



MEDIA LAW LETTER

Associate Member Edition

2006:2

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No Jurisdiction in California Over British Website Without “Something More”

By Kevin W. Goering and Aimee Kahn

Since 1984, the lower courts have struggled with the proper application of the Supreme Court’s “effects test” for personal jurisdiction created in the libel case of *Calder v. Jones*, 465 U.S. 783 (1984). This exercise has been especially difficult in the context of foreign operators of websites. In a recent trademark infringement case, the United States Court of Appeals for the Ninth Circuit held that courts in the United States lack personal jurisdiction over a British operator of a passive website. In *Pebble Beach Company v. Caddy*, No. 04-15577, U.S. App. LEXIS 17381 (9th Cir. July 12, 2006), the Court affirmed the District Court’s holding that it lacked both general and specific personal jurisdiction over a British company which used the website www.pebblebeach-uk.com and which catered in part to Americans.

Two Pebble Beaches

The plaintiff in the case is the owner of Pebble Beach, the well-known golf course and resort located in Monterey, California. The resort alleged that it has used the name “Pebble Beach” as its trade name for over 50 years and that it operates the website www.pebblebeach.com. The defendant, Michael Caddy (“Caddy”) operates “Pebble Beach,” a three room bed and breakfast located on a cliff overlooking a pebbly beach in southern England. The services he describes on his non-interactive website include general accommodation information, room rates, a menu and a wine list. Except for a brief time when Mr. Caddy worked at a restaurant in Carmel, California, he has lived in the United Kingdom. Pebble Beach Company sued Caddy under the Lanham Act and the California Business and Professions Code for trademark infringement and dilution of its “Pebble Beach” mark. *Id.*

Personal Jurisdiction and the “Effects Test”

Citing *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), the Court first noted in a footnote that Caddy’s activities were “not continuous or substantial enough to establish general jurisdiction.” *Pebble Beach*, No. 04-15577, slip op. at 7673. The Court then turned to the more difficult issue of specific jurisdiction,

applying the Ninth Circuit’s three part test for “minimum contacts.” Under that test, personal jurisdiction exists where

“(1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant’s forum-related activities and (3) the exercise of jurisdiction is reasonable.”

Id. at 7680. The Court held that Pebble Beach Company could not satisfy even the first prong of the three prong test and, accordingly, it proceeded no further.

Analyzing the first prong of the test, the court cited to *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) and examined whether Caddy had either “purposefully availed himself of the privilege of conducting activities in California” or “purposefully directed” his activities toward California. Noting that all of Caddy’s activities took place in England, the Court found no basis for a finding of “purposeful availment.” As for “purposeful direction,” the Court discussed and applied the “effects test” of *Calder v. Jones*, *supra*, but cautioned “that ‘something more’ is needed in addition to a mere foreseeable effect.” *Id.* at 7676. The Court then drew a distinction between “foreseeable effects” in the forum and “express aiming” at the forum.

The Court distinguished *Panavision Int’l v. Toepfen*, 141 F.3d 1316, 1321 (9th Cir. 1998), where a cybersquatter had registered a domain name in the hope of obtaining money from the California-based plaintiffs. Similarly, the Court found this case was unlike *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d 1082 (9th Cir. 2000) and *Metropolitan Life Insurance Co. v. Neaves*, 912 F.2d 1062 (9th Cir. 1990), because both of those cases involved defendants who sent letters to California which gave rise to the causes of action in those cases.

The Court relied heavily upon *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004). In that case, the Ninth Circuit refused to exercise personal jurisdiction over an Ohio car dealership which had used the California Governor’s “Terminator” image in a newspaper advertisement. The court emphasized the importance of the passive nature of the website, refusing categorically to find personal jurisdiction

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“where the sole basis for asserting jurisdiction is a non-interactive passive website.” *Id.* at 7681.

Pebble Beach argued in the alternative for a finding of personal jurisdiction under Federal Rule 4(k)(2) of Civil Procedure, the so-called federal long arm statute, claiming that Caddy had purposefully directed his action at the United States as a whole. Pebble Beach argued that the use of a “.com” domain name demonstrates that the United States was Caddy’s primary market, that the name “Pebble Beach,” which is an American trademark, indicates that the United States was his primary target, and that some of Caddy’s business has been with Americans. Again, reasoning that foreseeable effects alone, without “something more,” are insufficient to confer jurisdiction, the court summarily rejected Pebble Beach’s arguments under Rule 4(k)(2). The fact that “Pebble Beach” may be a famous trademark in the United States was deemed to be of “little practical consequence,” while Caddy’s selection of a “.com” domain name instead of a United Kingdom domain had “minimal importance.” *Id.* at 7683. The court noted that the fact that Caddy’s bed and breakfast occasionally had American guests again tends only to show an “effect,” and “not the ‘something more’ that is required.” *Id.* at 7683.

Finally the court held that the District Court had not abused its discretion by disallowing additional jurisdictional discovery because of the Circuit’s ruling as a matter of law “that a passive website and domain name are an insufficient basis for asserting personal jurisdiction.” *Id.* at 7684.

Conclusions and Comparisons

The broad ruling in *Pebble Beach* suggests that it is virtually impossible in the Ninth Circuit for a plaintiff to establish specific jurisdiction over the operator of a non-interactive website in a foreign country. The Ninth Circuit in essence extended its holding in *Schwarzenegger* to all cases where the sole basis for asserting jurisdiction is a non-interactive website. See *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007, 1020-21 (9th Cir. 2002) (finding that plaintiff alleged “something more” required to establish specific jurisdiction, where the defendant not only operated a passive website but also issued print and radio advertisements); see also *Panavision International v. Toepfen*, 141 F.3d, 1316, 1322 (9th Cir. 1998) (specific jurisdiction was found where the defendant had directly aimed his conduct at the forum state by registering a do-

main name and sending a letter demanding \$13,000 in return for the name).

Pebble Beach is yet another example of the more restrictive approach to internet jurisdiction taken by courts in the United States compared with courts in the United Kingdom, where the defendant in the case was located. There are recent indications that the British and other Commonwealth courts may be recognizing some limits on the exercise of jurisdiction over foreign internet publishers. See *Jameel v. Dow Jones*, [2005] EWCA Civ 75 QB 946 (3 February 2005) (declining to exercise jurisdiction where access to publication in England on the Internet was minimal); *Bangoura v. Washington Post Company*, 258 D.L.R. (4th) 341 (Ontario Court App. 2005) (no jurisdiction in Canadian libel case where plaintiff moved to Canada after publication). Yet, these courts have historically exercised jurisdiction in transnational internet cases where a court in the United States probably would not. E.g., *Gutnick v. Dow Jones*, [2002] HCA 56 (10 December 2002) (jurisdiction in Australia libel case for publication on an American subscription-based website); see also *Burke v. NYP Holdings, Inc.*, [2005] BCSC 1289 (British Columbia Court has jurisdiction over foreign internet publisher where plaintiff lived in British Columbia at the time of publication); *Harrod’s Ltd. v. Dow Jones & Company, Inc.*, [2003] EWHC 1162 (QB) (22 May 2003) (upholding jurisdiction where an article about Harrod’s was printed in the American edition of the Wall Street Journal and published online, but where only ten printed copies were sent to England and only a few hits on the website occurred); *Kitakufe v. Oloya Ltd.*, 67 O.T.C. 315 (jurisdiction upheld in Canada in a defamation suit for Ugandan newspaper article available on the internet). In sum, in England and other Commonwealth countries, the mere showing that the plaintiff suffered harm in the forum is generally still a sufficient jurisdictional basis, whereas courts in this country require the “something more” which the court in *Pebble Beach* found lacking. See D. Schulz and K. Wimmer, “Jurisdiction Over Internet Publishers,” MLRC Bulletin No. 3 (2005 at 53).

Stephen M. Trattner of Washington, D.C., represented the plaintiff-appellant. Mikal J. Condon, Boies, Schiller & Flexner LLP of Oakland, California represented the defendant-appellee.

Mr. Goering is a partner and Ms. Kahn is a summer associate at MLRC member firm, Sheppard Mullin Richter & Hampton, LLP.

Recent Developments in Ireland

New Bills on Defamation and Privacy

By Karyn Harty

Those with experience of publishing in the Republic of Ireland will be interested to hear that the Irish Government has recently published two significant pieces of draft legislation, which will directly impact on media defendants.

The long awaited Defamation Bill 2006 promises radical reform of Ireland's libel laws. Controversially, alongside that draft legislation the Government has also published a Privacy Bill and has made it clear that libel reform is contingent upon press regulation by way of a statutory Press Council and statutory recognition of the ECHR's decision in *Von Hannover v. Germany*. It is expected that the Government will seek to enact both pieces of legislation later this year.

This article examines some key provisions in the draft legislation, but those who want a closer look can download copies of the Defamation Bill and the Privacy Bill from the Department of Justice website at [www.justice.ie/80256E010039C5AF/vWeb/fIJUSQ6REJAY-en/\\$File/DefamationBill06.pdf](http://www.justice.ie/80256E010039C5AF/vWeb/fIJUSQ6REJAY-en/$File/DefamationBill06.pdf).

Defamation Bill 2006

The Defamation Bill would repeal the Defamation Act 1961 in its entirety, introduce significant procedural changes, redefine existing defences and introduce some new defences, as well as establishing a Press Council.

A list of the key procedural changes and new initiatives in the Bill is set out below, but it is worth focusing on two key developments which will be of particular interest to media specialists, namely the new *Reynolds* type defense and the Press Council. Unfortunately the Bill is clumsily drafted and ambiguous in many respects, but it is hoped that these may be resolved prior to enactment.

The key procedural changes are listed below, but it is worth noting that the limitation period would be reduced from six years to one year. That and other changes may allow libel defendants to resolve cases earlier, rather than being carried along to trial as is currently the case.

Reynolds Privilege

Section 24, if enacted in its current form, would introduce a new defense of "fair and reasonable publication on a matter of public importance." The defense is intended to provide *Rey-*

nolds type protection for media defendants and largely follows the Lord Nicholls formula, in providing a non-exhaustive list of things to which the court can have regard in assessing whether or not the publication was fair and reasonable.

To succeed under Section 24 a defendant must prove that it published the statement in good faith and in the course of the discussion of a subject of public importance for the public benefit. It would then have to demonstrate that it was fair and reasonable to publish the statement in all the circumstances, based on the court's assessment of all the circumstances of the case. Section 24(5) stipulates that the jury is to carry out this assessment.

Significantly, the Bill provides that the defense *shall fail unless* the defendant proves that it believed the statement to be true at the time of publication, that it did not act in bad faith, that "the statement bore a relation to the purpose of the defence" and that the manner and extent of publication did not exceed that which was reasonably sufficient in all the circumstances. It is not clear what is meant by the stipulation that the publication must bear a relation to the "purpose of the defense."

The fact that the jury must carry out the factual assessment, and that the trial judge in a jury case is precluded from doing so, reflects the particular importance of the jury's role under Irish jurisprudence, but could become unwieldy in practice.

The Bill steers away from terms such as "responsible journalism" and "the right to know," which have become central to any assessment of the *Reynolds* defense in England. This practitioner is sceptical as to the prospects of defendants successfully bringing this defense home, given the attitude of the Irish courts to privilege and indeed the experience in England, where *Reynolds* has become uncertain and largely ineffective as a defense. Note that there has not to date been any Irish decision adopting *Reynolds*, other than one High Court decision where the court said *obiter* that it was a useful way to approach the issues in that particular case, but where the defendants had not pleaded the defense. See *Hunter -v-Gerald Duckworth & Co Ltd and anor*, Unreported, 31 July 2003

Statutory Press Council

The media has largely welcomed the Defamation Bill but has greeted the idea of a statutory Press Council with consider-

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Recent Developments in Ireland

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able suspicion, not least because the Minister will have a role, albeit indirect, in appointing the council members.

There has not previously been any coherent press regulation in Ireland and statutory regulation was perhaps inevitable in the absence of an effective initiative by the Irish and UK press. The Press Council will include a Press Ombudsman, who will have statutory powers to investigate, hear and determine complaints and will be able to require the publication of corrections or findings. The fact that a defendant has complied with the code of standards issued by the Press Council can be taken into account as one of the factors under the defence of fair and reasonable publication.

Privacy Bill 2006

The Minister for Justice has expressed reservations about the need for a statutory privacy law, following *Von Hannover*. The Irish cabinet however insisted on a review group to examine privacy law and produce a draft Bill. It seems that a statutory privacy law is now inevitable.

The Privacy Bill is clear and concise and arguably does no more than codify the current protections under Irish common law. It does however represent a significant blow for publishers in Ireland as it gives formal recognition to privacy rights which up to now have been largely undefined, and confirms that individual citizens can enforce privacy rights as against other citizens and the media, as well as the state.

The Irish courts have long recognised that the right to privacy exists and have in appropriate cases compensated individuals for breach of privacy. An analysis of this case law is beyond the scope of this note, but in a recent case the High Court provided helpful guidance on the nature of privacy rights. *See Cogley –v- Radio Telefís Éireann*, Unreported, July 2005

In essence, the court said some things are inherently private, such as medical information and where there is a threat of disclosure of such information, the court is likely to restrain its publication and other factors such as freedom of expression and the public interest do not come into play. If however the issue is the method of obtaining information that is not inherently private, for example where there has been surreptitious filming, then the court must weigh the privacy rights against the wider public interest.

The Privacy Bill goes further in that it defines the entitlement to privacy in some detail. The definition is very broad, encompassing surveillance, use of a person's identity without

consent for advertising or financial gain, disclosing private items such as diaries and medical records, or committing an act amounting to harassment.

The court must have regard to the factual circumstances, including any office or position held by the person who claims breach of privacy and the extent to which the infringement relates to that office or function. The court must also consider the nature of the information disclosed and whether it relates to private and family life, for example. Significantly, the fact that the information published was available publicly already or that the event happened in public will not preclude a privacy claim.

The Bill also provides defences, including a 'good faith' defence and a Reynolds type defence specifically protecting newsgathering and it will be possible to apply to have cases heard *in camera*. While there is some political opposition to the Bill it is expected that it will be enacted in something close to its current form later this year.

Karyn Harty is Defamation & Media Partner at McCann FitzGerald in Dublin, Ireland.

Key Procedural Changes

- Distinction between libel and slander to be abolished
- Limitation period to be reduced from 6 years to 1 year
- Plaintiff and defendant to be required to swear affidavits verifying the accuracy of all factual assertions and allegations, with significant criminal penalties for false or misleading statements
- Defendants will no longer have to admit liability in order to pay money into court
- Cause of action to survive death of the plaintiff
- Juries to hear submissions on damages (not currently permitted)
- Supreme Court to substitute a figure when overturning an award

New Initiatives

- New multiple publication rule
- Existing defences redefined
- New defence of 'fair and reasonable publication on a matter of public importance'
- New offer of amends procedure
- New declaratory order procedure, without entitlement to damages

English High Court Decision Explore Jameel's Impact on Libel Cases

In two recent cases, Mr. Justice Gray of the High Court issued decisions that illustrate the principle as to the scope of defamation actions laid out last year by the Court of Appeal in *Jameel v. Dow Jones*, QB 946 (2005), and in so doing have wide-ranging implications for the availability of England as a forum for so-called libel tourists.

Al Amoudi

In *Al Amoudi v. Brisard and another*, EWHC 1062 (QB) (2006), the court denied a libel plaintiff's motion for summary judgment.

The plaintiff, Mohammed Hussein Al Amoudi, was born in Ethiopia, resides in Saudi Arabia, and spends two-and-a-half months a year in London where he owns a home. Al Amoudi sued Swiss terrorist financing expert Jean-Charles Brisard and his company, JCB Consulting International SARL, for references to Al Amoudi made in two publications that were available for download on JCB's website.

One reference suggested that Al Amoudi may be "a knowing participant in the economic, financial and/or terrorist networks of the terrorist Osama Bin Laden," while another listed Al Amoudi as one of the "Main individual Saudi sponsors of Al Qaeda." The two publications were removed from JCB's website in 2004, but Al Amoudi claimed that the words complained of were published "to a substantial but unquantifiable number of readers in this jurisdiction."

The court rejected Al Amoudi's argument that because the publications were available on the Internet there was a presumption of law that they had been published to a substantial number of readers sufficient to justify a judgment. Relying in part on *Jameel*, the court held that the plaintiff must prove that the offending material was accessed and downloaded in the jurisdiction.

In *Jameel*, the plaintiff could only show that the allegedly defamatory material had been downloaded in the jurisdiction by five people, including Mr. Jameel's lawyer and two of his business associates. In the Court of Appeal's view, since the damage to Mr. Jameel's reputation was minimal and an action would result in only nominal damages, it would be appropriate for the defendant to "seek to strike out the action as an abuse of process."

In *Al Amoudi*, the traffic originating in the jurisdiction viewing the website containing the allegedly defamatory material was similarly small. Mr. Justice Gray suggested that because the court in *Jameel* struck out the claim it would not have supported the existence of a presumption of publication, saying in conclusion, "I am unable to accept that under English law a claimant in a libel action on an Internet publication is entitled to rely on a presumption of law that there has been substantial publication."

The parties have since reached a settlement, the terms of which remain confidential.

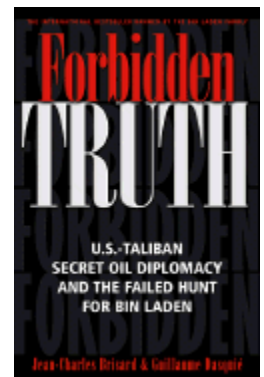
The defendants were represented by barrister Adam Speker of 5RB and Reynolds Porter Chamberlain, LLP, in London. Al Amoudi was represented by barrister Desmond Browne QC of 5RB and Jonathan Barnes of Nabarro Nathanson in London.

Mahfouz

In *Mahfouz v. Brisard*, EWHC 1191 (QB) (2006), the court granted the plaintiffs' motion for summary judgment but refused to issue a declaration of falsity. The plaintiffs, Saudi businessmen Sheikh Khalid bin Mahfouz and Abdulrahman bin Mahfouz, sued Jean-Charles Brisard and Guillaume Dasquie for references to them that appeared in the defendants' book, *Forbidden Truth*.

The language complained of included references to the first plaintiff as the "banker of terror," and words which bore the defamatory meanings that he knowingly supported and aided terrorist activities and that the second plaintiff was reasonably suspected of having assisted Al Qaeda organize an assassination attempt against Egyptian president Hosni Mubarak. The book was originally published in France in 2001 and then in the United States in 2002. Four hundred copies of the book were published in England, most ordered from distributors based outside the jurisdiction.

