKennitt because she trusted Ms Ash not to take advantage of her. This section also includes the rather intimate conversation to which I have referred in connection with item 4 above. As has been pointed out by Mr Browne, the section as a whole would be capable of being rewritten more shortly, so as to refer merely to the fact that there had been a visit to Tuscany and what, in general terms, they did there. I would uphold the complaint, however, about the intimate conversations and Ms McKennitt's fragility.

144. [Regarding] a contract Ms McKennitt entered into with Canadian Warner for her "next three albums." There is a general discussion on page 26 of the contractual terms and of concessions made. Even though it is general, it seems to me that Ms McKennitt is entitled to a reasonable expectation of privacy as to her contractual terms. They are certainly not for Ms Ash to reveal.



## **International Libel & Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers (Bloomberg 2006) Edited by Charles J. Glasser, Jr.**

Published this month, the *International Libel & Privacy Handbook* outlines libel and privacy law in 18 jurisdictions: Australia, Belgium, Brazil, Canada, China, England, France, Germany, India, Italy, Japan, Korea, Netherlands, Russia, Singapore, Spain, Switzerland and the United States.

Country outlines answer key questions about media libel and privacy law in each jurisdiction, including: the elements of libel, fault standards, protection for reporting on official documents, risks in reporting about ongoing investigations and trials, recognition and contours of privacy rights, taping and protection of confidential sources.

The book also contains articles on issues of interest to global publishers, including “International Media Law and the Internet,” “Special Issues for Book Publishers,” “Enforcing Foreign Judgments in the United States and Europe: When Publishers Should Defend,” “Fair Use: It Stops at the Border” and The Emergence of Privacy as a Claim in the UK: Theory and Guidelines.”

### **British Peer Withdraws Appeal in Claim Against U.S. Intelligence Source Suit Was Barred by Statute of Limitations**

Michael Ashcroft, a British businessman and member of the House of Lords, has withdrawn his appeal of a decision dismissing his lawsuit against former Atlanta Drug Enforcement Administration intelligence analyst Jonathan Randel. *Ashcroft v. Randel*, No. 05-15998-AA (11th Cir., Feb. 1, 2006). The district court had dismissed Ashcroft’s lawsuit on statute of limitations grounds. *Ashcroft v. Randel*, No. 1:03-cv-3645 (N.D. Ga., Sept. 30, 2005) (Story, J.). See *MLRC MediaLawLetter* Oct. 2005 at 49.

Randel had leaked DEA documents mentioning Ashcroft to *The Times* of London, leading to a series of legal actions, including a libel writ in London, a criminal prosecution in Atlanta and this civil lawsuit, alleging the leak violated the Computer Fraud and Abuse Act, as well as Ashcroft’s Fourth and Fifth Amendment rights. See *MLRC MediaLawLetter* Jan. 2003 at 3; Dec. 2003 at 34; Oct. 2005 at 49.

Ashcroft waited until November 2003 to file suit against Randel and replied to Randel’s motion to dismiss on limitations grounds by arguing that the limitations clock did not begin running until June 2002, when Randel pleaded guilty to conveying records in violation of 18 U.S.C. § 641.

The district court rejected that argument, noting that “a person with a reasonably prudent regard for his rights ... would have known that [Randel] was the cause of his injury” long before the guilty plea. In so holding, the district court noted that Ashcroft knew that the allegedly libelous articles published by the *Times* had been based on leaked documents, that Randel was a suspect in the DEA’s investigation into that leak and that Randel had in fact been indicted, in July 2001, for leaking the precise kind of documents involved in the *Times* story at the same time as the publication of the *Times* articles.

The district court determined that Ashcroft’s claims accrued, for limitations purposes, no later than the July 2001 indictment and that the lawsuit, filed over two years later, was untimely.

Lord Ashcroft was represented by Kellogg, Huber, Hansen Todd & Evans, P.L.L.C., Washington, D.C., and Alston & Bird LLP, Atlanta, Georgia. Jonathan Randel was represented by former Georgia Governor Roy E. Barnes and the Barnes Law Group, Marietta, Georgia. Peter Canfield and Dow, Lohnes & Albertson, Atlanta, Georgia, assisted *The Times*.



## European Court of Human Rights to Hear Russian Libel Appeal

The European Court of Human Rights this fall agreed to hear an appeal in an important Russian libel case that raises significant Article 10 issues, including whether government officials can sue over criticism of government actions. *Romanenko v. Russia*, Application No. 11751/03.

### **Background**

The applicants, Tatyana Romanenko, Irina Grebneva and Vladimir Trubitsyn, are the founders of an independent weekly newspaper in Primorsky in southeastern Russia. In January 2002, Romanenko wrote an article about an on-going regional conference about unlawful logging. The article quoted from a conference letter stating that:

“irregularities have been clearly on the rise since the town police department ... and the courts’ administration department ... became forest operators.”

The newspaper did not name any specific courts or public officials. And the letter itself was signed by seventeen people, including several local government officials, and it was sent to regional government officials.

Two separate but closely related civil defamation suits were commenced against the journalists for quoting from the letter. The first case was brought by a public authority, namely the local courts’ administration department. The second case was brought by the regional director of the courts’ administration department in his individual capacity.

In both cases Russian national courts granted standing to the claimants, found liability, and awarded monetary damages. The Russian courts found, moreover, that the journalists had failed to prove truth at trial and had failed, prior to publication, to verify the truth of the statement in the official document before they quoted from it in their newspaper.

### **Amicus Effort**

The International Senior Lawyers Project coordinated an amicus brief supporting the journalists’ petition for admissibility to the ECHR. The amicus brief urged the

ECHR to hear the case to correct three fundamental violations of Article 10 by the Russian courts.

First, citing to *New York Times v. Sullivan* and ECHR rulings, amici argued that government entities cannot sue the media for defamation.

Second, relying on the same authority, amici argued that Article 10 does not permit public officials to sue for defamation over statements that do not name, identify or refer to them, i.e., the familiar “of and concerning” requirement.

Third, amici argued that Article 10 must protect journalists when they fairly and accurately report the contents of non-confidential official government documents, i.e., a fair report privilege.

In its decision granting the journalists’ petition, the ECHR cited the amici brief and each of these three arguments as the grounds to hear the appeal. The court discussed the amici’s argument that “many established jurisdictions barred public authorities from suing in defamation because of the public interest in uninhibited public criticism”; that “Article 10 would be hollowed out if public officials could substitute themselves for their respective bodies in taking legal action.” And finally that “journalists have a right to publish accurately statements from a non-confidential document without being liable for the content of such statements.”

The case will be an important opportunity for the ECHR to address each of these doctrinal issues in the context of the increasingly harsh media climate in Russia.

Professor Peter Krug, David Bodney, Steptoe & Johnson; David Heller, MLRC; Kurt Wimmer, Covington & Burling; and Richard Winfield, International Senior Lawyers Project, wrote the amici brief on behalf of the Open Society Justice Initiative and the Moscow Media Law and Policy Institute.

September 27-29, 2006

**NAA/NAB/MLRC Media Law Conference**  
Alexandria, Virginia

## France to Consider New Protections for Journalists' Sources

By Benjamin Sarfati

French Justice Minister Pascal Clement announced on January 11, 2006 that the protection of journalists' sources is to be fully enshrined in French law. No bill has yet been presented to the French Parliament, but the Minister of Justice has nominated a working group to draft a proposed amendment to France's Press Law.

This article examines the existing French law and some of the issues the new bill may address.

The European Court of Human Rights has recognized that the protection of journalists' sources is one of the "basic conditions for press freedom" under Article 10 of the European Convention on Human Rights. *Goodwin v United Kingdom*, (1996) 22 EHRR. 123 (court order that journalist reveal the identity of his source violated Article 10).

More recently in *Roemen and Schmit v. Luxembourg*, [2003] ECHR 51772/99, the ECHR reiterated this principle in the context of newsroom searches, finding that the search of journalist's home and office to uncover a source is an even "more drastic measure than an order to divulge the source's identity."

France's press law, including criminal offenses for libel and breach of confidentiality, are provided by the 1881 law of Press Freedom ("Press Law"). However, no specific provision protecting journalists' sources exists in France's Press Law.

The only provision related to such protection is Article 109 of the French Code of Criminal Procedure. Article 109 provides that: "Any journalist called and heard as a witness to testify upon information gathered during the exercise of his activity, is free not to disclose the origin of such information."

This rule only applies to testimony in criminal cases (many libel cases are brought as criminal proceedings) – and it does not cover documents or other information acquired during the course of newsgathering which can be searched in the course of a criminal investigation.

Article 56-2 of the French Code of Criminal Procedure provides that a search of the premises of a press or audiovisual communications business may only be made by a judge or prosecutor who ensures that such investigations do not violate the freedom of exercise of the profession of journalist and do not unjustifiably obstruct or delay the dissemination of information.

### *Newsroom Searches*

In several recent French criminal cases, journalists whose premises were searched by the police raised as a defense that such a search was prejudicial to the right to protect their sources. Indeed, several journalists have been sued for violation of confidentiality of information arising from a search. In this respect, their premises have been searched in order to discover how the journalist acquired documents from a criminal investigation file.

French courts have allowed journalists to raise as a defense to searches the confidentiality of their sources (TGI Paris, 17th Chamber, 7 January 1991). But more recently the courts' position has changed, particularly in criminal investigations over leaks of information to the press.

In December 5, 2000 the French Criminal Court decided that searches at journalists' premises were valid, rejecting the argument that this violated Article 10. In the recent COFIDIS case – an investigation of doping by cyclists – French police in January 2005 searched the offices and premises of the weekly news magazine *Le Point* and the sports daily *L'Equipe* to discover who leaked information about the investigation to the press.

This case was widely reported in the press and led French press organizations to raise the issue with the Government. Their requests for better protection helped inspire the French Justice Minister's announcement, where he said that any breach of the right to protect sources should only be permitted in "exceptional" cases and "when the nature of the offense and particular gravity justify it."

Belgium's recently enacted law to protect sources may have also played a part in the French announcement. The new Belgian law passed in April 2005 provides for an almost absolute protection of sources, except in criminal cases to prevent serious physical injury.

At the time of writing this update, neither the Minister nor the government has provided any further information, let alone a time, when such bill will be deposited or an indication of the precise contents of such a bill. But the Minister's announcement gives hope that the protection of journalists' sources will be extended from a testimonial privilege to a broader right to protect information identifying confidential sources.

*Benjamin Sarfati is a partner with Taylor Wessing in Paris.*

## Protecting Those That Inform Us

### *Journalists' Shield Laws in Australia*

By Peter Bartlett and Chris Sibree

At the same time that America was consumed by the imbroglio of Judith Miller refusing to reveal her sources and going to jail, CIA agents being ratted out, Scooter Libby's indictment and a revived push for a federal shield law to protect journalists' sources from disclosure, Australia was focusing on its own governmental scandal.

#### **Background**

In February 2004, one of Australia's most widely read tabloid newspapers, the *Herald Sun*, published a contentious article outlining the Federal Government's plan to reject increases in war veterans' benefits. Written by two senior journalists with the paper, Michael Harvey and Gerard McManus, the feature was allegedly based on secret Government documents that the journalists had seen.

Federal police later charged a senior Federal bureaucrat with unauthorized disclosure of information. On two occasions at court hearings concerning the charges, Harvey and McManus were asked to identify their source. Both times they refused. The presiding Judge later directed that they be charged with Contempt of Court. The pair currently await trial.

The plight of Harvey and McManus re-focused calls for the enactment of a shield law in Australia. While over 30 US States and many countries worldwide have enacted legislation or developed case law which, to a certain extent, shield journalists and their confidential sources in court proceedings, there are scant protections for journalists' sources in Australia.

#### **Australian Law**

Australia has long had a disparate patchwork of evidence laws across the various states and territories, causing anomalies between the jurisdictions. The clos-

est Australia has to a shield law operates only in New South Wales (Sydney). The *Evidence Act* 1995 (NSW) privileges from disclosure "protected confidences" and "protected identity information," shielding the identity and information disclosed by a third party to a confidant in their professional capacity (including journalists) where the circumstances manifest an obligation to not disclose the information or identity.

The obligation can arise under law or from the nature of the relationship between the two, and the privilege does not apply where waived by the person making the communication or the communication was made in furtherance of a commission or fraud. The discretion is not absolute, the court being required to balance certain specified conditions before directing that the privilege exists.

However, after being asked by the Federal Attorney General, the Australian, New South Wales and Victorian Law Reform Commissions recently released their report into a renewed push for national uniform evidence laws.

In a clear recognition of the fact that it may be in the interests of justice to protect the confidentiality of professional confidential relationships, the Commissions recommended that the New South Wales provisions in relation to protection of journalists' sources be incorporated into the uniform evidence statutes Australia-wide.

While the recommendation supports limiting the protections to "circumnavigate illegitimate attempts to claim the privilege," it represents a substantial improvement in the current status quo, which is at best perforated and at worst non-existent. The recommendation will have significant force in the final framing and adoption of any uniform evidence legislation.

Importantly, Victoria (Melbourne) leads the charge and has already said that it will implement the Commissions recommendation, meaning the contempt charges against Harvey and McManus may be dropped.

*(Continued on page 12)*

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***The recommendation represents a substantial improvement in the current status quo, which is at best perforated and at worst non-existent.***

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### Protecting Those That Inform Us

*(Continued from page 11)*

One area of the proposal remains of concern however. Under the proposed laws, there is no protection of journalists where they are involved in the “furtherance” of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

Arguably, the term “furtherance” would not protect the Harvey and McManus situation, as all leaks by federal public servants are punishable under the Crimes Act with two years in prison.

While the Federal Attorney General has said that these two journalists would be protected under any amendments and “does not accept any inconsistency” between that sentiment and the proposal, there does appear to be some ambiguity.

### Conclusion

Shield laws contribute dramatically to the quality of reporting, the ability of the media to investigate and expose public and private scandals and hidden issues and to the upholding of the basic tenets of the implied constitutional freedom of political discussion and communication that the Australian High Court has established.

Although there is some way to go, the recent struggles to provide protections for journalists and their sources looks closer than ever to becoming a national reality. This is undoubtedly a positive move, particularly in light of the recent events surrounding journalists in Australia and elsewhere.

*Peter Barlett and Chris Sibree are with Minter Ellison in Melbourne, Australia.*

## MLRC Calendar

September 27-29, 2006

NAA/NAB/MLRC Media Law Conference  
Alexandria, Virginia

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November 8, 2006

MLRC Annual Dinner  
New York, New York

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November 10, 2006

MLRC Defense Counsel Section Annual Breakfast  
New York, New York

## English High Court Rules Reporter Can Protect Confidential Sources

### *Journalist Need Not Disclose Source of Medical Records*

By David Hooper

One has to look quite hard for areas where UK press law is more liberal than the US but the protection of journalists' sources may be one. On this side of the pond one is bemused by the succession of journalists in the USA threatened with jail, often, but of course not always, in cases where journalists may simply have done their work too well and to someone's obvious inconvenience.

Over here six years of litigation starting under the name of *Ashworth Hospital v. MGN Ltd* [2002] 1WLR 2002 and ending with *Mersey Care NHS Trust v. Ackroyd* [2006] EHC 107 (Feb. 7, 2006), eventually produced a decision this month that freelance journalist Robin Ackroyd need not disclose his source at Ashworth high security hospital who had disclosed medical records about the notorious child-killer Ian Brady which formed the basis of an article in the *Mirror* in December 1999.

#### **Background**

In *Ashworth Hospital v. MGN*, the *Mirror* had been ordered to disclose the identity of Robin Ackroyd who had written the article under a pseudonym. The hospital then sought an order that Ackroyd disclose how he came into possession of Brady's medical records and identifying his source against whom the hospital wanted to take disciplinary action.

As Brady had been on hunger strike and was not above manipulating the press for his own ends and as there were allegations of mistreatment at the controversially run Ashworth Hospital, the Court of Appeal ordered a full trial to examine the public interest issues. This trial took place last month before Mr Justice Tugendhat.

#### **Protection of Sources**

Journalists' sources are protected by Section 10 Contempt of Court Act 1981 which was reviewed by the

European Court of Human Rights in *Goodwin -v- United Kingdom* [1966] 22 EHRR 123.

Journalists' sources are to be protected unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime. Here the hospital said that they needed to identify the disloyal mole in the interests of justice, so they could take action against him and remove the suspicion of guilt from their loyal employees.

Too readily in the past the courts have swallowed this argument which rendered the protection of Section 10 distinctly weaker if not actually illusory. Indeed the first judge to review the Ackroyd case, Mr Justice Roulger, had in April 2000 ordered disclosure of Ackroyd's source.

Mr Justice Tugendhat after hearing all the evidence and noting particularly that there was no evidence of these files having been bought by the paper, while there was evidence of a responsible attitude by the journalist towards the sensitive treatment of the medical data and of the public interest issues, took a different view.

The court must, he noted, have regard to the freedom of expression provisions embodied in Section 12(4) Human Rights Act 2000 and to the potentially chilling effect on press freedom of journalists having to disclose their sources. An order for disclosure was not simply a matter of judicial discretion, it was a hard-edged judgment as to whether the conditions in Section 10 Contempt of Court Act 1981 existed.

The burden of proving the wrongdoing in respect of which it wished to take action was on the hospital and, on the facts, Mr Justice Tugendhat felt that the hospital had not discharged the burden. The hospital had to prove that disclosure was necessary for the fulfilment of one of the legitimate aims but the court had to be satisfied that disclosure was proportionate to achieving the aim in question.

At this point the concept of responsible journalism, so beloved by English judges, may cut in. How has the information been used, in what circumstances was it ob-

(Continued on page 14)

**English High Court Rules Reporter  
Can Protect Confidential Sources**

*(Continued from page 13)*

tained and is further wrongful use likely to be made of the information? While the court starts from the basis that prima facie it is contrary to the public interest that journalists' sources should be disclosed, ultimately the court's decision as to whether or not it is satisfied that there is a pressing social need for the source to be identified may well be influenced by the view it takes of the journalist's behavior and of how highly the journalist would score under the responsible journalism tests propounded by Lord Nicholls in the Reynolds case.

As a footnote it is worth observing that Mr Justice Tugendhat's decision in favor of the journalist was not

altered by the fact that he decided that the journalist had made a number of errors of fact and had to some extent been influenced by a misguided attempt to act in the public interest.

*David Hooper is a partner with Reynolds Porter Chamberlain in London. Barristers Gavin Millar QC and Anthony Hudson of Doughty Street Chambers and solicitors firm Thompsons represented the reporter in this trial. The hospital was represented by barristers Vincent Nelson QC and Jonathan Bellamy and solicitors firm Capsticks.*

**Mersey Care NHS Trust v. Ackroyd  
[2006] EHC 107 (Feb. 7, 2006) (Tugendhat, J.)**

“As Lord Keynes said: ‘When the facts change, I change my mind.’ Important facts that have changed are mentioned above. They include that the hospital no longer contends that the source acted for money, with the result that I have had to find afresh what the purpose of the source was, and to re-assess the risk of further disclosures now, in the light of that fact, and in the light of the absence of any similar disclosures since 1999. The extent of the disclosure by the source was more limited than was previously understood to be the case. I have not found that the source was one of a number of people limited to 200, but that it is impossible to say how large the group is. I have not found that the source was probably an employee, although he or she may have been, and even if it was an employee, the numbers who have left the hospital since 1999 represent about a third of those who worked there in 1999. So the likelihood of the hospital being able to obtain the redress it seeks against the source is correspondingly diminished.... Finally, unlike the courts in the MGN action, I have heard the evidence of Mr Ackroyd and have concluded that he was a responsible journalist whose purpose was to act in the public interest.”

## Setback for Press in “Rome II” Choice of Law Negotiations

### *EU Commission Decides to Withdraw Press-Friendly Rule*

The European Union’s ongoing legislative process to enact choice-of-law rules in cross-border tort claims took another turn this month when the EU Commission announced it would recommend withdrawing defamation and privacy claims from the scope of the treaty.

At one time that would have been good news. In 2003, the initial draft of Rome II proposed “the country or countries in which the harmful event occurred” as the primary choice of law rule in defamation and privacy cases.

Numerous press organizations objected to this proposal. MLRC, for example, submitted comments arguing that the proposal would codify an impractical and unworkable approach by subjecting publishers to a maze of potential liability under the different defamation and privacy laws of each EU member state.

MLRC recommended adopting a country of origin principle, coupled with single point of publication rule to ensure fairness and predictability. Alternatively, MLRC recommended removing defamation and privacy from the scope of Rome II rather than lock in a very unfavorable, but potentially influential, framework.

