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**MEDIA LAW LETTER**

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2006:3

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## House of Lords Delivers Landmark Libel Ruling

### *Outlines Privilege for Responsible Journalism on Subjects of Public Interest*

By Stuart Karle

In a widely covered landmark ruling in a long-running libel case against *The Wall Street Journal Europe*, the United Kingdom's House of Lords on October 11 entered a judgment in favor of the *Journal Europe* that should provide far greater protection for serious journalism in the U.K. and throughout the Commonwealth. *Jameel v. Wall Street Journal*, [2006] UKHL 44 (Bingham, Hoffman, Hope, Scott, Hale, JJ.).

The ruling by the Law Lords found that a February 6, 2002 article in the *Journal Europe* on Saudi Arabia's cooperation with the U.S. in the effort to cut off the flow of funds to terrorists was precisely the type of serious, sober, carefully reported investigative journalism that should be protected from libel claims.

As Baroness Hale writes about this article and the *Journal*, "We need more such serious journalism in this country and our defamation law should encourage rather than discourage it."

The decision is significant for all journalists whose work is published in the U.K. and throughout the Commonwealth (which means both the English press and anyone whose work is available on the web), as the Law Lords explicitly endorsed the editorial procedures of the *Journal* on this story as careful enough to merit protection from defamation actions.

This stamp of approval is in stark contrast to *Reynolds v. Times Newspapers*, [2001] 2 AC 127, where the Lords, while fashioning a privilege for responsible journalism on subjects of public interest, found that the article at issue did not merit protection. Journalists now, finally, have at least some idea what they need to do to avoid the obscurities of English libel when covering important stories, sometimes under very difficult conditions.

If the promise of the *Jameel* decision is realized, then finally in the United Kingdom the ultimate decision on whether to publish an article on serious topics might be

taken from night lawyers excising copy that cannot be proved true to a libel judge, and returned to news rooms where it belongs.

#### **Background**

The *Journal Europe*'s February 6, 2002 article reported on what its reporter James Dorsey in Saudi Arabia had been told was an agreement by Saudi Arabia to monitor the bank accounts of some of its most prominent citizens to ensure that no money, wittingly or unwittingly, ended up helping to finance terrorism.

The article included the names of five prominent Saudis who were among those whose accounts were being monitored. Dorsey and his editors asked another reporter in Washington, D.C., Glenn Simpson, who covered terrorism finance for *The Wall Street Journal*, to confirm the story with his U.S. government sources. (As is discussed at length by the Law

Lords, Simpson's uncontradicted testified was that he did so.)

Mohammed Jameel, a billionaire Saudi Toyota dealer whose family company was one of the five names included in the article, sued for defamation in London, alleging that including his name in the article amounted to an accusation that he was associated with terrorists. The *Journal Europe*'s position was that the article explicitly disavowed such an implication, and that the article was actually quite a positive report to the effect that the Saudis were finally getting serious about choking off funding from terrorists.

Under English common law as it has existed for centuries, the only real defense available to a newspaper sued for libel is to prove the truth of allegedly defamatory statements. If the libel defendant in London cannot prove truth, then it is exceedingly difficult for it to win the libel case.

The Law Lords had tried to loosen this up a bit to protect more serious journalism in *Reynolds*, where it held

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***The Lords ordered lower courts to stop looking for every little flaw in reporting and editing that might be apparent years after publication. Instead, they should look at the overall performance of the journalists in light of the circumstances surrounding publication.***

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(Continued on page 4)

## House of Lords Delivers Landmark Libel Ruling

(Continued from page 3)

that stories on matters of public interest that are the product of what the Lords called “responsible journalism” should be protected even if the publisher could not prove them true. But in reality little changed after *Reynolds* as the lower courts largely ignored the Lords’ holding.

### House of Lords Decision

Thus on October 11 the Lords said in *Jameel v. WSJE*, “[i]t is therefore necessary to restate the principles.” The Lords held that in deciding whether articles should be protected even without a defense of truth courts should examine three factors:

#### 1. WAS THE ARTICLE IN THE PUBLIC INTEREST?

In this case, “[t]he thrust of the article as a whole was to inform the public that the Saudis were cooperating with the U.S. Treasury in monitoring accounts.” This article, the leading opinion found, “was a serious contribution in measured tone to a subject of very considerable importance”

#### 2. WAS IT APPROPRIATE TO INCLUDE THE DEFAMATORY STATEMENTS IN THE ARTICLE?

If it decides an article concerns a matter of public interest, the court must then consider whether it was appropriate to include the defamatory statement in it. On this point, the Lords held that “allowance must be made for editorial judgment.”

Of particular importance to editors who have for years had English judges second guess their newsroom decisions, the Lords held:

“The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are ... in the public interest, too risky and would discourage investigative reporting.”

Here, the Lords found the inclusion of the names of prominent Saudis in the article “necessary” to convey the seriousness of the Saudis’ cooperation with the U.S. Treasury.

#### 3. DID THE JOURNALISTS PRACTICE “RESPONSIBLE JOURNALISM”?

The Lords ordered lower courts to stop looking for every little flaw in reporting and editing that might be apparent years

after publication. Instead, they should look at the overall performance of the journalists in light of the circumstances surrounding publication.

Here, the *Journal’s* reporter in Riyadh, James Dorsey, was operating under very difficult circumstances, and he had to rely on confidential sources. Were his sources identified, the Lords noted, it was likely that they would suffer reprisals, as had happened on an earlier story where a 75-year-old source who was willingly identified had been sentenced to years in prison and thousands of lashes for speaking with a reporter.

Critical evidence of the care exercised by the *Journal* was provided at trial by Glenn Simpson, the staff reporter for *The Wall Street Journal* in Washington, DC, whose contacts with his source in the U.S. Treasury in his effort to confirm the article is described at length by the Lords.

Noting that these conversations occurred in a “ritual or code” used by reporters and sources in Washington DC, Lord Hoffmann stressed that the issue was *not* the literal words that were exchanged between reporter and source, *but* whether there was any confusion in Simpson’s mind as to what those rituals and codes meant. Because Simpson’s testimony had stood up under harsh cross-examination at trial, there was no reason to doubt that Simpson believed the story had been confirmed.

### Confidential Sources

One of the remarkable features of the case, especially to American eyes at the moment, is that the *Journal Europe’s* reporters relied on six confidential sources, none of whom were ever identified in the case, and yet it still won.