In granting plaintiffs' motion for summary judgment, the court noted that the defendants had not advanced any



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English High Court Decision Explore Jameel's Impact on Libel Cases

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affirmative defenses. Mr. Justice Gray rejected the defendants' argument that the case should go to trial because little was known about the plaintiffs and that it was in the public interest to hear from persons who seek to vindicate their reputations by choosing a forum in England.

In determining damages, the court accepted the plaintiffs' argument that the alleged defamation was so serious that they should be entitled to the statutory maximum award in order to clear their names, and so the court awarded each plaintiff £10,000 in damages and injunctive relief restraining Brisard from further publishing the language complained of. (A default judgment had already been obtained against Dasquie).

Relying on *Jameel*, however, the court declined to grant a declaration of falsity. Mr. Justice Gray said that the publication of 400 books within the jurisdiction here

was analogous to the Internet publication to five persons in *Jameel*. The court was further troubled by the limited connections between the plaintiffs and the forum, saying that "it seems reasonable to infer in these circumstances" that one of the reasons why the plaintiffs were seeking a declaration of falsity was to "deploy it in jurisdictions other than this one." The court found that the Defamation Act of 1996 provided for reasonable alternate remedies, including a court order for the defendants to publish a summary of the court's judgment if they refuse to publish a correction or apology.

Brisard was represented by barrister Adam Speker, 5RB, and Reynolds Porter Chamberlain, LLP, in London. (Guillaume Dasquie did not appear and was not represented.) The plaintiffs were represented by barrister James Price QC, 5RB, and Laurence Harris of Kendall Freeman, in London.



50-STATE SURVEYS



Media Privacy and Related Law 2006-07

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U.S. TERRITORIES, AND CANADA.

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Copyright Claim Against *The Da Vinci Code* Rejected

A Tortuous Tale of Copyright

By Mark Stephens

After 11 days of trial, an English Chancery Court this spring rejected a copyright infringement claim by two authors who alleged that the international bestseller *The Da Vinci Code* copied the “architecture” of their earlier nonfiction work *Holy Blood Holy Grail*. *Baigent and Leigh v Random House*, [2006] EWHC 719 (Ch) (Judgment April 7, 2006).

Although, Mr. Justice Peter Smith, a former Chair of the Chancery Bar Association, threw out the allegation of copyright infringement, he agreed that some of the themes and language of *Holy Blood Holy Grail* were used in *The Da Vinci Code* – but this use did not amount to infringement.

Background

The central themes of *Holy Blood Holy Grail* were conceived in a 5 year period between 1976 and 1981, by Henry Lincoln: the marriage of Jesus Christ to Mary Magdalene, a blood line from Christ, and the role of the Merovingian’s to protect that blood-line. Michael Baigent researched and, together with Leigh and Lincoln, wrote *Holy Blood Holy Grail* which was published in 1982.

Holy Blood Holy Grail was described as a work of “historical conjecture for ordinary people” by the Claimants, Baigent and Leigh. Henry Lincoln, on advice, didn’t sue.

The *Da Vinci Code* is a fictional romp based on this historical conjecture. The research for the *Da Vinci Code* began in about 2000 with Dan Brown’s wife, Blythe, shouldering the major burden of the investigations. Indeed, Mr Justice Peter Smith, was moved to say: “Blythe Brown was the true researcher... Mr Brown in my view simply accepted Blythe Brown’s research material... I do not believe for one minute he was analytical of it or critical of it; he simply accepted it.”

Brown pokes fun at the Claimants by introducing a character into his book, a religious historian called Leigh Teabing. It will not have escaped the astute reader that this name is derived from authors Leigh and Baigent (the latter being an anagram.)

Copyright Law

It is trite law that there is no copyright protection in ideas, but only protection for the skill and labour in the rendering of words and the selection of the compilation: the story. There

have been no literary copyright infringement cases decided by the UK courts in recent years, and there has been much need of clarification of the law in the light of other developments as to what constitutes the test of “substantial copying.”

Particularly in the light of “so-called” non-textual copying cases, the House of Lords in 2000 effectively “*put the cat amongst the pigeons*” in *Designers Guild v. Russell Williams Textiles*, [2000] 1 WLR 2416 (23rd November, 2000). That decision effectively says, if you couldn’t have got to design “B” without having taken features from design “A” then there is an infringement of “A”.

This was a new and much looser test than had been previously applied, giving greater weight to themes of selection and compilation. The *Designers Guild* test only crystallized in 2001 but its genesis can be traced as far back as 1967 to a case about the film of a book on the Charge of the Light Brigade.

This non-textual-test invariably does justice in cases involving visual works but it has been less than clear how those principles translate into the copyright schemes for other media, in particular between literary works. This is undoubtedly why Baigent and Leigh focused their case with such vigor on the “architecture of the book.”

In essence Baigent and Leigh identified themes from *Holy Blood Holy Grail* which had been copied by Dan Brown. The judge accepted that even if its themes had been copied that was insufficient to meet the “substantial copying” test laid down in the Copyright Designs & Patents Act 1988.

Baigent and Leigh lose. They will have to pay their own lawyers and also those of the defendants – some millions. The only practical way of recovering those sums is from royalties so no doubt all parties will be hoping that the publicity of this case and the film will enhance the sales of *Holy Blood Holy Grail* sufficiently to give everyone, not just the lawyers, a handsome payday.

Mark Stephens and Nicola Solomon, of Finers Stephens Innocent LLP in London advised Henry Lincoln in this matter. Plaintiffs Michael Baigent & Richard Leigh were represented by Jonathan Rayner-James QC and Orchard Brayton Graham LLP. The Random House Group Ltd was represented by John Baldwin QC and Arnold & Porter (UK) LLP.

Declaratory Judgment Suit in *Ehrenfeld v. Bin Mahfouz* Dismissed *No Personal Jurisdiction Over Saudi Defendant*

A New York federal district court dismissed an action filed by American author and researcher, Rachel Ehrenfeld, seeking a declaratory judgment that a default libel judgment obtained in the UK by a Saudi Arabian businessman is unenforceable in the United States. *Ehrenfeld v. Bin Mahfouz*, No. 04-CV-9641 (S.D.N.Y. April 25, 2006) (Casey, J.).

The court held that there was no personal jurisdiction over the Saudi defendant and did not reach the merits of the request for a declaratory judgment to attack a foreign libel judgment.

Background

Plaintiff Rachel Ehrenfeld, a U.S. citizen and the director of the U.S. based American Center for Democracy, wrote *Funding Evil: How Terrorism is Financed and How to Stop It*. The book was published in 2003 by Bonus Books, a U.S. publisher, solely in the United States. The book alleges that defendant Khalid Salim a Bin Mahfouz, a Saudi Arabian billionaire, financially supported Al Qaeda in the years preceding the September 11, 2001, terrorist attacks on New York and Washington, D.C.

Mr. Bin Mahfouz, and two of his sons, brought a libel action against Ehrenfeld in London. Twenty-three copies of the book were purchased in England through Internet sites. Ehrenfeld chose not to defend the suit and it progressed to a default judgment. In May 2005, the UK court awarded each plaintiff £10,000 in damages, attorney fees, an injunction against publication in the UK and an extraordinary "declaration of falsity" in which the court entered a determination into the record (without, of course, the benefit of the views of Ehrenfeld, Bonus Books or any other witnesses) that *Funding Evil* is false and defamatory.

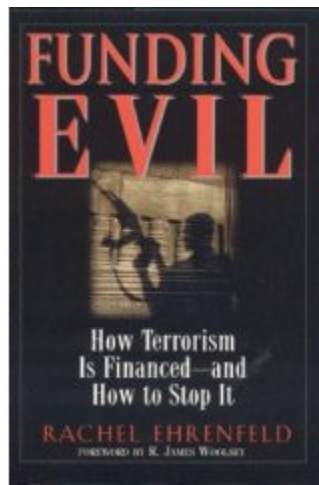
The plaintiffs have not sought to enforce the judgment in the U.S. Similar allegations against Bin Mahfouz have been made in the UK press and he has threatened or brought at least 29 other libel actions in the UK. Most of these have resulted in judgments, retractions or settlements in his favor.

Declaratory Judgment Action

Ehrenfeld filed her declaratory judgment action on December 8, 2004. She sought a declaration that the statements in her book do not give rise to liability under U.S. law and that the UK judgment is unenforceable in the U.S. Bin Mahfouz moved to dismiss for lack of personal and subject matter jurisdiction.

A coalition of media companies and free press associations filed a memorandum of law *amicus curiae* in support of Ehrenfeld. The amicus brief focused on the chilling effect foreign libel actions can have on U.S. speech protected by the First Amendment.

The media brief also distinguished the decision in *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003), where the court dismissed a declaratory judgment action seeking to stay a pending UK libel action. The decision in *Dow Jones*, the brief argued, would not control a case involving a final judgment.



District Court Decision

Dismissing the action, the court found no basis to exert personal jurisdiction over Bin Mahfouz under New York's long arm-statute, NY C.P.L.R. § 302.

The New York long-arm statute in relevant portion allows courts to take personal jurisdiction over a non-domiciliary defendant who transacts business within the state where the cause of action arises out of defendant's New York actions.

Ehrenfeld argued that Bin Mahfouz's activities in New York in connection with his UK libel action satisfied the statute. Among other things, he and/or his agents sent Ehrenfeld a cease and desist letter demanding she correct and/or withdraw her book, as well as numerous e-mails and letters regarding the status of the UK libel case. She argued that these, together with his

(Continued on page 11)

**Declaratory Judgment Suit in
Ehrenfeld v. Bin Mahfouz Dismissed**

(Continued from page 10)

website announcing the developments in the action against Ehrenfeld, amounted to transaction of business in New York with a substantial relationship to her cause of action.

Ehrenfeld also cited the Ninth Circuit's recent decision in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc). There the Ninth Circuit held there was personal jurisdiction over French defendants in a declaratory judgment action by Yahoo! challenging a French court order. The Ninth Circuit specifically cited the cease and desist letters sent to the U.S. as a factor supporting personal jurisdiction. (A majority of the Ninth Circuit ultimately held the case was not ripe for adjudication).

Judge Richard Casey disagreed, finding that "Courts in New York have consistently refused to sustain personal jurisdiction ... solely on the basis of a defendant's communication, by telephone or letter, from outside New York into the jurisdiction." Citing, e.g., *Fort Knox Music, Inc. v. Baptiste*, 139 F. Supp. 2d 505, 511 (S.D.N.Y. 2001) (multiple cease-and-desist letters insufficient to support personal jurisdiction under New York law).

He also found that Ninth Circuit's decision inapplicable because New York's long-arm statute is narrower than California's law. Whereas, California's long-arm statute is coextensive with due process, New York's statute is limited.

Finally, the New York court rejected the claim that personal jurisdiction could be supported under a separate prong of the statute for a tortious act committed outside of New York with impact in New York. This argument failed, according to the court, because the English libel action did not constitute a "tortious act."

Rachel Ehrenfeld is represented by Mark Platt of Kornstein Veisz Wexler & Pollard, LLP, of New York. Khalid Salim Bin Mahfouz is represented by Geoffrey Stewart of the New York office of Jones Day, Stephen Brogan of the Washington, D.C. office of Jones Day, and Michael Nussbaum of Bonner, Kiernan, Trebach & Crociata of Washington, D.C. Kurt Wimmer, Covington & Burling in Washington, D.C., coordinated the media amicus effort that included, Amazon.com; the American Society of Newspaper Editors; Article 19, a London-based freedom of expression advocacy group; the Association of Alternative Newsweeklies; the Association of American Publishers; the Authors Guild; the Electronic Frontier Foundation; the European Publishers Council; John Fairfax Holdings, Ltd., one of Australia's largest publishers; the Newspaper Association of America; the Online News Association; NYP Holdings, Inc., the publisher of the New York Post; the Radio-Television News Directors Association; Reporters Committee for Freedom of the Press; Times Newspapers Limited, publisher of the London Sunday Times; and the World Press Freedom Committee.

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French Court Allows Newspaper Owners' Criminal Libel Case Against *The Times* to Proceed

Rejects Jurisdictional Challenge

A court in Paris held that it had jurisdiction to hear a criminal libel case filed by Sir David and Sir Frederick Barclay, new owners of *The Daily Telegraph* newspaper, against the editor and media editor of The (UK) Times newspaper. Matter No 0435808665 (March 23, 2006).

At issue in the case is a November 2004 business news article in *The Times* headlined "Twins who swoop on owners in distress," which profiled their business dealings at a time when the brothers were trying to buy the *Telegraph* from Conrad Black.

The Times' article stated that "the Barclays often take advantage of owners in distress to pick up assets on the cheap." The Barclays alleged the article was false and defamatory by implying they preyed on vulnerable firms. As for bringing an action in Paris, the Barclays have stated that they are pursuing the action there because it is "quicker and simpler."

Jurisdiction in France

The Times argued that the case should be transferred to the UK, because the claim was essentially "an English" dispute: it involved UK business transactions, concerned the Barclays UK reputation and there was only minimal publication in France. The Barclays are UK citizens, but residents of Monaco, in the South of France. *The Times* argued they have no "French reputation" to justify a case in Paris.

Judge Anne-Marie Sautreau rejected *The Times'* argument, relying primarily on the fact that the newspaper has a daily circulation of about 3,000 copies in France. France has an expansive jurisdictional law. Under the Law of 29 July 1881, which protects reputation, French courts have jurisdiction over non-resident and foreign publishers if there is any circulation in France. And Article 113-2 of the French Criminal Code provides that "French criminal law is applied to crimes committed in the French territory" and that "a crime is deemed to be committed in the French territory if one of its constituent elements took place in the territory."

A separate claim by the Barclays to punish *The Times* for failing to publish a reply – under France's right of reply law – was denied on procedural grounds because of a defect in the summons. The Barclay's lawyer, Monique Fauchon, said she expects to appeal this ruling.

According to news reports, the Barclays have previously brought an action in France against the UK media – winning a conviction in 1996 against a BBC journalist over a documentary profiling the brothers.

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Roberts Court Strikes Down Campaign Expenditure and Contribution Limits

By Jerianne Timmerman

On June 26, the Supreme Court struck down a Vermont campaign finance statute (“Act 64”). *Randall v. Sorrell*, No. 04-1528 (June 26, 2006). In a 6-3 vote, the Court concluded that Act 64’s limits on the amounts that candidates for state office may spend on their campaigns violated the First Amendment, as interpreted in *Buckley v. Valeo*, 424 U.S. 1 (1976).

By the same margin, the Court found that the Vermont law’s stringent limits on the amounts that individuals, organizations and parties may contribute to state campaigns were not narrowly tailored, but instead disproportionately burdened numerous First Amendment rights.

Thus, for the first time, the Supreme Court has invalidated a limit on campaign contributions as inconsistent with the First Amendment. Among other impacts, this case may slow the movement toward greater regulation of campaign financing.

Background

Thirty years ago in *Buckley*, the Supreme Court addressed the constitutionality of the Federal Election Campaign Act of 1971 (FECA), which imposed both expenditure and contribution limits on campaigns for political office. The Court upheld FECA’s contribution limits as constitutional, but found that the Act’s expenditure limits violated the First Amendment. Last month the *Randall* case largely reaffirmed this constitutional distinction between limiting campaign expenditures and restricting campaign contributions. With both Chief Justice Roberts and Justice Alito voting in the majority, the Court rejected efforts to reopen the issue of expenditure limits. For the foreseeable future, *Buckley*’s determination that campaign expenditure limitations are unconstitutional will remain in force.

The more interesting aspect of *Randall* involved the Court’s treatment of the Vermont statute’s strict limitations on the amounts that individuals and parties may contribute to state political campaigns.

Here, the majority agreed (consistent with *Buckley*) that some limits on campaign contributions were constitutional, but the Court held for the first time that a particularly severe limi-

tation on contributions violated the First Amendment. The Court was splintered, however, into multiple separate opinions on this question.

Campaign Contribution Limits

Justice Breyer’s plurality opinion, joined by Chief Justice Roberts and Justice Alito, generally accepted the constitutionality of campaign contribution limits, as expressed in *Buckley*, but nonetheless recognized “the existence of some lower bound.”

Vermont’s Act 64 limited contributions from both parties and individuals to \$200-\$400 per candidate (depending on the office) for each election cycle (*i.e.*, for the primary and general election combined). Observing that these contribution limits were substantially lower than the limits the Court had previously upheld and comparable limits in other states,

the plurality found “danger signs” that Act 64’s contribution limitations “may fall outside tolerable First Amendment limits.” Accordingly, the Court stated that it “must examine the record independently and carefully to determine whether Act 64’s contribution limits are ‘closely drawn’ to match the State’s interests.”

Based on this examination of the record, the plurality found that Act 64’s contribution limits were too restrictive and not closely drawn. In reaching this conclusion, the Court pointed to five factors:

- The record suggests that Act 64’s contribution limits “will significantly restrict the amount of funding available for challengers to run competitive campaigns.”
- Act 64’s requirement that political parties abide by exactly the same low contribution limits applicable to other contributors “threatens harm to a particularly important political right, the right to associate in a political party.”
- Act 64 seems to count the expenses of campaign volunteers against the volunteer’s low individual contribution limits, thereby impeding a campaign’s ability effectively to use volunteers and making it more difficult for individuals to associate in this way.

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**For the foreseeable future,
Buckley’s determination that
campaign expenditure
limitations are unconstitutional
will remain in force.**

Roberts Court Strikes Down Campaign Expenditure and Contribution Limits

(Continued from page 13)

- The Act's contribution limits are not adjusted for inflation so the limits decline in real value each year.
- The record fails to show any special justification that might warrant a contribution limit so low or so restrictive as to bring about serious associational and expressive problems.

These five considerations, taken together, lead to the conclusion that Act 64's contribution limits were not narrowly tailored, but disproportionately burdened First Amendment interests.

Campaign Finance Regulation

Randall clearly shows that the Court remains divided when considering the constitutionality of campaign finance regulations.

Justices Thomas, Scalia and Kennedy concurred only in the judgment finding the challenged Vermont expenditure and contribution limits to be unconstitutional. Thomas and Scalia would overrule *Buckley* -- and its distinction between campaign expenditures and contributions -- as providing insufficient protection for political speech, and would subject both expenditure and contribution limits to strict First Amendment scrutiny (thereby likely finding all such limits unconstitutional).

Justice Kennedy expressed similar but more general skepticism about the system of campaign finance regulation endorsed by the Court in *Buckley* and subsequent cases.

Dissents

On the other hand, the dissenting opinions of Justices Stevens, Souter and Ginsberg in *Randall* showed them to be more favorably inclined toward regulating both contributions and expenditures. As discussed above, Chief Justice Roberts and Justices Alito and Breyer are somewhere in the middle, finding expenditure limits to be unconstitutional while supporting some contribution limits (at least those that are not too low).