This past July, the European Parliament unexpectedly modified the working draft of Rome II. Several European Parliament members inserted new language so that choice of law in defamation and privacy cases would turn on the location of the *target audience* and, if that is not readily ascertainable, then, the place in which *editorial control* is exercised. See *MLRC MediaLawLetter* July 2005 at 49.

Publishers welcomed the change since it puts them in a far better position to anticipate the substantive law that would apply to potential claims.

But the change faced resistance in the Council of the European Union – which shares authority with the European Parliament on the proposal. Council Vice President Franco Frattini, for example, found that the new proposal did not sufficiently address the rights of the victims of defamation and privacy torts.

The Council found it very difficult to find a consensus on an acceptable solution to balance the interests of the press and the concern for victims. Thus the entire article addressing the matter was withdrawn “for the time being.”

Rome II now goes back to the European Parliament for a second reading. Members of Parliament can again introduce language to address the issue. And MEP Diana Wallis, the rapporteur for the treaty, has expressed interest in reinserting language addressing defamation and privacy claims.

In the event of continued disagreement between the European Parliament and the Council the issue may be submitted to a conciliation procedure. Conciliation is the third and final phase of the legislative procedures of the European Union. It applies if the Council does not approve all the amendments of the European Parliament adopted at a second reading of a proposal. The Conciliation Committee is made up of twenty-five Members of the Council or their representatives and an equal number of representatives from Parliament who make up the EP delegation.

## **2006 MLRC BULLETINS**

*JUST PUBLISHED*

MLRC BULLETIN 2006 ISSUE NO. 1:

### **MLRC 2006 REPORT ON TRIALS & DAMAGES**

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## A Right to “Short Reports” on Events of Public Interest

### *New EU Draft Directive*

By Dianne Vander Cruyssen  
and Marie-Claire McCartney

The much-debated and long-awaited proposal from the European Commission for an Audiovisual Media Services Directive (which is intended to replace the Television Without Frontiers Directive 89/552/EEC) was published on December 13, 2005.

The aim of the draft Directive is to establish a legal framework for the broadcast of all audiovisual content on all media platforms in Europe (i.e. including internet and mobile platforms which did not fall under the scope of the 89 Directive).

While old style TV broadcasters are pleased with the loosening of the old regulatory regime, the draft Directive is not proving to be very popular with the new media industry. However, amidst all the fall-out, you may have missed another significant change. The draft Directive also includes a proposal for a new “right”, which has been variously described as “an explicit right to access”, “a right to information”, “news access” or “a right of short reporting.”

Contained in Article 3(b) of the draft is an explicit right of access to “events of high interest to the public.” The draft Directive makes clear that those broadcasters exercising exclusive rights concerning an event of public interest must grant to other broadcasters the right to use short extracts for the purposes of general news programming on fair, reasonable and non-discriminatory terms (taking due account of the exclusive rights). Draft Recital 27 states that “as a general rule” short extracts should be no longer than 90 seconds.

The official aim of this short reporting right (set out in draft Recital 27) is to safeguard the fundamental freedom to receive information and to encourage the trans-frontier circulation of reporting on Member States’ media events.

The Directive makes a critical (and much criticised) distinction between “linear” and “non-linear” audiovisual media services. The general rule of thumb is that a service

will be classified as one or the other depending upon who decides the timing of transmission, and to a lesser extent whether schedules for such transmission actually exist.

In general terms, a “linear” service will be a service which is scheduled by a broadcaster and is pushed out to end-users by a broadcaster. A “non-linear” service is defined in the proposed Directive as being “any audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media provider.” The short reporting right applies to linear services, meaning that its main use will be in relation to live media events (which are, by necessity, scheduled).

Exclusive-rights holders may find it unpleasant to hand over one and half minutes of prime coverage for which they have paid a premium, and parties are likely to have a very different idea of exactly what constitutes “fair, reasonable and non-discriminatory terms taking due account of exclusive rights”.

Exclusive rights holders will not want the premium revenue streams promised by developing digital technologies to be drained by the proposed right to short reporting, yet such a right will plainly be of interest and benefit to news broadcasters and agencies throughout Europe.

The proposed Directive will still be subject to debate and possible amendment, and with such diverse opinions in the industry, it is clear that changes to the text may yet be expected. Internet Service Providers will be lobbying hard, having so far expressed deep concerns that the proposed Directive will merely introduce regulation of the internet by the backdoor. News organisations will want to follow the developments as they unfold towards implementation, as the exclusive rights holders will seek to protect their exclusivity as strenuously as possible against the news organisations seeking to obtain access to the footage, albeit in limited form.

*Dianne Vander Cruyssen and Marie-Claire McCartney are lawyers with Reynolds Porter Chamberlain in London.*

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***The official aim of this short reporting right is to safeguard the fundamental freedom to receive information and to encourage the trans-frontier circulation of reporting on Member States’ media events.***

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## MLRC Creates Model Shield Law

With an increasing number of states seeking to enact state shield law legislation, MLRC has drafted a model shield law that provides absolute protection for confidential sources and information received in confidence.

The model shield law is the product of many conference calls and hours of discussion among our working group – Stephanie Abrutyn, Robin Bierstedt, Liz Ritvo, Nathan Siegel, Chuck Tobin and Kurt Wimmer. We cannot thank them enough for the amount of time and effort they expended in creating the model.

The model has also been vetted by a coalition of over 60 media representatives and media lawyers who have been meeting regularly (via conference call) on the federal shield law. We thank them, as well, for their time and feedback on the model.

### MODEL SHIELD LAW

#### SECTION 1. COMPELLED DISCLOSURE PROHIBITED.

Except as provided in Section 2, no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce or otherwise disclose:

- (a) the confidential source of any news or information or any information that would tend to identify the confidential source, or any news or information obtained or prepared in confidence by the news media in its capacity in gathering, receiving or processing news or information for potential communication to the public, including, but not limited to, any notes, drafts, outtakes, photographs, video or sound tapes, film or other data of whatever sort in any medium now known or hereafter devised; or
- (b) any source, news or information not otherwise described in Section 1(a) obtained or prepared by the news media in its capacity in gathering, receiving or processing news or information for potential communication to the public, including, but not limited to, any notes, drafts, outtakes, photographs, video or sound tapes, film or other data of whatever sort in any medium now known or hereafter devised.

#### SECTION 2. CONDITIONS FOR COMPELLED DISCLOSURE.

A court may compel disclosure of the identity of a source, news or information described in Section 1(b) if the court finds, after notice to and an opportunity to be heard by the news media, that the party seeking the identity of such source or such news or information established by clear and convincing evidence –

- (a) in a criminal investigation or prosecution, based on information obtained from other than the news media, that there are reasonable grounds to believe that a crime has occurred; or
- (b) in a civil action or proceeding, based on information obtained from other than the news media, that there is a prima facie cause of action; and
- (c) in all matters, whether criminal or civil, that:
  - (1) the identity of the source or the news or information is highly material and relevant;
  - (2) the identity of the source or the news or information is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto;
  - (3) the identity of the source or the news or information is not obtainable from any alternative source; and
  - (4) there is an overriding public interest in the disclosure.

*(Continued on page 18)*

*(Continued from page 17)*

### **SECTION 3. COMPELLED DISCLOSURE FROM THIRD PARTIES.**

The protection from compelled disclosure contained in Section 1 shall also apply to any subpoena issued to, or other compulsory process against, a third party that seeks records, information or other communications relating to business transactions between such third party and the news media for the purpose of discovering the identity of a source or obtaining news or information described in Section 1. Whenever a subpoena is issued to, or other compulsory process is initiated against, a third party that seeks records, information or other communications on business transactions with the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard. In the event that the subpoena to, or other compulsory process against, the third party is in connection with a criminal investigation in which the news media is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena or compulsory process shall be given to the affected news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.

### **SECTION 4. NON-WAIVER.**

Publication or dissemination by the news media of news or information described in Section 1, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure that is contained in Section 1.

### **SECTION 5. INADMISSIBILITY.**

The source of any news or information or any news or information obtained in violation of the provisions hereunder shall be inadmissible in any action, proceeding, or hearing before any judicial, legislative, administrative or other body.

### **SECTION 6. DEFINITIONS.<sup>1</sup>**

The term “news media” means:

- (a) any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company that disseminates news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, electronic or other means now known or hereafter devised;
- (b) any person or entity who is or has been engaged in gathering, preparing or disseminating news or information to the public for any of the entities listed in subsection (a) above or any other person supervising or assisting such a person or entity with gathering, preparing or disseminating news or information; or
- (c) any parent, subsidiary, division or affiliate of the entities listed in subsections (a) or (b) above to the extent the subpoena or other compulsory process seeks the identity of a source or the news or information described in Section 1.

<sup>1</sup> We recommend that you review the law in your state to see if any of the terms listed in the definition of “news media” have prescribed meanings under the laws of your state.

## Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

Maherin Gangat  
Staff Attorney  
Media Law Resource Center  
(212) 337-0200, ext. 214  
mgangat@medialaw.org

### The Reporter's Privilege

#### Protecting the Sources of Our News

This Presentation has been made possible by a grant from  
the McCormick Tribune Foundation

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**Suggestion for background reading:**  
**Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.**

**Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.**

### A Federal Shield Law?

- Bipartisan proposals for federal shield law in face of increased threats
- -- Need for nationwide uniformity
  - √ Reporters need to know the rules so they can do their jobs
  - √ Would-be whistleblowers and other potential sources need to be able to predict the risks
  - √ Will cut down on costly litigation over subpoenas

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### What Is the "Reporter's Privilege"?

Various rules protecting journalists from being forced, in legal and governmental proceedings, to reveal confidential and other sources.

- Sometimes also protects unpublished notes and other journalistic materials

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3

## Cert. Petition Filed in Wen Ho Lee Case

### *Journalists Seek Supreme Court Review on Scope of Reporter's Privilege*

By Chad Bowman

Three nonparty journalists in contempt of court for protecting their confidential news sources in a civil lawsuit, *Lee v. Department of Justice*, filed a petition for certiorari on January 31, 2006 in the U.S. Supreme Court.

Bob Drogin of *The Los Angeles Times*, H. Josef Hebert of The Associated Press, and James Risen of *The New York Times* seek review of a D.C. Circuit decision affirming their contempt orders. 413 F.3d 53 (D.C. Cir. 2005), *reh'g en banc denied* 428 F.3d 299 (D.C. Cir. 2005). See MLRC Media Law Letter November 2005 at 9; MLRC Media Law Letter July 2005 at 5.

A fourth journalist — Pierre Thomas, formerly of CNN and now with ABC — has received an extension to March 2 file a petition. A response to both petitions is due in early April.

Separately, another reporter in the underlying action, Walter Pincus of the *Washington Post*, has been held in contempt of court for refusing to disclose his confidential source(s). *Lee v. Department of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005); see also MLRC Media Law Letter November 2005 at 9. Pincus is expected to seek review by the U.S. Court of Appeals for the D.C. Circuit.

#### ***Procedural History***

The award-winning reporters are nonparties to a civil lawsuit under the Privacy Act brought by former nuclear scientist Dr. Wen Ho Lee against the Department of Justice, the FBI, and the Department of Energy for allegedly leaking personal information about him to the press.

Dr. Lee was fired from the Los Alamos National Laboratory in March 1999 and publicly identified by news reports as the target of a federal espionage probe into possible loss of nuclear secrets to China. He was later charged with multiple felony counts of mishandling classified information. Dr. Lee ultimately pleaded guilty to just one count, was sentenced to time

served, and received a lengthy apology from the bench in which the presiding judge harshly criticized the government's handling of the case and its treatment of Dr. Lee.

After completing discovery from the government in Dr. Lee's civil case, plaintiff's counsel served deposition subpoenas on the press. Five reporters — Drogin, Hebert, Risen and Thomas, along with Risen's colleague at the *New York Times*, Jeff Gerth — moved to quash the subpoenas pursuant to a First Amendment or federal common law reporter's privilege.

In October 2003, Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia denied the motions and ordered the reporters to testify and to identify those confidential sources who provided information directly about Dr. Lee. *Lee v. Department of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003). In so doing, Judge Jackson narrowly read the conditional reporter's privilege in the D.C. Circuit as a two-part test for centrality to a litigant's case and exhaustion of reasonable alternative sources, without any broader balancing consideration in light of First Amendment interests.

Holding that the reporters were central to a leaks case and that Dr. Lee's discovery efforts vis-à-vis the government were sufficient, Judge Jackson found that plaintiff overcame the privilege. The decision treated the reporters *en masse*, applying the privilege to Risen — the lead author of a seminal *New York Times* article on the federal investigation — and mentioning the other journalists only in a footnote.

Each of the reporters then sat for a deposition in early 2004, and all but one asserted a reporter's privilege to varying degrees in response to specific questions. The notable exception was Gerth, who explained that he did not know the identity of the relevant sources for the stories he co-authored. He asserted a reporter's privilege just once, in response to a broad question he interpreted as including confidential sources beyond those providing information about the investigation of Dr. Lee.

(Continued on page 21)

### Cert. Petition Filed in Wen Ho Lee Case

(Continued from page 20)

Following briefing and argument, Judge Jackson in August 2004 cited all five reporters for contempt of court and ordered sanctions of \$500 per day until compliance, stayed pending appeal, and deferred consideration of additional compensatory sanctions. *Lee v. Department of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004).

In finding contempt, Judge Jackson declined to consider the reporter's privilege — even as he narrowly defined it — with regard to the specific assertions by each reporter. Rather, the “sole issue” on the contempt motions was whether the reporters had complied with the court's order. In that regard, Judge Jackson found Gerth's explanation that he did not know his co-author's sources to be “not credible.”

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***The petition argues that the circuits are fractured over the appropriate scope of protection afforded to confidential news sources under the First Amendment in civil cases, an issue with “far-reaching implications for the ability of journalists to inform the public about the operations of its government and misconduct in the private sector.”***

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A unanimous D.C. Circuit panel affirmed as to all but Gerth. The panel first decided that it reviews application of the reporter's privilege only for abuse of discretion, splitting with other circuits on this point. The court then agreed with Judge Jackson that the appropriate standard for overcoming a conditional reporter's privilege under *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), is a two-part test for centrality and exhaustion, reading broader language in that case as *dicta*.

Under this rubric, the panel found it not an abuse of discretion to find that the privilege was overcome as to all reporters as a general matter. Like the district court, the panel declined to review the privilege with regard to specific questions for which a privilege was asserted, or even to specific reporters.

Turning to whether each reporter violated the court's order, the panel affirmed as to Drogin, Hebert, Risen, and Thomas. The court reversed the contempt citation against Gerth as abuse of discretion because he “never refused to answer questions directly covered by the Discovery Order and consistently professed ignorance of

the identity of sources who provided information directly about Lee.”

The reporters petitioned for reconsideration. The D.C. Circuit denied rehearing *en banc* in a 4-4 vote with two abstentions and three strong dissents — including a dissent by Judge Rogers, who was part of the panel. Judge Rogers recognized that the petitions “present significant issues ... regarding both the standard for appellate review and comprehensiveness of the necessary balancing analysis.”

Judges Tatel and Garland urged a broader balancing test beyond simple need and exhaustion, arguing that “the panel's arid two-factor test allows the exigencies of even the most trivial litigation to trump core First Amendment values.” Indeed, Judge

Garland argued that, at least in Privacy Act cases, “if the reporter's privilege is limited to those requirements, it is effectively no privilege at all.”

### *Petition for Certiorari*

Following the denial of rehearing or rehearing *en banc*, Drogin, Hebert, and Risen petitioned for certiorari, presenting the following questions to the Court:

1. Does the First Amendment require that a federal court balance the public's interest in confidential newsgathering with a civil litigant's interest in compelled disclosure before ordering a journalist to identify confidential sources in response to the litigant's subpoena?
2. Does federal common law recognize a reporter's privilege that requires a federal court to balance the public's interest in confidential newsgathering with a civil litigant's interest in compelled disclosure before ordering a journalist to identify confi-

(Continued on page 22)

### Cert. Petition Filed in Wen Ho Lee Case

(Continued from page 21)

dential sources in response to the litigant's subpoena?

3. Is an appellate court obliged to review *de novo* a district court's determination that a journalist's assertion of a reporter's privilege has been overcome?

The petition argues that the circuits are fractured over the appropriate scope of protection afforded to confidential news sources under the First Amendment in civil cases, an issue with "far-reaching implications for the ability of journalists to inform the public about the operations of its government and misconduct in the private sector." Several circuits apply a broader balancing test, several look simply to need and exhaustion, and at least one has indicated that it would afford no protection at all.

The petition further argues that this conflicting body of authority on a First Amendment privilege has been thrown into even greater disarray by the Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), a case that recognized a therapist's privilege and outlined considerations for the recognition of new federal common law privileges.

Under these standards, the reporters argued that there is a compelling case for recognition of a common law reporter's privilege, given the First Amendment interests served and the fact that 49 states and the District of Columbia protect confidential sources. (The vast majority of these states would afford protection for nonparties in a civil case that is stronger than a need-exhaustion test.)

The three federal circuits to consider this issue have reached three different results: The Third Circuit recognizes a common law privilege, the Ninth Circuit has rejected it, and a the D.C. Circuit panel split three ways between a judge who would recognize the privilege, one who would not, and a third who found it unnecessary to reach the question. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005).

Finally, the petition argues that the D.C. Circuit's holding that appellate courts review the application of the reporter's privilege only for abuse of discretion creates a conflict in the circuits and finds no support in Supreme Court case law.

Moreover, because the reporters raised serious arguments below as to whether the news reports in question even violated the Privacy Act and whether the plaintiff suf-

ficiently exhausted alternative sources of information for specific information at issue, the standard of review could alter the outcome of the case even under a narrow two-part test.

*Bob Drogin and H. Josef Hebert are represented by in-house counsel Karlene W. Goller and David H. Tomlin, respectively, and by Lee Levine, David Schulz, Nathan E. Seigel, and Chad Bowman, of Levine Sullivan Koch & Schulz, L.L.P. Jeff Gerth and James Risen are represented by inhouse counsel George Freeman and by Floyd Abrams and Joel Kurtzburg, of Cahill Gordon & Reindel LLP. Mr. Thomas was represented in the D.C. Circuit by Charles D. Tobin and Deanna K. Shullman, of Holland & Knight LLP. Dr. Lee was represented by Brian A. Sun, Betsy A. Miller, Christopher Lovrien, David J. Schenck, and David L. Horan, of Jones Day.*

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## D.C. Circuit Affirms Wiretap Judgment Against Congressman For Leak to Media

### *Leaked Tape Was “Unlawfully” Acquired*

A divided D.C. Circuit Court of Appeals panel ruled that Washington Democratic Congressman James McDermott violated the federal wiretap act by passing on to the media a tape of an illegally intercepted phone conversation. *Boehner v. McDermott*, No. 04-7203, 2006 WL 769026 (D.C. Cir. March 28, 2006).

McDermott did not participate in the illegal interception in any way, but the people who did intercept the conversation personally delivered the recording to McDermott and discussed with him how they acquired it, according to the facts found by the court. McDermott then leaked the recording to the press.

In a decision written by Judge Raymond Randolph and joined by Circuit Chief Judge Douglas Ginsburg, the court held that under these facts, the case was distinguishable from *Bartnicki v. Vopper*, 532 U.S. 514 (2001), where the Court held that a



*Washington Democratic Congressman James McDermott*

third party's illegal conduct does not remove the First Amendment shield from speech about matters of public concern.

Here, because McDermott had actual knowledge that the phone conversation was illegally intercepted and knew who intercepted the call, McDermott had “unlawfully” obtained the recording and had no First Amendment right to disclose it.

Judge David Sentelle, in a lengthy dissent, argued that the relevant facts were indistinguishable from *Bartnicki*, where it was assumed that defendants were also aware that the recording they disclosed was illegally intercepted. The majority's decision, Sentelle wrote, is “fraught with danger” because its “defect in the chain” rationale could create broad liability for the press and public.

### *Background*

The case began nearly ten years ago in December 1996. A Florida couple, Alice and John Martin, monitoring their police scanner radio, overheard and recorded a conference call involving Ohio Republican Congressman John Boehner (the plaintiff in the case),



*Ohio Republican Congressman John Boehner*

Newt Gingrich (then the Speaker of the House) and other House Republicans discussing how to deal with an ethics committee investigation of Gingrich – a matter of much public interest at the time.