Aside from the charm of the witnesses, there are a few factors that probably aided the Lords in reaching its decision without knowing who any of the sources were and without the plaintiffs having the opportunity to cross-examine those sources.

First, the plaintiffs never pressed the point, in part perhaps because the *Reynolds* privilege had generally been so futile that they did not think there was much for them to do.

Second, five of the six sources were in Saudi Arabia, and there was evidence at trial that one of Dorsey’s sources, an elderly man who had hosted a dinner for him, had been sentenced to years in prison and thousands of lashes for

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## House of Lords Delivers Landmark Libel Ruling

*(Continued from page 4)*

even talking with a Western reporter. In short, this was not a situation where a source faced loss of employment if identified, but something far more serious.

Third, a key question was what in fact the Saudi government had promised the U.S. government it would do and whether it was doing what it promised. There was strong evidence at trial that the Saudi central bank had publicly lied about its monitoring of accounts when, after the publication of the story, it denied doing. In fact, the evidence showed that plainly it was monitoring accounts.

Fourth, the plaintiffs had claimed the article accused them of actually financing terrorism, and the Lords made clear that they didn't think that was what the article was about. Those who discuss the article pretty clearly thought it was about a monitoring program, and that the fact that one was being monitored did not mean he was suspected of actually financing terrorism.

## Conclusion

The ruling itself will do nothing to help the worst of the tabloid press in covering celebrity nonsense. The Lords are fond of the concept that not everything that interests the public is of public interest. But serious journalism does appear to have gotten a ringing endorsement in one of the world's most plaintiff-friendly libel jurisdictions.

*Stuart Karle is General Counsel of The Wall Street Journal, and was up to his neck in the case since the plaintiffs' lawyers at Peter Carter-Ruck wrote their first letter the week after the article was published. Geoffrey Robertson, QC of Doughty Street Chambers and Rupert Elliot of One Brick Court were the barristers on the case for the newspaper; Mark Stephens, Dominic Ward and Gina Laytner of Finers Stephens Innocent were the solicitors. Barrister James Price QC, 5RB, represented plaintiff throughout the case.*

## The Wall Street Journal Article Litigated in Jameel Saudi Officials Monitor Certain Bank Accounts *Focus Is on Those With Potential Terrorist Ties*

RIYADH, Saudi Arabia - The Saudi Arabian Monetary Authority, the kingdom's central bank, is monitoring at the request of US law-enforcement agencies the bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used wittingly or unwittingly for the funneling of funds to terrorist organizations, according to U.S. officials and Saudis familiar with the issue.

The accounts - belonging to Al Rajhi Banking & Investment Corp, headed by Saleh Abdulaziz al Rajhi; Al Rajhi Commercial Foreign Exchange, which isn't connected to Al Rajhi Banking; Islamic banking conglomerate Dallah Al Baraka Group, with \$7 billion (8.05 billion euros) in assets and whose chairman is Sheik Saleh Kamel; the Bin Mahfouz family, separate members of which own National Commercial Bank, Saudi Arabia's largest bank, and the Saudi Economic Development Co; and the Abdulatif Jamil Group of companies - are among 150 accounts being monitored by SAMA, said the Saudis and the US officials based in Riyadh. The US officials said the US presented the names of the accounts to Saudi Arabia since the Sept. 11 terrorist attacks in America. They said four Saudi charities and eight businesses were also among 140 world-wide names given to Saudi Arabia last month.

The US officials said the US had agreed not to publish the names of Saudi institutions and individuals provided that Saudi authorities took appropriate action. Many of the Saudi accounts on the US list belong to legitimate entities and businessmen who may in the past have had an association with institutions suspected of links to terrorism, the officials said. The officials said similar agreements had been reached with authorities in Kuwait and the United Arab Emirates. 'This arrangement sends out a warning to people,' a US official said.

SAMA couldn't be reached for comment. In a recent report to the United Nations about combating terrorism, however, the Saudi government said: 'The Kingdom took many urgent executive steps, amongst which SAMA sent a circular to all Saudi banks to uncover whether those listed in suspect lists have any real connection with terrorism.'"

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## Inter-American Court of Human Rights Issues Landmark Ruling on Freedom of Information

**Eduardo Bertoni**

Court decisions are labeled as “historical decisions” from time to time. For example, there is some consensus that U.S. Supreme Court holdings in *Near v. Minnesota* and *New York Time v. Sullivan*, among others, were historic ones.

International tribunals’ decisions may also be considered historic when, for example, they establish an international standard for the first time. Many non-governmental organizations and this author consider the recent decision by the Inter-American Court of Human Rights (IACourt) in the case *Claude Reyes et al v. Chile* to be a landmark ruling. The complete decision of the Court is available in Spanish at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_esp.pdf) An un-official translation, made by the Open Society Justice Initiative is available at <http://www.justiceinitiative.org/advocacy/press>

The IACourt decided that the American Convention on Human Rights includes, in its list of civil and political rights, the right to access to government held information. Until now, no other international tribunal had recognized freedom of information as a fundamental right.

### **Background**

The facts in the *Claude* case were simple: Claude Reyes, the executive director of an environmental NGO in Chile, requested information from the Foreign Investment Office. The information requested related to a contract between the Chilean state and a couple of foreign companies and a local one. The object of the contract was the development of a forest industrialization project.

The project had raised important concerns in Chile because of its potentially harmful environmental impact. The Office only provided some of the information requested, and denied the rest without any legal basis. The denial was challenged before the Chilean tribunals, which finally upheld the Investment Office’s decision.

In 1998, after exhausting all domestic remedies, Reyes petitioned the Inter-American Commission on Human Rights, arguing the denial violated Article 13 of the American Convention on Human Rights. This convention

and the American Declaration of the Rights and Duties of Man are the principal instruments through which the Inter-American system provides for the protection of human rights. The organizations responsible for enforcing these international obligations are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. A brief description of the two is available at <http://www.cidh.org/Basicos/basic1.htm>

In 2003 the Commission formally admitted the case and in 2005 sent the case for a decision to the IACourt.

### **Right to Information**

The IACourt issued its landmark ruling on September 19th, 2006. The main holding of the ruling is that Article 13 of the American Convention on Human Rights:

“protects the right of all persons to request access to information held by the State, with the exceptions permitted by the restrictions regime of the Convention. As a result, this article supports the right of persons to receive such information and the positive obligation on the State to supply it, so that the person may have access to the information or receive a reasoned response when, for ground permitted by the Convention, the State may limit access to it in the specific case.”