Implications

Randall clearly sets the stage for new legal challenges to the constitutionality of particular laws limiting contributions to

political campaigns. The multi-factor test set forth by the plurality invites challenges to some existing state limits on political contributions and will inhibit the creation of new, lower limits.

The expressed willingness of a majority of the Court to look closely at campaign finance regulations may also result in a slowing of the movement toward increased regulation of campaign finance that many observers expected after the Supreme Court's 5-4 decision upholding the Bipartisan Campaign Finance Reform Act of 2002. See *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

The rationale of the plurality in *Randall* may also change the focus of future challenges to campaign finance regulations. Past challenges to campaign finance restrictions focused on the First Amendment rights of political donors.

In contrast, Justice Breyer's plurality opinion finding Ver-

Thomas and Scalia would overrule Buckley -- and its distinction between campaign expenditures and contributions.

mont's contribution limits unconstitutional focused on whether the state's contribution limits were so low as to "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." Rather than its role in safeguarding individuals' First Amendment rights, Justice Breyer stressed the institutional role of the judiciary in preserving the fairness of the democratic process.

In addition, the *Randall* plurality emphasized the important role that parties play in the political arena. Although recent Court decisions such as *McConnell* had seemed to call into question any special rights for parties, *Randall* found that subjecting political parties to the same low contribution limits applicable to individuals threatened to harm the "particularly important political right" to "associate in a political party."

In counting the "special party-related harms" that Act 64 threatened as a factor specifically weighing against the constitutional validity of the Vermont law, *Randall* apparently returned to the idea that parties matter. The extent to which parties constitutionally matter will no doubt be a subject of future campaign finance regulation and litigation.

Jerianne Timmerman is Senior Vice President and Deputy General Counsel of the National Association of Broadcasters.

Supreme Court Denies First Amendment Protection to Public Employee Statements Made Pursuant to Official Duties

In a 5-4 opinion written by Justice Kennedy and joined by Chief Justice Roberts, and Justices Scalia, Thomas and Alito, the U.S. Supreme Court in May held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti v. Ceballos*, 126 S.Ct. 1951 (U.S. May 30, 2006).

The Court reasoned that to hold otherwise would place the judiciary in the “new, permanent and intrusive role” of supervising routine managerial decisions. Instead, the Court noted that federal and state whistleblower laws, as well as union and civil service rules, provided adequate remedies for public employees who speak about matters of public concern in the course of their official duties.

Factual Background

The plaintiff, Richard Ceballos, was a deputy district attorney for Los Angeles County. One of his duties was to review affidavits in warrant proceedings to check for inaccuracies. After receiving a request to check a sheriff’s affidavit, Ceballos determined that the sheriff had misrepresented the facts.

Ceballos discussed the matter with his immediate supervisor, who agreed the validity of the warrant was questionable. Ceballos then wrote a memorandum detailing his concerns for the Head Deputy District Attorney, Frank Sundstedt. Sundstedt instructed Ceballos to rewrite the memo to make it less accusatory of the sheriff, which he did.

The prosecutors held a meeting to discuss the memo with the sheriff’s office and Sundstedt decided to proceed with the prosecution pending the outcome of a motion challenging the warrant. Ceballos informed the defense counsel of his suspicions and he was subpoenaed and testified for the defense. The criminal defendant’s challenge to the warrant was ultimately rejected.

Soon thereafter, Ceballos alleged that he was effectively demoted and transferred to a distant office. He then filed the instant §1983 First Amendment retaliation suit against his supervisors, the district attorney and the county.

Underlying Decisions

The district court granted summary judgment for the defendants based on qualified immunity. A Ninth Circuit panel reversed, holding that qualified immunity was not available because “the law was clearly established that Ceballos’s speech addressed a matter of public concern and that his interest in the speech outweighed the public employer’s interest in avoiding inefficiency and disruption.” *See* 361 F.3d 1168, 1170 (9th Cir. 2004) (Reinhardt, O’Scannlain, Fisher, JJ.).

The Ninth Circuit applied the two-step test based on the U.S. Supreme Court’s holdings in *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968): first, whether the speech addresses a matter of public concern, and, if so, whether the government employee’s interest in expressing himself outweighs the government’s interests in promoting workplace efficiency and avoiding workplace disruption.

The government defendants conceded that the plaintiff’s statements involved a matter of public concern, but argued that since the plaintiff’s statements were made as part of his job responsibilities *Pickering* and *Connick* did not apply (the position ultimately adopted by the U.S. Supreme Court). In fact, *Pickering* and *Connick* did not address this precise fact pattern and focused instead on whether the speech at issue involved matters of public or personal concern. This was also the case in the Court’s other leading decision in this area *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979). There the Court held that a teacher’s complaints to a principal concerning racist hiring practices were protected by the First Amendment. (In *Givhan*, the plaintiff’s speech was arguably in the scope of her employment, but the Court in *Connick* later described it as being made in her capacity as a “citizen.”)

But the Ninth Circuit ruled that for First Amendment purposes there was no distinction between speech pursuant to official duties and speech made outside the scope of employment. Rather, the crucial factor was whether the speech involved a matter of public interest – a position the Ninth Circuit had endorsed in *Roth v. Veteran’s Admin. of*

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Supreme Court Denies First Amendment Protection to Public Employee Statements Made Pursuant to Official Duties

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United States, 856 F.2d 1401, 1406 (9th Cir.1988). *Roth* involved a wrongful termination claim by a doctor who alleged he was fired because he prepared, as part of his official duties, reports criticizing the operation of a VA hospital. The Ninth Circuit held that the claim was subject to the *Pickering / Connick* test because the point of the speech was to bring wrongdoing to light.

Interestingly, Judge O’Scannlain wrote a separate concurrence, finding the result in *Garcetti* was compelled by *Roth*. But he concluded that *Roth* should be revisited and overruled, finding that “when public employees speak in the course of carrying out their routine, required employment obligations, they have no personal interest in the content of that speech that gives rise to a First Amendment right.” 856 F.2d. at 1189.

Questions Presented

The defendants appealed, presenting the following two questions in their petition:

- (1) Should public employee’s purely job related speech, expressed strictly pursuant to duties of employment, be cloaked with First Amendment protection simply because it touches on matter of public concern, or should First Amendment protection also require speech to be engaged in “as a citizen,” in accordance with holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 US. 138 (1983)?
- (2) Is immediate review by this court necessary to address growing inter-circuit conflict on the question of whether public employee’s purely job-related speech is constitutionally protected, especially when a lack of uniformity dramatically impacts ability of all public employers to effectively manage their respective agencies?”

The case was argued to the U.S. Supreme Court on October 12, 2005, but was reargued in March 2006 after Justice O’Connor retired and was replaced by Justice Alito. At the October argument, Justice O’Connor asked few questions and gave no hint as to how she would have voted.

Justice Kennedy, on the other hand, clearly telegraphed his views with the following comment to plaintiff’s counsel:

“the consequence of your view is to have the first amendment being used for courts to monitor the discussions that take place in every public agency – local, State, and Federal – in the United States. You are advocating a sweeping rule.... the intrusive consequences of your rule are sweeping.”

The oral argument transcripts are available online at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html

Majority Opinion

Justice Kennedy began the majority opinion by discussing *Pickering* and *Connick*, noting the competing values at stake. Kennedy was careful to note that government employees do not cease being citizens for First Amendment purposes just by virtue of their employment. Furthermore, the public has a First Amendment interest in hearing the commentary of those who are best informed on public issues. On the other hand, the government, like any employer, must retain a measure of control over employee speech if it is to accomplish its objectives efficiently.

Ceballos’s speech was not protected by the First Amendment, the Court concluded, because:

“restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”

Citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

To hold otherwise, the Court insisted, would place the judiciary in the “new, permanent and intrusive role” of supervising routine managerial decisions.

“This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a

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Supreme Court Denies First Amendment Protection to Public Employee Statements Made Pursuant to Official Duties

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matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.”

The Dissents

Justice Souter authored a dissent, which Justices Stevens and Ginsburg joined. Justices Stevens and Breyer issued individual dissents.

The joint dissent argued that public employees speaking on matters of public concern pursuant to their employment duties should be protected by a modified *Pickering* balancing test. Souter would have altered the *Pickering* test in these circumstances by requiring that an employee “should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it.”

Matters of “unusual importance” include “comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety.”

He also argued that the majority’s standard, where speech engaged in pursuant to employment duties is not protected, will result in an expansion of job descriptions with the courts deciding if these descriptions are accurate.

Justice Kennedy replied to this in the majority opinion, stating that an employee’s job responsibilities would, for First Amendment purposes, be determined by a “practical” inquiry, and would not depend on formal job descriptions.

Souter also criticized the majority’s reliance on *Rosenberger* and other government speech cases. These cases, he states, apply only to employees hired to perform a specific speaking assignment, promoting a government view. However, Ceballos was hired not to promote any particular view, but to “enforce the law through constitutional action.”

In a separate short dissent, Justice Stevens argued that the majority decision was inconsistent with the Court’s decision in *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979).

In his separate dissent, Justice Breyer reasoned that Souter’s test was too broad.

“The speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates.”

Nevertheless, he found that First Amendment could apply to public employee’s job speech provided it

“involves a matter of public concern and also takes place in the course of ordinary job-related duties. But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public’s affairs.”

The dissents also argued that the majority decision creates an anomalous incentive for employees to air their complaints to the press. But this objection, Justice Kennedy wrote, is unfounded as a practical matter since statements of complaint, he suggested, would generally fall outside the scope of employment.

The dissents also argued that the majority decision creates an incentive for employees to bypass internal procedures and go straight to the press with their complaints. But this objection, Justice Kennedy wrote, is unfounded as a practical matter since statements of complaint would generally fall outside the scope employment.

Cindy S. Lee, Glendale, California, argued the case for the Petitioners. Edwin S. Kneedler, Deputy Solicitor General, argued for the United States, as amicus curiae, supporting the Petitioners. Bonnie Robin-Vergeer, Washington, D.C., argued for the plaintiff.

Cert. Denied in *Yahoo! v. LICRA* Case

The Supreme Court denied defendants' petition for certiorari in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006), *cert. denied*, 74 USLW 3599 (May 30, 2006) (No. 05-1302).

In January 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.

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 concluded that the case was not ripe for adjudication. Their votes, together with the three judges who rejected personal jurisdiction formed a six judge majority to dismiss the case.

At issue are lawsuits filed in France against Yahoo! by two French civil rights groups complaining that Nazi-era items were available on Yahoo!'s auction websites accessible to French residents.

Although the California action was dismissed, the French defendants last month filed a petition for certiorari on the issue of personal jurisdiction. The questions presented were:

- 1) By litigating a bona fide claim in a foreign court and receiving a favorable judgment, does a foreign party automatically assent to being haled into a court in the other litigant's home forum?
- 2) Under the "effects" test set for in *Calder v. Jones*, must the underlying action in a non-contract case be tortious or otherwise wrongful to justify exercise of personal jurisdiction, or is "express aiming" of any action, regardless of culpability, sufficient?

The petition was filed by E. Randol Schoenberg of Donald S. Burris, Burris & Schoenberg LLP in Los Angeles. Yahoo! did not file a responsive petition.



50-STATE SURVEYS

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U.S. Supreme Court Upholds Solomon Act But Avoids Difficult Unconstitutional Conditions Question

By Robert Corn-Revere

In a unanimous ruling written by Chief Justice John Roberts – his debut opinion on First Amendment issues – the U.S. Supreme Court in March held that the federal government may require universities that receive federal funds to provide military recruiters with access equal to that provided to any other prospective employer. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006) (“*Rumsfeld v. FAIR*”).

The Court reversed a 2004 decision of the United States Court of Appeals for the Third Circuit that the funding condition unconstitutionally limited the schools’ freedom of association and compelled them to transmit expression with which they disagreed. *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (“*FAIR*”). Justice Samuel Alito did not participate in the case.

Background

The Solomon Amendment requires the United States Department of Defense (“DOD”) to deny federal funding to institutions of higher education that prohibit access and/or deny assistance to military recruiters. 10 U.S.C. § 983.

Originally enacted as an amendment to the annual defense appropriation bill in 1994, the law subsequently was expanded to deny funding by a number of federal agencies, including the Departments of Transportation, Labor, Health and Human Services, and Education. Exemptions to the funding restrictions included: (1) institutions that had ceased denying access or assistance to military recruiters; (2) institutions with a longstanding religious-based policy of pacifism; and (3) schools that provide DOD recruiters with a degree of access (but not active assistance) equal to that provided to other recruiters.

After September 11, 2001, however, DOD began to require the same degree of active assistance, such as help from universities’ career development offices, in order to comply with the Solomon Amendment. This change in policy was codified in 2004. The law now requires access and assistance for military recruiters “in a manner that is at least equal in quality and scope to the [degree of] access to campuses and to students that is provided to any other employer.” 10 U.S.C. § 983(b).

The Forum for Academic & Institutional Rights, Inc. (“FAIR”), an association of law schools and law faculty, challenged the Solomon Amendment as a violation of associational rights under the First Amendment. FAIR argued that its members should not be required to endorse the military’s discriminatory policies against homosexuals by participating recruitment activities.

The U.S. District Court in New Jersey denied FAIR’s motion for preliminary injunction but the Third Circuit reversed this decision on appeal in a 2-1 decision. *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *rev’d*, 126 S. Ct. 1297 (2006). The court held that the funding condition imposed by the Solomon Amendment violated FAIR’s right of free association and that it compelled educational institutions “to assist in the expressive act of recruiting.” *Id.* at 230.

The Third Circuit majority opinion, written by Judge Ambro, relied on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), where the Supreme Court held that it would infringe the Boy Scouts’ rights of free association to be compelled to accept an openly gay scoutmaster.

It found it likely that FAIR would be able to establish that law schools are expressive associations, that the Solomon Amendment adversely affected the expression of the schools’ viewpoints, and the government’s interest did not justify the resulting burden on speech. *FAIR*, 390 F.3d at 231-235. The court also found that the Solomon Amendment compelled FAIR’s members to propagate, accommodate, and subsidize viewpoints with which they disagree. *Id.* at 240.

Separately, the majority concluded that the Solomon Amendment also would fail to satisfy intermediate First Amendment scrutiny as a regulation of expressive conduct. *Id.* at 243-245. In a sharply-worded dissent, Judge Aldisert wrote that the Solomon Amendment did not impose an undue burden on speech, and that recruitment is more “an economic transaction” than speech. *Id.* at 248, 256 (Aldisert, J., dissenting). He disagreed that the temporary presence of military recruiters on campus impinged FAIR’s associational rights, reasoning that the universities were neither required to subsidize the campus visits nor to accept the recruiters as members of their institutions. *Id.* at 257-260.

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U.S. Supreme Court Upholds Solomon Act But Avoids Difficult Unconstitutional Conditions Question

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The Supreme Court Decision

The Supreme Court unanimously reversed the Third Circuit decision, but did so without disturbing its jurisprudence on the doctrine of unconstitutional conditions. The Court instead based its ruling on the dichotomy between speech and conduct, holding that the recruiting assistance required by the Solomon Amendment constituted the latter.

Chief Justice Roberts' opinion reaffirmed the principle that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Rumsfeld v. FAIR.*, 126 S. Ct. at 1307, quoting *United States v. American Library Assn., Inc.*, 529 U.S. 194, 210 (2003) (further citations omitted).

However, it compared the funding conditions of the Solomon Amendment to the requirement that universities comply with Title IX of the Education Amendments of 1972 in order to receive federal grants. *Grove City College v. Bell*, 465 U.S. 555, 575-576 (1984). As such, the Court characterized the activities covered by the Solomon Amendment as conduct, not speech, that could be constitutionally imposed either directly or indirectly.

The opinion stressed that the Solomon Amendment "affects what law schools must do – afford equal access to military recruiters – not what they may or may not say." *Rumsfeld v. FAIR.*, 126 S. Ct. at 1307 (emphasis in original). Justice Roberts wrote that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything," and his opinion quoted the Solicitor General's statement from oral argument that affected institutions "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests."

The Court also held that the requirement to assist recruiters did not constitute compelled speech. While acknowledging that recruiters' presence on campus often included "elements of speech" (e.g., sending email notices or posting announcements on bulletin boards) the Court distinguished such incidental communications from compelling recitation of the pledge of allegiance, *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943), or requiring the display of a state motto. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

And, while noting that not all of the prior compelled speech cases involved requirements where "an individual must personally speak the government's message," the Court explained that the common element in all such cases was that the "speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v. FAIR.*, 126 S. Ct. at 1308-09. It cited with approval *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), a case that upheld a California law that required a shopping center owner to allow protest activities by others on its property. *Id.* at 1310.

The Court also held that the Solomon Amendment does not impermissibly regulate expressive conduct. It compared the recruiting activities at issue unfavorably to core symbolic speech like burning an American flag as a form of protest and concluded "[u]nlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive." *Id.*, citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989). The law schools' position on the discriminatory policies of military recruiters was made evident by their speech about the policies, not their actions alone, so that the Solomon Amendment condition does not affect expressive conduct. Otherwise, the court reasoned, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* at 1311.

Finally, the Court rejected the Third Circuit's conclusion that the Solomon Amendment violated the freedom of association of FAIR's members. Acknowledging that freedom of speech includes the right to associate for the purpose of speaking, Chief Justice Roberts disputed the notion that the temporary presence of recruiters on law school campuses impaired the institutions' associational interests. He pointed out that "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students – not to become members of the school's expressive association," and he concluded that "the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Id.* at 1312.

Although freedom of association also may be impaired by measures other than compelling unwanted members (e.g., revealing the identity of members or withholding benefits based on "undesirable" affiliations), the Court found that the Solomon Amendment did nothing that would "mak[e] group membership less desirable." *Id.* at 1212-13.

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U.S. Supreme Court Upholds Solomon Act But Avoids Difficult Unconstitutional Conditions Question

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Bottom line, the Court found that “[a] military recruiter’s mere presence on campus does not violate a law school’s right to associate, regardless of how repugnant the law school considers the recruiter’s message.” *Id.* at 1313.

Implications of the Ruling

The FAIR decision may be more notable for what it did not decide than for the issues it reached. The case presented the Court with an opportunity to reconsider the unconstitutional conditions doctrine under which the government is barred from tying the receipt of a benefit to the relinquishment of a constitutional right.