The couple – supposedly Democratic Party activists – initially sought out their local Congresswomen, but were directed to give the recording to McDermott, who was then the ranking Democrat on the House Ethics Committee. The Martins went to Washington, D.C. and personally gave the tape to McDermott together with a letter stating that it contained a “conference call heard over a scanner.”

McDermott listened to the tape and then leaked it to the *New York Times* and *Atlanta Journal-Constitution* and *Roll Call* which published articles about the content of the recording in early 1997. The *Times*, for example, reported that it received the tape from a “Democratic Congressman hostile to Mr. Gingrich” who said “the tape had been given to him ...by a couple .... saying it had been recorded off a radio scanner.”

Boehner sued McDermott for violating the federal wiretap statute, 18 U.S.C. § 2511 which provides in relevant part:

Except as otherwise specifically provided in this chapter any person who –

....

intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the

*(Continued on page 24)*

## D.C. Circuit Affirms Wiretap Judgment Against Congressman For Leak to Media

(Continued from page 23)

interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

The D.C. District Court initially granted McDermott's motion to dismiss the complaint, holding that the disclosure of truthful, newsworthy information was protected by the First Amendment. *See* 1998 WL 436897 (D.D.C. Jul 28, 1998) (Hogan, J.).

That decision was reversed by the Court of Appeals the following year – with the identical panel of judges split along the same lines as now. *See* 191 F.3d 463 (D.C.Cir. 1999) (Randolph and Ginsburg voting to reinstate the claim, Sentelle dissenting).

In that 1999 decision, Judge Randolph took the view that McDermott engaged in “conduct” not speech and could therefore be held liable under the wiretap statute. Ginsburg concurred in the result, but wrote separately. Assuming for purposes of the decision that McDermott engaged in speech, McDermott was still liable under the statute, according to Judge Ginsburg, because “one who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not ‘lawfully obtained’ that information in any meaningful sense” – the reasoning largely adopted by Judge Randolph on remand.

In 2001 the Supreme Court granted certiorari in *McDermott and Bartnicki v. Vopper*. In *Bartnicki*, which was decided after *McDermott*, a divided Third Circuit held that defendants who disclosed the contents of an illegally intercepted phone call could *not* be held liable under the wiretap statute where they did not participate or encourage the illegal interception. In *Bartnicki* an unknown person illegally intercepted a phone conversation about ongoing teacher union negotiations and anonymously left the recording in one defendant's mailbox.

Interestingly, the Third Circuit noted that while the two cases bore some factual resemblance they were distinguishable because “McDermott was more than merely an innocent conduit” because he knew who intercepted the conversation and allegedly sought to embarrass his political opponents with the tape.

## *Bartnicki Decision*

In 2001, the Supreme Court in a 6-3 ruling affirmed the Third Circuit's ruling in *Bartnicki*. Justice Stevens' opinion for the Court began by noting that “as a general matter, state action to punish the publication of truthful information seldom can satisfy constitutional standards.” He recognized the state interest in protecting the privacy of phone conversations, but found that “the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.”

He concluded that the wiretap statute could not be applied to the defendants for three reasons. First, they played no part in the illegal interception of the phone conversation, finding out about the interception only after it occurred, and never learning the identity of the person who made the interception. Second, even though a third party illegally intercepted the conversation, the defendants obtained the tape lawfully. And third, the content of the conversation was a matter of public concern.

Justice Stevens only mentioned *McDermott* in a footnote, noting that in that case “the defendant knew both who was responsible for intercepting the conversation and how they had done it.” Nothing seemed to suggest that this factual difference required a different result.

The Supreme Court in a separate opinion summarily reversed and remanded *McDermott* for further proceedings in light of its *Bartnicki* ruling. The Court of Appeals in turn sent the case back to Judge Hogan. Following discovery, both sides moved for summary judgment.

## *On Remand*

In 2004, D.C. District Court Judge Hogan granted summary judgment to Boehner, holding that McDermott entered into an “illegal transaction” when he voluntarily accepted the tape with knowledge that it was produced unlawfully and thus fell outside the protection of *Bartnicki*.

The District Court essentially concluded that because McDermott had a face to face encounter with the Martins, rather than receiving the tape anonymously, and because, in the court's view, he knew it was an illegally recorded tape as he received it and before he listened to it, McDermott had “participated in an illegal transaction” and was stripped of his First Amendment rights.

(Continued on page 25)



## D.C. Circuit Affirms Wiretap Judgment Against Congressman For Leak to Media

(Continued from page 24)

Boehner was awarded \$10,000 in statutory damages, \$50,000 in punitive damages for “defendant’s outrageous conduct in this case” and attorneys fees, estimated at \$600,000.

### D.C. Circuit Affirms

This month the D.C. Circuit affirmed. Judge Randolph disposed of McDermott’s objection that disputed issues of fact existed regarding whether he knew the tape was illegally intercepted when he received it from the Martins. The court found that McDermott’s knowledge of the illegal interception was proven as a matter of law by the 1997 *New York Times* article. Its description of how the tape was made and acquired could only have been based on a conversation between McDermott and the Martins.

As to the constitutional issues, the Court held that *Bartnicki* does *not* stand for the proposition that “any individual who did not participate in the illegal interception of a conversation has a First Amendment right to disclose it.”

In a rather thin analysis of *Bartnicki*, Judge Randolph glossed over most of Justice Stevens opinion and returned again to McDermott’s encounter with the Martins.

“The eavesdropping statute may not itself make receiving a tape of an illegally-intercepted conversation illegal. ... But it does not follow that anyone who receives a copy of such a conversation has obtained it legally and has a First Amendment right to disclose it. If that were the case, then the holding in *Bartnicki* is not ‘narrow’ as the Court stressed, but very broad indeed. On the other hand, to hold that a person who knowingly receives a tape from an illegal interceptor either aids and abets the interceptor’s second violation (the disclosure), or participates in an illegal transaction would be to take the Court at its word. It also helps explain why the Court thought it so significant that the illegal interceptor in *Bartnicki* was unknown, and why the Court distinguished this case on that ground ....” (citations omitted).

In conclusion, Randolph returned to the speech vs. conduct distinction he relied on his first decision in the case. “The difference between this case and *Bartnicki* is plain to see,” he wrote. “It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift.”

But as Judge Sentelle pointed out in dissent, the Supreme Court in *Bartnicki* found no constitutional significance to the fact that defendants knew or had reason to know of the illegal interception. Had their actual knowledge been a relevant concern in *Bartnicki*, Sentelle added, the Supreme Court would have remanded the case for further fact finding because the record did not establish whether the defendants actually knew the provenance of the tape. “As the Court made no such disposition, there is plainly no such distinction of constitutional magnitude.” (Randolph’s counter-argument to this was that actual knowledge must have been relevant because the Court remanded *McDermott* for further proceedings rather than dismissing it outright.)

The potential impact of the majority’s decision on newsgathering and publication is evident. As Judge Sentelle concluded:

Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. I see no distinction, nor has Representative Boehner suggested one, between the constitutionality of regulating communication of the contents of the tape by McDermott or by The Washington Post or The New York Times or any other media resource. For that matter, every reader of the information in the newspapers also learned that it had been obtained by unlawful intercept. Under the rule proposed by Representative Boehner, no one in the United States could communicate on this topic of public interest be-

(Continued on page 26)

### **D.C. Circuit Affirms Wiretap Judgment Against Congressman For Leak to Media**

*(Continued from page 25)*

cause of the defect in the chain of title. I do not believe the First Amendment permits this interdiction of public information either at the stage of the newspaper-reading public, of the newspaper-publishing communicators, or at the stage of Representative McDermott's disclosure to the news media. Lest someone draw a distinction between the First Amendment rights of the press and the First Amendment speech rights of non-professional communicators, I would note that

one of the communicators in Bartnicki was himself a news commentator, and the Supreme Court placed no reliance on that fact.”

In April, Congressman McDermott filed a motion for rehearing en banc.

Congressman McDermott is represented by Frank Cicero, Jr., Kirkland & Ellis, Chicago, IL. Congressman Boehner is represented by Michael A. Carvin, Jones Day, Washington, D.C. Theodore J. Boutros, Jr. and Thomas H. Dupree, Jr., Gibson Dunn & Crutcher, filed a media amicus brief to the D.C. Circuit Court of Appeals.



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## Espionage Prosecution of Lobbyists Raises First Amendment Issues

A rare government prosecution under the Espionage Act, 18 U.S.C. § 793, has raised interesting First Amendment questions about criminalizing the receipt of leaked government information.

In *U.S. v. Rosen and Weissman*, Crim. No. 1:05CR225 (E.D. Va.), two former lobbyists for AIPAC, the American Israel Public Affairs Committee, are being prosecuted for violating the statute by receiving national defense information from a former Defense Department official, Lawrence Franklin.

Franklin pled guilty to violating the Espionage Act and was sentenced to 12 years in jail for providing Rosen and Weissman with classified defense information. Rosen and Weissman are charged with violating the statute by sharing that information with reporters and foreign government officials.

The Espionage Act criminalizes, among other things:

unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . Shall be fined under this title or imprisoned not more than ten years, or both.

Defendants moved to dismiss the indictments, arguing that the Act is unconstitutionally vague as applied to their routine meetings with American and foreign government officials. In particular, they argue the statute is vague as applied to oral communications of information since such communications do not give the recipient fair notice of the status of the information.

As stated in the defendants' brief:

The implications of this prosecution cannot be overstated. Every day members of the press and members of policy organization meet with government officials. These meetings are a vital and necessary part of how our government and society function. ... With regularity, members of the press publish the information they obtain from these meetings. ... [and] reporters actually solicit the leaking of classified information.

In its brief, the government stressed that defendants are not members of the press and any vagueness in the statute is cured by the scienter requirement which they stressed they could prove at trial. As to the press, the government stated:

we recognize that a prosecution under the espionage laws of an *actual* member of the press for publishing classified information leaked to it by a government source, would raise legitimate and serious issues and would not be undertaken lightly, indeed, the fact that there has never been such a prosecution speaks for itself.

On March 24, Judge T.S. Ellis in the Eastern District of Virginia heard oral argument on the defendants' motion to dismiss the indictments – a portion of the transcript is reproduced herein. Judge Ellis noted that there was no case law applying the statute on these facts, observing “we are a bit in new, uncharted waters, and that's why I'm going to consider this matter extremely carefully.” Judge Ellis ultimately asked for additional briefing on the constitutional issues which he regarded as “central to the case.” Those briefs were due to be submitted on March 31, 2006.

*The history of the Espionage Act is discussed in detail in “Reporting on the War on Terror: The Espionage Act and Other Scary Statutes,” by Susan Buckley, Cahill Gordon Reindel, published in LDRC Bulletin 2002:02 Criminal Prosecutions of the Press.*

*The article is available at [www.medialaw.org](http://www.medialaw.org)*

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA,

Plaintiff,

v. CRIMINAL ACTION

STEVEN J. ROSEN, 1:05 CR 225  
KEITH WEISSMAN,

Defendants.

REPORTER'S TRANSCRIPT MOTIONS HEARING

Friday, March 24, 2006

BEFORE: THE HONORABLE T.S. ELLIS, III  
Presiding

APPEARANCES: OFFICE OF THE UNITED STATES ATTORNEY  
BY: KEVIN DIGREGORY, AUSA  
NEIL HAMMERSTROM, AUSA  
THOMAS REILLY, SAUSA (DOJ)  
MICHAEL MARTIN, SAUSA (DOJ)

For the Government

---

ABBE LOWELL, ESQ.  
KEITH ROSEN, ESQ.  
ERICA PAULSON, ESQ.  
For Defendant Rosen

JOHN NASSIKAS, ESQ.  
KARITHA BABU, ESQ.  
KATE BRISCOE, ESQ.  
BARUCH WEISS, ESQ.  
For Defendant Weissman

\* \* \*

23 THE COURT: Does it make any difference to you  
24 if, instead of these defendants, it had been reporters for  
25 the Washington Post and the Washington Times?

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1 ATTORNEY DIGREGORY: Interesting question, your  
2 Honor. And I think that, as we said in our pleading --  
3 THE COURT: Isn't that the Pentagon Papers?  
4 ATTORNEY DIGREGORY: Well, no, that's not  
5 Pentagon Papers, your Honor. And it's not, because Pentagon  
6 Papers was a case about prior restraint. It's not a case

7 about criminal prosecution.  
8 THE COURT: All right. Go on. Forget the  
9 Pentagon Papers' reference. You're correct. It was about  
10 prior restraint.  
11 But nonetheless, what's the answer to my  
12 hypothetical? Suppose these two defendants had been  
13 reporters for a newspaper.  
14 ATTORNEY DIGREGORY: It all depends, your  
15 Honor, on what the facts are in any given situation.  
16 But as we said in our pleading, we would have  
17 to carefully scrutinize whether or not, whether or not there  
18 was -- because of the media being involved, we would have to  
19 carefully scrutinize whether or not the statute was actually  
20 violated, whether or not there was any willfulness shown on  
21 the part of the actors in engaging in the conduct that they  
22 engaged in. And we would do that with respect to any case,  
23 just as we have done in this case, your Honor.  
24 THE COURT: Let me ask you two further  
25 questions along this line.

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1 Tell me again why you argue that Bartnicki is  
2 distinguishable.  
3 ATTORNEY DIGREGORY: Bartnicki is  
4 distinguishable in the first instance because it doesn't  
5 deal with the national security interests of the United  
6 States.  
7 In the second -- and it deals with an  
8 individual's right to privacy, an individual who, oh, by the  
9 way, was engaged in the telephone conversation about hurting  
10 other individuals who didn't agree with him. Okay?  
11 And secondly, Bartnicki is a case in which  
12 there is no implication whatsoever of the person who, who

(Continued on page 29)

(Continued from page 28)

13 eventually broadcasted the tape-recorded conversation, nor  
14 the person who obtained the tape-recorded conversation in  
15 any illegality.  
16 That's different from this case, your Honor,  
17 because of what we've alleged in this case. And we'll have  
18 to be put to our proof, but what we've alleged in this case  
19 is that these defendants, together with other individuals  
20 known and unknown, including Lawrence Anthony Franklin,  
21 actively decided, agreed, that they were going to gather  
22 national defense information and disseminate it.  
23 They engaged in illegal conduct. And that's  
24 another reason why Bartnicki does not apply to them.  
25 THE COURT: Well, you -- let me go back to the

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1 question I asked you, which is whether a prosecution of  
2 members of the press would be different from prosecution of  
3 members of a foreign policy lobbying organization.  
4 Why would it be any different?  
5 ATTORNEY DIGREGORY: I'm not -- I think that  
6 because of the function that the media serves in this  
7 country --  
8 THE COURT: So you're --  
9 (Simultaneous speaking)  
10 ATTORNEY DIGREGORY: -- we would have to be --  
11 THE COURT: -- taking a position --  
12 ATTORNEY DIGREGORY: -- we would have to  
13 carefully scrutinize whether or not we would take action.  
14 And of course --  
15 THE COURT: So you're taking --  
16 (Simultaneous speaking)  
17 ATTORNEY DIGREGORY: -- as with any --

18 THE COURT: -- a position now diametrically  
19 opposed to Mr. Lowell's argument that there isn't a  
20 hierarchy of values in the First Amendment. All First  
21 Amendment -- all First Amendment rights are of the same  
22 stature.  
23 ATTORNEY DIGREGORY: Not at all, sir. The  
24 position that I'm taking is one that has to do with the  
25 exercise of prosecutorial discretion, and what kinds of

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1 things we would consider in exercising that discretion.  
2 THE COURT: There are comments in the Pentagon  
3 Papers, New York Times case about 793(e).  
4 ATTORNEY DIGREGORY: Yes, sir.  
5 THE COURT: You're familiar with that?  
6 ATTORNEY DIGREGORY: Yes, sir. I'm sorry.  
7 THE COURT: Are those to be ignored?  
8 Are they mere dicta or --  
9 ATTORNEY DIGREGORY: I'm not -- and if the  
10 comments of which the Court speaks are those comments made  
11 by Justices White and Justice -- Justices White and Stewart,  
12 no, they're not comments to be ignored.  
13 All the justices were simply saying that if you  
14 look at the statute on its face, it plainly applies to  
15 journalists.  
16 And that's all we said in our pleading, was  
17 that 35 years ago, two very brilliant Supreme Court justices  
18 decided to take a look at that statute, and said that that  
19 statute on its face plainly applies to anyone, to anyone,  
20 whoever, whoever engages in the criminal conduct that is  
21 laid out in the statute.

## Fourth Circuit Upholds Maryland Governor's Boycott of Two Journalists

### Court Finds No Actionable Retaliation

By Charles D. Tobin

Because “government officials frequently and without liability evaluate reporters and reward them with advantages of access,” Maryland's governor did not violate two Baltimore journalists' First Amendment rights by banning all executive state officials from speaking to them, according to a new decision by the U.S. Fourth Circuit Court of Appeals. *The Baltimore Sun Co. v. Ehrlich*, 2006 WL 335900 (4th Cir. February 15, 2006) (Niemeyer, Luttig, Traxler, JJ.).

In an unfortunate ruling that can only fuel the increasingly adversarial nature of the relationship between officials and the press, the panel held that – instead of the courtroom – “the ‘rough and tumble’ political arena” is where disputes like this should be resolved.

#### Background

The court's decision upheld a lower court ruling that Maryland Governor Robert L. Ehrlich did not commit an unconstitutional First Amendment retaliation by banning officials from providing any comment to reporter David Nitkin and columnist Michael Olesker of *The Sun*. The Fourth Circuit decision came in the first of two very similar appeals, the other pending in the Sixth Circuit, arising out of official boycotts of journalists.

In November 2004, Governor Ehrlich's press aides in an e-mail instructed all employees in the state “executive department or agencies” from speaking with the journalists, saying that his administration “feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration.”

The journalists filed affidavits in the lawsuit attesting that previously informative state officers, in the days after the ban, refused to give them any oral information or to return phone calls. Additionally, Nitkin attested that, while he was still able to attend press conferences

that were open to larger groups of reporters, he was denied access to the smaller press briefings in the governor's conference room, which the governor said were invitation-only events.

In February 2005, a federal judge in Baltimore dismissed the journalists' and *The Sun's* lawsuit that claimed the selective exclusion of the journalists violated their First Amendment rights under 42 U.S.C. §1983 because it constituted an unlawful government retaliation for speech. The court also denied the journalists' request for an injunction. *See* 2005 WL 352596 (D. Md. Feb. 14, 2005) (Quarles, J.). *See also MLRC MediaLawLetter* Feb. 2005 at 43.

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***The court ignored entirely the argument made by an amicus coalition of newspapers and news associations that smaller news outlets without resources to contest or report around reporter boycotts could be forced to alter coverage.***

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#### Fourth Circuit Decision

The 3-0 decision of the Fourth Circuit panel, written by Judge Paul V. Niemeyer, relied almost entirely the court's unwillingness to distinguish between the granting of exclusive interviews on the one hand, and the targeted

and wholesale exclusion of select journalists on the other.

The court cited what it termed the “common knowledge” that “reporting is highly competitive, and reporters cultivate access – sometimes exclusive access – to sources, including government officials.” The court wrote that officials “regularly subject all reporters to some form of differential treatment based on whether they approve of the reporters' expression.” To the court, both the situation where a governor favors certain journalists with preferred access to information, and the boycott of the *Sun* journalists:

“present instances in which government officials disadvantage some reporters because of their reporting and simultaneously advantage others by granting them unequal access to nonpublic information. Thus, whether the disfavored reporters number two or two million, they are still denied

(Continued on page 31)

### Fourth Circuit Upholds Maryland Governor's Boycott of Two Journalists

(Continued from page 30)

access to discretionarily afforded information on account of their reporting.”

Finding preferential and selectively punitive treatment of journalists “materially indistinguishable” – and the “challenged government response ... so pervasive a feature of journalism and the journalists’ interaction with government” – the Fourth Circuit held:

“[N]o actionable retaliation claim arises when a government official denies a reporter access to discretionarily afforded information or refuses to answer questions.”

The court specifically rejected the journalists’ argument, which was based on previously prevailing First Amendment precedent in this and other jurisdictions, that a government action is unconstitutional where it would chill “a person of ordinary firmness” in the exercise of their free speech rights. Instead, the court fashioned a test that measured the conduct by the reaction of “a reporter of ordinary firmness,” finding that:

“It would be inconsistent with the journalist’s accepted role in the ‘rough and tumble’ political arena to accept that a reporter of ordinary firmness can be chilled by a politician’s refusal to comment or answer questions on account of the reporter’s previous reporting.”