The IACourt was even more specific in tailoring the decision: first, the information “should be provided without a need to demonstrate a direct interest in obtaining it, or a personal interest, except in cases where there applies a legitimate restriction.”

Second, restrictions “must be established by laws,” not by the discretionary judgment of public officials. The IACourt considered that without legal basis, a restriction “creates ample room for discretionary and arbitrary state actions in classifying information as secret, reserved or confidential.”

Third, a restriction should be limited to those goals permitted by the Convention (respect for the rights and reputations of others, protection of national security, public order, health or public morals) and should be propor-

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## Inter-American Court of Human Rights Issues Landmark Ruling on Freedom of Information

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tionate to the right being protected by the restriction. The State – and not the individual requesting information – has the burden to prove that the restriction is necessary.

And fourth, “state authorities are governed by the principle of *maximum disclosure*, which establishes the presumption that all information should be accessible, subject to a restricted system of exceptions.”

In applying these principles to the facts of the *Claude* case, the IACourt found Chile had violated the Inter-American Convention. The IACourt ordered Chile to pass an access to information law, saying that “in particular, this means a legal framework that regulates restrictions on access to information held by the State that should comply with the Convention standards and may only impose restrictions for reasons permitted by the Convention.”

Moreover, the court ordered that Chile “should, in a reasonable time, conduct training for the bodies, authorities, public agents charged with receiving requests for information on the norms that regulate this right, including on the Convention standards that they should respect with regard to restrictions on access to such information.”

### ***Impact of the Decision***

The decision has the potential of impacting freedom of information law throughout the world. It is important to underscore that the United States has had an important influence in transparency issues in the rest of the hemisphere. The principles established in the Freedom of Information Act (FOIA), were seriously considered during many years as principles that should be followed in other countries.

These principles helped spur the enactment of freedom of information laws in many countries around the world over the past five years. Since 2002, in Latin America and the Caribbean, Mexico, Panama, Peru, Ecuador, Dominican Republic, Jamaica, Antigua & Barbuda, Trinidad & Tobago, among others countries, passed access to information laws.

Freedom of information bills are pending in other national legislatures and from now on the decision in the *Claude* case will help to move forward that reform.

Finally, even though the United States has never accepted the jurisdiction of the Inter-American Court of Human Rights, the *Claude* ruling could be an important tool for lawyers within the U.S. to challenge denials of information – particularly in challenging cases involving access to allegedly sensitive government information. Lawyers can argue that freedom of information is not just a statutory right, but one that is grounded in the constitutionally protected right to free speech.

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**“State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information should be accessible, subject to a restricted system of exceptions.”**

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*Eduardo Bertoni, Executive Director of the Due Process of Law Foundation, a non-governmental organization based in Washington, D.C. ([www.dplf.org](http://www.dplf.org)) is the former Special Rapporteur for Freedom of Expression at the Organization of American States (2002-2005), and advised the Inter-American Commission on Human Rights in filing the *Claude* case before the IACourt. The Open Society Justice Initiative, ARTICLE 19, Libertad de Información Mexico, Asociación Civil (LIMAC); Instituto Prensa y Sociedad (IPYS) of Peru; and Access Info Europe were among the groups that filed an amicus brief in support of Reyes and his two co-applicants.*

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## European Court of Human Rights Rules in Favor of Ukrainian Journalist *Reaffirms Protection For Reporting Allegations*

In August, the European Court of Human Rights ruled in favor of a Ukrainian journalist, finding that his conviction for criminal defamation was a violation of Article 10 – the free speech provision of the European Convention on Human Rights. *Lyashko v. Ukraine*, Application No. 21040/02 (ECHR Aug. 10, 2006).

The court cited a number of reasons for ruling that the conviction violated Article 10. Many of the statements were value judgments about public figures and concerned matters of public interest. Criminal punishment was wholly disproportionate under the circumstances. And, reaffirming the Court's recent jurisprudence protecting the republication of newsworthy allegations, the Court found that the journalist was essentially "reporting what was being said by others." In such circumstances he was "faced with an unreasonable, if not impossible task," of proving those statements true. *Id. at ¶ 55*.

### **Background**

At issue in the case were four articles published in 1997 by Oleg Valeriyovych Lyashko, a Ukrainian journalist and former editor in chief of the now defunct Ukrainian daily newspaper, *Polityka*. The first article criticized the then acting Prime Minister, accusing him of firing the head of a state-owned shipping company because it advertised in *Polityka*. It caustically referred to the prime minister as a former "bureaucrat, police pen-pusher and near-political schemer."

The second article published two weeks later reported that the Prime Minister had gone to state prosecutors to demand that the newspaper be criminally punished for the first report. The newspaper described this as an "abuse of power."

The third and fourth articles involved separate issues of official corruption. The newspaper published an article and photographs of the Chief of the Odessa Police at a private party together with a "Mr. S." – a reputed criminal. The paper reported that Mr. S. was using the pictures to show a close relationship with the police chief to extort money from local businesses. The final article published an update on the relationship: the police chief and Mr. S. were brothers-in-law.

### **Criminal Proceedings**

Lyashko was charged with criminal defamation and abuse of power under Ukrainian law. He was acquitted but was then retried and found guilty of defaming the former prime minister and the law enforcement agencies of the Ukraine. He was sentenced to two years imprisonment on probation and a two year ban on occupying a media management post.

A Ukrainian appeals court ruled that there was sufficient evidence to sustain the conviction, but it effectively reversed because defamation had been subsequently decriminalized and other claims were stale under the relevant statute of limitations.

### **ECHR Decision**

Notwithstanding the result of the appeal, the ECHR ruled that Lyashko's complaint was admissible. The Ukrainian appeals court decision was equivocal at best because it "gave a strong indication to the applicant that the authorities were displeased with the publications and that, unless he modified his behavior in future, he would run the risk of being prosecuted again." *Id. at ¶ 32*.

The Court also took specific note that this was a criminal defamation case – an important circumstance in determining the proportionality of a restriction on free expression.

The dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.

*Id. at ¶ 41*.

But the Court refused to categorically condemn criminal defamation.

"It remains open to the competent State authorities to adopt ... measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.