The Court’s pronouncements in this area have been far from crystalline, holding on the one hand that local government cannot condition contracts on a businessman’s agreement to forego criticizing the county board, *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674 (1996), while approving a restriction that Title X funding under the Public Health Service Act could not be used to support “counseling concerning the use of abortion as a method of family planning.” *Rust v. Sullivan*, 500 U.S. 173, 179-180 (1991).

In FAIR, however, the Court was content simply to reaffirm the basic tenets of the unconstitutional conditions doctrine while concluding that the affected institutions were not required to give up any constitutional rights.

Perhaps the key to the Court’s unanimous vote in FAIR was the Court’s decision to avoid the thorny issue of unconstitutional conditions. Chief Justice Roberts’ opinion did not even cite the sharply divided opinion in *Rust v. Sullivan*. Interestingly, as a Deputy Solicitor General, Roberts had briefed the government’s position in *Rust*, one of the most controversial and least speech-protective decisions in this area.

But the FAIR opinion avoided any discussion of *Rust* and instead cited *United States v. American Library Assn.* and *Umbehr* to reaffirm the proposition that “the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *Rumsfeld v. FAIR*, 126 S. Ct. at 1307.

Some critics of the FAIR decision acknowledge that it sidestepped the difficult unconstitutional conditions issue, but argue that the opinion provides a lower level of protection for symbolic speech and expressive association. Notwithstanding the outcome in this particular case, however, such concerns are

debatable. In fact, there are some indications that the unanimous FAIR decision may signal a heightened awareness by the Court of the important First Amendment issues involved with expressive conduct and association.

The Court has not yet devised a satisfying theory for separating speech from conduct, and the FAIR decision does nothing to advance the analysis in this regard. However, Chief Justice Roberts’ citation of flag burning as the paradigmatic example of expressive conduct in an 8-0 decision represents a more uniform approach to symbolic speech than previously existed.

The Court up to now was divided 5-4 on the issue of flag burning. See *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990). Indeed, the Court’s unanimous embrace of flag burning as protected symbolic speech is far removed from former Chief Justice Rehnquist’s dissent in *Johnson* that compared flag burning to “an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others.” 491 U.S. at 432 (Rehnquist, C.J., dissenting).

After FAIR, it seems beyond question that “inherently expressive” conduct is protected by the First Amendment, although disputes will persist in future cases about which actions meet this criterion.

The FAIR decision should not diminish the rule that restricting an association’s ability to communicate its message violates the First Amendment, although it rejected the claim that the universities involved were engaged in a communicative act. While there is room to disagree with the Court’s judgment about the facts, the opinion does not effect doctrinal change in the protection of associational rights.

FAIR reaffirmed the rule that measures making membership in a group “less attractive” may violate the First Amendment. At the same time, however, it highlighted the debate about how institutions, whether law schools or shopping centers, may engage in “expression.” How such institutional rights are to be understood undoubtedly will be the subject of future cases.

Robert Corn-Revere practices First Amendment and communications law and is a partner at Davis Wright Tremaine LLP in Washington, D.C. E. Joshua Rosenkranz, of Heller Ehrman, LLP, argued the case for FAIR. Solicitor General Paul D. Clement, argued the case for the United States.

California Supreme Court Protects “Friends” Writers From Sexual Harassment Claim

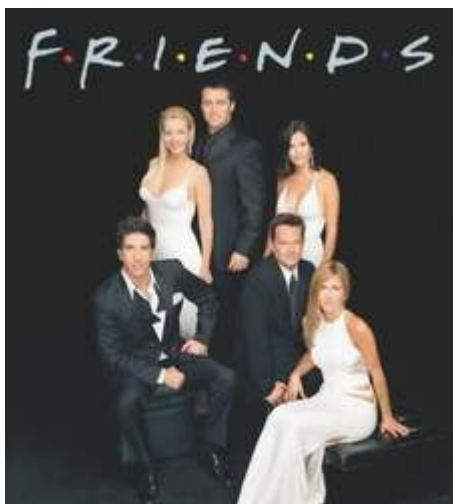
By Rochelle Wilcox

The California Supreme Court in April issued its highly-anticipated decision in *Lyle v. Warner Brothers Television Productions, No. S125171*, 2006 WL 1028558 (Cal. April 20, 2006), dismissing a sexual harassment claim over statements made by television writers during the course of their creative meetings.

Background

This case sent tremors through the entertainment industry in April 2004, when the California Court of Appeal held that Warner Brothers Television Productions, which produced the popular television program “Friends,” and three of the program’s writers could be held liable for “hostile environment sexual harassment” based on explicit jokes and discussions about sex by the writers. *See* 12 Cal.Rptr.3d 511 (Cal. App. 2 Dist. April 21, 2004).

The jokes and discussions were, according to the plaintiff, coarse and vulgar – discussions about the writers’ sexual preferences, their claimed exploits and fantasies, among other things – but with minor (and ultimately irrelevant) exceptions, they were not directed at plaintiff. Plaintiff claimed that she was harassed by being subjected to that allegedly hostile work environment.



The Court of Appeal ruled that plaintiff’s claims raised questions of fact, and that plaintiff was entitled to a jury trial. Defendants’ Petition for Review was granted by the Supreme Court, which ordered briefing on the following issues:

(1) Can the use of sexually coarse and vulgar language in the workplace constitute harassment based on sex within the meaning of the [Fair Employment and Housing Act (the “FEHA”)]?

(2) Does the imposition of liability under the FEHA for sexual harassment based on such speech infringe on defendants’ rights of free speech under the First Amendment to the federal Constitution or the state Constitution?

California Supreme Court Decision

Ultimately, a unanimous California Supreme Court answered only the first question, but it did so in a way that protects the First Amendment rights of defendants and others like them. First, the Court held that plaintiff was not harassed “because of ... sex,” as required to establish a sexual harassment claim.

It reached that conclusion by evaluating the context in which the alleged harassment occurred. The Court emphasized that “it is the disparate treatment of an employee on the basis of sex – not the mere discussion of sex or use of vulgar language – that is the essence of a sexual harassment claim.” Vulgar or coarse language, standing alone, does not give rise to a sexual harassment claim.

The Court found that “considering the totality of the circumstances, especially the nature of the writers’ work, the facts largely forming the basis of plaintiff’s sexual harassment action ... did not present a triable issue whether the writers engaged in harassment ‘because of ... sex.’” The Court emphasized that the “Friends” program featured extensive sexual themes and content, and that writers of both sexes participated in the explicit discussions. Consequently, Plaintiff could not establish harassment “because of ... sex.”

Second, the Court held that Plaintiff failed to raise a triable issue of fact on her claim that the alleged harassing conduct was “severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment.”

Quoting the U.S. Supreme Court, the Court emphasized that the inquiry regarding whether alleged harassment is sufficiently severe to be actionable “requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.” *Citing Oncale v. Sun-downer Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998).

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California Supreme Court Protects “Friends” Writers From Sexual Harassment Claim

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The analysis is both objective and subjective. The Court considered and rejected plaintiff’s claim that the few comments from the writers that were directed at particular women were actionable, finding that they were not severe or pervasive enough to alter plaintiff’s working conditions.

The Court concluded that while plaintiff might be able to state a claim based on alleged sexual harassment directed toward others, she could do so only by meeting a high threshold, and establishing that those comments “permeated” plaintiff’s “direct work environment” or were so pervasive and destructive of the work environment that they justified affording plaintiff recovery. Plaintiff could not meet this high test.

Thus, the Court concluded:

Based on the totality of the undisputed circumstances, particularly the fact the *Friends* production was a creative workplace focused on generating scripts for an adult-oriented comedy show featuring sexual themes, we find no reasonable trier of fact could conclude such language constituted harassment directed at plaintiff because of her sex within the meaning of the FEHA.

The Court did not reach the second question – whether imposition of liability would have offended defendants’ First Amendment rights – but there was no need. Resolution of the first issue in defendants’ favor, and the Court’s emphasis on the context in which the discussion occurred, fully protected defendants’ rights.

The decision also should fully protect others whose businesses are the creation or dissemination of works protected by the First Amendment. Just as the writers were protected in what plaintiff alleged was extreme and caustic sexual banter, editors and writers should be protected as they discuss controversial issues in attempting to decide how best to cover a story.

Concurring Opinion

Justice Chin did, however, include a concurring opinion emphasizing this key point. As Justice Chin explained, he “wr[ote] separately to explain that any other result would

violate free speech rights” under the United States and California Constitutions. He emphasized that “this case has very little to do with sexual harassment and very much to do with core First Amendment free speech rights.”

The First Amendment protects creativity, and it protects defendants engaged in the creative process. Thus, “[w]hen, as here, the workplace product is the creative expression itself, free speech rights are paramount. The *Friends* writers were not renting cars and talking about sex on the side. They were writing adult comedy; sexual repartee was an integral part of the process.” Justice Chin emphasized his belief that free speech rights are placed in “clear and present danger” when the process by which the speech is created is challenged.

Writers must be free to push the limits, particularly if they are addressing controversial issues.

Relying on an amicus brief submitted by a “‘who’s who’ of television and motion picture writers and directors,” Justice Chin emphasized the importance of freedom during the creative process. He explained that “[t]he creative process must be unfettered, especially because it can often take strange turns, as many bizarre and potentially offensive ideas are suggested, tried, and, in the end, either discarded or used.”

Writers must be free to push the limits, particularly if they are addressing controversial issues. Justice Chin emphasized that “speech may not be prohibited because it concerns subjects offending our sensibilities.” Juries cannot be allowed to dissect the creative process to determine – after the fact – whether a certain statement was “necessary” to the final product, and to impose sexual harassment liability for that which the jury deems “unnecessary.” It matters not that some – or most – of what was said was not, ultimately, incorporated into any script. “The First Amendment also protects attempts at creativity that end in failure.”

Thus, Justice Chin explained:

I agree with the general test proposed in the amicus curiae brief of the California Newspaper Publishers Association et al.: “Where, as here, an employer’s product is protected by the First Amendment – whether it be a television program, a newspaper, a book, or any other similar work – the challenged

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California Supreme Court Protects “Friends” Writers From Sexual Harassment Claim

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speech should not be actionable if the court finds that the speech arose in the context of the creative and/or editorial process, and it was not directed at or about the plaintiff.

Justice Chin explained that this test presents the proper balance because “in the creative context, free speech is critical while the competing interest – protecting employees involved in the creative process against offensive language and conduct *not* directed at them – is, in comparison, minimal.”

Justice Chin emphasized that summary judgment is a favored remedy whenever First Amendment values are at stake, to ensure that unnecessarily protracted litigation cannot chill the exercise of First Amendment rights, and that demurrer (California’s form of a motion to dismiss on the pleadings) is even preferable. Justice Chin concluded:

We must always remember that the widest scope of freedom is to be given to the adventurous and imagi-

native exercise of the human spirit. ... We must not tolerate laws that lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society. ... The allegedly offending conduct in this case arose out of the protected creative process and was not directed at plaintiff. Accordingly, the trial court properly granted summary judgment in defendants’ favor. The First Amendment demands no less.

(Citations, internal quotes omitted.)

Rochelle L. Wilcox and Kelli L. Sager, Davis Wright Tremaine, represented Amicus Curiae California Newspapers Publishers Association, The Reporters Committee for Freedom of the Press, The Daily Journal Corporation, The Copley Press, Inc., Los Angeles Times Communications LLC, California First Amendment Coalition, Freedom Communications, Inc., and the American Society of Newspaper Editors in this matter.

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Barry Bond's Motion to Freeze Book Profits Rejected

Following oral argument on March 24, San Francisco Superior Court Judge James Warren denied an emergency motion by Barry Bonds to impose a temporary restraining order on the authors and publishers of *Game of Shadows* – a book which details Bonds' use of steroids and other performance enhancing drugs. *Bonds v. Fainaru-Wada, et al.*, No. 450613 (Super. Ct. March 24, 2006).

In an act of creative lawyering, Bonds' lawyers did not seek to directly restrain publication of the book (or challenge its accuracy), instead they alleged that the book, and publication of excerpts in *Sports Illustrated* and the *San Francisco Chronicle*, violated California's Unfair Competition Law § 17200, which prohibits "any unlawful, unfair or fraudulent business act or practice." Bonds alleged that publication violated the statute because it is based, in part, on leaked grand jury material.

Bonds' lawyers asked the court to appoint a receiver to collect the profits from publication to protect the integrity of the criminal justice system. The profits would be turned over the United States as the "owner" of the grand jury materials.

Background

Game of Shadows was published in March by Gotham Books, a division of Penguin Group. It is written by two



Photo Credit: Agência Brasil

reporters from the *San Francisco Chronicle*, Mark Fainaru-Wada and Lance Williams. They broke the story about the grand jury investigation into BALCO, the company that was supplying marquee athletes with steroids and other performance enhancing drugs. The book, based on grand jury materials as well as numerous interviews, focuses on

intense debate in the sports media and among sports fans about Bonds' baseball legacy.

Court Hearing

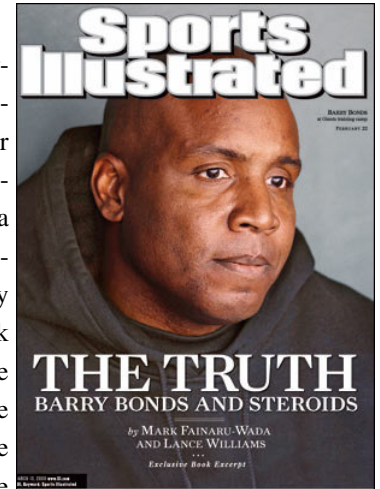
At the March 24 hearing, Bonds' lawyers argued that he and other grand jury witnesses received and relied on a guarantee of confidentiality. The use of grand jury information in the book deprived him of these guarantees and injured the public's confidence in the grand jury system. The appropriate remedy, his lawyers argued, was for any profits from publication to be returned to the government.

The lawyers for the authors and publishers argued, among other things, that Bonds had no underlying claim under the state Unfair Competition Law because publication of newsworthy information from the grand jury by the press was not a violation of grand jury secrecy law. Indeed, they argued the law could not constitutionally be applied to truthful, newsworthy speech – without meeting the strict scrutiny standard, which Bonds failed to do.

Judge Warren was mindful of the First Amendment implications of Bonds' request.

"The only way you can stop profits from occurring or accruing is to stop the publication of it. The plaintiff says that he is not seeking to stop the publication of it but in practical effect, that's what he's doing. There is serious First Amendment issues raised there, of course, and I know the plaintiff has very carefully avoided saying he wants to stop publication but I think the nature of the relief sought to the extent it can be granted would involve the First Amendment."

Denying Bonds' motion, Judge Warren found that he failed to show irreparable harm and suggested that he had no chance of success on the merits.



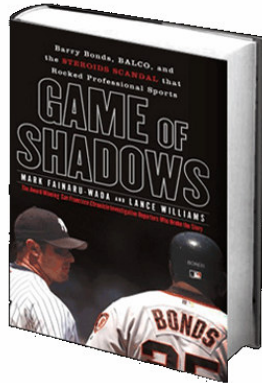
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Barry Bond's Motion to Freeze Book Profits Rejected

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The authors and publishers plan to file an anti-SLAPP motion to dismiss the case. A separate grand jury is now considering whether Bonds committed perjury before the Balco grand jury when he denied knowingly taking steroids.

Theodore Boutrous, Jr., Gibson Dunn & Crutcher, LLP, Los Angeles, represented Gotham Books / Penguin Group, Sports Illustrated and Mark Fainaru-Wada and Lance Williams with respect to their authorship of *Game of Shadows*. Jonathan Donnellan, Senior Counsel for Hearst, and Karl Olson, Levy Ram Olson LLP, San Francisco, represented *The San Francisco Chronicle* and Fainaru-Wada and Williams in their capacity as *Chronicle* reporters. Barry Bonds is represented by Michael Rains and Alison Berry Wilkinson of Rains Lucia & Wilkinson, LLP Pleasant Hill, CA.



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Government, Reporters Settle With Wen Ho Lee

By Dave Tomlin

Wen Ho Lee, the former government nuclear scientist at Los Alamos National Laboratory who was the subject of a 1999 espionage investigation that was leaked to reporters, dropped his Privacy Act lawsuit against three federal agencies on June 2 in exchange for a payment of \$895,000.

At the same time, five news organizations agreed to pay a total of \$750,000 to Lee after he asked the trial court -- and the court agreed -- to vacate contempt orders against the five reporters who refused the court's order to identify the sources of the leaks that gave rise to some of Lee's claims against the Energy and Justice departments and the FBI.

The two settlement agreements were the outcome of court-ordered mediation in the case. They came just as the U.S. Supreme Court was preparing to announce whether it would consider the appeal of four of the reporters from the D.C. Circuit Court of Appeals decision upholding the contempt orders.

The appeal of the fifth reporter, Walter Pincus of the Washington Post, was still pending before the D.C. Circuit. The other four reporters were Pierre Thomas of ABC News, H. Josef Hebert of The Associated Press, Robert Drogin of the Los Angeles Times, and James Risen of the New York Times.

The employers of the five journalists expressed mixed feelings about cutting the appeals process short and paying money to a plaintiff to avoid a potential choice between naming confidential sources or the sanctions that would follow defiance of a federal court order.

"We were reluctant to contribute anything to this settlement," the news companies said in a joint statement, "but we sought relief in the courts and found none. Given the rulings of the federal courts in Washington and the absence of a federal shield law, we decided this was the best course to protect our sources and to protect our journalists."

Most observers agreed that the settlement provided fresh evidence that a federal shield law is badly needed.

But some expressed strong disappointment that the news companies had chosen to settle rather than waiting to see whether the Supreme Court could be persuaded to rule that a reporter privilege based on constitutional or common law, or both, protected the reporters from Lee's demand for their sources' identities.

There was concern in some quarters that an opportunity to strengthen the reporter privilege might have been wasted, that plaintiffs in other cases might view the settlement as an invitation to seek quick payments from journalists as an alternative to lengthy litigation of their actual claims, and that media critics might point to the settlement as a concession that the reporters had done something wrong.

CNN, where Pierre Thomas was working at the time of his Wen Ho Lee reporting, said it decided not to take part in the settlement for "philosophical" reasons. Thomas wished to settle, however, and ABC agreed to underwrite his share of the payment to Lee.

The other news organizations concluded that the concerns expressed by settlement critics were either entirely misplaced or were heavily outweighed by more immediate dangers. They believed there was a significant chance that the Supreme Court would either decline to hear the reporters' appeals, or would hear them and then uphold the contempt orders, possibly further or even fatally undermining what remains of the reporter privilege still recognized in a majority of the federal circuits.

The reporters and their employers calculated that a settlement of the case after a final loss in the Supreme Court would either be far more costly or not possible at all, in which case severe contempt sanctions, including the strong likelihood of jail time for the reporters, would be almost sure to follow.