The court also held that the journalists had not demonstrated that they actually were “chilled from expressing themselves.” The panel cited to evidence put in by the governor that each journalist had written the same amount of stories or columns about state government in an equal time period before and after the ban.

The court, however, ignored entirely the argument made by an amicus coalition of newspapers and news associations that smaller news outlets without resources to contest or report around reporter boycotts could be forced to alter coverage. The court also did not address the journalists’ and amici’s argument that in addition to First Amendment retaliation, the boycott constituted viewpoint-based discrimination.

As for the authority to issue the ban, the court held that the governor “himself need not talk to reporters,” and that – despite the unbounded language in the ban – his “internal directive ... extended only to the official conduct and speech of others in the executive branch.”

In a footnote the court seemed to suggest that government employees themselves may have a claim to the extent the order “chills employees’ constitutionally permissible speech,” but said that the question was not before it.

Citing the upcoming election season in which it will cover Governor Ehrlich’s re-election bid, *The Sun* reported in the newspaper that it will not seek further review of this decision.

The Ehrlich lawsuit was one of two nearly identical cases working their way through the appeals courts. The other, *Youngstown Publishing Co. v. McKelvey*, involves a ban on an Ohio newspaper by the mayor of Youngstown. See *MLRC MediaLawLetter* May 2005 at 5; Aug. 2005 at 19.

The Sixth Circuit will hear an appeal in that case after the district court last year dismissed the newspaper’s lawsuit.

*Charles D. Tobin, Judith F. Bonilla and Rachel E. Fugate of Holland & Knight LLP in Washington D.C. represented the Baltimore Sun. Amici counsel in support of the journalists were Kevin T. Baine, Adam L. Perlman and Zoe C. Scharff of Williams & Connolly in Washington D.C. Maryland Governor Robert L. Ehrlich was represented by Margaret Ann Nolan, Cynthia G. Peltzman and William F. Brockman, of the Maryland Attorney General's Office.*

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## Ninth Circuit Dismisses Yahoo!'s Declaratory Judgment Suit Over French Action

### *No Personal Jurisdiction and/or Lack of Ripeness Bars Suit*

In a 100 page decision, a fractured eleven judge en banc panel of the Ninth Circuit dismissed Yahoo!'s declaratory judgment action seeking a ruling that French court orders against the global internet company are not recognizable or enforceable in the United States. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 2006 WL 60670 (9th Cir. Jan. 12, 2006).

By a vote of eight to three, the panel held that there was personal jurisdiction in California over the French defendants to hear the case. But three of these eight – Judges Fletcher, Schroeder and Gould – concluded that the case was not ripe for adjudication. Their votes, together with the three judges who rejected personal jurisdiction – Judges Ferguson, O'Scannlain and Tashima – formed a six judge majority to dismiss the case.

Judges Hawkins, Fisher, Paez, Clifton and Bea formed the minority who found both personal jurisdiction, ripeness and a strong First Amendment reason to decide the case.

#### **Background**

In April 2000, the French civil rights groups, La Ligue Contre Le Racisme et L'Antisemitisme ("LICRA") and L'Union des Etudiants Juifs de France ("UEJF") filed suit in France against Yahoo! complaining that Nazi-era items, including knives, swastikas, and photos of concentration camps, were available on Yahoo!'s auction websites accessible to French residents. The French Criminal Code Section R645-2 makes it illegal to possess, sell or display publicly Nazi uniforms, emblems or insignias.

The French groups also complained that French residents could access Holocaust denial, pro-Nazi and anti-Semitic websites through Yahoo!'s servers.

In May and November 2000, the French court issued interim rulings ordering Yahoo! to destroy "all Nazi-related messages, images and text stored on its server"

under penalty of a daily fine of 100,000 Euros for non-compliance. It also ordered Yahoo to "take any, and all measures" to ensure that the materials were not available to French residents.

Yahoo! did not appeal the French court ruling, but instead brought a declaratory judgment action in California. It also adopted new policies prohibiting the auctioning or advertising of items "that promote or glorify groups that are known principally for hateful and violent positions directed at others based on race or similar factors." The new policy, adopted independently of the litigation according to Yahoo!, proved to be significant to the ultimate decision to dismiss Yahoo!'s claim. Following the change in policy, LICRA and UEJF took no further substantive action in the French courts, but the French action is not final.

In 2001 Judge Jeremy Fogel granted summary judgment to Yahoo! holding that the French decisions were contrary to the First Amendment and U.S. public policy. *See* 169 F.Supp.2d 1181, 1194 (N.D. Cal.2001) ("the First Amendment precludes enforcement within the United States"); *LDRC LibelLetter* Nov. 2001 at 37.

In 2004, a split three judge panel of the Ninth Circuit reversed, ruling that there was no personal jurisdiction over the French defendants. *See* 379 F.3d 1120, 32 Media L. Rep. 2185 (9th Cir. 2004). This decision was vacated last year when a motion for rehearing en banc was granted. *See* 399 F.3d 1010 (9th Cir. Feb 10, 2005).

#### **En Banc Decision**

The en banc panel first addressed the issue of personal jurisdiction over the French defendants. Calling it a "close question," an eight judge majority found there was personal jurisdiction over the defendants based on three factors: 1) the cease and desist letter sent to Yahoo!; 2) service of process on Yahoo! in California; and

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***As currently framed,  
however, Yahoo!'s suit  
comes perilously close to  
a request for a forbidden  
advisory opinion.***

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*(Continued on page 33)*



### **Ninth Circuit Dismisses Yahoo!'s Declaratory Judgment Suit Over French Action**

*(Continued from page 32)*

3) the French court's orders directing Yahoo! to take action in California. The third factor was the most important one to the majority because it showed that LICRA and UEJF's suit was expressly aimed at California.

The three dissenters vigorously rejected this conclusion, calling it "not true." "LICRA and UEJF's suit sought French court orders directing Yahoo! to perform significant acts locally in France, not in California.... LICRA and UEJF had one aim and one aim only: to prevent French citizens from using "Yahoo.fr" and "Yahoo.com" to access illegal anti-Semitic hate merchandise in France. They were plainly concerned with Yahoo!'s actions within France, regardless of where those actions emanated from."

#### ***Ripeness***

Although mindful of the First Amendment issues at stake, Judges Fletcher, Schroeder and Gould, who voted for exerting person jurisdiction over the French defendants went on to find the matter not ripe for adjudication on prudential grounds. They noted that while there was a live dispute when Yahoo! first filed suit in federal district court, Yahoo!'s voluntary change of policy made it "unclear how much is now actually in dispute."

"First Amendment issues arising out of international Internet use are new, important and difficult. We should not rush to decide such issues based on an inadequate, incomplete or unclear record. We should proceed carefully, with awareness of the limitations of our judicial competence, in this undeveloped area of the law. Precisely because of the novelty, importance and difficulty of the First Amendment issues Yahoo! seeks to litigate, we should scrupulously observe the prudential limitations on the exercise of our power."

"Yahoo! wants a decision providing broad First Amendment protection for speech and speech-related activities on the Internet that might violate the laws or offend the sensibilities of other countries. As currently framed, however, Yahoo!'s suit comes perilously close to a request for a forbidden advisory opinion."

#### ***Act of State Doctrine***

In an interesting analysis, Judges Ferguson, O'Scannlain and Tashima wrote that they would have dismissed the case not on ripeness but on the common law act of state doctrine, i.e., that "the court of one country will not sit in judgment on the acts of government of another, done within its own territory."

"The criminal statutes of most nations do not comport with the U.S. Constitution. That does not give judges in this country the unfettered authority to pass critical judgment on their validity, especially where, as here, the criminal statute embodies the determined will of a foreign sovereign to protect its borders from what it deems as morally reprehensible speech of the worst order."

#### ***The Dissent***

Finally, it was the dissenters – Judges Hawkins, Fisher, Paez, Clifton and Bea – who analyzed the case through a First Amendment lens. They concluded that the majority imposed "a heightened standard on a U.S. plaintiff seeking to vindicate its First Amendment rights when that plaintiff is challenging a foreign prior restraint." "The extraordinary hurdles the majority creates are inconsistent with our established jurisprudence protecting this country's tradition of free expression."

The uncertainties about the impact of the French court orders on Yahoo! could have been resolved by fact finding at the district court level, the dissenters found. Concluding that the "majority creates a new and troubling precedent for U.S.-based Internet service providers who may be confronted with foreign court orders that require them to police the content accessible to Internet users from another country."

Yahoo! was represented by Michael Traynor, Cooley, Godward, Castro, Huddelson & Tatum, San Francisco, CA; and Robert C. Vanderet, O'Melveny & Myers, Los Angeles, CA. Defendants were represented by Robert A. Christopher, Coudert Brothers, Palo Alto, CA; Randol Schoenberg, Burris & Schoenberg, Los Angeles, CA; and Mark D. Lebow, Sokolow Carreras, New York, NY.

## Tenth Circuit Hears Oral Argument on Constitutional Challenge to Colorado's Criminal Libel Law

By Steven D. Zansberg

On January 9, 2006, the Tenth Circuit heard oral argument in the case of *Thomas Mink v. Suthers, Buck, et al.*, a case challenging the constitutionality of Colorado's criminal libel statute.

### Background

The constitutional challenge arose after law enforcement authorities in Greeley, Colorado obtained a search warrant for and seized computer files of college student Thomas Mink, publisher of "The Howling Pig" an online parody newspaper.

"The Howling Pig" had hosted articles ridiculing a University of Northern Colorado professor Junius Peake. The Professor complained to the local District Attorney's Office, which authorized the execution of a search warrant on Mink's computer.

The Colorado ACLU, on behalf of Thomas Mink, filed a § 1983 civil rights action in Colorado federal court, and obtained a temporary restraining order requiring return of Mink's computer. Subsequently, the District Attorney for Weld County, Colorado issued a memorandum stating that he would not press charges under the criminal libel statute based upon the first three editions of "The Howling Pig."

### Challenge to the Statute

In 2004, U.S. District Court Judge Lewis Babcock ordered the dismissal of Mink's claim challenging the constitutionality of Colorado's criminal libel statute, finding that Mink lacked standing because he was unable to satisfy the "credible fear of prosecution" requirement. *See* 344 F. Supp.2d 1231 (D. Colo. 2004).

Judge Babcock also dismissed Mink's § 1983 claim against the Assistant District Attorney who had authorized the search warrant, finding that she was entitled to absolute judicial immunity. In addition, Judge Babcock dismissed

Mink's claim under the Privacy Protection Act against the assistant prosecutor, finding that she had not participated in the execution of the search warrant. Mink appealed the District Court's order dismissing all of his claims.

### Tenth Circuit Argument

On January 9, 2006, oral argument was heard by Judges Ebel, O'Brien and Tymkovich of the Tenth Circuit. The panel focused much of its questioning on how the facts of the present case could be distinguished from a case decided January 5, 2006 by the Tenth Circuit, *Winsness v. Yocom*, Tenth Circuit Case No. 04-2475.

In *Winsness*, the Tenth Circuit found that two plaintiffs who had challenged Utah's anti-flag burning statute could not proceed with their facial challenge to that statute, because the case

had been mooted by sworn declarations from two prosecutors granting assurances that they would not

bring any prosecutions under Utah's anti-flag burning statute against the plaintiffs or anyone else unless the statute was significantly amended to cure its defects under *Texas v. Johnson*, 491 U.S. 397 (1989).

Plaintiff's lawyer, Bruce Jones of Holland & Hart in Denver, argued that the *Winsness* case made clear that the District Court erred in finding that Mink lacked standing to assert a constitutional challenge to the criminal libel statute. Because Mink clearly faced a credible fear of prosecution at the outset of the case, the appropriate analysis was one of mootness, not standing.

When Judge Ebel asked what evidence there was that Mink faced a credible threat of prosecution at the outset of the case, Jones pointed out that the District Attorney had admitted in his answer that Mink faced a credible threat of prosecution when the lawsuit was filed.

Jones then explained that the District Attorney's memo stating he would not bring charges against Mink based only upon the first three editions of "The Howling



## The Howling Pig

Bitch · Moan · Howl  
Don't let them get away with anything

## Tenth Circuit Hears Oral Argument on Constitutional Challenge to Colorado's Criminal Libel Law

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Pig" was a far cry from the sworn affidavits that had been tendered by the prosecutors in the *Winsness* case.

Because *Winsness* establishes that prosecutors seeking to moot a case post-filing face an extremely heavy burden, the District Attorney's unsworn memorandum in this case failed to meet that standard. Accordingly, Jones argued, the case was not moot, and the Court should address the constitutional challenge to Colorado's criminal libel statute.

### ***Questions on Merits Appear Promising***

When the panel turned their attention to the merits of the facial challenge to Colorado's criminal libel statute, their questions illuminated the glaring constitutional infirmities of the law. Judge Ebel asked whether the Colorado Supreme Court's ruling in *People v. Ryan*, 806 P.2d 935, 19 Media L. Rep. 1074 (Colo. 1991), limited the application of the criminal libel statute only to purely private figure and private matter subject matter statements.

Jones answered that *Ryan* still allowed the imposition of criminal sanctions on statements of public concern (so long as they were not about public officials or public figures) without requiring the prosecution to prove actual malice. Hence, under *Garrison v. Louisiana*, the statute was unconstitutional.

Judge Tymkovich asked whether even in a purely private figure/private matter case, the government bears the burden of persuasion on all elements of the crime, including falsity. Jones answered that he believes it does.

The questions posed to the Assistant Attorney General on the merits of the constitutional challenge were even more encouraging. Judge Tymkovich asked pointedly whether under the First Amendment a statute criminalizing speech must have a fault requirement when applied to speech on matters of public concern.

Judge Ebel made clear that the Colorado Supreme Court had not stated in the *Ryan* decision that the statute could not be applied to matters of public concern, but only matters of public concern regarding a public official or public figure.

When the Assistant Attorney General cited to three separate Colorado Supreme Court decisions, two of which

involved claims for civil libel, Judge Tymkovich stated that it seemed odd to argue that all a citizen would need to do would be to read three separate Colorado Supreme Court decisions in order to understand what was the reach of the criminal libel statute: "Doesn't that create quite a bit of uncertainty – the need to read three Supreme Court cases? What kind of notice is that providing to an ordinary member of the public?"

The panelists also peppered the Attorney General about the inadequacy of the prosecutors' assurances of their lack of intent to bring charges under the statute. Judge Tymkovich (who was on the panel that had decided the *Winsness* decision) pointed out that in the *Winsness* case there was a "definitive affidavit" tendered by the prosecutor, but that there was no affidavit whatsoever in this case.

Judge Ebel stated that mootness presented a much harder showing for the government to make than lack of standing: He stated that the government's disavowal of an intention to proceed with prosecution must not be strategic, but permanent.

The panel spent precious little time addressing the other arguments presented on appeal concerning immunity to the Assistant D.A., and practically no discussion of the Privacy Protection Act claim.

### ***Further Briefing Authorized***

At the close of oral argument, Bruce Jones asked the panel whether it would welcome additional briefing on the import of the recently-decided *Winsness* decision. The panel granted the request and ordered both parties to file simultaneous five-page briefs distinguishing or explaining the *Winsness* decision and how it applied to the current case.

*Steven Zansberg, a partner with Faegre & Benson in Denver, Colorado, wrote an amicus brief to the Tenth Circuit on behalf of the Associate Press, Bloomberg News, Dow Jones and MLRC. Bruce Jones of Holland & Hart in Denver argued on behalf of the plaintiff Thomas Mink and "The Howling Pig." Assistant Attorney General William Allen argued on behalf of the State of Colorado. David Brougham of Hall & Evans in Denver argued on behalf of Assistant District Attorney Susan Knox.*

## Google's Cached Websites Not Copyright Infringement

### *Fair Use as a Matter of Law*

In an interesting internet copyright decision, a Nevada federal district court this month ruled that the standard search engine practice of storing, or “caching,” copies of websites is not a copyright infringement. *Field v Google Inc.*, No. CV-S-04-0413-RCJ-LRL (D. Nev. Jan. 12, 2006) (Jones, J.).

The court ruled that the standard practice of search engines to store copies of websites is done under an implied license and is, moreover, protected as fair use as a matter of law.

#### **Background**

Plaintiff Blake Field brought an action against Google for copyright infringement. He claimed that Google violated his exclusive rights to reproduce and distribute copies of the copyrighted works on his website because internet users were able to access the works by clicking on Google's “cached” link, accessing a stored version of the website.

Like most search engines, Google has a program – Googlebot – that scours the internet, locating and analyzing web pages, and cataloging the pages into Google's searchable index. Part of that process includes copying the web code of the site in a temporary repository, or cache.

When Google provides results to a search, it also generally includes another link labeled “cached.” By clicking

Yet, Field alleged that “Google directly infringed his copyrights when a Google user clicked on a ‘Cached’ link to the Web pages containing Field's copyrighted works and downloaded a copy of those pages from Google's computers.”

#### **Downloading Websites**

In an interesting analysis, the court first found that there could be no direct infringement as alleged by the plaintiff because when a user clicks on the “cached” link, it is the user, not Google, who “creates and downloads a copy of the cached Web page.” Accordingly, the court granted summary judgment for Google on the issue of non-infringement, and said, the “automated, non-volitional conduct by Google in response to a user's request does not constitute direct infringement.”

Nonetheless, assuming Google was engaged in direct copyright infringement, all four of Google's defenses were recognized by the court.

#### **Implied License / Estoppel**

Typically, when a website does not want a search engine to cache its pages, what is known as a “no-archive” meta-tag is added to the code, telling the Googlebot not to store the site. Field was familiar with this practice and knew that the “no-archive” meta-tag would have prevented his site from being cached.

However, Field did not include this meta-tag on his site. Because he knew that meant Google would cache his website, the court determined

that Field's conduct was “reasonably interpreted as the grant of a license to Google for that use.”

The same arguments were made on Google's estoppel defense. Additionally, to meet the elements of es-



this link, instead of going to the website, you download a version stored in Google's server. A disclaimer appears at the top of the page, linking to the original website, and stating that the page may not be the most current version and is merely the latest version stored by Google.

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## Google's Cached Websites Not Copyright Infringement

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toppel, Google noted that it had no way of knowing that Field didn't want his site cached. Had Field made his preference known, Google would not have provided the link.

### *Fair Use*

The fair use analysis largely turns on "whether and to what extent the new work is 'transformative'." See *Campbell v Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Here, the court was quick to note that the Google cache system serves a different purpose than the plaintiff's original work. The cached links add a new element by allowing users to access information when the original page is down or not available. This use benefits "the public by enhancing information-gathering techniques on the internet." See *Kelly v Arriba Soft Corp.*, 336 F.3d 811 (2003).

In addition, cached links allow users to "detect changes that have been made to a particular Web page over time." "Such comparisons can reveal significant differences that have political, educational, legal or other ramifications," the court reasoned.

Precisely because the page is cached, Google can "automatically highlight the user's query in the copy." *Id.* This is an important distinction because it helps users determine quickly whether the page is relevant to their search, allowing them to "more quickly find and access the information they are searching for..."

For the aforementioned reasons, because Google makes clear to users that the cached page is not the origi-

nal page, and site owners can disable the cache feature "within seconds," the copying and distributing of Field's copyrighted works was transformative."

Once a work is determined transformative, the remaining copyright factors are less relevant. Yet, the court looked to other factors in its analysis. First, the court noted that Field provided his copyrighted works on the internet free of charge for all the world to see. Field even added a specific text file, known as "robots.txt," which ensured that web search engines would include his site in their search results.

Therefore, "the nature" of the works weigh[ed] only slightly in Field's favor." *Id.* And because the works were free, there was certainly no evidence that Google "had any impact on any potential market for those works."

Additionally, Google used no more of the works than necessary in granting access to them, although that meant the entire page here. Finally, while Google was operating in good faith, Field, "deliberately ignored the protocols that would have instructed Google not to present "Cached" links."

Balancing these factors, the court held that Google's use was a fair use of the works as a matter of law.

Google was represented by David H. Kramer, Michael B. Levin, and William O'Callaghan of Wilson Sonsini Goodrich & Rosati in Palo Alto, CA; and Kelly A Evans, Snell & Wilmer in Las Vegas, NV. Plaintiff acted pro se.

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## Google Image Search Thumbnails Held Likely to Infringe Photo Copyrights

By Mark Sableman

In a decision with potentially broad implications for search engines, a federal district court has ruled, on a preliminary injunction motion, that the creation and display of thumbnail images, in the ordinary operation of Google's Image search service, likely infringes copyrights of parties that object to the indexing and display of their images in that service. *Perfect 10 Inc. v. Google, Inc.*, 2006 WL 454354 (C.D. Cal. Feb. 17, 2006) (Matz, J.).