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### European Court of Human Rights Rules in Favor of Ukrainian Journalist

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What an appropriately crafted criminal defamation law looks like is still unknown. The ECHR has never affirmed the imprisonment of a journalist for criminal defamation. And this decision certainly casts doubt on the validity of criminal defamation when alternative civil remedies are available.

#### Article 10

As to the merits of Lyashko's Article 10 claims, the Court found that the articles all involved matters of public interest, e.g., the management of a public company and police corruption. And there was no evidence that Lyashko was prejudiced against any of the subjects of his articles.

The first set of articles reflected value judgments not susceptible of being proven false, notwithstanding the "sarcastic and broad terms" used to describe the Prime Minister.

The second set of articles also contained protected value judgments. Moreover, they were protected on separate grounds.

In short, the applicant was essentially reporting what was being said by others, or what could be reasonably inferred from the events that have undisputedly taken place. In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task

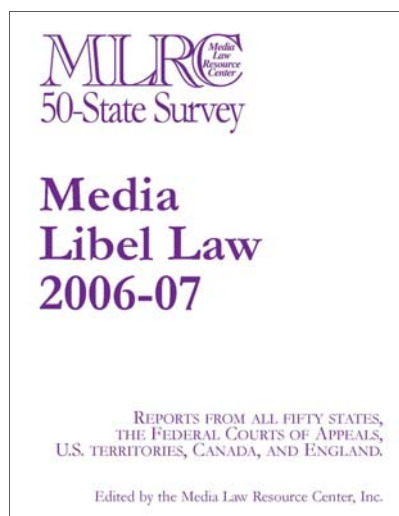
*Id. at ¶ 55.* Under these circumstances, the lengthy criminal proceedings, conviction and sentenced had a considerable "chilling effect" on the applicant's freedom of expression in violation of Article 10.

The Court concluded that the Ukrainian government violated Article 10, since the government's reasons for applicant's conviction were insufficient to show that "the interference complained of was proportionate to the legitimate aim pursued. [That interference] was therefore not necessary in a democratic society."

Lyashko was represented by Natalya Petrova, Kiev, Ukraine. The Ukrainian government was represented by Valeria Lutkovska.



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## EU Court Dismisses Reporter's Lawsuit Stemming From Search of Home and Office

### *Decision Exposes Gap in Legal Protections Over Acts of EU Authorities*

By Christoph Arhold

On October 4, 2006, the European Court of First Instance rejected an action for damages by journalist Hans-Martin Tillack against the European Commission's Anti-Fraud Office for making false accusations of bribery which led Belgian authorities in March 2004 to order a police raid of the journalist's home and office to identify his sources within OLAF. *Tillack v. European Commission*, Case T-193/04.

The European Court of First Instance is based in Luxembourg and functions under the authority of the 25 member states of the European Union. The court hears disputes arising under EU rules and regulations.

The court found that the journalist had no cause of action against the Anti-Fraud Office which instigated the police raid because the raid was a discretionary act by Belgian police authorities. The decision is alarming because it means there may be little direct accountability for actions by some EU authorities that impinge on free expression rights.

#### **Background**

In March 2004, Belgian police raided the home and office of Hans-Martin Tillack, then Brussels correspondent for the German news magazine *Stern*, and seized his computers and documents. They were acting on a complaint from the European Commission's Anti-Fraud Office (OLAF), which is responsible for investigating administrative fraud in the European Union (EU).

Mr. Tillack had published a number of articles criticizing OLAF. The articles were based on leaked information, and OLAF had repeatedly suggested, despite the lack of any evidence, that Mr. Tillack obtained the information by bribing an EU official. OLAF's real goal was to identify the leak in its administration.

Once Mr. Tillack's materials became part of the Belgian authorities' file on the "bribery case" (two and a half years

after the raid, no charges have been brought against Mr. Tillack), OLAF or the Commission itself could become a "partie civile" and obtain the right to access the file.

After his files were seized, Mr. Tillack fulfilled his ethical duty by trying to protect his sources by bringing a number of legal actions. As Belgian law at the time did not protect a journalist's sources, his initial action in Belgium to obtain the return of his files was dismissed. (Only in March 2005 did Belgium adopt a law which explicitly grants journalists the right to protect their sources; Mr. Tillack is pursuing this aspect of the case against the Belgian authorities before the European Court of Human Rights).

Denied legal protection from the Belgian courts, Mr. Tillack also asked the European Court of First Instance for interim measures to prevent OLAF from obtaining any information or documents seized by the Belgian police. Applications for interim measures are only admissible if they are linked to a substantive action before the court.

Mr. Tillack's main action was brought under Article 230(4) EC Treaty for annulment of OLAF's decision to file its complaint with the Belgian authorities. As it was uncertain whether OLAF's complaint was such an act, Mr. Tillack also filed an action for damages under Article 288(2) EC Treaty to compensate for injury resulting from the decision and the defamation campaign against him.

Both actions rely heavily on OLAF's infringement of most of its few procedural obligations during its investigations, and the fact that the information provided to the Belgian authorities was egregious, based entirely on vague rumors and hearsay, and misleading in order to induce the Belgian authorities to act immediately against the journalist.

It said, for instance, that Mr. Tillack was about to move to Washington and take important evidence with him, which was not the case. OLAF's investigators knew this.

In October 2004 and (on appeal) in April 2005, the Court of First Instance and then the European Court of Justice Presidents refused Tillack's request for interim meas-

*(Continued on page 12)*

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***There may be little direct accountability for actions by some EU authorities that impinge on free expression rights.***

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## EU Court Dismisses Reporter's Lawsuit Stemming From Search of Home and Office

*(Continued from page 11)*

ures on the ground that there was no *prima facie* case in the main proceedings. They considered the action for annulment inadmissible and the action for damages unfounded, for the same reason: that Belgian authorities acted under their own discretion in conducting the raids.

Since OLAF's complaints were not legally binding on Belgian authorities, they did not constitute challengeable acts, and as the Belgian authorities had discretion in responding to them, there was no direct causal link between OLAF's complaint and the injury resulting from the raid, the court reasoned.

This reasoning, though, endangers the principle of effective judicial control, since it means that someone harmed by actions resulting from false accusations by OLAF would be left without protection: the national authorities could claim they had been misled by OLAF, while OLAF could maintain that the national authorities were not legally bound by its requests. Judicial review of OLAF's information-gathering and processing behaviour would be impossible.