Refusing the settlement opportunity in hopes of winning their contempt appeal before the Supreme Court thus seemed like a gamble the journalists could not afford to lose.

On the heels of the settlement announcement, there was evidence the journalists might have been right. The Supreme Court announced on June 5 that it was declining to hear the reporters' appeals, despite the fact that the justices must already have known they would soon be asked to dismiss them in the wake of the settlement.

While it can't be known whether the court would have granted cert if no settlement had been in the offing, some observers viewed the court's seemingly pointed denial as a sign that if they had not settled, the reporters would have reached their difficult crossroads sooner rather than later.

Dave Tomlin is assistant general counsel for the Associated Press.

Connecticut Passes Shield Law

By Karen Kaiser, Craig Bloom and Maherin Gangat

On June 6, 2006, Connecticut became the 32nd state to enact a shield law when Governor M. Jodi Rell signed House Bill No. 5212, "An Act Concerning Freedom of the Press," into law.

The legislation, spearheaded by Representative James Spallone (D-Essex), takes effect on October 1, 2006 and provides a strong qualified privilege against compelled disclosure of sources and information, regardless of confidentiality.

Following an unsuccessful effort to pass a shield law bill during the 2005 legislative session, Rep. Spallone convened a task force made up of local media representatives and attorneys to work on passage of a bill in 2006. The task force included, among others, Karen Kaiser (attorney representing *The Hartford Courant*), Craig Bloom (attorney representing NBC Universal, Inc. and its Hartford station, WVIT), Eric Kemmler (attorney representing ESPN), Kirk Varner (news director of LIN TV station, WTNH) and Maherin Gangat (MLRC attorney).

The focus of the renewed legislative effort was on streamlining the provisions of the previous bill, in particular the definition of a journalist, and establishing a large-scale consensus among Connecticut media entities in support of the bill. The bill was drafted carefully to draw appropriate balances in defining coverage while also strengthening protection for journalists and their sources, and promoting the free flow of information.

The lobbying effort was a true success, as the legislation drew support from the Board of Directors of the Connecticut Broadcasters Association and the Connecticut Daily Newspapers Association; the Connecticut Council on Freedom of Information; and the Attorney General of Connecticut. Indeed, aside from some last-minute opposition from an insurance lobby, support for the bill was overwhelming.

Legislative Background

The original bill put forward by Rep. Spallone in the start of the session provided an absolute privilege for confi-

dential sources and information received in confidence, and a strong qualified privilege for non-confidential information. It was based on the model shield law drafted by the MLRC.

Shortly after introduction, the legislature's Joint Committee on Judiciary held a public hearing on the bill. Ms. Kaiser and Mr. Varner testified as part of a panel in favor of the bill, together with Kevin Crosbie, publisher of the *Willimantic Chronicle*, representing the Connecticut Daily Newspapers Association. Jim Taricani, the investigative reporter for Providence, R.I. station WJAR who recently served a 4-month sentence for refusing to disclose a confidential source, also testified in support of the bill. Chris Powell, managing editor of the *Journal Inquirer*, testified against the bill.

Of the many issues raised during the extensive public hearing, one of the chief concerns was the definition of a journalist and whether the scope of the bill was too broad in including Internet bloggers. Critics of the bill

feared that expanding the definition of journalist from traditional media to include bloggers would impermissibly extend protection to any member of the public who posts commentary on his or her individual website.

Another line of questioning concerned protection of sources during leak investigations. In particular, opponents of the bill challenged the use of the Shield Law to withhold confidential source information when the leaking of information is itself a crime.

Much of this discussion analogized to the recent grand jury investigation into the leaked identity of CIA operative Valerie Plame. Senators and Representatives demanded to know why sources should be protected in such situations. Critics of the bill further questioned why existing First Amendment protection was not sufficient, and argued that the law would unfairly establish a special status for reporters, creating a privileged class of citizens. Opponents of the bill further questioned the need for the legislation, given the historically limited number of Connecticut journalists jailed or held in contempt.

The panel spent much of its time explaining the expanding role of the Internet and the need to cover new forms of media, while distinguishing those bloggers who

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One of the chief concerns was the definition of a journalist and whether the scope of the bill was too broad in including Internet bloggers.

Connecticut Passes Shield Law

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are legitimate journalists from those whose posts are personal in nature. The panel explained that the bill draws a meaningful distinction in a test built on both function and experience.

It further explained the potential public benefit of certain leaks, citing numerous historical examples of how the public benefited from leaked information, even if the leaking was a crime. And it stressed the importance of providing a shield to potential whistleblowers, giving them the confidence to come forward with important information about government or corporate wrongdoing, without fear of reprisal. The bill passed the Judiciary Committee by a vote of 30-10.

Several weeks later, in a vote of 107 to 34, the House of Representatives approved the bill, but added an amendment addressing the rights of a criminal defendant under the shield law. The new provision specified that nothing in the bill “shall be construed to deny or infringe the rights of an accused in a criminal prosecution guaranteed under the sixth amendment to the Constitution of the United States ...”

In the final days of Connecticut’s legislative session, the bill faced a number of proposed amendments in the Senate. The most notable amendment that passed the Senate was rejection of the absolute privilege, and instead making disclosure of confidential sources and information received in confidence subject to a qualified privilege.

Rep. Spallone, however, successfully lobbied members of the Senate to defeat other amendments to the bill, including one that would have required individual journalists to have a degree in journalism in order to claim the privilege.

The Senate unanimously passed the amended bill on the eve of the very last day of the legislative session and it returned to the House the following morning for subsequent approval, which it received in a vote of 136-11.

Substantive Protections

The privilege contained in HB 5212 covers members of the “news media,” a defined term that includes (1) newspapers, magazines and other periodicals, book publishers, news agencies, wire services, radio and television stations and networks, and cable and satellite systems that disseminate information to the public by print, broadcast, photographic, mechanical, electronic or any other means or medium; (2) journalists working for such entities (as employees, agents or independent contractors) and persons supervising or assisting those journalists in newsgathering; and (3) entities in the corporate family that are subpoenaed for privileged information.

The party seeking to subpoena the news media (or initiate other compulsory process) must first engage in prior negotiations with the news media. If such negotiations fail, a court may compel disclosure of the subpoenaed information if the party seeking the information overcomes the balancing test.

As a preliminary matter, the party seeking to compel must establish that in criminal investigations, there are reasonable grounds to believe that a crime has occurred, and in civil cases, that there are reasonable grounds to sustain a cause of action. The party must also prove that the subpoenaed information is “critical and necessary” and not available from alternative sources and that there is an overriding public interest in disclosing the information.

The shield law also extends the media’s privilege to records held by third parties, to the extent such parties receive subpoenas seeking business records that would reveal privileged information.

Karen Kaiser is Senior Counsel with Tribune Company, which owns the Hartford Courant. Craig Bloom is Senior Media Counsel with NBC Universal, Inc. Maherin Gangat is a Staff Attorney with MLRC.

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MLRC Annual Dinner

Reporting on National Security under Threat of Indictment

New York, New York

California's Shield Law Covers Websites

Court Quashes Subpoenas in Trade Secrets Litigation

A California appeals court ruled that websites that publish news and information are clearly covered by the state's reporter's shield law, as well as a First Amendment-based privilege to protect confidential sources. *O'Grady v. Superior Court*, No. H028579, 2006 WL 1452685 (Cal. App. May 26, 2006) (Rushing, Premo, Elia, JJ.).

In a lengthy decision, the Court reasoned that there is no basis to distinguish such web publications from traditional hard copy publications for purposes of protecting confidential sources. Instead, the key factor for both the statutory and First Amendment privilege is simply whether websites engage in the gathering and dissemination of news, broadly defined.

The Court also gave a ringing endorsement to the primacy of free press rights over statutory trade secret rights, the issue in the underlying litigation.

Background

Apple filed suit in December 2004 against numerous John Doe defendants for misappropriation of trade secrets after information about a new Apple digital music recording device was published on several websites that report and discuss Apple's computer and software developments. In an effort to identify the source of the disclosures, Apple issued subpoenas to the publishers of the websites where the information appeared. These included "O'Grady's PowerPage," "Apple Insider" and "Mac News Network." Apple also issued a subpoena to the e-mail service provider of one of the websites to determine the source of the leak.

The web publishers moved for a protective order to prevent discovery on two separate grounds. First, they argued that they were covered by California's shield law, as well as a First Amendment-based privilege to protect the identity of confidential news sources. Second, they argued that the subpoena to the Internet service provider violated the Stored Communications Act, 18 U.S.C. § 2702(a) (1).

Last year a California trial court denied the web publishers' motion. *See Apple v. Doe*, No. 1-04-CV-032178, 2005

WL 578641 (Cal. Super. Mar. 11, 2005) (Kleinberg, J.). The court did not directly address whether the web publishers were "journalists" for purposes of the privilege, finding the issue not ripe for adjudication. Instead, the court essentially concluded that no privilege applies in trade secrets litigation because there is no public interest in publishing stolen information. And even assuming the publishers were journalists, the trial court stated "this is not the equivalent of a free pass."

Appeals Court Decision

The Court of Appeals reversed on every point, handing a complete victory to the web publishers. The Court first explained why it granted the web publishers' motion for an extraordinary interlocutory appeal. While noting that interlocutory review of discovery decisions should be rare, the court noted that:

This case raises several novel and important issues affecting the rights of web publishers to resist discovery of unpublished material, and the showing required of an employer who seeks to compel a newsgatherer to identify employees alleged by the employer to have wrongfully disclosed its trade secrets. In part because of these issues and their implications for the privacy of

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The screenshot shows the PowerPage.org website interface. At the top, there is a navigation bar with the site's logo and name, "POWERPAGE.ORG", and a tagline "YOUR MOBILE TECHNOLOGY DESTINATION". Below the navigation bar, there is a banner for "100% Compatible Memory GUARANTEED" with a link to "4allmemory.com". The main content area is divided into several sections: "TODAY'S NEWS" featuring an article titled "The Apple Core: Apple's European culture clash" by Jason D. O'Grady, dated 31 May 2006 09:20 EST; "SPOTLIGHT" featuring a "POWERPAGE LISTEN NOW" button; and "SPONSORS" featuring an advertisement for "G4 Hinge Replacement only" for \$269. The article text discusses a shift in Europe to a more homogeneous, centrally-managed Apple, contrasting it with the U.S. and other cultures. It mentions that Europe is a loosely associated collection of neighboring countries with starkly different cultures, while the United States is a more closely knit unit with similar cultures. The article concludes that if Apple is planning to market its products to Europe as a single unit rather than a group of discrete societies, they are bound to have problems. There are also links for "Read More", "Comments (0)", "Discuss in the Forums (new)", and "Buy from Amazon.com". At the bottom, there is a "DONATE" section and an "Ads by Google" advertisement.

California's Shield Law Covers Websites

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internet communications, the First Amendment status of internet news sites, and the protection of trade secrets, the case has generated widespread interest within the technology sector, the digital information industry, internet content providers, and web and email users. The case also involves an attempt to undermine a claimed constitutional privilege, threatening a harm for which petitioners, if entitled to the privilege, have no adequate remedy at law.

Stored Communications Act

On the merits, the appellate court first considered the more arcane question of whether the Stored Communications Act ("SCA") prohibited the subpoena to the Internet service provider. The SCA provides in relevant part that except under certain circumstances:

a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service

18 U.S.C. § 2702(a)(1).

Among the circumstances where disclosure is authorized are those that are incidental to the provision of the intended service; incidental to the protection of the rights or property of the service provider; made with the consent of a party to the communication or, in some cases, the consent of the subscriber; related to child abuse; made to public agents or entities under certain conditions; related to authorized wiretaps; or made in compliance with certain criminal or administrative subpoenas issued in compliance with federal procedures.

Apple argued that a civil discovery subpoena was within the SCA's exception for disclosures that "may be necessarily incident ... to the protection of the rights or property of the provider of that service" because if the ISP refused to comply it could be subject to contempt. The appeals court dismissed this argument as entirely circular.

Apple also argued that the SCA includes an implicit exception for civil discovery subpoenas. The appeals court, after a lengthy review of the statute, declined to create such an exception. Congress, the court reasoned, could reasonably

have concluded that civil discovery of stored messages from ISPs without the consent of subscribers would harm "digital media and their users."

Prohibiting such discovery imposes no new burden on litigants, but shields these modes of communication from encroachments that threaten to impair their utility and discourage their development. The denial of discovery here makes Apple no worse off than it would be if an employee had printed the presentation file onto paper, placed it in an envelope, and handed it to petitioners.

Finally, on this issue, the court distinguished the instant case from John Doe lawsuits in which civil litigants have successfully subpoenaed ISPs to learn the identities of subscribers who posted anonymous defamatory messages on the

Internet. Here the subpoenas do not concern an anonymous poster, "but the stored private communications of known persons who openly posted news reports based on information from confidential sources."

We can think of no workable test or principle that would distinguish "legitimate" from "illegitimate" news.

Shield Law

Addressing the reporters privilege issue, the court began by "declin[ing] the implicit invitation to embroil ourselves in questions of what constitutes legitimate journalism."

The shield law is intended to protect the gathering and dissemination of news, and that is what petitioners did here. We can think of no workable test or principle that would distinguish "legitimate" from "illegitimate" news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment

Apple had argued that the websites merely republished "verbatim copies" of internal information and exercised "no editorial oversight at all." But the court welcomed the publication of source material.

Courts ought not to cling too fiercely to traditional preconceptions, especially when they may operate to discourage the seemingly salutary practice of provid-

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California's Shield Law Covers Websites

(Continued from page 31)

ing readers with source materials rather than subjecting them to the editors' own "spin" on a story.

The Court also dismissed Apple's argument that "anyone with a computer and Internet access could claim protection under the California Shield and conceal his own misconduct." This argument, the Court noted, rests on the "dismissive characterization" of the web publishers as simply "posting information on a website." The web publishers' conduct, the Court reasoned, was substantially different from that of a person who might occasionally "post" a comment to a website – activity that would not constitute newsgathering or reporting.

The Court next examined whether the web publishers fell within the scope of the shield law as "a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication."

The Court found "no reason to doubt" that the operators of the website were "publishers" for purposes of the statute. And after a lengthy examination of the history and language of the statute, the Court held the web publishers fit within the definitions of "newspaper, magazine, or other periodical publication." The Court found the web publishers' sites "highly analogous" to printed publications, the only difference being that they are read on a screen, rather than from a hard copy.

Finally, to the extent there are any ambiguities in the definitions of newspaper, magazines or periodical publications within the statute, the Court was guided by the "core purpose" of the shield law – to protect the gathering and dissemination of news to the public. Thus the web publishers were covered by the statute, notwithstanding the format of their publications.

Constitutional Privilege

The web publishers were similarly protected under a First Amendment-based privilege.

[W]e can see no sustainable basis to distinguish petitioners from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media. It is established without contra-

diction that they gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience.

Apple failed to overcome this separate constitutional privilege because it did not adequately pursue other means to identify the source who leaked Apple's trade secrets. Among other things, the Court noted that Apple did not fully exploit "internal computer forensics" to investigate the source of the leak.

Finally, the Court addressed the issue of First Amendment protections in the context of trade secret litigation.

Apple first contends that there is and can be no public interest in the disclosures here because "the public has no right to know a company's trade secrets."

It is the statutory quasi-property right that must give way, not the deeply rooted constitutional right to share and acquire information.

Surely this statement cannot stand as a categorical proposition. As recent history illustrates, business entities may adopt secret practices that threaten not only their own survival and the investments of their shareholders but the welfare of

a whole industry, sector, or community. Labeling such matters "confidential" and "proprietary" cannot drain them of compelling public interest. Timely disclosure might avert the infliction of unmeasured harm on many thousands of individuals, following in the noblest traditions, and serving the highest functions, of a free and vigilant press. It therefore cannot be declared that publication of "trade secrets" is ipso facto outside the sphere of matters appropriately deemed of "great public importance."

"In the abstract," the Court concluded, "it seems plain that where both [interests] cannot be accommodated, it is the statutory quasi-property right that must give way, not the deeply rooted constitutional right to share and acquire information."

Petitioners were represented by Richard R. Wiebe, Berman DeValerio, Tomlinson Zisko, Thomas E. Moore, III, and Kurt B. Opsahl and Kevin S. Bankston of the Electronic Frontier Foundation. Apple Computer was represented by George A. Riley, David R. Eberhart, Dhaivat H. Shah, James A. Bowman, Ian N. Ramage of O'Melveny & Myers.

D.C. Court Rejects Press's First Amendment, Common Law Privilege Claims in Libby Criminal Case

Judge Reggie B. Walton, the presiding judge in the criminal case against former White House official Scooter Libby for perjury, false statements and obstruction of justice, ruled that no First Amendment or common law privilege exists to protect reporters from having to disclose to Libby information that is relevant and admissible at trial. *U.S. v. Libby*, 2006 WL 1453084 (D.D.C. May 26, 2006).

The ruling came on motions to quash from NBC News, NBC reporter Andrea Mitchell, Time, Inc., reporter Matthew Cooper, The New York Times, and former Times' reporter Judith Miller. All had been subpoenaed by Libby's defense lawyers to produce documents concerning their conversations with Libby and other documents about conversations concerning former Ambassador Joseph Wil-

son and/or his wife, Valerie Plame.

The court narrowed most of the requests on relevance and admissibility grounds under Federal Rule of Criminal Procedure Rule 17(c) – but found that some information from Miller, Cooper and Tim Russert would be discoverable since



Scooter Libby

they “did not simply report on alleged criminal activity, but rather they were personally involved in conversations with the defendant that form the predicate for several charges in the indictment.”

Rule 17 (c) provides:

- 1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

- 2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

In contrast to civil rules which permit discovery of documents or other materials which could lead to admissible evidence, Rule 17(c) is narrowly limited to discovery of relevant and admissible evidence. *See, e.g., Nixon v. United States*, 418 U.S. 683, 698-99 (1974), *U.S. v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir.1980) (“Courts must be careful that rule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases”).

The movants provided the court with responsive documents so that the court could review them in camera. And Judge Walton carefully worked through Libby's requests to see what documents would meet the Rule 17 standard. He ordered some to be produced to Libby immediately (prior drafts and notes for some of Matthew Cooper's articles); and found that other documents were potentially discoverable for impeachment purposes – contingent on the reporters' testimony at trial.