Though limited to the image search function, the decision could have ramifications for other search engine services, including even textual search results. The court considered and addressed several important issues raised by the Google Image search service (some of which also arise in the context of other search engine services):

- Whether the thumbnails that are essential to displaying image search results themselves infringe copyrights in the original photographs
- Whether the use of "inline linking" to bring an image resident on the original publisher's server onto the page created by the search engine constitutes a display-right infringement
- Whether the act of framing the searched-for photo on a search-engine-created composite page constitutes some kind of infringement
- Whether search engine operators can be secondarily liable for infringement committed by internet users, or by third-party sites that obtain customer traffic through search engine listings

The court found infringement liability only as to as to the first issue (direct infringement through creation and use of thumbnails), and rejected infringement with respect to use of the in-line linking and framing techniques, and the secondary liability theories. But although the decision did not go as far as the plaintiff wanted, it still represents a significant impingement on customary search engine practices.

### *Background*

Perfect 10 is the publisher of an adult magazine and the operator of a subscription website, both of which feature "high-quality, nude photographs of 'natural' models," according to the court. Moreover, in addition to its magazine and website outlets, since early 2005 (after it filed this case), Perfect 10 through a licensing arrangement with a UK mobile phone service provider has sold reduced-size copyrighted images for download and use on cell phones – approximately 6,000 downloads per month in the United Kingdom.

Perfect 10 is also a frequent litigator, largely unsuccessful until now, of innovative copyright claims against internet intermediaries including search engines, service providers, and credit card companies.

Google, of course, is one of the most admired companies of the day, known to almost everyone. But several relatively unknown aspects of its services played important roles in the decision. First,

Google lets websites opt out of having their content indexed.

If a website signals that it does not wish to be indexed, or wishes only partial indexing, Google will honor that request. In this case, Google has apparently honored Perfect 10's wishes not to be indexed, but it has continued to index Perfect 10 photographs that appear on infringing websites.

Second, Google has two advertising programs, the well-known AdWords program, for advertising on Google's own pages, and the less visible AdSense program, whereby pages on third party websites carry Google-sponsored advertising and share the resulting revenue with Google. The focus of the case appears to have been on Google thumbnail indexing of Perfect 10 photos found on infringing third-party websites – particularly websites that belonged to the AdSense program.

One prior case has addressed an image search engine, *Kelly v Arriba Soft Corp.*, 280 F.3d 935 ("Kelly I") and 336 F.3d 811 (9th Cir. 2003) ("Kelly II"). *Kelly I* had addressed in-line linking – the process by which one website (here, the image search engine) signals through HTML code that an image from another website (here, the original publisher of

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***Perfect 10 is also a frequent litigator, largely unsuccessful until now, of innovative copyright claims against internet intermediaries including search engines, service providers, and credit card companies.***

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## Google Image Search Thumbnails Held Likely to Infringe Photo Copyrights

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the photograph) should be displayed on the user's browser.

*Kelly I* held this process constituted infringement of the copyright display right, but the Ninth Circuit later withdrew that controversial and much-criticized ruling on procedural grounds in *Kelly II*. *Kelly II* addressed only image search thumbnails, and held that the image search engine's creation and use of them constituted fair use.

### ***In-Line Linking & Infringement***

In *Perfect 10*, the court first addressed Google Image Search's use of two special internet techniques: in-line linking, and framing.

Google, like the Arriba Soft image search engine involved in the earlier decision (now Ditto.com), creates a special page when the image-search user shows interest in a photo thumbnail shown on its image search results page. The resulting page is shown in frames. The upper frame, from Google's server, shows the thumbnail and a textual explanation about it.

The bottom frame displays the full photograph, from its home website; it does so because Google, which created the two-frame page, so directed, through an in-line link. The overall framed page will display a Google URL, since Google's webpage had created the framed composite page.

The court considered Google's framing and in-line link in the copyright context. It noted that framing could mislead consumers as to a website's origin by creating a "seamless presentation" from content taken from the creator's own and third party websites – but this was a trademark issue, not a copyright issue. Thus, the court essentially found framing irrelevant in a copyright analysis.

As to in-line linking, the court recognized two different approaches, one which favored Google and one which favored *Perfect 10*. The court adopted the "server" approach to in-line linking, which favored Google. Under this approach, the "display" of the image – i.e., the utilization of this exclusive right of the copyright owner – is attributed to the party that physically sends the content to the user's browser. In this case, it was the underlying site

that contained the full photograph. While acknowledging that this test could be abused (a website entitled "Infringing Content for All," with thousands of in-line links), the court found it to be the most straightforward and intuitive.

The opposing approach to in-line linking, which the court termed the "incorporation" test, would have attributed the "display" to the website that inserted the in-line link, and thus sought to incorporate an image from another website into the composite page of its design. While this approach had its pluses (it focused on the "visual" resulting page) and potential abuses (placing even well-explained well-intended in-line links at risk of infringement), ultimately the court seem to find it incompatible with the link-happy and search-needy nature of the internet.

"To adopt the incorporation test would cause a tremendous chilling effect on the core functionality of the web – its capacity to link, a vital feature of the internet that makes it accessible, creative, and valuable," the court held. Similarly, referring to the "delicate balance" in copyright law between encouraging initial creativity and encouraging dissemination of information, the court held that the incorporation test would defeat that policy if it made it infringement "merely to index the web so that users can more readily find the information they seek."

Thus, the court in *Perfect 10* exculpated Google from any direct copyright infringement liability by virtue of its use of in-line linking in connection with the Google Image service. Considering the contrary *Kelly I* conclusion, which took a far more expansive view of the copyright display right, this holding was a useful win for Google, and other users of the in-line linking technique.

### ***Fair Use Analysis***

In the next part of its analysis, however, the court departed from *Kelly II*'s conclusion that image search thumbnails were protected by fair use. Changes in facts both about the search engines (Google's broad advertising services) and the original photograph copyright owner (especially, the salability of thumbnail-sized photos for cell phone displays) contributed to this different holding.

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## Google Image Search Thumbnails Held Likely to Infringe Photo Copyrights

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The *Kelly II* holding that image search thumbnails were fair use had hinged largely on the non-commercial nature of the Arriba Soft image search engine, and the transformative nature of the thumbnails, due to the fact that the thumbnail images did not replace the market for the full-sized images, but rather served a different (and public interest) purpose of enabling users to find images on the internet. In *Perfect 10*, however, the court found that Google obtained commercial benefit from its Image Search, and its thumbnails supplanted a commercial use, the use of images for cellphone displays.

On the commercial benefit point, the court noted that Google's AdSense program allows Google to benefit when internet users are directed to participating websites, because Google shares in the revenue obtained from AdSense ads. Indeed, the court noted that 46% of Google's total revenues derived from the AdSense program. Although Google asserted that its policy prohibits posting of images from AdSense partners on Google Image Search, the court credited evidence that the policy was not consistently enforced. Accordingly, the court treated Google as a party deriving commercial benefit from the thumbnail displays, and thus found that the fair use factor relating to the purpose and character of the use, including the commercial versus non-commercial aspect, to slightly favor Perfect 10.

(Media lawyers may have some concerns with this conclusion. Considering that fair use doctrine embodies the public interest and First Amendment interests in use of copyrighted materials, the conclusion that profit makes the difference between a protected use (the non-commercial Arriba Soft image search engine) and an unprotected use (the for-profit Google Image search engine) seems to contradict the principle that the First Amendment applies to all, including profit-making businesses.)

The fair use factor relating to the effect of the use on the market for the copyrighted work had been the decisive one in *Kelly II*, because the Ninth Circuit found the search engine use "transformative," and not "consumptive" – that is, the thumbnails used by the image search engine served a

different function than the original photographs, and thus did not substitute for them in the marketplace.

In *Perfect 10*, the court acknowledged that the thumbnails still accomplished that transformative search-related use, but in view of Perfect 10's exploitation of the cell phone display market, the Google thumbnails also performed a consumptive use. People could, and probably did, use Google thumbnails as a substitute for paid Perfect 10 cell phone downloads. The court employed some speculation on this point, including its observation "that viewers of P10's photos of nude women pay little attention to fine details." The court did not discuss the fact that Perfect 10's thumbnail sales began after the suit was under way. Accordingly, the court found this factor to weigh slightly in favor of Perfect 10.

The court decided the two other stated fair use factors similarly to *Kelly II*; the amount and substantiality of the portion used was neutral and the nature of the copyrighted work weighed slightly in favor of Perfect 10. The court did not – unlike the court in *Field v. Google Inc.*, (D. Nev. Jan. 12, 2006), which considered fair use in the context of Google caching a month earlier – consider factors other than the four stated factors in section 107, despite that section's non-exclusive language.

After considering the four stated factors, the court essentially applied an arithmetical weighing of those factors, concluding that three factors slightly favoring Perfect 10 and one neutral led to a clear conclusion of no fair use. This section of the decision – particularly contrasted against the *Field* analysis that gave strong weight to the public policy interest in search engine functioning in connection with an unstated "public interest" fair use factor – may well become the focus of discussion concerning the correctness of the thumbnail ruling.

Based on its rejection of the fair use defense, and Google's acknowledgement that it created and stored the thumbnails, the court found it likely that Perfect 10 would prevail on its direct infringement claim against Google based on the thumbnail images.

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***The court found that Google obtained commercial benefit from its Image Search, and its thumbnails supplanted a commercial use, the use of images for cellphone displays.***

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## Google Image Search Thumbnails Held Likely to Infringe Photo Copyrights

(Continued from page 40)

### **Impact of the Decision**

Copyright-owner plaintiffs in other suits will undoubtedly find encouragement in this ruling. Agence France Press is challenging the use of its headlines and other materials by the Google News service. Book authors and publishers are challenging the planned Google Library project which would permit searching and review of short excerpts of copyrighted books.

And like the recent pro se case of *Parker v. Google Inc.*, No. 04-CV-3918, 2006 WL 680916 (E.D. Pa. March 10, 2006), other suits could assert claims that the website excerpts found in Google's ordinary textual search listings infringe copyrights. Many of these claims could hinge on whether courts are willing to step beyond the four stated fair use factors to recognize a public interest in the information-indexing benefits of search engines.

The court then turned to Perfect 10's secondary liability claims against Google. For secondary liability to exist, of course, there must be some direct infringement by someone. The court found no evidence that individual users of Google infringed Perfect 10's copyrights, and thus did not consider that as direct infringement. It examined, instead, Google's secondary liability or the direct infringement by third party websites that reproduce and display Perfect 10's photographs.

For contributory infringement, Perfect 10 had to show that Google knew of the infringing activity and induced, caused or materially contributed to it. Perfect 10's theory was that by helping people find sites that carried infringing material, Google was materially contributing to the infringement. The court decided that even if Google had knowledge of the third party infringement from the many notices that Perfect 10 sent it, Google's mere facilitation of searching was not equivalent to the far more active participation that has been found sufficient in the Napster case.

As to vicarious liability, which required proof that Google enjoyed direct financial benefit from the third party websites' infringement, and that Google had declined to exercise its right and ability to control the infringement, the court found that Perfect 10 could not

"control" third party infringement for a some basic reasons: "Google does not exercise control over the environment in which it operates – *i.e.*, the web", and even the AdSense program falls short of creating such strong control over third party sites.

Based on the court's refusal of the secondary liability theories, the court concluded that Perfect 10 was not entitled to all of the preliminary injunction relief it sought, and it requested the parties to jointly propose the terms of an injunction implementing the court's decision – an injunction to be "carefully tailored to balance the competing interests ... of intellectual property rights on the one hand and those promoting access to information on the other."

Amazon.com was also a defendant in the case, because of its licensed use of Google technology, but the decision addressed only plaintiff's claims against Google, and promised that a separate order would address the issues as to Amazon.

*Mark Sableman is a partner with Thompson Coburn in St. Louis MO. Jennifer A. Golinveaux, Michael S. Brophy, and Andrew P. Bridges of Winston and Strawn, San Francisco, CA, represented Google. Daniel J. Cooper, Beverly Hills, CA; Jeffrey N. Mausner, of Berman Mausner and Resser; and Jeffrey D. Goldman, Russell J. Frackman, of Mitchell Silberberg and Knupp, Los Angeles, CA, represented Perfect 10.*

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## FCC Unloads its Docket

### *Rules on Thousands of Television Indecency Complaints; Imposes Record Fine*

Clearing a four-year backlog, the FCC this month ruled on thousands of television indecency complaints. The Commission upheld its decision to fine CBS for Janet Jackson's Super Bowl "wardrobe malfunction," and it handed down its largest fine ever – \$3.6 million – over a teen sex scene.

These were the first fines imposed under the leadership of Chairman Kevin J. Martin, who took over for Michael Powell last March.

#### *“Without a Trace”*

More than doubling its largest previous single program indecency fine, the FCC ordered 111 CBS owned and affiliate stations to pay the maximum allowable penalty of \$32,500 per station (\$3.6 million total) for airing an episode of “Without a Trace.” (Opinion at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-18A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-18A1.pdf)).

The stations fined were only those in the Central and Mountain time zones for which the FCC had received a citizen complaint. Eastern and Pacific time zone stations

aired the episode at 10 PM rather than 9PM, placing them inside the FCC's “safe harbor;” the 10 PM to 6 AM time period during which indecency regulations are not enforced.

The episode, titled “Our Sons and Daughters,” depicted several teenagers engaged in group sex. It also included two shots of teen couples engaged in simulated intercourse. The scene contains no nudity, but “it does depict male and female teenagers in various stages of undress.”

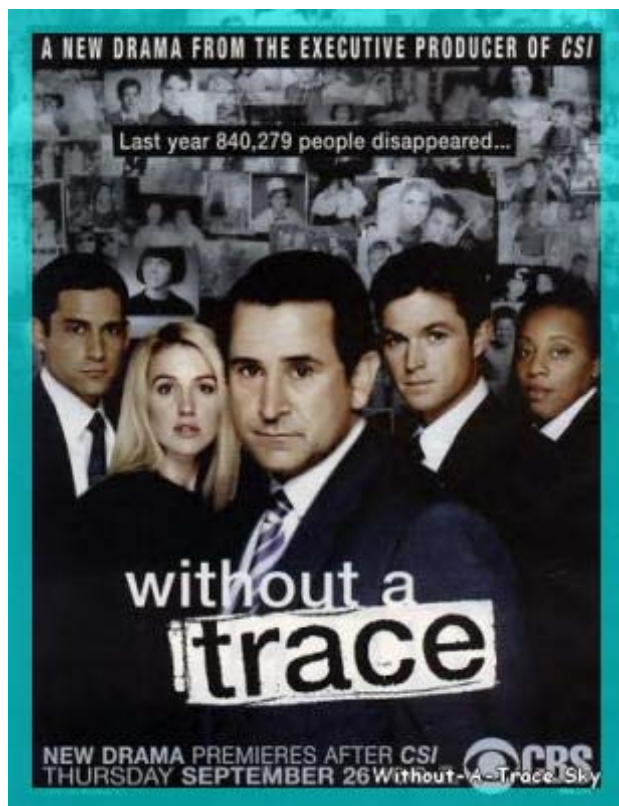
The FCC “defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.” Contemporary community standards are defined according to the tastes of the average broadcast viewer in the nation. The degree to which this preternaturally typical viewer would be offended is measured by a three factor balancing test.

These factors include: “(1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.” The degree to which the material panders to or titillates the audience can be mitigated by educational, political, and current affairs content.

In the space of four paragraphs, the Commission ruled that “Our Sons and Daughters” violated decency standards. The program was intended to excite sexual thoughts, included explicit sexual sounds, and would easily be discerned as sexual activity by any child in the audience. The FCC found it particularly offensive that the actors were depicting teenage sex, as if that alone was dispositive of the inquiry.

#### *Ms. Jackson's Wardrobe Malfunction*

The FCC upheld its September 22, 2004 decision, fining CBS \$550,000 (20 CBS-owned stations each fined \$27,500) for its airing of a Super Bowl Halftime



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### FCC Unloads its Docket

*(Continued from page 42)*

show which culminated in Justin Timberlake pulling off a portion of Janet Jackson's bustier, revealing her breast. (Opinion at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-19A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-19A1.pdf).)

CBS affiliates were not fined because there was "no evidence that the licensees of any of those stations played any role in the selection, planning or approval of the halftime show or that they could have reasonably anticipated that CBS's production of the halftime show would include partial nudity."

On appeal, CBS argued: 1) that the Super-Bowl Halftime show was not indecent; 2) that any violation of the rules was not "willful" as required for liability under §503(b)(1)(B) of the Communications Act; and 3) that the FCC's indecency regulations were unconstitutionally vague and overbroad both facially and as applied.

Using the same three part balancing test outlined above, the FCC quickly rebuffed CBS' contentions. As for the first factor, explicitness, the FCC stated "[n]otwithstanding CBS's claimed befuddlement at how the televised image of a man tearing off a woman's clothing to reveal her bare breast could be deemed explicit, we believe that conclusion is clearly warranted by the facts here and fully consistent with the case law."

Although the display was brief, the FCC ruled that this mitigating factor was overwhelmed by the aggravating factors present in the first and third prongs of the test. Discussing the context of the performance, the FCC found it highly sexualized, containing suggestive lyrics and sexual gestures such as crotch grabbing, and thus it was clearly intended to titillate.

The FCC interpreted "willful" as the term is used in trespass rather than how it is used in criminal or copyright law. That is, it is sufficient that CBS intended to broadcast the show. "Willful" is defined as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.

It is enough, the opinion states, that CBS was aware of some risk that indecency rules could be violated and yet failed to take available precautions that would have prevented the broadcast of indecent material. Even if CBS had no knowledge that Ms. Jackson's breast would be revealed, CBS is responsible for her actions, as well as those of the other performers, under a respondeat superior theory. The performers

were employed by a Viacom subsidiary and CBS had a high degree of control over their actions.

The Commission did not fully entertain CBS' Constitutional arguments, dismissing them with a reference to the many judicial decisions upholding the indecency framework. CBS' contention that new technologies had rendered FCC regulation of broadcast obsolete was shunted aside just as quickly.



Lastly, the FCC rejected CBS' concern that this ruling would chill coverage of live public affairs and political programming, noting that this was a staged event for which CBS had ample notice and opportunity to prepare. Given CBS' knowledge that the program was live and would contain sexually charged material, the decision notes, they should have taken more precautions, such as instituting a video delay.

### *Other Sanctions and Complaints*

In its memorandum "Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005," the FCC addressed hundreds of thousands of other complaints regarding programming aired between February

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## FCC Unloads its Docket

(Continued from page 43)

2002 and March 2005. (Opinion at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-17A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-17A1.pdf)).

The FCC imposed fines involving six programs. Several of these programs aired on multiple stations, but only those stations that had viewer complaints lodged against them were fined.

- “The Surreal Life 2”: The Commission imposed a \$27,500 against WBDC Broadcasting for airing an episode showing Ron Jeremy, an adult film star, having a pool party with several female adult film stars. “The scene lasts for over ten minutes, contains approximately twenty pixilated images of nude adults, including a fully nude body, and focuses almost entirely on men and women disrobing, ogling, fondling, kissing, and sexually propositioning one another during a pool party.” Pixilation, the Commission notes, does not preclude forfeiture, but must be analyzed in context.
- “Con El Corazón En La Mano”: NBC Telemundo was fined \$32,500 for airing a graphic rape scene. The FCC rejected claims that the scene was necessary for a realistic portrayal of events. Even if it were, the opinion states, the factors other than pandering (explicitness and dwelling at length) are sufficient to justify the fine.
- “Fernando Hidalgo Show”: The FCC fined the Sherjan Broadcasting Company \$32,500 for a segment of a talk show where a woman wore an open front dress with only her nipples covered. The comedic nature of the program did not mitigate its intent to titillate.
- “Video Musicales”: Aerco Broadcasting Corp. was fined \$220,000 for airing explicit Spanish language music videos. The amount was reduced from \$385,000 (\$27,500 multiplied by 14 broadcasts) because the Commission deemed the smaller amount sufficient for deterrence and the broadcaster had no prior indecency violations.
- “The Blues: Godfathers and Sons”: This most controversial decision imposed a \$15,000 fine on San Mateo County Community College District for airing a program that included multiple uses of the words “fuck” and

***The Commission did not fully entertain CBS’ Constitutional arguments, dismissing them with a reference to the many judicial decisions upholding the indecency framework.***

“shit.” The program in question, executive produced by Martin Scorsese is a documentary about the history of the blues and its influence on modern hip-hop music. The film also aired on various PBS stations. Unlike its prior decision on the broadcast of “Saving Private Ryan” which dismissed a complaint over such language where deleting would have diminished the power and realism of the film, here the FCC determined that San Mateo had not shown the expletives to be necessary. Given that the station is a small non-profit educational broadcaster, it was not fined the maximum amount allowed. Commissioner Jonathan Adelstein vigorously dissented from this decision, saying that it would chill protected speech.