### ***Court of First Instance Decision***

Unfortunately, the Court of First Instance did not weigh this risk sufficiently and followed the Presidents' reasoning. This month the court ruled that the report OLAF sent to the Belgian authorities was not the cause of the harm suffered by Mr. Tillack, since the Belgian authorities were free to decide whether or not to act on the report. Thus in the court's view, the sole responsibility for the raid and any consequences following from it lies with the national authorities.

The Court dismissed Mr. Tillack's action for lack of "direct and individual concern," and "direct causal link" relying on case law developed in the context of classic European economic law as laid down, for instance, in regulations on market organizations for milk or bananas, where the interest of the market operators is normally limited to quick financial compensation, regardless of who – the national or the European authorities – has committed the misconduct and regardless of who has caused the prejudice.

Times, of course, have been changing. The EU is not a mere economic community anymore. It is not only about milk quotas and import duties anymore, but has a much broader mandate that includes the fight against terrorism and organized crime. Its institutions do not act solely via directives to be implemented by national authorities, but have developed their own investigative powers – ones that can clash with European citizens' fundamental rights on almost all sectors of private and public life.

It should be a matter of course that EU actions be fully reviewable. But, as the Tillack case shows, this is not so. There is a critical gap in the EU's protection of its citizens against arbitrary behavior by the EU's Institutions. This gap needs to be bridged.

With respect to the protection of his journalistic sources, Mr. Tillack is now pinning his hopes on a separate action filed with the European Court for Human Rights in Strasbourg. The ECHR recently opened the written procedure with respect to Mr. Tillack's complaint against the unjustified raids by the Belgian police (Case No 20477/05, *Tillack v Belgium*). This procedure, however, will not deal with OLAF's misconduct which falls solely under the jurisdiction of the European Court of First Instance.

*Christoph Arhold, a lawyer with White & Case in Brussels, represents the reporter in this matter.*

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## Scottish MP Wins £200,000 Award in Trial Against The News of the World

By Rosalind McInnes

In British libel cases, a defamatory statement is presumed to be false. The publisher whose defense is that the story is true has the onus of rebutting this presumption and showing that it is true, on the balance of probabilities.

Unofficially, where the claimant has a photogenic spouse, the standard for defendants seems a good deal higher, as both the Jeffrey Archer case in the 1980s and the current Scottish cause celebre, Tommy Sheridan the radical socialist politician's action against the *News of the World* tabloid newspaper, go to suggest.

### Background

Tommy Sheridan is a member of the Scottish Parliament from Glasgow, and a founder and former leader of the Scottish Socialist Party. In October 2004, the *News of the World*, the UK's best selling Sunday tabloid, published a

story entitled "Married MSP Is Spanking Swinger." The article reported that an unnamed member of the Scottish Parliament had gone to a swingers club, enjoyed threesomes and being spanked. Another article by the newspaper's sex columnist reported that she herself had a "kinky fling" with a married Scottish parliamentarian.



**Tommy Sheridan**

In November 2004, Sheridan abruptly resigned from his leadership position with the party. Sheridan reportedly admitted to his party colleagues that he had attended a swingers club – and his admission was memorialized in the group's minutes. But this later became a matter of factual dispute at trial, with Sheridan arguing the minutes were part of a conspiracy against him. To the public, Sheridan explained that his resignation had nothing to do

with rumors about his private life, rather he resigned to "spend more time with his family."

Libel proceedings, of course, followed.

### Libel Trial

Midway through a five-week trial this summer Mr Sheridan sacked his legal team in circumstances of some drama after his counsel wrongly suggested to a witness that she had a fraud conviction. Sheridan then conducted his own case with flamboyance and success. On August 4, he got a £200,000 award from the jury, making Cardonald, the small suburb of Glasgow where he lives, the libel capital of Scotland.

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***The article reported that an unnamed member of the Scottish Parliament had gone to a swingers club, enjoyed threesomes and being spanked.***

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Press, and in many cases public, reaction has been disbelief. His political party had vehemently opposed – to the point where one of the party officials was jailed for contempt – handing over a crucial piece of evidence in the case, the alleged minutes of a party meeting where Mr Sheridan was said to have admitted at-

tending a "swingers" club. Eleven members were brought to court to say this admission had been made.

Other witnesses testified themselves to having had adulterous relationships with him or witnessing him in group sex. He attributed this evidence to a combination of the *News of the World's* paying what he called "hired liars," coupled with the "political civil war" raging in his party, a fairly powerful but apparently riven minority.

The jury, by a 7-4 majority, believed Sheridan and his witnesses. Though an appeal is in the cards, it seems likely, on Scottish precedent, that it will be said that the jury was entitled to find for Sheridan.

What persuaded – or possessed, according to your point of view – the jury? In the UK, no one can ask. It is a criminal offence to ask about a jury's deliberations. (The public debriefing of the Michael Jackson jury was watched by our newsroom with enviously dropped jaws.)

But the theories of those of us who were in this packed and electric courtroom are crudely simple. The majority of people find both Mr Sheridan and his family – an attractive and forthright wife, his devoted activist mother, the father in law who

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### Scottish MP Wins £200,000 Award in Trial Against The News of the World

(Continued from page 13)

gave him an alibi and the sisters who worked hard on his legal case- basically likeable.

Whereas they find the *News of the World*, for a complex and compelling mixture of politics, prudery, gender issues, literacy and journalistic ethics, pretty unappetising. Several witnesses admitted to having been paid by the newspaper for their stories. Others seemed self-interested, malicious and even what Bart Simpson has called “emotionally frail.”

Perhaps also hoi polloi are quicker to read about the highly sexed consenting adults than to throw stones at them. The *News of the World* scored some specific own goals by having to admit to such activities as taping people who were explicitly told the contrary, blending truth and fiction and paying £20,000 to an escort girl who couldn't remember dates or produce a single photograph of herself with Tommy Sheridan.

Whatever the tipping factors, a £200,000 award is remarkable in Scotland, and no good cause for celebration even by the *News of the World's* more respectable competitors.

#### Perjury?

In an interesting post-trial development, the Crown Prosecution announced it will review all the testimony and evidence in the case to determine whether there are grounds to bring a perjury investigation. This process is expected to take several weeks. The *News of the World* has said it welcomes the review, while Sheridan chalked it up to a “a quiet week in the Crown Office and the newspaper offices.”