Privilege Issues

All the movants (except Judith Miller) argued that a First Amendment privilege and/or common law privilege protected them from compelled disclosure, notwithstanding Rule 17 (c). The court rejected this argument. Relying on *Branzburg* and the D.C. Circuit's decision in the Miller Cooper case, *In re: Grand Jury Subpoena*, 438 F.3d 1141, the court concluded that:

the First Amendment does not protect a news reporter, or that reporter's news organization, from producing documents pursuant to a Rule 17 (c) subpoena in a criminal prosecution when the news reporter is personally involved in the activity that forms the predicate for the criminal offenses charged in the indictment.

While prior D.C. Circuit cases had not considered the issue in the context of a criminal prosecution at the trial

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D.C. Court Rejects Press's First Amendment, Common Law Privilege Claims in Libby Criminal Case

(Continued from page 33)

stage, the court agreed with Libby's position that *Branzburg* applied with at least equal force in the context of a criminal trial. Indeed, the court noted that the defendant's right to obtain evidence in a criminal trial rested on a constitutional footing. Moreover, the court added, disclosure in the context of a criminal trial would be less invasive than in the more sweeping investigatory context of a grand jury proceeding.

Finally, the court found no need to decide whether to adopt Judge Tatel's suggestion that a common law privilege exists to protect reporters. *See In re: Grand Jury Subpoena*, 438 F.3d 1141, 1163-83 (in leak cases, "courts applying the [common law] privilege must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in news gathering, measured by the leaked information's value.")

The court found that any common law privilege would be defeated under the circumstances of the case. At the trial stage, Libby's liberty interest and right to a fair trial "far outweigh" any other interest in the case. Second, all the documents at issue had already been narrowed under the Rule 17 (c) standard to those that would be relevant and admissible at trial.

Scooter Libby is represented by William H. Jeffress, Jr., and Alexandra M. Walsh, Baker Botts L.L.P., Washington, DC. NBC and Andrea Mitchell were represented by Lee Levine, Levine Sullivan Koch & Schulz LLP. Time, Inc.

was represented by Theodore Boutrous and Thomas Dupree, Gibson Dunn & Crutcher. Matthew Cooper was represented by Richard Alan Sauber, Fried, Frank, Harris, Shriver & Jacobson, LLP. Judith Miller was represented by

Robert Bennett, Skadden, Arps, Slate, Meagher & Flom LLP. The New York Times was represented by Charles Leeper, Drinker Biddle & Reath LLP.

**Any common law
privilege would be defeated
under the circumstances
of the case.**

The media briefs in this matter are available on MLRC's website www.medialaw.org



50-STATE SURVEYS

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50-State Survey

Media
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2006-07

REPORTS FROM ALL FIFTY STATES,
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New Federal Shield Law Bill Introduced in Senate

On May 18, 2006, Senator Richard Lugar (R-IN) introduced the "Free Flow of Information Act of 2006," a bill to create a federal shield law. The bill (S. 2831) would provide a qualified privilege against disclosure of confidential sources and information received in confidence. It would exclude from coverage unpublished, non-confidential information, disclosure of which would continue to be subject to existing law.

Senator Lugar introduced a federal shield law bill last year, the "Free Flow of Information Act of 2005" (S.1419), which differed from the latest bill in that it provided absolute protection for confidential sources (except when disclosure was necessary to "prevent imminent and actual harm to national security") and a privilege for non-confidential information.

The new bill separately treats subpoenas from federal prosecutors in criminal cases, from criminal defendants and from civil litigants, with distinct balancing tests for each to overcome to compel disclosure. It also addresses application of the privilege in circumstances raised by Senators during a Judiciary Committee Hearing on the 2005 bill, namely: where a journalist is an eyewitness; where disclosure is necessary to prevent death or substantial bodily harm, or to prevent an act of terrorism or harm to national security; and the unauthorized disclosure of properly classified information by government employees.

Unlike the 2005 bill, the 2006 bill only covers journalists engaged in newsgathering "for financial gain or livelihood," but like the 2005 version, it does cover subpoenas to communication service providers for information that would disclose the privileged information.

Senator Arlen Specter (R-PA), whose office took the lead in drafting the 2006 bill, signed on as a co-sponsor to the bill on the day it was introduced by Senator Lugar, together with Senators Christopher Dodd (D-CT), Lindsey Graham (R-SC) and Charles Schumer (D-NY). Senator James Jeffords (Independent-VT) has since signed on as a co-sponsor. The full text of the bill is reprinted below.

Representative Mike Pence (R-IN), the main proponent behind last year's federal shield law, remains committed to the Free Flow of Information Act of 2005 (H.R. 3323), a bill identical to Senator Lugar's 2005 version. While Rep. Pence supports movement on a federal shield law in the Senate, the House Judiciary Committee's Subcommittee on Courts, the Internet, & Intellectual Property, of which Rep. Pence is a member, recently announced that it will hold a hearing on H.R. 3323 on June 29.

S 2831 IS

109th CONGRESS

2d Session

S. 2831

To guarantee the free flow of information to the public through a free and active press while protecting the right of the public to effective law enforcement and the fair administration of justice.

IN THE SENATE OF THE UNITED STATES

May 18, 2006

Mr. LUGAR (for himself, Mr. SPECTER, Mr. DODD, Mr. GRAHAM, and Mr. SCHUMER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To guarantee the free flow of information to the public through a free and active press while protecting the right of the public to effective law enforcement and the fair administration of justice.

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Free Flow of Information Act of 2006.'

SEC. 2. PURPOSE.

The purpose of this Act is to guarantee the free flow of information to the public through a free and active press as the most effective check upon Government abuse, while protecting the right of the public to effective law enforcement and the fair administration of justice.

SEC. 3. DEFINITIONS.

In this Act--

- (1) the term 'attorney for the United States' means the Attorney General, any United States Attorney, Department of Justice prosecutor, special prosecutor, or other officer or employee of the United States in the executive branch of Government or any independent regulatory agency with the authority to obtain a subpoena or other compulsory process;
- (2) the term 'communication service provider'--
 - (A) means any person that transmits information of the customer's choosing by electronic means; and
 - (B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153 and 230)); and
- (3) the term 'journalist' means a person who, for financial gain or livelihood, is engaged in gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing news or information as a salaried employee of or independent contractor for a newspaper, news journal, news agency, book publisher, press association, wire service, radio or television station, network, magazine, Internet news service, or other professional medium or agency which has as 1 of its regular functions the processing and researching of news or information intended for dissemination to the public.

SEC. 4. COMPELLED DISCLOSURE AT THE REQUEST OF ATTORNEYS FOR THE UNITED STATES IN CRIMINAL PROCEEDINGS.

- (a) In General- Except as provided in subsection (b), in any criminal investigation or prosecution, a Federal court may not, upon the request of an attorney for the United States, compel a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider to disclose--
 - (1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or

- (2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and upon a promise or agreement that such records, communication data, documents, or information would be confidential.
- (b) Disclosure- Compelled disclosures otherwise prohibited under subsection (a) may be ordered only if a court, after providing the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, determines by clear and convincing evidence that--
- (1) the attorney for the United States has exhausted alternative sources of the information;
 - (2) to the extent possible, the subpoena--
 - (A) avoids requiring production of a large volume of unpublished material; and
 - (B) is limited to--
 - (i) the verification of published information; and
 - (ii) surrounding circumstances relating to the accuracy of the published information;
 - (3) the attorney for the United States has given reasonable and timely notice of a demand for documents;
 - (4) nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens;
 - (5) there are reasonable grounds, based on an alternative, independent source, to believe that a crime has occurred, and that the information sought is critical to the investigation or prosecution, particularly with respect to directly establishing guilt or innocence; and
 - (6) the subpoena is not being used to obtain peripheral, nonessential, or speculative information.

SEC. 5. COMPELLED DISCLOSURE AT THE REQUEST OF CRIMINAL DEFENDANTS.

- (a) In General- Except as provided in subsection (b), a Federal court may not, upon the request of a criminal defendant, compel a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider to disclose--
- (1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or
 - (2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and under a promise or agreement that such records, communication data, documents, or information would be confidential.
- (b) Disclosure- Compelled disclosures otherwise prohibited under subsection (a) may be ordered only if a court, after providing the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, determines by clear and convincing evidence that--
- (1) the criminal defendant has exhausted alternative sources of the information;
 - (2) there are reasonable grounds, based on an alternative source, to believe that the information sought is directly relevant to the question of guilt or innocence or to a fact that is critical to enhancement or mitigation of a sentence;

- (3) the subpoena is not being used to obtain peripheral, nonessential, or speculative information; and
- (4) nondisclosure of the information would be contrary to the public interest, taking into account the public interest in compelling disclosure, the defendant's interest in a fair trial, and the public interest in newsgathering and in maintaining the free flow of information.

SEC. 6. CIVIL LITIGATION.

- (a) In General- Except as provided in subsection (b), in any civil action, a Federal court may not compel a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider to disclose--
 - (1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or
 - (2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and upon a promise or agreement that such records, communication data, documents, or information would be confidential.
- (b) Disclosure- Compelled disclosures otherwise prohibited under (a) may be ordered only if a court, after providing the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, determines by clear and convincing evidence that--
 - (1) the party seeking the information has exhausted alternative sources of the information;
 - (2) the information sought is critical to the successful completion of the civil action;
 - (3) nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and in maintaining the free flow of information to the widest possible degree about all matters that enter the public sphere;
 - (4) the subpoena is not being used to obtain peripheral, nonessential, or speculative information;
 - (5) to the extent possible, the subpoena--
 - (A) avoids requiring production of a large volume of unpublished material; and
 - (B) is limited to--
 - (i) the verification of published information; and
 - (ii) surrounding circumstances relating to the accuracy of the published information; and
 - (6) the party seeking the information has given reasonable and timely notice of the demand for documents.

SEC. 7. EXCEPTION FOR JOURNALIST'S EYEWITNESS OBSERVATIONS OR PARTICIPATION IN CRIMINAL OR TORTIOUS CONDUCT.

Notwithstanding sections 1 through 6, a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider has no privilege against disclosure of any information, record, document, or item obtained as the result of the eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the journalist, including any physical evidence or visual or audio recording of the observed conduct, if a court determines by clear and con-

vincing evidence that the party seeking to compel disclosure under this section has exhausted reasonable efforts to obtain the information from alternative sources. This section does not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue.

SEC. 8. EXCEPTION TO PREVENT DEATH OR SUBSTANTIAL BODILY INJURY.

Notwithstanding sections 1 through 6, a journalist, any person who employs or has an independent contract with a journalist, or communication service provider has no privilege against disclosure of any information to the extent such information is reasonably necessary to stop or prevent reasonably certain--

- (1) death; or
- (2) substantial bodily harm.

SEC. 9. EXCEPTION FOR NATIONAL SECURITY INTEREST.

(a) In General- Notwithstanding sections 1 through 6, a journalist, any person who employs or has an independent contract with a journalist, or communication service provider has no privilege against disclosure of any records, communication data, documents, information, or items described in sections 4(a), 5(a), or 6(a) sought by an attorney for the United States by subpoena, court order, or other compulsory process, if a court has provided the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, and determined by clear and convincing evidence, that--

- (1) disclosure of information identifying the source is necessary to prevent an act of terrorism or to prevent significant and actual harm to the national security, and the value of the information that would be disclosed clearly outweighs the harm to the public interest and the free flow of information that would be caused by compelling the disclosure; or
- (2) in a criminal investigation or prosecution of an unauthorized disclosure of properly classified Government information by an employee of the United States, such unauthorized disclosure has seriously damaged the national security, alternative sources of the information identifying the source have been exhausted, and the harm caused by the unauthorized disclosure of properly classified Government information clearly outweighs the value to the public of the disclosed information.

(b) Rule of Construction- Nothing in this Act shall be construed to limit any authority of the Government under the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.).

SEC. 10. JOURNALIST'S SOURCES AND WORK PRODUCT PRODUCED WITHOUT PROMISE OR AGREEMENT OF CONFIDENTIALITY.

Nothing in this Act shall supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure by a journalist, any person who employs or has an independent contract with a journalist, or a communications service provider of--

- (1) information identifying a source who provided information without a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or
- (2) records, communication data, documents, or information obtained without a promise or agreement that such records, communication data, documents, or information would be confidential.

Shield Bill Falters In Washington Legislature

Bill May Be Introduced Again In 2007 or 2008

By Bruce E. H. Johnson

In October 2005, Washington State Attorney General Rob McKenna, a Republican elected in 2004, announced his support for a strong shield law. McKenna said that the recent imprisonments of journalists on the East Coast had prompted him to support such a measure. Meanwhile, Gov. Christine Gregoire, a Democrat also elected in 2004, told the public and the media that she would sign such a measure.

Unfortunately, even bipartisan efforts can fall short.

Currently, 32 states (including most recently Connecticut) and the District of Columbia have shield laws, but Washington State has no reporter's shield statute. Since the mid-1980s, the state's courts have recognized a common law qualified privilege for the identity of confidential sources, but there are no published state court decisions regarding the scope of protection for reporters' notes, outtakes, and other journalist work-product information.

Many Washington state trial judges have recognized a qualified First Amendment privilege in these situations, usually citing federal (specifically Ninth Circuit) authority. But, not always – and the results have meant additional expense for the media in defending its independence.

In 2000, for example, several former *Arizona Republic* reporters sued their former editor in Arizona state court for libel. They then issued a subpoena against University of Washington journalism professor Doug Underwood, who had written an article in the *Columbia Journalism Review* about the problems between the reporters and their editor.

Serving the subpoena on Underwood, these ex-reporters demanded Underwood's notes and, when he refused to comply, obtained an order from King County Superior Court judge Sharon Armstrong, who decided to enforce the subpoena even as she refused to conduct an *in camera* review. Underwood managed to seek discretionary review with the Court of Appeals, Division I, which stayed Judge Armstrong's ruling, reviewed the notes

themselves, and pronounced them “not relevant” to the case – but also refused to issue a published ruling explicitly acknowledging a journalist privilege and clarifying the case law.

As the *Underwood* case illustrates, lack of explicit shield law protection means that lawyers for Washington State journalists and news media must provide detailed briefing for even routine subpoenas seeking reporter's notes or outtakes, and even then some trial judges might misapply the law, uncertain whether the First Amendment, at least as construed by leading federal and state appellate courts, was applicable in Washington State.

**Many knowledgeable
observers expected
the bill to pass.**

The effect, of course, is to raise the cost of defending such subpoenas. As for the existing common law qualified privilege for confidential sources, how many reporters in Washington State or elsewhere make qualified promises to their sources? Obviously, not all potential sources feel comfortable with such conditional or qualified promises of confidentiality.

The Washington Shield Bill

The bill proposed by Attorney General McKenna would create an absolute privilege for confidential sources and a qualified or conditional privilege for journalist's notes. The bill covered “news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public.”

The definition of “news media” in the bill was sufficiently broad to allow recognition of protections for journalists in the newspaper, magazine, broadcast, cable, and electronic media, including bloggers who made or expected to earn their living from journalistic activities.

The term “news media” included “newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any person or entity that is in the regular business of disseminating news or information to

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Shield Bill Falters In Washington Legislature

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the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution” and any “person who is or has been a journalist, a scholar or researcher employed by any institution of higher education, or other individual who either: (i) At the time he or she obtained or prepared the information that is sought was earning or on a professional track to earn a significant portion of his or her livelihood by obtaining or preparing information for dissemination” through any news organ. (A copy of the bill in its final form is available at: <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/Senate%20Bills/6216-S.pdf>.)

The shield bill overwhelmingly passed the State House on February 13, 2006, by an 87-to-11 vote. Meanwhile, members of the State Senate Judiciary Committee, with the active support of Democratic Sen. Adam Kline, and ranking Republican Sen. Stephen Johnson (who later became a candidate for State Supreme Court), pushed through a slightly-revised version of the bill.

Many knowledgeable observers expected the bill to pass the State Senate (and be signed by Gov. Christine Gregoire), but in the final days of the legislative session, Sen. Lisa Brown, the Democratic majority leader from Spokane, refused to let the bill reach the floor. So, it died.

Shield Bill Opponents

Why did this shield bill fail? One major culprit is U.S. Automobile Association, a Texas-based insurance company, which attacked the Washington shield bill as a type of grudge match.

USAA’s executives were angered by WOIA-TV, a San Antonio television station owned by Clear Channel, which had obtained allegedly confidential USAA documents about the company’s outsourcing plans and broadcast a story about USAA’s plans to move jobs to India.

The company sued the station in 2004 and obtained an order compelling disclosure of the source of the information, but before an appeals court could consider the legal issues presented, the former USAA employee waived confidentiality – and the case soon died.

That lawsuit was not sufficient for USAA management – the company’s executives decided to take their battle with the media nationwide. “We’re in a whole different situation here, with bloggers and others saying that they’re journalists, and it’s very scary for us,” William McCartney, a USAA vice president told Sarah Lai Stirland of *National Journal*. “The only reason we’re aware of this is we were involved in this lawsuit, and we think it is in the interest of society to say: ‘Wait a minute. Before we rush to enact all these laws, we ought to think about all the ramifications.’”

The Texas company therefore decided to spend significant sums on lobbying in Olympia, Washington. As Nina Shapiro wrote in *Seattle Weekly*, the bill had sailed smoothly through the House:

Then the bill got to the Senate and ran into fierce opposition. “It’s weird,” says state Rep. Lynn Kessler, D–Port Angeles, a sponsor in the House.

“All of a sudden, Cliff Webster was all over it.” Webster is a high-powered lobbyist who had been hired, according to Kessler and others, by USAA. “It’s like somebody came in and said, ‘Stop this.’”

USAA’s involvement alone didn’t kill the shield bill, judging by interviews with key players in the debate. The lethal injection was a mix of some resentment of the media, perhaps a tad of partisanship by Democrats against the Republican attorney general, and a whole lot of nonpartisan disagreement by people arguing either that the bill went too far or that it didn’t go far enough.

USAA, which had already helped kill a shield bill in Texas, amped up that debate. “It hurt,” McKenna says, alluding to the company’s local lobbyist. “He riled up members of both parties.”

Meanwhile, there were other opponents as well, who assisted USAA’s efforts to stop the shield bill. The Western Washington chapter of the Society of Professional Journalists opposed the bill, for example, because it pro-

The risk that some bloggers might enjoy protection as members of the news media also posed problems for the bill’s supporters.

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Shield Bill Falters In Washington Legislature

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vided only qualified protections for journalists' work-product and they believed they should have absolute protection from any subpoenas. Some Democrats, particularly from the Seattle area, were hesitant to support a shield bill that was, after all, opposed by working journalists. The criminal and insurance defense bars, and several prosecutors (though not King County Prosecuting Attorney Norm Maleng, who endorsed the bill) also opposed the shield law, which they believed would interfere with their lawsuits and criminal proceedings.