- “The Pursuit of D.B. Cooper”: KTVI TV was fined \$27,500 for airing a movie containing multiple gratuitous utterances of the words “shit,” “horseshit,” “bullshit,” and “owl shit.”

Several broadcasts were determined to be indecent or profane but were not fined because the Commission’s “precedent at the time of the broadcast indicated that [it] would not take enforcement action against isolated use of expletives.” (These broadcasts aired before the Commission’s 2004 ruling in *Golden Globe Awards*, which fined several stations for airing a speech where Bono said something approximating “fuck.”)

### ***Oprah and Today Show Spared***

Two of the more interesting of the many decisions where fines were not imposed concerned the Today Show and the Oprah Winfrey Show. During live coverage of a police rescue, broadcast during the Today Show, a man wearing only a shirt was pulled from flood waters, briefly exposing his genitals. The Commission found that the news context of this rescue, and that it was not intended to titillate, militated against liability.

And Oprah Winfrey’s discussion of sexual vocabulary used by teenagers was also found not to be indecent. Despite discussion and definition of such terms as “rainbow party,” “booty call,” and “tossed salad,” the Commission found the show was presented with an educational intent, rather than intent to titillate.

## Department of Justice Continues Crackdown On Publication of Advertisements for Online Gambling

By Robert J. Driscoll

Recent developments make clear that for United States media outlets, publishing or broadcasting advertisements for offshore gambling websites continues to be a risky business.

### *Sporting News Settles with Prosecutors*

Since the late 1990's, federal and state prosecutors have sought to restrict the availability in the United States of offshore gambling websites, contending that offering gambling activities to United States residents via the sites violates various federal and state anti-gambling laws.

Initially, prosecutors focused on those who run the websites. However, the government (apparently recognizing the difficulties involved in locating and prosecuting offshore businesses and their principals) subsequently turned its attention to U.S.-based companies that do business with operators of online gambling sites, including financial services companies that process gambling-related payments and media companies that run advertisements for the sites.

In a signal that the government's campaign against these peripheral players remains in force, the United States Attorney for the Eastern District of Missouri in January 2006 announced a settlement with The Sporting News concerning its publication of advertising for offshore sports betting and casino-style gaming operations.

In the settlement, the publisher, without admitting any liability, agreed to pay \$4.2 million to the United States and to undertake a \$3 million public service anti-gambling campaign. This appears to be the largest civil forfeiture to date by any media company in connection with publication of advertisements for offshore gambling sites.

### *Pressure on Publishers*

The settlement involving The Sporting News is the latest development in a pressure campaign against media outlets that has been underway for several years.

In 2003, an Assistant Attorney General in the Department of Justice's Criminal Division sent a letter to the National Association of Broadcasters informing it, as a "public service," that provision by offshore gambling sites of their services to United States residents violates various federal laws, including the Wire Act (18 U.S.C. § 1084), the Travel Act (18 U.S.C. § 1952), and the Illegal Gambling Business Act (18 U.S.C. § 1955), and that broadcasters that run advertisements for such sites may be guilty of aiding and abetting these illegal activities.

The prosecutor noted that broadcasters might wish to "consult with their counsel or take whatever actions they deem appropriate" with respect to such advertisements. At around the same time, the office of the United States Attorney for the Eastern District of Missouri, which has for several years been the primary source of the federal government's prosecutorial activities in this area, issued a number of subpoenas to media outlets seeking information relating to online gambling advertisements.

Other highly-publicized examples of the federal government's activities in this area include the seizure from Discovery Communications in 2004 of \$3.2 million that the company had received for commercial airtime purchased by an offshore online casino, and a 2004 settlement between the federal government and a group of St. Louis radio stations that involved a forfeiture of \$158,000.

### *Casino City Lawsuit Dismissed*

In response to the government's enforcement activities, a number of publishers – although disputing the government's position that publishing gambling advertisements may be a violation of the federal aiding and abetting statute – determined that the risk of investigation or prosecution outweighed the benefits of running the advertisements, and the advertisements disappeared from many major media outlets.

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***Since the late 1990's,  
federal and state prosecutors  
have sought to restrict  
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gambling websites.***

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(Continued on page 46)

## Department of Justice Continues Crackdown On Publication of Advertisements for Online Gambling

(Continued from page 45)

One media company, however, decided to fight. Casino City, an operator of websites featuring information about and advertising for online gambling sites, filed a complaint in 2004 against the United States in federal court in Baton Rouge, seeking a declaratory judgment that the threatened application of the federal aiding and abetting statute to Casino City's publication of advertisements for online gambling sites violates the First Amendment.

The District Court dismissed the complaint in February 2005, holding that Casino City had failed to establish an actual case or controversy and that it lacked standing because it had failed to show a credible threat of prosecution.

*See Casino City, Inc. vs. United States Department of Justice*, Civil Action No. 04-557-B-M3 (M.D. La. February 15, 2005).

Among other things, the court found it important that the Department of Justice had not sent its 2003 letter to Casino City, served Casino City with a subpoena, or issued to it a target letter advising it that it was the subject of a criminal investigation.

The court did not stop there, however – it went on to reject Casino City's First Amendment claims on the merits. It analyzed, in a rather cursory fashion, the government's activities with respect to online gambling activities under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980):

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.* at 567.

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**United States media outlets that continue to deal with online gambling companies must remain prepared for further governmental scrutiny.**

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The Casino City court held that because advertisements for online gambling “only address[] illegal activity” and “falsely portray[] the image that Internet gambling is legal,” such advertisements do “not [constitute] speech that is protected by the First Amendment.”

The court went on to assert that the government has a substantial interest in regulating Internet gambling “because of its accessibility by the general public, which includes children and compulsive gamblers.”

Finally, the court noted that “[b]y targeting and punishing advertisers who utilize this information, the government reaches its goal of deterring this illegal activity” (apparently concluding that the government's activities therefore “directly advance” the governmental interest asserted, as required by *Central Hudson*).

It did not, however, explicitly consider the final element of the *Central Hudson* analysis, i.e., whether the government regulation “is more extensive than is necessary to serve [the asserted governmental] interest.”

Casino City initiated an appeal to the Fifth Circuit, which the parties fully briefed, but Casino City withdrew the appeal after oral argument. The District Court's decision therefore remains the last word on the First Amendment issues relating to online gambling advertisements.

### ***The Future of Online Gambling Ads?***

One of the arguments made by offshore gambling companies, and media companies that publish their advertisements, is that not all forms of gambling are prohibited under federal law.

They note that although the federal government has relied heavily on the Wire Act to support its blanket assertion that all forms of online gambling violate federal law, that statute refers only to “bets or wagers on any sporting event or contest,” such that it is applicable only to sports betting operations and not casino-style gambling. *See In re MasterCard Int'l*, 313 F.3d 257, 273 (5th Cir. 2002) (noting that “the Wire Act does not prohibit non-sports [I]nternet gambling”).

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## Department of Justice Continues Crackdown On Publication of Advertisements for Online Gambling

*(Continued from page 46)*

To the extent this limitation of the Wire Act presents a loophole for operators of offshore casino-style gambling websites, however, it may soon be closing: The Internet Gambling Prohibition Act (H.R. 4777), introduced in the House of Representatives in February 2006 by Rep. Robert Goodlatte, would amend the Wire Act such that it would apply to all forms of online gambling, including casino-style gambling.

In addition, the limitations of the current Wire Act notwithstanding, many forms of Internet gambling violate various state laws, and would therefore also run afoul of the federal Illegal Gambling Business Act, 18 U.S.C. § 1955, which criminalizes gambling businesses that violate state law and exceed certain revenue or operational thresholds.

Another aspect of the online gambling controversy that is likely to draw further attention is the advertising of “.net” sites. These are sites affiliated with gambling websites and accessible at a URL that is virtually the same as the gambling site, except that the website address ends with “.net” rather than “.com” (for example, a gambling website located at allgambling.com might have a companion site at allgambling.net).

The content of these companion sites vary, but they all tend to avoid directly offering paid gambling services. Many of them are limited to offering gambling-related information, and others offer Internet users the opportunity to play games such as poker and blackjack but without paying a fee or receiving a prize.

A number of media outlets now run advertisements for these companion sites, believing that they are sufficiently removed from actual gambling activity to minimize the threat of governmental scrutiny.

Some also have attempted to protect themselves by carefully reviewing the content of the “.net” sites to make sure that they do not offer gambling services or link directly to gambling sites, and requiring advertisers to verify that the funds used to pay for the advertising space are not derived from gambling activity.

It remains to be seen how prosecutors will view “.net” advertising. There are some reports that the Department of Justice is looking into media outlets that accept advertisements for these “.net” sites, but it appears that the investigative focus may be on those sites that actually offer consumers the ability to play poker and similar games (albeit without charge), rather than those sites that only offer gaming-related information.

In any case, it is unlikely that offshore gambling companies will cease trying to reach consumers in the United States. Given the highly visible and political nature of the federal government’s anti-gambling campaign, those United States media outlets that continue to deal with online gambling companies – regardless of the specific manner in which those companies advertise – must remain prepared for further governmental scrutiny.

*Robert J. Driscoll is a partner in the New York office of Davis Wright Tremaine LLP.*

### **RECENTLY PUBLISHED** **MLRC BULLETINS**

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GOVERNMENT RETALIATION AND THE FIRST AMENDMENT  
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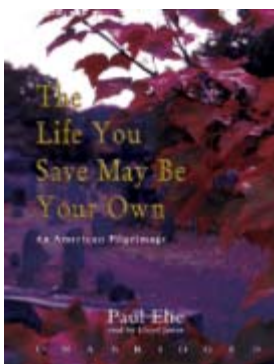
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## Copyright Claim Over Book Review Photo Survives Summary Judgment

### *No Fair Use as a Matter of Law*

In a case testing the fair use defense, a California federal court denied a newspaper's motion for summary judgment in a copyright infringement suit over the newspaper's use of a photograph taken from a book being reviewed. *Harris v. San Jose Mercury News*, Case No. C 04-05262 CRB. (N.D. Cal. Jan. 3, 2006) (Breyer, J.). The court, however, will consider certifying the issue for interlocutory appeal to the Ninth Circuit.



#### **Background**

Plaintiff, Christopher R. Harris, is a photographer and photojournalism instructor. In 1982 while on assignment for *Esquire* magazine, Harris photographed author Walker Percy.

In 2003 the photograph was used in a book by author Paul Elie entitled *The Life You Save May Be Your Own: An American Pilgrimage* about four prominent American Catholic authors, including Walker Percy. Harris was paid \$600 for use of his photo of Walker Percy in the book. His agreement with Elie specified that the photograph could not be used for promotional purposes.

A publicity package promoting the book was sent to the *Mercury News*, and it decided to review the book. To illustrate the review, the *Mercury News* reproduced the cover, a jacket photo of Elie, and four photographs from the inside the, including Harris's photograph of Walker Percy.

The version of the Percy photograph produced in the book (and the review) was not the complete image; the image was significantly cropped. The Percy photograph was attributed to Harris in the review, but the attribution did not include a copyright symbol (©), which had accompanied the photo credit in the book.

Harris sued, asserting copyright infringement, violation of section 1202 of the Digital Millennium Copyright Act (removal of copyright management information), and state unfair competition claims. A motion for judgment on the pleadings was granted in part and denied in part, resulting

in the filing of an amended complaint that omitted the state law unfair competition claims.

Judge Charles Breyer (brother of U.S. Supreme Court Justice Breyer) then set a hearing on a motion for summary judgment focused on the defense of fair use, and ordered the parties to take discovery limited to the issue of fair use. After discovery was completed on the fair use issue, the *Mercury News* moved for summary judgment.

#### **Fair Use Factors**

The evidence regarding the first three fair use factors (the purpose and character of the use, the nature of the copyrighted work, and the amount and substantiality of the portion used in relation to the copyrighted work as a whole) was essentially undisputed.

Most of the discovery –and the briefing – focused on the fourth fair use factor, *i.e.* the effect of the use upon the potential market for or value of the copyrighted work. The evidence established that there are only two potential markets for the use of any existing photographic image: (1) a potential market for rights or licenses to reproduce the photograph, and (2) a potential market for prints of the photograph.

The *Mercury News* introduced evidence showing that in the twenty-three years since the photograph was taken, Harris had licensed the photograph only three times, and never for use in a book review. Harris had never taken or licensed any photograph for use in a book review. The evidence also showed that Harris had sold only two prints of the photograph.

Expert testimony and declarations established that it was the practice of many newspapers to reproduce interior photographs from books in reviews of those books without seeking permission or making payment.

Thus, the *Mercury News* argued that there was no market for paid licenses to use the copyrighted work in book reviews, and that Harris could not demonstrate that any alleged future lack of licensing or print sales was attributable to its use.

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### Copyright Claim Over Book Review Photo Survives Summary Judgment

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Relying primarily on the testimony of Jane Kinne, a photo researcher and stock photo agency representative, Harris claimed that the *Mercury News*' use of the photograph had deprived him of a license fee, had diminished his ability to license the photograph for subsequent use by other newspapers or book review publications (who allegedly would not use a photograph that had appeared in another review), had diminished his ability to sell prints of the photograph through "overexposure" of the work (because buyers of photograph prints would only want images that were not well known), and had diminished the perception of the quality of the work by distributing a poor quality, newsprint reproduction.

#### ***District Court Decision***

After consideration of the lengthy summary judgment papers, Judge Breyer denied the motion for summary judgment in a two-page decision. The decision does not specifically address the fair use factors.

The decision characterized the *Mercury News*' fair use defense as an argument that "the use of the photo was the equivalent of a pictorial quotation from the book," although that was not a principal argument by the *Mercury News*.

The decision then stated:

"Yet the photograph was obviously marked as a copyrighted photograph in the book, both on the page the photograph appeared [sic] and then again in the credits in the back of the book. In other words, the photograph was a copyrighted work within a copyrighted work. Therefore, the Court does not concur with defendant's analogy. Photographs taken for

aesthetic purposes, as plaintiff's photograph is reasonably inferred to be, are 'creative in nature and thus fit squarely within the core of copyright protection.' ... As a result, the Court cannot say as a matter of law that use of a copyrighted photograph in a book review, in which the book clearly states that the photograph is copyrighted, constitutes fair use."

Harris's attorney issued a press release, claiming that Harris had been "vindicated." According to an article published by his college newspaper, Harris has asserted that "the outcome of the lawsuit ... may mean jail time for the *Mercury News* editor who approved the publication."

However, at the subsequent case management conference, Judge Breyer stated that there are "serious questions on fair use," and that he would consider a motion to certify the decision for appeal.

Harris has now filed a second amended complaint, adding a class action claim for injunctive relief on behalf of other photographers who photographs have appeared in reviews in the *Mercury News*.

A hearing has been set for March 24, 2006 on motions by the *Mercury News* to dismiss or strike the amended complaint (a procedure Judge Breyer adopted in lieu of having separate motions opposing leave to amend and to dismiss the amended complaint), and to certify the decision denying the motion for summary judgment for interlocutory appeal.

The *Mercury News* is represented by James Chadwick of DLA Piper Rudnick Gray Cary in San Francisco. Harris is represented by Robert A. Spanner, of Trial & Technology Law Group, in Menlo Park, Ca.

## MLRC Calendar

September 27-29, 2006

NAA/NAB/MLRC Media Law Conference  
Alexandria, Virginia

## Fourth Circuit Orders District Court to Provide Access to Moussaoui Trial Exhibits

### *Press and Public Have Right of Access to Exhibits*

By Jay Ward Brown

Granting in part a petition for a writ of mandamus, the Fourth Circuit has ordered District Court Judge Leonie M. Brinkema to provide to the press and public contemporaneous access to copies of exhibits admitted in evidence and published to the jury in the death penalty sentencing trial of Zacarias Moussaoui. *In re Associated Press*, No. 06-1301 (4th Cir. March 22, 2006) (Wilkins, CJ, and Gregory and Duncan, JJ.).

In reversing an order that had effectively sealed the exhibits at least until after conclusion of the anticipated three-month trial, the Fourth Circuit reaffirmed that the right of access to trial exhibits is grounded in both the First Amendment and the common law, and it rejected administrative burden and fear of possible juror taint as sufficient to overcome these access rights.

#### **Background**

Three weeks before commencement of Moussaoui's sentencing trial, Judge Brinkema *sua sponte* entered two orders governing access to portions of the trial record. First, in a written order, she directed that "none of the exhibits entered into evidence will be made available for public review until the trial proceedings are completed, at which time requests for these materials will be considered."

Citing the administrative burden that would be imposed either on court staff or the parties if they were required to make available copies of the thousands of anticipated exhibits while focusing on trying a complex case, Judge Brinkema preemptively ruled that it simply was impossible as a practical matter to accommodate the public's access rights during trial.

Moreover, Judge Brinkema asserted, the prospect that news media outlets would discuss exhibits that had not yet been published to the jury, coupled with the possibility that jurors would be exposed to those news reports, created the

potential for juror taint. The need to protect the defendant's fair trial rights therefore overrode any interest the public had in contemporaneous access to the exhibits during trial.

Judge Brinkema stated in her order that she would not entertain any requests for "reconsideration" of her ruling, notwithstanding that the press and public had neither notice nor any opportunity to be heard in connection with it.

For similar reasons, Judge Brinkema the same day orally ordered that all transcripts of bench conferences

would be sealed until after trial, at which time they would be unsealed unless their contents required continued sealing.

A coalition of news organizations promptly intervened in the district court and moved to modify both orders on the grounds that they were (1)

facially invalid because entered without notice to or opportunity for the public to be heard in connection with them and (2) substantively invalid because the court had not made specific findings sufficient to support the conclusion that such sealing was required to protect a compelling interest that no narrower relief could achieve. Participants included the Associated Press, CNN, The Hearst Corporation, NBC Universal, The New York Times, the Washington Post, USA Today, The Star Tribune Company and the Reporters Committee for Freedom of the Press.

Without conceding that "contemporaneous" means less than it implies, the media intervenors suggested several ways in which the district court could reconcile the interests it had cited with the public's access rights. For example, the intervenors suggested that the parties could be required to provide a single copy of exhibits to a pool representative at the end of each half day, or even each full day of trial.

And, with respect to bench conference transcripts, the intervenors suggested that they could be sealed for a brief period, but then automatically placed in the public record

*(Continued on page 51)*

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**Judge Brinkema preemptively ruled that it simply was impossible as a practical matter to accommodate the public's access rights during trial.**

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### Fourth Circuit Orders District Court to Provide Access to Moussaoui Trial Exhibits

(Continued from page 50)

if no party sought within that period to maintain them under seal.

Both the government and the defense filed perfunctory oppositions to the motion, with the government endorsing the district court's stated reasons for entering the orders. While the motion for access, pursuant to normal court procedure, was set for hearing a full week in advance of the commencement of trial, Judge Brinkema struck the hearing from the calendar, saying she would decide the motion on the papers.

When Moussaoui's sentencing trial began and access to exhibits and transcripts was denied without any action by Judge Brinkema on the pending access motion, the media intervenors filed a petition for a writ of mandamus in the Fourth Circuit, repeating the arguments made in the district court. A few hours after the petition was filed and served, Judge Brinkema entered a written order denying the motion for the reasons previously stated. The appellate court ordered the government and defense to answer the petition within five days, and the Fourth Circuit issued its ruling just eight business days after the petition was filed.

#### Fourth Circuit Decision

The Fourth Circuit first reiterated the principle that an order sealing any portion of the record or closing a courtroom is facially invalid if entered without *prior* notice to and an opportunity for interested members of the public to be heard. See Slip Op. at 5 (citing *In re Knight Publ'g Co.*, 743 F.2d 231, 234 (4th Cir. 1984); *In re S.C. Press Ass'n*, 946 F.2d 1037, 1039-40 (4th Cir. 1991)). The Fourth Circuit concluded that this defect in Judge Brinkema's original orders had been "belatedly" cured by her subsequent ruling on the merits of the intervenors' motion to modify those orders. Slip Op. at 5-6.