*Rosalind McInnes is an in-house solicitor with BBC Scotland and attended portions of the trial. Plaintiff had been represented at trial by Richard Keen QC and Graeme Henderson before dismissing them and conducting his own case. The News of the World was represented by Michael Jones QC.*



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## Espionage Act Can Be Applied to Lobbyists for Political Speech

### *Judge Rejects First Amendment Defense*

By Nathan Siegel

This year's most important judicial decision affecting freedom of speech and the press may well be Judge T.S. Ellis' decision permitting *United States v. Rosen, et. al.*, Case No. 1:05cr225, 2006 WL 2345914 (E.D. Va., August 9, 2006), a criminal prosecution not involving the media, to go to trial.

For the first time since the enactment of the Espionage Act in 1917, a federal judge was asked to determine whether the Act may be applied to punish the speech activities of citizens who are not alleged to be either spies or government employees. Judge Ellis concluded that the law may be applied consistent with the First Amendment, and his reasoning sweeps well beyond the particular facts of *Rosen*.

While at times *Rosen's* legal analysis seems almost as opaque as the statute it interprets, the basic outlines of Judge Ellis' construction of the Sections 793(d) and 793(e) of the Espionage Act are fairly clear. Generally, in Judge Ellis' view the Act prohibits anyone from intentionally disseminating government secrets if the persons knows that national security could be harmed. However, if a person only learns and passes on purely oral information – as opposed to tangible materials like documents – the Act only applies if the person also intended to harm national security or aid a foreign nation.

In either case, as long as the government alleges facts in an indictment supporting each of these elements pursuant to the rather liberal standards of criminal pleading, in Judge Ellis' view the First Amendment provides little or no substantive or procedural barriers to such cases reaching trial. In this very important respect, *Rosen* effectively leaves the enforcement of the Bill of Rights in the hands of juries, at least in the first instance.

Judge Ellis' purpose plainly appears to be to make it difficult to successfully prosecute political "speech" in its purest form, but easier to prosecute both leakers and recipients of actual classified documents. His construction of the

statute is novel in a several respects. Whether it fairly reflects Congress's intent, would survive appellate scrutiny, or even makes sense as a policy matter, is open to serious debate.

However, for journalists, scholars and other members of the information media *Rosen's* construction of the law has disturbing implications, though it is not uniformly negative. On the one hand, *Rosen* may provide some practical protection for oral conversations about national security matters with sources. And even in cases involving leaks of classified documents, the opinion is less than clear about what the government must prove about the defendant's state of mind.

On balance, however, *Rosen* represents a significant judicial step towards laying the foundation for potential prosecution of journalists who receive classified documents from government sources.

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***In Judge Ellis' view the Act prohibits anyone from intentionally disseminating government secrets if the persons knows that national security could be harmed.***

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#### *The AIPAC Case*

This decision arises out of a controversial indictment of two former lobbyists employed by the American Israel Public Affairs Committee ("AIPAC"), a well-known pro-Israel lobbying and advocacy organization. The two employees, Steven Rosen and Keith Weissman, are charged with conspiring with a former Department of Defense official, Lawrence Franklin, to receive and disclose what Sections 793(d) and 793(e) of the Espionage Act call "information related to the national defense."

Specifically, the government alleges that Franklin orally leaked information to the AIPAC employees, some of it classified, related to events in the Middle East. In turn, the AIPAC defendants, knowing that some of the information was classified, discussed it with journalists, Israeli embassy officials and other AIPAC employees. Franklin previously pled guilty to some of the charges and is cooperating with the government.

The AIPAC defendants, however, moved to dismiss the indictment. They argued that the Espionage Act does not proscribe the oral disclosure of intangible information, and

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## Espionage Act Can Be Applied to Lobbyists for Political Speech

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alternatively that if it does it is unconstitutional both on its face and as applied to these cases.

Judge Ellis' opinion expresses skepticism about the wisdom of the government's decision to prosecute these defendants, and urges Congress to reconsider whether as a policy matter the Espionage Act's World War I-era language strikes the appropriate balance between national security and free speech interests. Nonetheless, he squarely rejects the defendants' broader statutory and constitutional defenses.

### *Espionage Act & Oral Communications*

One of many novel aspects of this case is that it is apparently the first Espionage Act prosecution to solely target the oral communication of "information related to the national defense," as opposed to the dissemination of tangible materials such as classified documents.

As an initial matter, *Rosen* holds that the statute does apply to oral information. Judge Ellis recognized that some provisions of Sections 793(d) and (e) do not make sense if applied to oral communications, particularly its retention provision requiring that any information obtained in violation of the statute be returned to the government. However, he concludes that the apparent absurdity of the retention clause in this context is simply the result of "inadvertence and careless drafting" when the statute was last amended in 1950. Slip op. at 15.

However, *Rosen* does hold that the statute distinguishes between tangible and intangible information in one important respect, making it somewhat more difficult for the government to prevail at trial in a pure speech case. One of the many interpretive difficulties the relevant provisions of the Espionage Act pose is that they appear to contain more than one intent standard. One portion of Sections 793(d) and (e) provides that a person must act "willfully," but another also requires the government to prove that the defendant had "reason to believe that [the information received or communicated] could be

used to the injury of the United States or the advantage of a foreign nation."

Judge Ellis reconciles these provisions by finding that the latter standard applies only to the possession of "information," which he interprets to mean only intangible information. Moreover, he concludes that the "reason to believe" standard requires a "bad faith purpose to either harm the United States or to aid a foreign government" (34). This deliberately high standard may be difficult to meet in the AIPAC case, and even more so in any case involving the normal practice of journalism.

However, in Judge Ellis' view, the "bad faith" standard would not apply in a prosecution arising out of a Pentagon

Papers-type leak of physical documents to a journalist. Thus, the government would have a materially lower burden of proof in such a case.

Indeed, perhaps the most disturbing part of *Rosen* is its transformation of the *dicta* of several Justices in the actual

Pentagon Papers case into virtually a decision of the Court that *The New York Times* and the *Washington Post* violated Section 793(e) by publishing the Pentagon Papers (53-55). Thus, the case that is popularly viewed as the apogee of the Constitution's protection of freedom of the press is slowly being judicially fashioned into a blueprint for what would be one of the most serious assaults upon press freedoms in the history of the Republic.