The risk that some bloggers might enjoy protection as members of the news media also posed problems for the bill's supporters. Sen. Brian Weinstein, a Mercer Island Democrat, who strongly opposed the bill when it was presented to the Senate Judiciary Committee, noted, "Someone who blogs at night should not be afforded the same protections [as journalists]."

These various opponents managed to collect enough opposition to this bipartisan bill within the State Senate's

Democratic ranks that Sen. Brown, the Democratic majority leader, recognized that her caucus was sharply divided and that there were other bills that she could bring to the floor that would receive strong Party support – and which would allow the Democrats to claim legislative victories from the shortened legislative session. So, on March 2, 2006, she killed the bill in the closing hours of the session.

The proponents of the Washington shield bill have not yet regrouped, but McKenna is still very supportive of the news media's independence and of a strong state shield law. Thus, it remains possible that the shield bill could be re-introduced, either in the longer legislative session that begins in January 2007, or in the 2008 Legislature.

Bruce Johnson is a partner at Davis Wright Tremaine LLP in Seattle, Washington. He was involved in the drafting of the proposed Washington State shield law on behalf of Allied Daily Newspapers of Washington and testified in favor of the bill. He also represented Doug Underwood in the 2000 case discussed in this article.

Broadcast Indecency Enforcement Act Signed into Law

On June 15, President Bush signed legislation authorizing the Federal Communications Commission to increase maximum broadcast indecency fines from \$32,500 to \$325,000. Dubbed the Broadcast Decency Enforcement Act of 2005, it also sets a maximum penalty for any single, continuing violation at \$3 million.

The law was sponsored in the Senate by Kansas Republican Senator Sam Brownback and in the House by Missouri Republican Representative Fred Upton. Following several highly publicized episodes on broadcast television – beginning with Janet Jackson's 2004 Super Bowl "wardrobe malfunction," and ending most recently with a simulated orgy scene on the CBS series "Without a Trace" earlier this year – there was strong Congressional support to increase indecency fines. An increase in indecency complaints to the FCC has resulted in fines jumping from \$440,000 in 2003 to nearly \$8 million in 2004.

The impact of the law is already being felt. PBS has sent a new set of guidelines to its documentary producers. In shows airing before 10 p.m., compound words containing indecent words, which used to be only partially bleeped, must now be entirely bleeped. Also, if it is possible to discern the word by reading a person's lips, his mouth must be digitally blurred.

Federal Court Quashes Subpoena for 60 Minutes Outtakes Under New York Shield Law

By Alia L. Smith

A federal district court in New York denied a motion to compel outtakes from 60 Minutes in *United Auto Group v. Ewing*, No. M-85 (S.D.N.Y. May 3, 2006) (Mukasey, J.) under New York's Shield Law, holding that the information sought was not "critical or necessary."

Affirming that state law privileges apply when the underlying case asserts diversity jurisdiction, the court found that the plaintiff had not satisfied its burden under the Shield Law when it asserted only that the information sought "may" assist its case, and not that the case could not proceed without it.

Background

In April 2004, the CBS News program 60 Minutes broadcast a report entitled "The Best Possible Deal?" which focused on the practice – by some car dealers – of including undisclosed finance charges in car loan financing packages. The 60 Minutes report included interviews with Andrew Barbee and Adam Ewing, who had been finance managers at a dealership, owned by United Auto Group (UAG).

After they left the company, Barbee and Ewing brought employment discrimination claims against UAG. The discrimination case ultimately settled, and the confidential settlement agreement provided that no party would disparage, defame, denigrate and/or malign any other Party.

In their interviews with 60 Minutes, the former finance managers spoke about dealer reserve, explaining that their goal had been to charge the buyer the highest interest rate possible. The dealers would arrange for financing through other companies, and then would add on a few points for themselves, known as the dealer reserve. The financing companies would bury these extra points in their bills, and then send lump-sum checks back to the dealers. Barbee and Ewing reported that dealer reserve could often add thousands of dollars to the cost of a car.

Based in part on Ewing and Barbee's interview with CBS News, UAG sued the pair in federal court in

Tennessee for breach of the settlement agreement. In December 2004, UAG subpoenaed the outtakes from the 60 Minutes interview out of the Southern District of New York. CBS objected on the grounds – among others – that UAG had not exhausted alternative sources because it had not yet even deposed Ewing and Barbee. After deposing Ewing and Barbee – who claimed not to remember what they had said to 60 Minutes that was not broadcast – UAG sought to enforce the subpoena early this year.

The Motion to Compel

In its motion to compel, UAG argued that it had overcome the qualified federal reporter's privilege in effect in the Second Circuit under *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999) because the outtakes were of likely relevance to a significant issue in the case, and [were] not reasonably obtainable from other available sources. Specifically, UAG sought the outtakes because it believed they may give rise to claims for additional breaches of the settlement agreement or provide assistance in responding to Ewing and Barbee's defenses. UAG asserted that because it had deposed Ewing and Barbee, who could not recall their statements, it had exhausted alternative sources.

In opposition, CBS News asserted that the New York Shield Law, N.Y. Civ. Rts. Law § 79-h, rather than the federal reporters' privilege, applied to UAG's subpoena, because the underlying Tennessee action was a diversity case for breach of contract. Under the New York Shield Law, CBS News argued, UAG had not satisfied its burden of establishing, among other things, that the outtakes were critical or necessary to plaintiff's claim, because UAG had conceded in its papers that it already had all the evidence it needed to prosecute its claim.

In its reply papers, UAG argued that the federal standard should apply because the underlying settlement agreement, the breach of which formed the basis of the lawsuit, settled a federal (Title VII) claim. Further, retreating from its earlier argument asserting that Second Circuit law applied, UAG urged the application of Sixth Circuit law (since the interviews were conducted in Tennessee), which does not recognize any sort of reporter's privilege.

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Federal Court Quashes Subpoena for 60 Minutes Outtakes Under New York Shield Law

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New York Law Applies

Chief Judge Michael Mukasey rejected plaintiff's arguments. First, the court held that state law governed because the Supreme Court has held that federal courts do not have jurisdiction to enforce an agreement settling a federal claim when the parties' obligations under that agreement are not included in the underlying judgment, absent an independent basis for jurisdiction. (Moreover, the court found, the underlying complaint appears to allege diversity of citizenship.)

Under these circumstances, the court held that New York law controls the determination of whether a court located in New York can compel a newsgathering organization in New York to produce subpoenaed outtakes, citing *In re NBC, Inc.*, 79 F.3d 346, 351 (2d Cir. 1996).

Applying New York's Shield Law, the court found that UAG had not satisfied its burden of demonstrating that the information sought was critical or necessary to its claim, reading that portion of the statutory test to require that the claim "virtually rises or falls with the admission or exclusion of the proffered evidence." The court held:

The outtakes sought here simply did not meet that standard. UAG has not shown that its case cannot be presented without the outtakes but has argued only that the outtakes would be useful in strengthening its claim against Ewing and Barbee. UAG professes to seek the outtakes because they may contain statements different from those that aired and such additional statements "may strengthen" its

claim and "may" provide an independent basis for the breach of contract claim.... When UAG states in its brief that "statements Defendants made during the 60 Minutes broadcast were a blatant breach of their Settlement Agreements," ... it concedes that it can prove its case without the outtakes.

Accordingly, the court denied the motion to compel.

Michael D. Sullivan and Alia L. Smith of Levine Sullivan Koch & Schulz, LLP, and Naomi Waltman of CBS Broadcasting Inc. represented CBS News in this case. Plaintiff-Movant United Auto Group was represented by Marc Newman of Miller Shea, P.C. in Rochester, Michigan.

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Missouri Newspaper Ordered to Produce Unpublished Photos

By Jean Maneke

Members of the media in Missouri took another blow recently when a court declined to quash a subpoena issued to a photographer for the *Columbia Tribune* in a wrongful death lawsuit. *O'Neal v. Rex Sharp et al.*, No. O5BA-CV03288 (Mo. Cir. Ct. April 26, 2006).

Background

At issue were some 622 photographs taken at a football practice session for the University of Missouri at which a player collapsed and died. The practice session was closed to the public but the newspaper had made arrangements for a photographer to attend the session. When the incident occurred, the photographer, Jenna Isaacson, shot a number of photographs of the student collapsed on the field and being carried off the field, as well as earlier shots of the intensity of the workout and the players' physical appearance during the session.

After the death of the player, Aaron O'Neal, the newspaper ran about 15 photos in the paper and placed them on the paper's website, but the rest were never published. The father of the victim filed a wrongful death suit against a number of persons connected with the University. In connection with that suit, the plaintiff's attorneys served the photographer with a subpoena seeking all of her photographs for use in their litigation.

After initial discussions with the attorneys for the paper, the counsel for the plaintiff filed a motion to compel, arguing that no reporter's privilege in Missouri would protect the photographer from producing the photos.

The newspaper responded primarily that the motion was

untimely filed and that there was no refusal to produce at that time which would trigger a motion to compel to be heard by the court. The motion was heard by Judge Gary M. Oxenhandler, of the Boone County Circuit Court, who agreed with the newspaper that the motion was premature. In addition, that order included provisions that witness fees were still owed to the photographer in connection with the command to appear and produce the photographs.

About five days later, the deposition which was the subject of the subpoena was taken. Ms. Isaacson appeared with the photos which had been published and repeatedly refused to answer questions about the non-published photos or to produce those photos per the plaintiff's request.

Thereafter, the plaintiff renewed its motion with the court, seeking an order compelling the photographer to produce the unpublished photos. The plaintiff asserted that no reporter's privilege attached to the photographs, that they did not concern confidential matters and that the photographer did not grant confidentiality with respect to the photographs or that any privilege the photographer had was waived by her repeated use of the photos and her discussion of the nonpublished photos in trade journal articles or on Internet sites.

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MO Newspaper Ordered to Produce Unpublished Photos

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Reporter's Privilege in Missouri

Missouri has no statutory reporter's privilege. The state has had several cases address the reporter's privilege issue in the past, but there is only a limited body of case law supporting a privilege of limited proportions in the state.

Probably the strongest case in the state is *State ex rel. Classics III, Inc., v. Ely*, 954 S.W.2d 650 (Mo. App. 1997), in which the court held that if confidentiality had been promised to a source, the privilege could not be overcome unless it was shown in court that the material sought was relevant, that it was necessary or critical to the party's claim and that the party requesting the information had exhausted alternative sources.

Other, earlier cases have held that there is no privilege in regard to unpublished materials which much be produced to a grand jury.

Plaintiff's counsel argued that the photographer had discussed her photographs and what was in them in a wide variety of publications and therefore any privilege that might have existed had been waived by the photographer herself. Counsel for Ms. Isaacson likened her attendance at the closed practice session to a promise of confidentiality, which would have allowed the photographer to tap into the modest protection offered to the media in Missouri.

In a somewhat creative attempt to reach this position, her attorneys argued that there was an implied understanding with the University that the photos would be restricted to the newspaper itself and that they would not be released to the public and that her presence on the practice field that day was under these implied restrictions. Unfortunately, the University did not agree with this interpretation of the events of that day and joined with the plaintiff in asking the court to order production of the photos.

The court held that no promise of confidentiality existed in this set of facts. Further, the court found that the photos were relevant to the case, that they were unique and critical, and that they could not be duplicated from any other source. The court noted that she had voluntarily published a portion of the photographs and had generally and openly discussed the photos. The court held that there was

no alternative source for the same materials and that therefore the motion to compel should be granted.

(Ms. Isaacson acknowledged before the court that as a witness to events on the field that day, she had an obligation as a citizen to give testimony if asked as to what she witnesses with her own eyes. The only issue before the court was access to the unpublished photographs.)

Newspaper Posts Photos

Editors at the newspaper decided an appeal was not advisable due to concerns over precedent that might be set by an appellate opinion on the matter. Instead, the *Tribune* decided to publish the photos on its website and then release them to the plaintiff.

The photographs are available at: <http://www.columbiatribune.com/2005/Jul/0712FootballWorkout/index.html>.

Of interest after the fact is the news forum which is hosted by the *Columbia Tribune* on its website at www.showmenews.com. Several discussion threads resulted from the court case. While a few people seemed to understand the principles behind protecting reporter's sources and information, most of those who wrote in to discuss the case seemed angry that the paper felt it had a right to withhold the photographs. Clearly, this is an issue on which the media will be challenged to rally public support to its side of an important First Amendment issue.

Jean Maneke, of The Maneke Law Group, LC., Kansas City, Mo. represented the Columbia Tribune in this matter. Lonnie O'Neal, father of the player, was represented by Christopher Bauman, of Blitz, Bardgett & Deutsch, L.C., St. Louis. The University of Missouri and its employees who were sued, who filed no pleadings, were represented by Hamp Ford, of Ford, Parshall & Baker, Columbia, Mo., who chose to sit with the plaintiff's counsel during the final arguments before the court to show his support for that position.

The court found that the photos were relevant to the case, that they were unique and critical, and that they could not be duplicated from any other source.

New York Court Rejects Constitutional Challenge to New York's Shield Law

by Nathan Siegel

A New York trial court presiding over a high-profile murder case decisively rejected a constitutional challenge to New York's Shield Law. *State v. Hendrix*, No. 3668/03 (N.Y. Sup. Kings Co., Feb. 28, 2006) (hereinafter "*Hendrix*").

The two defendants sought to subpoena large quantities of unpublished outtakes related to the case gathered by ABC News, as well as the outtakes of an interview conducted by a documentary film company. The case is particularly significant because it represents the first known attempt by criminal defendants to challenge the constitutionality of New York's Shield Law, since a decision by the New York Court of Appeals last year hinted that it might be receptive to such a challenge. See *People v. Combest*, 4 N.Y. 3d 341 (2005).

Background

The subpoenas arose out of an especially gruesome murder case that was also the subject of an hour-long news report, part of a series of ABC News special reports entitled *NYPD 24/7*. To prepare those reports, ABC News personnel spent many weeks accompanying detectives of the New York Police Department as they investigated a number of crimes. Along the way ABC News also interviewed other persons involved in or affected by the investigations, including witnesses, family and friends of crime victims and members of the affected communities.

In this case, two men were tried for the abduction, rape, torture and murder of a female college student. ABC News had compiled dozens of hours of footage of and interviews with the two principal detectives involved, as well as interviews with two other key prosecution witnesses. By coincidence, a documentary film company, Swinging T Productions, had also interviewed one of those witnesses for an unrelated and yet-to-be produced documentary about teenage female prostitutes.

Lawyers for the defendants sought court-issued subpoenas for the outtakes of all footage of those four witnesses, claiming they needed to review the material for potential impeachment of the witnesses at trial. However, in seeking the subpoenas the defendants employed an unusual strategy. Even before either news organization challenged the subpoenas, the defendants conceded that they could not meet the New York

Shield's Law three-part test for compelled disclosure of non-confidential information.

Rather, they contended that the test itself violated the constitutional rights of criminal defendants because it inadequately balances their Sixth Amendment fair trial rights. They also contended that Swinging T Productions personnel are not "professional journalists" as defined by the shield law and therefore had no standing to invoke the statute. See *N.Y. Civil Rights Law* § 79-h(a)(6).

Constitutional Challenge Rejected

The defendants' constitutional arguments relied heavily on the New York Court of Appeals' recent *Combest* decision, which also considered a challenge to the constitutionality of the Shield Law in the context of a documentary arising out of a film crew that followed a police investigation. At issue in *Combest* was footage of the defendant's custodial interrogation by police following his arrest, which the defendant claimed would prove that his confession was coerced. The Court of Appeals concluded that it did need to reach the constitutional question because it held that the defendant had met the three-part test on the facts of *Combest*.

However, in considering the defendant's constitutional arguments *Combest* also noted that "[i]n a criminal case, defendant's interest in nonconfidential material weighs heavy," 4 F.3d at 346, and it left open the question of "what standard is constitutionally required in order to overcome a criminal defendant's substantial right to obtain relevant evidence." *Id.* at 347. The Court also criticized what it characterized as "troubling practice of the police partnering with the media to make a television show." *Id.* at 349.

The defendants in *Hendrix* were represented by the same public defender's office that represented the defendant in *Combest*, and they urged the trial court to reach the constitutional question that *Combest* declined to resolve.

In response, ABC News and Swing T Productions both filed motions to quash the subpoenas. ABC in particular emphasized that the defendants wished to sift through vast quantities of information – as much as 50 hours worth of footage – to discover unknown impeachment evidence, rather than seek specific, discrete information going to the heart of their defense at trial as in *Combest*.

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New York Court Rejects Constitutional Challenge to New York's Shield Law

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Swinging T Productions asserted that the interview in question was absolutely protected by the Shield Law, because no portion of the outtakes in question had yet been viewed by the public and it had agreed to permit the teenager interviewed to review any use of her interview prior to its public release.

Subpoenas Quashed

After extensive briefing and separate oral hearings for each news organization, Judge Albert Tomei quashed the subpoenas. Importantly, though the Court hinted during oral argument that he might at least require *in camera* review of the outtakes, he quashed the subpoenas without requiring their production to the Court.

Judge Tomei concluded that he did not need to reach the broader question of the shield law's facial constitutionality, but for reasons very different than those at issue in *Combest*. He found that even if there was no Shield Law, the defendants had not established that they would have any constitutional or even statutory right to obtain the subpoenaed outtakes. *A fortiori*, the application of the Shield Law to bar such discovery could not raise any potential constitutional question on the facts of this case.

Calling the subpoenas a "proverbial fishing expedition," the court found that as a general matter criminal defendants do not have a constitutional right to conduct non-party discovery. *Hendrix* at 5. The court examined every possible source of the constitutional right the defendants' claimed, including the Fifth Amendment's Due Process Clause and the Sixth Amendment's Confrontation and Compulsory Process clauses.

In each case, it found that the Constitution provides no right to sift through materials in the hands of non-party, civilian witnesses in a criminal trial, merely to try to determine whether they might contain relevant evidence.

In one respect, however, the court's analysis seemed to implicitly reject any broader challenge to the facial constitutionality of the Shield Law's test for unpublished information. The court noted that in order to establish a Sixth

Amendment violation, a criminal defendant would have to show that he was deprived of "relevant, material and vital" evidence, a standard the defendants conceded they could not demonstrate here. *Hendrix* at 8.

As ABC News argued, however, that standard is not materially different than the three-part test articulated by the Shield Law, so the statute presents no conflict with constitutional standards.

Finally, the Court also found that Swinging T Productions had standing to invoke the Shield Law. Importantly, it also rejected any argument that by following the police around, ABC News became an agent of the State and therefore shared the State's obligations to disclose any potentially exculpatory evidence – an argument that was also raised but not decided in *Combest*. 4 F.3d at 350.