Turning to the order denying access to copies of documentary trial exhibits (a category that, according to the Fourth Circuit, includes documents, videotapes and photographs, Slip Op. at 6), the appellate court confirmed its prior conclusion that this right "aris[es] from the First

Amendment" in addition to the common law. Slip Op. at 6-7 (citing *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999)).

The Fourth Circuit "ha[d] little difficulty concluding that the district court did not abuse its discretion in refusing to provide access to items that have been admitted into evidence but that have not yet been published to the jury," or that were to be published to the jury part by part, since the burden of providing "piecemeal access to partially admitted exhibits" justified a denial of contemporaneous access. Slip Op. at 7.

Similarly, the Fourth Circuit held that, if an exhibit is published to the jury but *not* to the public in attendance at trial, *e.g.*, where an exhibit is a classified national security document shown only to jurors and not disclosed in open court, then the district court could properly deny access to copies of the exhibit. Slip Op. at 8.

But where an exhibit has been both "admitted into evidence and fully published to the jury" the "district court abused its discretion in denying access." *Id.* Adopting a standard articulated by the Second Circuit, the Fourth Circuit held that "it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction." *Id.* (quoting *United States v. Myers (In re Nat'l Broad. Co.)*, 635 F.2d 945, 952 (2d Cir. 1980)). Not even the highly-charged circumstances surrounding the Moussaoui death penalty trial meet this high bar, the Fourth Circuit concluded.

In particular, Judge Brinkema's "concern for jury taint is not well taken regarding the exhibits that have been fully published to the jury," especially where, as here, the district court had "instructed the jurors not to expose themselves to media coverage of the trial," since it is "unlikely that simply seeing the evidence again through a media publication will endanger Moussaoui's right to a fair trial." Slip Op. at 8-9.

Although the Fourth Circuit emphasized that it did "not doubt that the administrative burdens facing the district

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**Where an exhibit has been both "admitted into evidence and fully published to the jury" the "district court abused its discretion in denying access."**

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(Continued on page 52)

### Fourth Circuit Orders District Court to Provide Access to Moussaoui Trial Exhibits

(Continued from page 51)

court are enormous,” it agreed with the media intervenors “that there are ways to ease the incremental administrative burdens that would arise from accommodating their First Amendment right of access, such as providing access to one copy of an exhibit – either through the parties or through the court – and requiring the media to make additional copies at their own expense.” Slip Op. at 9-10.

At bottom, the Fourth Circuit held, it could not agree with Judge Brinkema “that the incremental rise in [administrative] burdens that would be caused by providing access justifies” the order denying access to copies of exhibits until after trial.

The appellate court therefore directed the district court to make one copy of each exhibit available to the media “as soon as is practically possible, but in no event later than 10:00 a.m. on the day after the exhibit is published to the jury, or, in the case of an exhibit that is published to the jury in parts, after all parts of the exhibit have been published to the jury.” Slip Op. at 10.

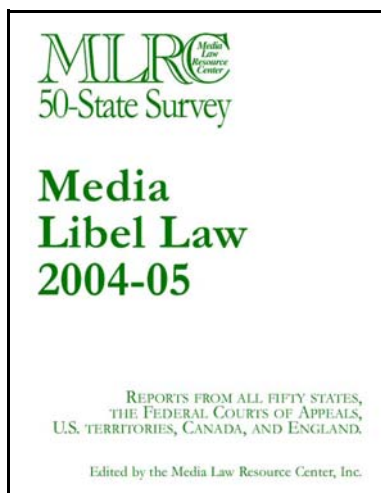
### Post-Trial Release of Transcripts

As for the bench conference transcripts, however, the Fourth Circuit concluded that, because the conferences themselves properly are closed to the public, the public does not have a right of contemporaneous access to transcripts of them, precisely because this would risk exposing jurors to matters properly concealed from them prior to deliberation. Slip Op. at 11-12. Any right of access to bench conference transcripts “is amply satisfied by prompt post-trial release of transcripts.” Slip Op. at 12.

*Jay Ward Brown, David A. Schulz and Adam J. Rappaport at Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. represented the media intervenors. Principal appellate counsel for the Department of Justice were Assistant Attorney General Alice S. Fisher, Criminal Division Appellate Section Chief Patty Merkamp Stemler, and AUSA Robert A. Spencer. The defendant was represented by Edward B. MacMahon of Middleburg, Va., and by public defenders Gerald T. Zerkin and Kenneth P. Troccoli.*



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## Department of Defense May Not Invoke Blanket Privacy Exemption to Withhold Information About Guantanamo Bay Detainees

By Adam Rappaport

The Department of Defense cannot invoke a blanket privacy exemption to the Freedom of Information Act as grounds to withhold the names and identifying information about detainees at Guantanamo Bay, the U.S. District Court for the Southern District of New York recently held. *Associated Press v. United States Department of Defense*, No. 05 CV 3941 (JSR) (S.D.N.Y. Jan. 4 and Jan. 23, 2006).

In response to the Associated Press's FOIA request for transcripts of tribunals that determined whether the detainees were "enemy combatants," DOD eventually provided transcripts that redacted any kind of information that could be used to identify the detainees. Its only justification was that releasing the information would invade the privacy of the detainees and put them and their families at risk.

In an opinion issued January 4, 2006, Judge Jed Rakoff held that DOD had not established any legitimate privacy interest, and therefore could not redact the identifying information across the board. Judge Rakoff elaborated on these points in a January 23 opinion denying DOD's motion for reconsideration, and ordered DOD to produce unredacted copies of the transcripts. However, he stayed this order while DOD decides whether to appeal his decisions.

### Background

In response to the attacks of September 11, 2001, the U.S. government captured hundreds of "enemy combatants" in Afghanistan and other places around the world. The government designated these men "enemy combatants" based on its conclusion that they had ties to al-Qaeda or other terrorist organizations. Since January 2002, about 750 of these detainees have been housed for some period at the Naval Base at Guantanamo Bay, Cuba.

Over the next several years, detainees at Guantanamo and elsewhere challenged the process by which they were designated enemy combatants and the legality

of their imprisonment by the United States. Ultimately, in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Supreme Court ordered, among other things, that detainees have the right to a determination of their status as enemy combatants by an impartial decision maker. In response, DOD created a "Combatant Status Review Tribunal" ("CSRT") to serve as a forum for detainees to contest their status. From July 2004 through January 2005, 558 tribunals were convened.

While DOD announced that it planned to have open hearings for the CSRTs, in practice DOD made it difficult for journalists to attend many of them. For example, DOD regularly conducted hearings on days which reporters were not allowed to be at Guantanamo, scheduled multiple hearings for the same time (even though only one reporter per organization at a time was allowed on the Guantanamo base), and scheduled other proceedings at Guantanamo that conflicted with the CSRTs.

On November 4, 2004, AP submitted to DOD a FOIA request seeking: (1) transcripts of all testimony given by detainees at the CSRT hearings; (2) written statements given to the CSRTs by the detainees; and (3) any documents provided by a detainee to his assigned Personal Representative. Notwithstanding repeated assurances that AP's request was being expedited, and that documents would be forthcoming, DOD did not turn over a single document until after AP filed a lawsuit in April 2005.

Beginning in May, DOD produced approximately 3900 pages of documents related to 369 separate CSRTs. However, DOD redacted any information in the documents produced that it believed could be used to identify the detainees or witnesses. This included their names, ages, nationalities, addresses, home locales, and a variety of other information.

DOD claimed the right to withhold identifying information under FOIA's Exemption 6, which permits an agency to withhold "personnel and medical files and similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.

(Continued on page 54)

## **DOD May Not Invoke Blanket Privacy Exemption to Withhold Information About Guantanamo Bay Detainees**

*(Continued from page 53)*

S.C. § 552(b)(6). This was the only exception invoked by DOD – it did not claim that withholding the information was necessary to protect national security.

### ***DOD Moves for Summary Judgment***

In June, DOD moved for summary judgment. It argued that disclosure of personal identifying information which could link a specific detainee to particular testimony may be withheld under Exemption 6 because it could place detainees or their families in danger if terrorists or others were displeased by something the detainee said. DOD recognized that Exemption 6 requires this privacy interest to be weighed against the public interest in the information, but argued that the redacted documents were sufficient to inform the public about how the CSRTs functioned. As a result, DOD contended, the identifying information could be categorically redacted.

AP responded that DOD could only withhold the information if it revealed little or nothing about the government's conduct. Identifying information about the detainees is useful to the public's understanding of DOD's actions, AP argued, in that it reveals who the government has detained, helps the public understand the validity of the procedures DOD used in making its determinations of enemy combatant status, and sheds light of allegations of misconduct and abuse at Guantanamo Bay. AP also asserted that FOIA's privacy exemption did not allow DOD to keep secret the names of people who had been subject to a government tribunal convened to determine their liberty.

Judge Rakoff's initial response to the motion was to question whether the detainees themselves agreed with DOD that keeping their identities secret was in their best interest. In two orders, he noted that it would not be difficult to ask the detainees because they were in custody. The judge rejected DOD's arguments that the court did not have the authority to order the government to ask the detainees their opinion, that their views were irrelevant to his decision, and that it would be a heavy logistical burden to do

so. Taking an unusual but not unprecedented step, he ordered DOD to give to each detainee a questionnaire asking whether or not they wanted identifying information about them released to the AP, and to provide him with the responses.

DOD complied. Of the 317 detainees who were given the form, 63 said they wanted their identifying information released, 17 said they did not, 35 returned the form without checking either box, and 202 did not return the form at all.

### ***Summary Judgment Denied***

With this additional information in hand, Judge Rakoff denied DOD's motion for summary judgment on January 4, 2006. FOIA strongly favors a policy of disclosure, he noted, and the government carries a heavy burden to show that disclosure is "clearly unwarranted." In this case, the only privacy interest DOD asserted was on behalf of the detainees, but just 17 of 317 of them said they wanted their identities kept confidential, the judge said.

Moreover, none of the detainees had any expectation of privacy with respect to the information they provided at the CSRTs, he held. "Most of the information was provided by them in formal legal proceedings before a tribunal, and nothing in the record suggests that they were informed that the proceedings would remain confidential in any respect." Jan. 4 Opinion and Order at 4.

The court then distinguished *United States Dep't of State v. Ray*, 502 U.S. 164, 172 (1991), a case in which the Supreme Court upheld the government's assertion of Exemption 6 in denying access to identifying information about Haitian "boat people." These refugees were intercepted by the Coast Guard and returned to Haiti. The State Department later interviewed them to make sure they were not being persecuted for trying to emigrate. Unlike here, Judge Rakoff said, in *Ray* the Haitians who agreed to be interviewed and provide information expressly were promised confidentiality by the U.S. government, and had relied on that promise.

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***Judge Rakoff's initial response to the motion was to question whether the detainees themselves agreed with DOD that keeping their identities secret was in their best interest.***

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*(Continued on page 55)*

## DOD May Not Invoke Blanket Privacy Exemption to Withhold Information About Guantanamo Bay Detainees

(Continued from page 54)

Furthermore, in *Ray* the returnees' fear of retaliation and embarrassment when they got back to Haiti was so well founded that the U.S. government demanded that Haiti not retaliate, and interviewed the people returned under strict promises of confidentiality. By contrast, Judge Rakoff said, DOD failed to come forward in this case "with anything but thin and conclusory speculation to support its claim of possible retaliation." Jan. 4 Opinion and Order at 5. This "meager and unparticularized showing" was not sufficient to meet either the standards of Rule 56 or FOIA, Judge Rakoff concluded. *Id.*

As a result, DOD failed to establish "any cognizable privacy interest on the part of the detainees that would warrant the across-the-board application of Exemption 6 the defendant here seeks." *Id.* at 6. The court allowed in a footnote that it was "conceivable" in the "particular circumstance of a particular detainee" DOD could meet its burden, but that it had only sought a blanket redaction of all information "even remotely tending to identify any of the detainees."

### **Reconsideration Denied**

Immediately after Judge Rakoff issued the opinion, DOD moved for reconsideration. The only issue DOD raised was that while the court considered the privacy interests of the detainees itself, it overlooked the interests of their families, friends, and associates. In a January 23 opinion and order, the court denied reconsideration, and elaborated on its earlier reasoning.

The court first held that DOD had not raised the privacy interests of third parties in any cognizable way prior to the motion for reconsideration. Jan. 23 Opinion and Order at 4-6. Even if it had, Judge Rakoff added, the motion still would be denied on substantive grounds. If the detainees themselves had no reasonable expectation of privacy in the information they provided to the CSRTs, he reasoned, third parties would have even less of an expectation that the information would be kept confidential. *Id.* at 6.

Bolstering the discussion in the January 4 opinion, Judge Rakoff again addressed the detainees' expectation of privacy during the CSRTs. Most of the identifying

information was provided by the detainees "in sworn testimony at quasi-judicial hearings that were visibly recorded by the equivalent of a court reporter" and at which the press was present, he noted. *Id.* at 10. Furthermore, before each detainee testified the "Tribunal President" explained the CSRT process, without suggesting that any information provided would be kept private. *Id.* at 11. Accordingly, Judge Rakoff concluded, there was no evidence that the detainees had any expectation of privacy.

In addition, the government provided no evidence for its claim that the family, friends, and associates of the detainees could be subject to embarrassment or retaliation if their identities were revealed. These "wholly conclusory and grossly speculative assertions" were not entitled to any deference, the court said. *Id.* at 13.

As there was no protectable privacy interest in the redacted identifying information, the court said it did not need to balance the privacy concerns of third parties against the public interest in disclosure. However, in a footnote, Judge Rakoff said that AP's argument that the public interest would prevail appeared to be strong. For example, he said, several of the detainees claimed that there were people in their villages who could attest to their innocence. Without the names of the people or their villages, he said, it was impossible for AP to follow up on these assertions.

### **The Court Enters Final Judgment for AP**

During oral argument on the motion for reconsideration, DOD indicated that if the motion were denied, it did not plan to offer any further evidence. As a result, Judge Rakoff entered final judgment in favor of AP in his January 23 opinion, and ordered DOD to produce unredacted copies of the transcripts to AP by January 30. However, the court then agreed to stay the order until February 23 while DOD decided whether it would file an appeal.

*Dave Schulz, Adam Rappaport, and Nicole Auerbach of Levine Sullivan Koch & Schulz, L.L.P. represented the Associated Press in this case. Defendant was represented by Assistant United States Attorney Elizabeth Wolstein of the United States Attorney's Office for the Southern District of New York.*

## Billionaire Seeks Review of California Court of Appeal Decision Striking Down Divorce Court Secrecy Statute

By Susan Seager

Two months after a California appellate court struck down a new divorce court secrecy statute as unconstitutional in *Burkle v. Burkle*, 37 Cal. Rptr. 3d 805 (2006), the battle continues over the statute and public access to divorce court records in that state.

The battle is as much political as it is legal. Hundreds of pages of routine divorce court records remain under seal as the fight continues.

### Background

In the middle of the battle is Ronald W. Burkle, the California billionaire supermarket magnate and multimillion-dollar political fundraiser. Mr. Burkle has waged a four-year battle to keep his divorce court records under seal and to defend a secrecy statute that appeared to be written specifically for him after he made over \$150,000 in political donations to Governor Arnold Schwarzenegger and the state Democratic Party. Mr. Burkle has denied that he had a hand in writing the statute, Family Code § 2024.6.

Mr. Burkle has asked the California Supreme Court to review the Court of Appeal's January 20 decision striking down the statute for creating an undue burden on the First Amendment right of public access to court records. See *MLRC MediaLawLetter* Jan. 2006 at 32.

### Petition to California Supreme Court

Mr. Burkle has asked the California Supreme Court to review the Court of Appeal's January 20 decision striking down the statute. Mr. Burkle asserts that the Court of Appeal erred in its conclusion that divorce court proceedings and records are presumptively open under the First Amendment.

Mr. Burkle also argues that the appellate court should have rewritten the statute to get rid of its unconstitutional features, including the requirement that a trial court seal an entire court record upon request without conducting a balancing test.

But the Los Angeles Times, The Associated Press, and California Newspaper Publishers Association have filed a

brief with the Supreme Court asserting that review is not necessary. The media organizations assert that the *Burkle* decision relied on well-established authority in deciding that divorce court proceedings and records are presumptively open under the First Amendment, and that the statute is not narrowly tailored. The media entities also argue that the Court of Appeal was not permitted to rewrite the statute because Mr. Burkle's suggested revisions would violate Legislative intent.

The Legislature made plain that it intended to do away with the constitutionally proscribed case-by-case balancing tests by *requiring* a court, upon request, to automatically seal a divorce court record – in its entirety and without a balancing test – even if the court record merely contained a footnote reference to a party's home address (which would be a reference to the location of an "asset").

Meanwhile, the Legislature is frantically trying to resurrect a new version of the unconstitutional divorce court secrecy law that once again appears to be written with Mr. Burkle's interests in mind. The new version of Family Code § 2024.6 would still require a court, upon request, to seal all financial information contained in divorce court records, but would allow a court to use redactions. The statute continues to be revised, but at least one version would still require redactions without a balancing test.

Meanwhile, Mr. Burkle has emerged as a suitor for the dozen newspapers McClatchy Co. is unloading in the wake of its \$4.5 billion purchase of Knight Ridder Inc. Mr. Burkle's desire to play a role in owning a chain of newspapers is ironic given that he reportedly ordered an employee to swoop down on a Beverly Hills newsstand to buy all up copies of the Los Angeles Business Journal's detailed report about his divorce court records before they were sealed – including his estranged wife's allegations that he hid \$30 million in assets from her.

*Kelli Sager, Susan Seager, and Alonzo Wickers of Davis Wright Tremaine LLP in Los Angeles represent the media intervenors in this case.*



## The Cost of Protecting California's Royalty

By Kent Raygor & Demery Ryan

Hollywood's paparazzi may have rung in the New Year with a little less enthusiasm than usual this year. That's because, on January 1, a new law went into effect in California that extends the scope of Section 1708.8 of the California Civil Code, better known as the "Anti-Paparazzi Act," to include liability for assault.

Of course, plain-old garden variety assault (Cal. Penal Code § 240: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another") was already actionable in California, which raises a few questions: Why does California need a special cause of action for assault by paparazzi? Who benefits? And at what cost?

### *The Original Law*

The Anti-Paparazzi Act was first enacted in 1999 in the wake of the tragic death of Princess Diana, who was killed in a car accident after photographers pursued her vehicle. Although it was eventually determined that the accident was due to the fact that the driver of Princess Diana's car was intoxicated and reckless, the role that the photographers played in the accident brought a great deal of public awareness to the issue of overly-aggressive paparazzi.

The law as enacted in 1999 created liability for two new privacy torts: "physical invasion of privacy" and "constructive invasion of privacy." More specifically, the statute established liability for trespass with the intent to capture any type of visual image or sound recording. In the case of constructive invasion, the trespass is made through the use of a visual or auditory enhancing device.

Once liability is established, the person whose privacy is invaded is entitled to various remedies and damages, including up to three times the amount of any gen-



eral and special damages resulting from their actions, punitive damages, disgorgement of ill gotten gains, and injunctive relief. Furthermore, any person who directs, solicits, or induces another to engage in either physical or constructive invasion of privacy is also liable for both general and punitive damages.

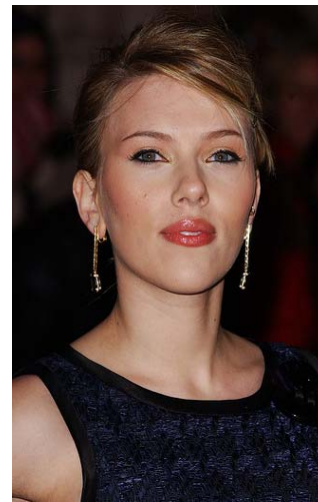


Photo by Will Rise

### *The Revised Law*

At least where the paparazzi are concerned, movie stars are America's royalty. So it is no surprise that a spate of recent car accidents caused by photo-hungry paparazzi chasing celebrities such as Lindsey Lohan

and Scarlett Johansson would provoke the California legislature to expand the scope of the statute. California State Assembly Member Cindy Montañez (D-San Fernando), who drafted the new law, has confirmed that these incidents inspired the changes to the Anti-Paparazzi Act.

Specifically, the changes create an additional privacy tort for assault committed with the intent to capture any type of visual image or sound recording of a plaintiff. Note that this new language is not limited to celebrity or public figure plaintiffs and is not limited to paparazzi.