### *Is the Espionage Act Constitutional?*

After concluding that as a matter of statutory construction the Espionage Act does apply to oral communications, most of Judge Ellis' opinion is devoted to rejecting the constitutional claims by the AIPAC defendants that the statute is vague and violates the First Amendment.

Strikingly, although the opinion purports to primarily address the constitutionality of the statute as applied to this case, apart from the issue of oral communications its reasoning barely touches upon the actual allegations of the indictment. Rather, it attempts to address many of the

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## Espionage Act Can Be Applied to Lobbyists for Political Speech

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broader questions surrounding the Espionage Act's potential application to core political speech that have recently been the subject of intense political and scholarly debate.

### Vagueness

First, Judge Ellis rejects the defendants' argument that the statute is vague and fails to provide fair warning that the conduct alleged in the indictment was illegal. Specifically, the defendants argued that two provisions of Sections 793(d) and (e) are impermissibly vague: their bar on the disclosure of all information "related to the national defense" to anyone "not entitled to receive it."

Vagueness arguments are commonly raised in Espionage Act cases, and Judge Ellis' analysis relies heavily on prior case law addressing the issue, particularly *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), a successful prosecution of a Defense Department employee who leaked classified intelligence photos to *Jane's Defense Weekly*. He concludes that the judicial gloss these cases impose on the admittedly imprecise language of the statute cures any facial vagueness issue.

Implicitly, Judge Ellis rejects the view often advanced by media advocates that there is a bright-line distinction between speech-related activities like lobbying and journalism, and spying or leaking acts that have been the subject of prior prosecutions under the Act.

### "Not entitled to receive" national defense information?

First, Judge Ellis suggests that proof that the defendant knew the information at issue was classified would conclusively demonstrate that the defendant was "not entitled to receive it", thus curing any vagueness problem with respect to this provision (23-25). While the opinion does not formally foreclose the possibility of a prosecution based upon secret information that is not classified, its reasoning would seem to make it very difficult for the government to prevail in any such case.

Indeed, a few days after the opinion was issued Judge Ellis denied a government motion to change the indictment to allege that the defendants had solicited a classified document, on the grounds that the change would be sufficiently material to violate the Fifth Amendment's requirement that charges be presented to a Grand Jury. *United States v. Rosen*, Case No. 1:05cr225 (E.D. Va., August 11, 2006).

### What is "information relating to the national defense"?

With respect to the question of what the statute means by information "related to the national defense," Judge Ellis ratifies prior case law construing this provision to encompass "the type of information that, if disclosed, could harm the United States" – a formulation that is arguably more vague than the statutory language it purports to clarify. Opinion at 20. However, unlike previous cases, Judge Ellis at least attempts to flesh out what this language means, but the end result remains rather opaque.

On the one hand, *Rosen* appears to hold that whether information is potentially harmful to national security is an objective inquiry (albeit presumably for the jury), concerning the "quality of the information" rather than the intended "effect of the disclosure." *Id.* at 34.

On the other hand, Judge Ellis concludes that the statute's requirement of "willful" conduct means that "the defendant must know that the disclosure is potentially harmful to the United States," or at least is "the type of information" that is potentially harmful. *Id.* at 34.

Furthermore, the defendant must act with "a bad purpose either to disobey or to disregard the law." *Id.* at 31-33. And, as previously discussed, in the case of oral communications, the defendant must also proceed with a bad-faith purpose to harm the United States or aid a foreign country.

Taken together, these requirements might assist a journalist-defendant in a Pentagon Papers-type case, to the extent that *Rosen* could be construed to permit an argument that a journalist commits no crime as long as he or she does not believe that the disclosure of the specific documents at issue could actually harm the United States.

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**Judge Ellis rejects the view often advanced by media advocates that there is a bright-line distinction between speech-related activities like lobbying and journalism, and spying.**

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## Espionage Act Can Be Applied to Lobbyists for Political Speech

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However, it is not entirely clear whether such an argument would be a viable defense under the rationale of *Rosen*, and even less clear whether a defendant could argue that while she recognized some harm to national security might result from disclosure, on balance she believe that the likely benefit to the country outweighed any potential harm.

Yet however these questions might ultimately be answered, it would appear that in Judge Ellis's view they are issues going to state of mind that must be sorted out at trial or even in the jury room, rather than in motions challenging the sufficiency of an indictment.

It is important note that *Rosen* does not and could not address whether heightened, independent appellate review should be applied to jury findings under the Espionage Act, similar to the scrutiny applied in defamation and other First Amendment cases.

However, at least in the first instance, as long as the government alleges the requisite *mens rea* in the indictment, under *Rosen* there would appear to be few constitutional impediments to a case against a journalist or other citizen proceeding to trial. Indeed, Judge Ellis explicitly rejected the AIPAC defendants' argument that the statute failed to provide them fair warning of their alleged offense because no one has ever been prosecuted under the Act for oral, political speech.

Since "the statute's plain language" contains no exception for such speech activities, *Rosen* holds that the absence of any prior analogous prosecutions is irrelevant. *Id.* at 37-39.

### ***Espionage Act and the First Amendment***

Finally, Judge Ellis devotes more than a third of his 68-page opinion to addressing the Defendants' First Amendment arguments. In the abstract, *Rosen* holds that the relevant provision of the Espionage Act must be subject to First Amendment scrutiny, at least as applied to ordinary citizens charged with "the passing of government secrets relating to the national defense to those not entitled to receive them in an attempt to influence United States foreign policy." *Id.* at 40.

Relying on the two concurrences in the *Morison* case that were the most sympathetic to First Amendment interests, Judge Ellis seems to hold that such prosecutions must be subject to general balancing of the "competing social interests"

at stake. *Id.* at 45. Importantly, *Rosen* also emphasizes that national security concerns cannot automatically trump the First Amendment.

However, in reality the First Amendment protections Judge Ellis recognizes seem to mean little, because he concludes that his explication of various provisions of the statute in the first part of his opinion satisfies any possible First Amendment concerns. His First Amendment analysis is not clearly tethered to the facts of this particular case, and relies heavily on his expansive interpretation of the Pentagon Papers case discussed above.

Thus, both as applied and on its face, *Rosen* holds that Sections 793(d) & (e) are narrowly tailored to effect a compelling government interest, i.e. the protection of national security. *Id.* at 63.