The Court found that ABC News was distinct from the police, had not supplied police with any unpublished footage and would invoke the same privilege if the State were to attempt to subpoena its outtakes. *Hendrix* at 8.

Conclusion

Hendrix sends an important signal that *Combest* should not be construed by New York trial courts as a license to for criminal defendants to conduct broad discovery of news-gathering information. However, the trial court's opinion may not be the last word in this matter.

On March 24 2005, the defendants in *Hendrix* were convicted and their counsel announced their intention to appeal their convictions. If either of them contests the merits of this issue on appeal, as the defendant convicted at trial in *Combest* did, the appellate courts may revisit these questions. This case therefore bears close watching.

Nathan Siegel, Adam Rappaport and Nicole Auerbach of Levine Sullivan Koch & Schulz LLP and Indira Satyendra of ABC, Inc. represented ABC News in this case. Cameron Stracher represented Swinging T Productions. Troy Hendrix and Kayson Pearson, the defendants in the case, were represented by the Brooklyn Public Defenders' Office.

Calling the subpoenas a "proverbial fishing expedition," the court found that as a general matter criminal defendants do not have a constitutional right to conduct non-party discovery.

Subpoena For Newsgathering Materials Quashed in Federal Criminal Trial

By Elizabeth A. McNamara and Peter Karanjia

Some welcome news attesting to the continuing vitality of the reporter's privilege within the Second Circuit recently emerged from a decision in the criminal trial of former New York City police officers, Louis Eppolito and Stephen Caracappa, before Judge Weinstein in the Eastern District of New York. The two were convicted this month of multiple murders committed while they were policemen, allegedly in the aid of the Mafia. *US v. Caracappa and Eppolito*, No. CR 05-0192 (E.D.N.Y.).

Background

Following the defendants' arraignment, publisher Simon & Schuster announced that it had acquired the rights to publish a non-fiction book concerning the investigation and trial of the defendants co-authored by William Oldham, a former New York City detective who participated in the investigation of defendants, and Guy Lawson, an award winning investigative journalist. The book is currently scheduled to be published in January 2007, after the completion of the trial.

Just over a week before the trial was to commence, defendant Caracappa served Simon & Schuster with a subpoena seeking broad categories of documents regarding the book, including the publishing contract between Simon & Schuster and the authors, any book proposals or treatments submitted by Mr. Oldham, and any other notes Mr. Oldham may have taken in connection with his investigation. Caracappa had not previously sought the requested documents from Mr. Oldham, nor had he subpoenaed Mr. Oldham to appear as a trial witness.

Simon & Schuster moved to quash the subpoena on two grounds. First, it argued that Caracappa could not satisfy his burden under Fed. R. Crim. P. 17(c) by showing that the materials sought were (1) relevant, (2) admissible at trial, and (3) specifically identified.

Second, the publisher argued that Caracappa could not meet his burden under the qualified privilege for non-confidential newsgathering materials recognized in *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1999) because he could not establish that the

materials sought could have "likely relevance to a significant issue" in the case or that they were not "reasonably obtainable from other available sources."

Describing the dispute as "a matter of some importance," Judge Weinstein granted Simon & Schuster's motion to quash the subpoena in a bench ruling on March 10, 2006, followed by a short written opinion. (While quashing the subpoena, Judge Weinstein indicated that he would require Simon & Schuster to make the publishing agreement available to all counsel in the event that Oldham should testify at the trial.)

Judge Weinstein explicitly regarded the motion to quash as raising a "freedom of press issue" and, undertaking a "freedom of the press First Amendment analysis, as well as a Rule 17 analysis," concluded that Caracappa could not make the requisite showing under the applicable balancing test. As Judge Weinstein put it, addressing counsel for Caracappa:

"we have under Rule 17 [and] the freedom of press cases a balancing. The court has to balance your need for the information against the other considerations. Every other consideration suggests you shouldn't get [the information] from the publisher. You can get it from the prospective witness."

Judge Weinstein elaborated that it was "fairly clear" even under Rule 17 that the information sought "could be obtained more conveniently from another source, namely, Oldham himself" and that "you can't make an end run around the Federal Rules of Criminal Procedure by going after the publisher."

He also admonished that "there is particularly no reason to get from the publisher information that may impinge on the journalist's freedom to consider the book and the journalist's point of view."

Elizabeth A. McNamara and Peter Karanjia of Davis Wright Tremaine LLP represented Simon & Schuster, Inc. Edward Hayes, New York, NY, for represented Stephen Caracappa.

Missouri Reporter's Privilege Bill Fails to Make It Out of Committee

By Joseph E. Martineau

In this most recent legislative session, State Senator Jason Crowell (R-Cape Girardeau) and State Senator Charles Graham (D-Columbia) introduced legislation in the Missouri Senate which would have created a limited or qualified evidentiary privilege for journalists' unpublished and confidential newsgathering information.

Though these Bills provided less than optimal protection, they were actively supported by the Missouri Press Association, the Missouri Broadcasters Association and media throughout the State as a means of reigning in a recent rise in media subpoenas.

One sponsor of the Bill rebuffed efforts by media representatives urging stronger legislation, stating that such legislation could not pass. (The stronger proposed legislation was modeled after a version of the "Free Flow of Information Act" presently before the U.S. Congress, under which (i) a reporter could be compelled to disclose unpublished information only when there is an important need for the information and it is otherwise unobtainable; and (ii) a reporter could be compelled to disclose the identity of confidential sources only when disclosure is necessary to prevent imminent harm to public safety.)

Ironically, as it turns out, neither will this more limited legislation. Although the legislative session remains ongoing, it now appears certain that this legislation will die without making it out of the Senate Judiciary Committee.

The proposed legislation was similar in many respects and indeed modeled after the Illinois Reporter's Privilege Statute, 735 I.L.C.S §5-8-901 *et seq.* It would have required a person seeking unpublished or confidential newsgathering information over a journalist's objection to submit a motion to the circuit court seeking divestiture of the privilege. In that motion, the seeker of the information would have been required to identify the sought-after information, its significance to the claim or defense at issue, and the exhaustion of alternative sources for that information. This requirement would have existed in criminal and civil cases, including grand jury proceedings.

In granting divestiture of the privilege, the court would have been required to consider and articulate in a written order: (i) the merits of the claim or defense sought to be asserted; (ii) the importance of the information to the proceeding involved; (iii) the possibility of obtaining the information through means other than the reporter; and (iv) where confidential sources were involved the public interest in protecting the confidentiality of any source as balanced against the public interest in requiring disclosure. Further, the effect of any such order would have been stayed pending any appeal.

Though it is difficult to determine the exact cause of the Bill's failure, statements by certain members of the Judiciary Committee seem to indicate that members, some of whom were trial lawyers and former prosecutors, believed that the bill gave undue preference to the journalistic quest for truth over and above that of the courts. Attempts to dissuade them of this view were unsuccessful.

Thus, for now, journalists challenging subpoenas from Missouri courts will need to continue to rely on the limited case law that exists in the State and the body of federal cases applying the privilege. *See, e.g., State ex rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650 (Mo.App.W.D. 1997); *State ex rel. CBS, Inc. v. Campbell*, 645 S.W.2d 30 (Mo.App.E.D. 1982) *see also Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 583 F. Supp. 427 (E.D. Mo. 1984).

Joseph E. Martineau is a partner with Lewis, Rice & Fingersh, L.C. in St. Louis.

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MLRC would like to thank summer interns — Peter Shapiro, Benjamin N. Cardozo School of Law and Benjamin Whisenant, University of Utah, S.J. Quinney College of Law for their contributions to this month's MLRC MediaLawLetter.

SEC Releases Policy Statement on Media Subpoenas

The Securities and Exchange Commission issued a policy statement this month that sets forth guidelines for the issuance of subpoenas to members of the news media. The guidelines come after public criticism, most notably from SEC Chairman Christopher Cox, of subpoenas issued to journalists in late February as part of an SEC investigation.

The guidelines are meant “to ensure that vigorous enforcement of the federal securities laws is conducted completely consistently with the principles of the First Amendment’s guarantee of freedom of the press, and specifically to avoid the issuance of subpoenas to members of the media that might impair the news gathering and reporting functions.”

They set forth the following procedures for SEC staff to follow when seeking information from a member of the news media:

- SEC should first “make all reasonable efforts” to obtain the information from non-media sources and determine that the information “is essential to successful completion of the investigation.”
- Thereafter, staff should seek approval to contact lawyers representing the news media member to obtain the information through “informal channels,” provided such negotiations do not threaten the investigation. The guidelines describe “informal channels” as including “voluntary production, informal interviews, or written summaries.” (Approval must be obtained from an SEC Regional Director, District Administrator or Associate Director; staff may directly contact the news media member only if such member has no legal representation.)
- If negotiations fail, and there are “reasonable grounds to believe the information sought is essential to the investigation” and “all reasonable alternative means of obtaining [the information] have been exhausted,” then SEC staff may seek approval to issue a subpoena. The Director of the Division of Enforcement, in consultation with the General Counsel of the SEC, must approve all subpoenas.

- Following approval to issue a subpoena, notice must be “immediately” given to the Chairman of the SEC and “reasonable and timely” notice to the lawyers representing the news media member.

The guidelines state that subpoenas should not seek “peripheral or nonessential information” and that they should be negotiated with lawyers representing the news media member so as to be narrowly tailored: “Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material.”

And, if possible, subpoenas should “... be limited to the verification of published information and to surrounding circumstances relating to the accuracy of published information.”

The SEC guidelines generally draw from the Department of Justice Guidelines. But, unlike the DOJ Guidelines, the SEC guidelines make no specific reference to subpoenas for telephone toll records.

Three journalists – Herb Greenberg of Dow Jones’ MarketWatch, Carol Remond of Dow Jones Newswires and James Cramer, who writes a column for TheStreet.com – received subpoenas from the SEC in February.

The subpoenas sought records and other materials related to Overstock.com Inc, which has accused Gradient Analytics, a research firm, of publishing negative reports about the company in exchange for payments from a hedge fund.

Following news reports about the subpoenas to Greenberg and Remond, SEC Chairman Cox issued a statement describing the issuance of a subpoena to a journalist as “highly unusual” and criticizing the staff for not informing him (nor the SEC General Counsel, the Office of Public Affairs, or any SEC commissioner) of “such an extraordinary step.” Cox subsequently decided not to enforce the subpoenas for the time being.

The SEC Policy Statement is reprinted here in full.

MLRC Examines Complaints Filed Against News Media in 2005

Libel is the most common claim made in lawsuits against the media over content, and corporations are the most frequent plaintiffs, according to a study by the Media Law Resource Center of lawsuits filed in 2005 against media defendants.

The study, the latest in a series examining complaints from various years since 1995, examined 397 complaints filed in state and federal courts during 2005. The 2005 Complaint Study examines in detail the types of cases filed against media defendants, broken down by media type, plaintiff type, jurisdiction, and type of claim(s), and compares results to MLRC's previous studies in 2001 and the 1990s.

While the sample is neither comprehensive nor scientific, it provides a useful snapshot of such cases. MLRC obtained information on the bulk of the cases from its members, including major media insurance companies, media companies and outside counsel for media companies.

The study found that corporations were the most common plaintiffs, named in 19.6 percent of the complaints, followed by government plaintiffs (including judges and other judicial officers, elected officials, non-elected government employees, government contractors, law enforcement officers, and political candidates), named in 18.6 percent.

Almost three-quarters – 72.5 percent – of the 2005 complaints were filed in state court, with California, New York and Pennsylvania the leading jurisdictions. Of complaints filed in federal court, the district courts in the Ninth Circuit had the most cases, followed by the Second Circuit.

Print media, named in 53.7 percent of complaints, were sued more often than audio-visual (named in 43.1 percent) and Internet (named in 0.8 percent) defendants. By market size, the share of complaints naming media defendants in the smallest markets, 29.0 percent, was almost double the share naming defendants in the top 20 markets (15.9 percent).

Individual newspapers were the most frequently named individual defendants, in 39.3 percent of cases, followed by reporters and correspondents with 25.7 percent. Television stations were sued in 17.6 percent of cases, produc-

tion entities in all media were named in 16.4 percent, and television and radio networks (programming services) were named in 11.8 percent.

Virtually all – 94.8 percent – of the newspapers named as defendants in suits in the 2005 sample were dailies, and more than half were in the smallest U.S. markets. The small markets were also the largest share of television stations sued. Among radio station defendants, those in the top 20 markets were the most frequently named.

Internet defendants were named in a very small number of complaints in the study, with content providers sued more often than service providers.

General reporting was the most frequent activity leading to lawsuits, accounting for 45.8 percent of cases. Investigative reporting is second, representing 8.8 percent of lawsuits. Business relationships led to 8.3 percent of complaints, while advertising and promotion accounted for 8.1 percent of cases in the sample.

Libel was by far the most popular claim, made in 61.0 percent of complaints; but this share is somewhat lower than MLRC's prior studies. Various invasion of privacy claims were made in a third of the complaints, with false light claims leading the pack. Contractual claims were made in 18.4 percent of complaints, followed by emotional distress claims in 16.6 percent of cases and intellectual property claims in 13.9 percent.

Libel was pled as the sole claim in 26.4 percent of cases. But more than a third of cases had libel and other claims in the same suit, with the most common additional claims being privacy, emotional distress and contractual claims. Other claims frequently paired with libel were simple negligence claims and conspiracy claims.

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

Call us, or send us a note.

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New York, NY 10011

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House Hearing on Leaks of Classified Information

On May 26, the House Intelligence Committee held a public hearing on the “Media’s Role and Responsibilities in Leaks of Classified Information.” The hearing was called in the midst of controversial comments by Attorney General Alberto Gonzalez that the press could be open to criminal prosecution for publishing classified information – an issue that has been debated in numerous articles and blogs.

Walter Isaacson, former editor of Time and now President of the Aspen Institute testified before the Committee, together with Professor Jonathan Turley, Professor John Eastman, and Gabriel Schoenfeld, Commentary magazine. Their testimony is available at <http://intelligence.house.gov>.

MLRC and other media organizations submitted letters to Committee. Below is a copy of MLRC’s letter.

May 24, 2006

The Honorable Peter Hoekstra
Chairman
Permanent Select Committee on Intelligence
H-405, The Capitol
Washington, DC 20515

The Honorable Jane Harman
Ranking Member
Permanent Select Committee on
Intelligence
H-405, The Capitol
Washington, DC 20515

Dear Chairman Hoekstra and Ranking Member Harman:

I am writing on behalf of the Media Law Resource Center (“MLRC”), a non-profit information clearinghouse organized by the media to monitor and report on developments in First Amendment law. Our membership includes the leading publishers and broadcasters in the U.S., all of whom have a deep interest in and commitment to the publication of news and information to the American public.*

MLRC appreciates the consideration this Committee is giving to the issue of national security and the publication of classified information. Because protecting the public’s ability to receive information from a free press is an MLRC core concern, we welcome the opportunity to set forth our understanding of the media’s role and responsibilities in this area and respectfully request that this letter be included in the record.

To begin, MLRC is very concerned with suggestions that Congress create a new statute akin to an “official secrets act” that would criminalize the press’s publication of classified information. We believe that history and experience show that such a law is unnecessary and is fundamentally antithetical to the principle of a federal government that is by and for the citizenry.

As Professor Geoffrey R. Stone has written to the Committee, “in the entire history of the United States the federal government has never criminally prosecuted the press for publishing government secrets.” Efforts to enact an official secrets law have been rejected as unnecessary and harmful to First Amendment rights and the public interest even in the midst of war and other serious threats to our national security. Even in the current war against terrorism, then-Attorney General John Ashcroft in his report to Congress dated October 15, 2002 saw no need for new criminal legislation.

Our country’s longstanding rejection of an official secrets law is based on the danger that such a law will inevitably be used against the press and public to stifle legitimate criticism and discussion of government policies and ac-

* Membership in the MLRC is made up of corporations, associations and other entities that publish, broadcast or otherwise disseminate news, information or other data to the public, and various related entities that support freedom of speech and press. MLRC also has a Defense Counsel Section made up of over 230 law firms in the United States and around the world that defend free press issues.

tions. Notwithstanding the current political debate over leaks of classified information, nothing that has happened justifies departing from this historical wisdom.

As good citizens, though, the press recognizes that national security does entail keeping some information secret. The press has a professional and civic obligation to respect that principle. It does so by acting with great caution before publishing leaked information relating to national security, including listening to the concerns of appropriate government officials prior to publication and sometimes delaying publication. For example, the *New York Times* waited at least one year before publishing its report on the NSA surveillance program. Indeed, there are countless instances in which the press has held stories, has edited stories, and has worked cooperatively with government officials so that reporting would not jeopardize highly sensitive national security matters. This reflects the relationship between two institutions of democratic society that routinely cooperate, notwithstanding the tensions that arise as both seek to serve the public.

Reporters and press organizations are committed to this cooperative approach and are ready to strengthen the ongoing dialogue with government officials and agencies on this subject. This approach is not only consistent with the government's interest in national security, but it ultimately serves the press's interest in preserving the public trust that newspapers and broadcasters have with their readers and viewers.

Of course, the border between national security and the public's right to know is not always clear. Government employees unremarkably may regard more information as secret than is actually critical. There is little if any penalty for exercising undo caution in stamping information as secret and placing it outside of public view. Over-classification – in addition to the creation of pseudo-classification categories such as “sensitive but unclassified” – undermines the basics of a democratic society by depriving citizens of information about how their government is operating. It can be used as a pretext to prevent the public from learning about embarrassing or controversial information. It prevents legitimate oversight. It also leads, inevitably, to “leaks” as the counterweight.

The broad threat of criminal punishment for publishing classified information would severely chill routine communications between government officials and the press and public. It would limit historical and investigative research into government. And it would deter whistleblowers from exposing government mismanagement and corruption. These sorts of disclosures all serve the public interest and have been and should continue to be left to the political forces that govern a democratic republic. Certainly nothing warrants making reporters and citizens criminals for receiving or publishing such information.

Instead, secret information that goes to the heart of national security can and should be guarded at the source. This means the government should judiciously designate what information is secret. The government should exercise appropriate oversight and control over officials who can designate information as classified and those who can access such information. And the government can enforce the existing criminal laws against officials who violate their obligations to preserve secrecy.

Finally, as a matter of law any sweeping criminalization of newsgathering and publishing is fundamentally incompatible with the First Amendment. Protecting national security is no doubt a compelling government interest. But a statute that broadly criminalizes the publication of information on matters of public interest and concern is certainly not the least restrictive means of accomplishing the government's purpose – the standard the statute would have to meet to pass constitutional muster.

Sincerely,

Sandra S. Baron
Executive Director
Media Law Resource Center