Anyone who commits an assault to photograph someone is liable, even if no privacy is invaded. An individual who commits an assault of this kind is liable for the full panoply of damages described by the original text of the law, and, as with the original law, any person who directs, solicits, or induces another to engage in such an assault is liable for general and punitive damages. Assembly Member Montañez has said that the intent of these changes is to deter paparazzi from aggressive behavior by taking away the financial incentive.

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## The Cost of Protecting California's Royalty

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### *A Cost Benefit Analysis*

An individual who commits an assault – whether in an attempt to get a photograph or in line at the grocery store – should be held liable for their actions. However, it is not clear why the law that creates liability for assault in a grocery store or any other place is insufficient to impose liability for assault by a photographer.

For example, Governor Arnold Schwarzenegger – who doubtless had few reservations about signing the bill into law – was himself involved in a run-in with the paparazzi, when they surrounded his vehicle with their cars in 1998. As a result of that incident, which took place before the first iteration of the Anti-Paparazzi Act went into effect, both photographers were convicted of misdemeanor false imprisonment, and one of reckless driving.

To the extent that the Anti-Paparazzi Act is intended to deter paparazzi, as Assembly Member Montañez has stated, it seems unlikely that piggybacking a financial penalty on top of criminal charges is going to do much to increase the deterrent effect, and in any event tort damages for assault have always been available. And if redundant liability is the benefit of the law, then what are the costs?

Critics of the law, such as the California Newspaper Publishers Association, contend that there are serious issues about the constitutionality of the law, including the fact that it holds all photographers – paparazzi and traditional news journalists alike – to the same standard. This could have a chilling effect on constitutionally-protected newsgathering. Furthermore, the law provides a mechanism for public figures, both movie stars and politicians, to control their image in the media.

By simply filing a suit based on the law, a public figure could suppress an embarrassing photograph, even if obtained without incident. If so, the law would allow privacy concerns to trump free speech. These issues have never been tested in the California courts, and therefore remain of interest to First Amendment advocates.

Another potential cost with the law is the vagueness and overbreadth of the language that imposes vicarious liability on anyone who “directs, solicits, actually induces, or actually causes another person to commit an assault” with the intent to capture any type of video image or sound recording. The issue of what amount of behavior crosses the threshold for vicarious liability is left unresolved by this language.

Would a celebrity gossip magazine editor who tells a paparazzo that he will pay him \$1,000,000 for the first picture of Angelina Jolie's and Brad Pitt's baby, but provides no further instruction, be liable if the paparazzo commits an assault in pursuit of the photo? Would the editor of a gourmet food magazine who has a standing offer for pictures of celebrity chefs dining at other chefs' restaurants be liable if a paparazzo assaults Emeril Lagasse at Nobu?

It is axiomatic that preventing assaults is a societal good. However, without satisfactory answers to these questions about constitutionality, vagueness and overbreadth, the new Anti-Paparazzi Act may not be the right vehicle for achieving this good.

*Kent R. Raygor and Demery Ryan are with Sheppard Mullin Richter & Hampton LLP in Los Angeles, Ca.*

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## New Law Prohibits Anonymous Harassing Internet Communications Could Raise Constitutional Questions If Applied To Web Sites And Blogs

By Samir C. Jain And Stephen M. Obenski

In December 2005, Congress passed a new statute that, with surprisingly little public discussion or notice, expands a pre-existing prohibition on anonymous harassing phone calls to cover communications made via the Internet. *Violence Against Women and Department of Justice Reauthorization Act*, Pub. L. No. 109-162 § 113 (effective Jan. 5, 2006) (“the Act”).

Some observers have suggested that the new law is so broadly worded that prosecutors could use it to target anonymous annoying e-mails, web sites, and postings on blogs, message boards, and other public fora, raising significant First Amendment concerns.

The pre-existing law, section 223 of the Communications Act, provides that it is illegal to “make[] a telephone call or utilize[] a telecommunications device ... without disclosing [one’s] identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications.” 47 U.S.C. § 223(a)(1)(C).

The new law does not change this language. Instead, it expands the definition of “telecommunications device” to include “any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet.” 47 U.S.C. § 223(h)(1)(C).

Previously, an “interactive computer service” had been explicitly excluded from the reach of section 223.

Although the statute on its face appears to sweep broadly and to cover potentially any type of anonymous “communications” via the Internet, there is little to confirm that Congress intended such broad coverage. The Act generally made changes to the law designed to address the problem of violence against women, and Congress appears to have wanted to give prosecutors more power to bring charges against suspects in anonymous stalking cases that occur entirely online.

Further, there is some suggestion that Congress intended to expand the law to include new technologies such as voice over Internet protocol so that a perpetrator could not escape the reach of section 223 simply based on the technology used to place a voice call.

For example, Senator Biden wrote a summary of the law in which he describes it as encompassing “any device or software that uses the Internet and possible Internet technologies such as voice over internet services.” See 151 Cong. Rec. S13763 (daily ed. Dec. 16, 2005).

Beyond that, Congress’s intent is unclear. Representative McDermott (D-Wash.), who claims credit for

drafting the provision, issued a press release implying that the law was intended only to assist prosecutors in e-mail stalking cases and claiming that it “does not affect online message boards or anonymous online posting.” *McDermott Succeeds with Federal Law Against Cyberstalking*, Jan. 11, 2006,

<http://www.house.gov/mcdermott/pr060111.html>.

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**Although the statute on its face appears to sweep broadly and to cover potentially any type of anonymous “communications” via the Internet, there is little to confirm that Congress intended such broad coverage.**

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### Commentators Have Voiced Concerns

Nevertheless, some commentators have voiced concerns that the statute now appears to encompass virtually any type of anonymous online speech (e.g., on web sites, message boards, and blogs) that is intended to “annoy” one or more readers. See, e.g., Declan McCullagh, *FAQ: The new ‘annoy’ law explained*, C|Net News.com, Jan. 11, 2006, [http://news.com.com/FAQ+The+new+annoy+law+explained/2100-1028\\_3-6025396.html](http://news.com.com/FAQ+The+new+annoy+law+explained/2100-1028_3-6025396.html); Eugene Volokh, *Annoying Anonymous Speech Online*, Jan 10, 2006, <http://volokh.com/posts/1136923654.shtml>.

Any such reading of the statute would appear to raise serious constitutional concerns on at least three grounds. First, even prior to the Act, section 223 had already been found unconstitutional as applied to political speech.

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## New Law Prohibits Anonymous Harassing Internet Communications

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In *U.S. v. Popa*, 187 F.3d 672, 676-78 (D.C. Cir. 1999), a court reversed the conviction of a man who made a number of anonymous insulting phone calls to the U.S. Attorney. Even though the defendant made the calls with the intent to annoy, harass or abuse the recipient, the court found that the statute was not narrowly tailored because it covered non-threatening political speech.

In light of *Popa*, section 223 is likely also generally unenforceable against anonymous Internet communications of a political nature.

Second, the expanded statute might be challenged as unconstitutionally overbroad. Section 223 has survived such challenges in the past, but the case law suggests the statute was upheld only due to the unique nature of telephone communications.

In particular, in *U.S. v. Bowker*, 372 F.3d 365, 378-80 (6th Cir. 2004), the court found that the law was not overbroad, in part because recipients of anonymous harassing phone calls could not easily avoid anonymous harassing calls without changing phone numbers (and the caller's anonymity made it difficult for the listener to identify and confront or avoid the caller), and in part because the court read the ban to cover only communications intended to instill fear in the victim rather than ones intended to promote discourse.

These justifications might not apply as easily to a ban on anonymous Internet web sites, blogs, or mailing lists, which may annoy some readers but not others. The annoyed readers could more easily avoid the offending sites and mailing lists in the future, and the less targeted nature of the communication is less likely to induce fear and annoyance in the first place. Therefore, the expanded statute appears on its face to burden substantially more protected speech than its predecessor.

Third, the statute might be challenged as unconstitutionally vague because it fails to provide "notice that will enable ordinary people to understand what conduct it prohibits," or it authorizes "arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 52 (1999). In particular, the statute's use of the word "annoy" could potentially encompass any amount of

anonymous, online content, and it may well be difficult or impossible for an online speaker to know what may "annoy" one of the myriad readers of a bulletin board or other online forum.

To be sure, courts have held that the statute requires the defendant to have a *specific intent* to annoy, harass, etc., and thus the statute presumably would not apply merely because a particular reader was annoyed at a comment. See *U.S. v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978). Further, courts have held that, although the word "annoy" standing alone might be vague, read together with "abuse, threaten, or harass," it covers only conduct intended to instill fear in the recipient. See *U.S. v. Bowker*, 372 F.3d 365, 382-83 (6th Cir. 2004) (also noting evidence of legislative intent to protect innocent individuals from fear and harassment).

### Conclusion

In sum, by expanding the reach of 223 from situations largely confined to one-to-one conversations to speech that reaches numerous recipients who the speaker often will not even know, the recent changes to section 223 raise or at least exacerbate significant constitutional concerns. Although protecting individuals from stalking or actual harassment is undoubtedly an important policy goal, the statute as written appears to go well beyond that goal and threatens to chill protected speech.

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

Call us, or send us a note.

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## MLRC Report on Trials and Damages

### *Review of 2005 Trials and Long Term Trends*

MLRC's annual REPORT ON TRIALS AND DAMAGES was published in February. There were 14 trials this past year involving media defendants on libel, privacy and related claims based on the gathering and publication of information to the public.

The REPORT is an ongoing study of trials with libel, privacy and related claims against media defendants. What began as a report on 54 trials from 1980 through 1982, now includes data on over 500 trials from 1980 to the present, showing the results and trends in this area of litigation.

#### ***Trials in 2005***

Media defendants won seven trials in 2005, and lost seven trials. Among the high-profile trials of the year was the *Chicago Tribune's* trial win in a libel lawsuit filed by a former prosecutor – *Knight v. Chicago Tribune*; and the Boston Herald's loss in a libel suit brought by a sitting judge – *Murphy v. Boston Herald*. The full list of the year's trials appears on page 7.

The 14 trials over the year are consistent with the steady long-term trend of fewer media trials per year. In the 1980s – when then-LDRC first began monitoring trials – there were an average of 27 trials per year. That dropped to 18.8 trials per year in the 1990s. So far this decade this has further declined to an average of only 13.8 trials a year.

The damage awards in 2005 were relatively modest – an average of \$369,000; and a median of \$75,000. The highest award came in the *Murphy* trial, \$2.09 million. The six other plaintiff awards were all under \$250,000.

#### ***Media Trials 1980 to 2005***

The 2005 REPORT analyzes 541 trials since 1980, which led to 531 verdicts. Media defendants have won 214 of 531 trial verdicts (40.3 percent). Plaintiffs' average damage award was \$2.9 million.

The 2005 REPORT includes new statistics on media defendants' success following post-trial motions and appeals. The data shows that media defendants ultimately won 51.4 percent of the cases that went to trial and verdict.

In contrast, plaintiffs won and got to keep the entire award from trial in 18.7 percent of the cases that went to trial and verdict.

The average damage award at trial, \$2.9 million, drops to an average final award of \$1.4 million after post-trial motions and appeals, excluding cases that settled. The median drops from \$278,000 to \$90,500.

#### ***Trends***

Several notable trends are apparent from the data in MLRC's REPORT.

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***The REPORT includes new statistics on media defendants' success following post-trial motions and appeals.***

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- Media defendants are winning more trial verdicts. The win rate has gone up decade by decade: from 36.3 percent in the 1980s, to 40.2 percent in the 1990s; to 53.8 percent so far this decade.
- There is an upward trend in damage awards. In the 1980s, 21.8 percent of awards were over \$1 million; in the 1990s, 30.0 percent of awards reached this threshold. So far this decade, the share of awards is 37.8 percent.
- There has been a large decrease in the percentage that punitive damages contribute to awards. In the 1980s, 61 percent of damage dollars awarded were punitive. That declined to 51.2 percent in the 1990s with the exceptional verdict in *MMAR v. Dow Jones* excluded. And so far this decade punitive awards have been only 7.3 percent of total awards.

#### ***Other Findings in MLRC's Report***

***Defamation is most frequently litigated claim.*** Defamation claims were litigated in 87.6 percent of trials, and in 73.8 percent of the trials it was the only claim litigated. False light is the second most common claim (9.1 percent of trials); followed by general invasion of privacy (5.7 percent of trials) and intentional infliction of emotional distress (4.3 percent of trials).

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## MLRC Report on Trials and Damages

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**Public vs. Private Figure Plaintiffs.** Public officials and figures were plaintiffs in 247 trials (51.8 percent of trials with known plaintiffs); private figures, in 230 (48.2 percent). Defendants win slightly more trials involving public plaintiffs, 40.9 percent, than trials involving private figure plaintiffs, 38.7 percent.

**Print Media Defendants.** The vast majority of trials (68.6 percent) involved print media defendants, primarily newspaper defendants. In the 1980s, print defendants won 34.6 percent of their trials; rising to 37.5 percent in the 1990s and 44.2 percent this decade. The number of print media trials has declined each decade, comprising most of the overall decline in the number of trials each year.

**Audio-Visual Media Defendants.** There have been 158 trials involving audio-visual media defendants, primarily broadcast television (119 trials). These defendants have fared better than print media defendants throughout the study. Overall, audio-visual defendants have won 48.7 percent of their trials (77 of 158 trials); compared to print media defendants' win rate of 36.7 percent (136 wins in 371 trials). While the average number of print media trials each year has declined from decade-to-decade, the number of a-v trials has remained virtually constant throughout the study.

### Defense Win Rate Improving in Jury Trials

The overwhelming majority of trial verdicts have been decided by juries (442 out of 531), and defendants have won 33.5 percent of these trials. This percentage has steadily increased: in the 1980s, defendants won only 28.7 percent of trials decided by juries. That increased to 34.6 percent in the 1990s, and even further to 47.0 percent this decade.

In 2005, juries decided nine of the year's 14 trials, and rendered verdicts for defendants in three (33.3 percent). This is the lowest win rate before juries so far in the decade, and bucks the long term general trend of an increasing defense victory rate in this category.

### Damage Awards

In the 1980s, the average damage award was over \$1.5 million. In the 1990s that rose to almost \$5 million – largely due to a \$222.7 million award in *MMAR v. Dow Jones*. Ex-

cluding *MMAR*, the average award in the 1990s was \$3.0 million, close to the 2000s average of \$2.8 million.

The median damage award has increased from decade to decade: from \$200,000 in the 1980s, to \$373,000 in the '90s, to \$626,000 in the current decade.

### Post-Trial & Appellate Results

**Defendants' Post-trial Motions.** Defendants' success in post-trial motions has been roughly consistent. In the 1980s, 26.5 percent of plaintiffs' awards were modified by post-trial motions; in the 1990s, 19.1 percent were modified. So far in the 2000s, defendants' post-trial motions have resulted in modifications of 27.0 percent of jury awards. Overall, 76 of the 316 awards to plaintiffs since 1980, or 24.0 percent, have been modified by defendant's post-trial motions.

**Plaintiffs' Post-trial Motions.** Plaintiffs, on the other hand, have had little success with their post-trial motions. Plaintiffs have succeeded only three post-trial JNOV motions, and only three plaintiffs' motions for a new trial following a defense verdict were successful. In the end, only 2.3 percent of defense victories have been modified on plaintiffs' post-trial motions.

**Appellate Results.** After excluding awards in trials that were settled, the average final award in the 1980s was \$421,000 and the median was \$75,000. The average final award in the 1990s was a bit higher, \$451,000, while the median dropped to \$63,000. So far in the 2000s, the average final award has jumped to \$634,000, but the median has leapt up more than six-fold, to \$395,000.

**Final Results of Trials.** Overall, defendants ultimately won 51.4 percent of the cases with trial verdicts, while plaintiffs wholly or partially won 32.6 percent. There were post-verdict settlements of 12.4 percent of cases that went to trial.

**The MLRC REPORT is mailed to all Media and DCS members, and is available to Media and Enhanced DCS members on MLRC's web site, [www.medialaw.org](http://www.medialaw.org). Additional print copies are available for \$35 by calling (212) 337-0200.**

## Media Trials in 2005

### Plaintiff Wins Over the Past Year

- *Aficial v. Mantra Films*, (Va. Cir. Ct., Virginia Beach jury verdict June 29, 2005).

The jury awarded the young women plaintiff \$150 in compensatory damages and \$60,000 in punitive damages on a misappropriation claim against the makers of the “Girls Gone Wild” video series. Plaintiff was filmed kissing a girlfriend and the scene was included in a DVD from the series.

- *Mann v. Abel*, No. 14180/2003 (N.Y. Sup. Ct., Westchester Co. jury verdict Oct. 20, 2005).

The jury awarded a local town official \$75,000 in compensatory damages and \$30,000 in punitive damages over a critical newspaper column that alleged plaintiff covered up “political favors” and “pulled strings” in town.

- *Murphy v. Boston Herald*, Civil No. 02-2424B (Mass. Super. Ct., Suffolk Co verdict Feb. 18, 2005).

The jury awarded the plaintiff, a sitting judge, \$2.09 million in damages, based on statements in various *Boston Herald* articles and television interviews by a reporter that plaintiff told a teenage rape victim to “get over it.”

- *Price v. Blair*, No. 04-4194-E (Tex. Co Ct. at Law No. 5 default judgment Nov. 14, 2005).

A Texas judge awarded a local elected official \$852,000 damages against a weekly newspaper that criticized plaintiff after the newspaper refused to comply with discovery orders

- *Reilly v. Boston Herald*, Civil No. 98-294 (Mass. Super. Ct. jury verdict Nov. 4, 2005).

The jury awarded \$225,000 in damages to a veterinarian on a libel claim against the Boston Herald for publishing pet owners’ allegation that plaintiff failed to properly treat their dog and covered up the records.

- *Wiggins v. Mallard*, No. (Ala. Cir. Ct., Escambia County jury verdict Oct. 27, 2005).

The jury awarded one dollar in libel damages award to a father and son over a newspaper’s erroneous arrest report. (Damages were split between the newspaper and the police chief source for the article).

- *Ziglar v. Media Six, Inc.*, No. CL02000132-00 (Va. Cir. Ct., Roanoke City jury verdict Dec. 15, 2005).

Jury award of \$75,000 to a prosecutor over a letter to the editor from a convict published in a local newspaper. The letter accused plaintiff of trumping up criminal charges against the convict.

### Defense Wins Over the Past Year

- *Columbus v. Globe Newspaper Co, Inc.*, Civil Action No. 00-724 (Mass. Super. Ct., Middlesex County, jury verdict Feb. 2, 2005).

Jury verdict for the *Boston Globe* in a libel suit over an articles about alleged corruption, conflicts of interest, and favoritism in a vocational high school home building program.

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- *Davis v. Marion Star*, No. 1998-CP-3300372 (S.C. Cir. Ct., Marion County directed verdict May 3, 2005).

Directed verdict for the defense for lack of actual malice on a public official's libel claim against a local newspaper for its coverage of plaintiff's statements at a town council meeting.

- *Divita v. Ziegler*, Civil No. 03-9214 (Ky. Cir. Ct. jury verdict May 24, 2005).

Jury verdict for a radio talk show host and distributor over on-air comments made about the host's personal relationship with plaintiff, also a radio show host.

- *Jarosak v. Boyer*, (Ind. Super. Ct., Porter County directed verdict entered Jan. 25, 2005).

Directed verdict for the host of a cable television show for lack of evidence of actual malice over statements that plaintiff, a retired police chief, was found in the back seat of his police car with a teenage girl, and that he had pointed a gun at his ex-wife's head.

- *Knight v. Chicago Tribune Co.*, No. 2000-L-004988 (Ill. Cir. Ct. jury verdict May 20, 2005).

Jury verdict for a reporter and newspaper on a libel claim by a former prosecutor over coverage of a criminal trial in which the plaintiff and other government officials were accused of framing a criminal defendant for murder.

- *Pitts Sales, Inc. v. King World Productions, Inc.*, (S.D. Fla. bench verdict July 29, 2005).

Bench verdict rejecting plaintiff's claim for trespass (for nominal damages) over hidden camera filming at plaintiff's magazine subscription sales business by a producer working as an employee at the company.

- *Thermal Engineering Corp. v. Boston Common Press, Ltd.*, (S.C.Ct.C.P directed verdict June, 2005).

Directed verdict for defendant for lack of actual malice on a libel claim over a *Cook's Illustrated* magazine article that rated plaintiff's grill "not recommended."

**A full report on these cases and the year's results  
are analyzed in MLRC's 2006 Report on Trials & Damages.**