One other aspect of *Rosen's* First Amendment analysis also is potentially significant for the media. Judge Ellis distinguishes this case from prosecutions of government leakers under Section 793(d), the provision of the Act that applies only to persons who disclose national defense information they are authorized to possess. Relying on cases such as *Snepp v. United States*, 444 U.S. 507 (1980) that approved contractual restraints against the publication of government secrets by former government employees, *Rosen* holds that leak prosecutions should receive little or no First Amendment scrutiny, because public employees entrusted with keeping official secrets enjoy no First Amendment right to breach that special relationship of trust. *Id.* at 49-51.

Almost in passing, the opinion also notes that "if the government proves the defendants conspired with Franklin in his commission of that offense [793(d)], they may be subject to prosecution as well." *Id.* at 51. While it is not clear, *Rosen* might be construed to suggest that constitutional scrutiny also need not be applied if the person who received classified information is charged only with conspiracy to facilitate the leak, rather than for passing the information on to others.

Many observers have speculated that if the government is interested in prosecuting a journalist, it might focus the charges on leaks from a government source to the journalist pursuant to Section 793(d), rather than the journalist's subsequent communications to the public under Sections 793(e).

While this *dicta* from *Rosen* might be cited in support of such a strategy, within the confines of *Rosen* itself Judge Ellis

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## Espionage Act Can Be Applied to Lobbyists for Political Speech

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arguably posits a distinction without a difference, since he concludes that Sections 793(d) and (e) as construed by him both survive First Amendment scrutiny anyway.

### *The Impact of Rosen*

While *Rosen* has understandably raised enormous concern in media circles, it is far too early to assess its ultimate impact on the development of the law. Whether Judge Ellis' novel construction of the Espionage Act would withstand appeal is certainly open to question.

For example, *Rosen's* view that the statute's heightened intent standard only applies to oral communications is based largely on the placement of one comma in a statute that contains more than 50 of them, which the same opinion characterizes elsewhere as the product of "careless drafting."

Moreover, *Rosen* does not mention the Fourth Circuit's discussion of the same provisions in *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), which affirmed a district court's application of the heightened intent standard to charges involving classified docu-

ments. The distinction Judge Ellis posits also begs the question about what happens if someone learns the contents of a document, without obtaining the document.

On the other hand, Judge Ellis's view that the statute's heightened *mens rea* standard actually requires proof of bad faith, if adopted by appellate courts and extended to all forms of national defense information, could provide a significant barrier to prosecutions of journalists. In short, *Rosen* contains a number of elements, some of which make the law worse for the media but others that are potentially helpful.

While *Rosen's* overall treatment of the law is troubling, another court could in theory choose the good and reject the bad. The ultimate resolution of these issues will therefore have an enormous impact on the future state of freedom of speech and the press.

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***Whether Judge Ellis' novel construction of the Espionage Act would withstand appeal is certainly open to question.***

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*Nathan Siegel is a partner with Levine Sullivan Koch & Schulz LLP in Washington, D.C. The defendants in the case are represented by John N. Nassikas, III, Arent Fox, and Abbe Lowell, Chadbourne & Park.*

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## Ninth Circuit Affirms Contempt Order Against Freelance Videographer *No Constitutional or Common Law Privilege in Grand Jury Context*

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

On September 8, 2006, the Court of Appeals for the Ninth Circuit filed an unpublished memorandum opinion that affirmed an order by the Northern District of California finding freelance videographer Joshua Wolf to be in civil contempt. *Wolf v. U.S.*, No. 06-16403, 2006 WL 2631398 (9<sup>th</sup> Cir. Sept. 8, 2006) (O'Scannlain, Graber, Clifton, JJ.).

Wolf had refused to abide by a grand jury subpoena ordering him to produce unaired video footage he shot during a 2005 demonstration in San Francisco, California. Wolf, who had been released on bail pursuant to an earlier Ninth Circuit order, reported back to prison on September 22, 2006, where he could remain until the grand jury's term expires in July 2007.

### *Ninth Circuit's Orders*

In conjunction with his appeal of the district court's contempt order, Wolf filed a motion in the Ninth Circuit for bail pending his appeal. On August 31, 2006, the Ninth Circuit issued an order granting Wolf's bail motion and Wolf was released from prison. The court's order stated that the bail motion was decided by Chief Judge Schroeder and Judge Reinhardt, who were sitting on the court's motions panel in August 2006. The order noted, however, that "[t]his appeal and all other pending motions will be decided by the next motions panel."

The Ninth Circuit's motions panel in September 2006 was comprised of Judges O'Scannlain, Graber, and Clifton. On September 8, 2006, that panel issued an unpublished opinion that rejected Wolf's appeal and affirmed the District Court's order. The Court of Appeals stated that Ninth Circuit cases interpreting *Branzburg v. Hayes*, 408 U.S. 665 (1972) required a limited balancing of First Amendment interests only in certain circumstances, none of which it felt existed in Wolf's case.

According to the court, for example, there was no showing that the grand jury was being conducted in "bad faith." In any event, the court stated that "[e]ven if we applied a balancing test, we would still affirm."

The Ninth Circuit panel also noted the argument presented by Wolf and *amici* that the court should recognize a

federal common-law reporter's privilege. Citing *Branzburg* and *Scarce v. United States*, 5 F.3d 397, 401 (9th Cir. 1993) the court stated only that "[t]his argument has been squarely rejected." The court did not address the arguments raised in the briefing that *Branzburg* and *Scarce* did not preclude recognition of the privilege under Federal Rule of Evidence 501.

Specifically, the court did not address the contention that *Branzburg* pre-dated Rule 501 and dealt exclusively with analytically distinct First Amendment issues, and that the district court's interpretation of *Scarce* conflicted with the Supreme Court's subsequent decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996).

Following the Ninth Circuit order affirming the district court, the United States Attorney's Office for the Northern District of California filed a motion to revoke Wolf's bail. Shortly thereafter, the court of appeals issued an order stating that Wolf had to produce the materials sought by the grand jury subpoena or report back to prison. Wolf chose to report back to prison, where he remains pending efforts by his attorneys to seek rehearing of the court of appeals decision affirming the district court's contempt order.

### *Conclusion*

The Ninth Circuit's unpublished decision affirming the district court is not considered binding precedent and under local rules it may not be cited to or by the courts of the Ninth Circuit. Nevertheless, the seven-page decision, issued without oral argument, unfortunately provides only limited analysis of issues of significant importance to all journalists.

*Theodore J. Boutrous, Jr.*, is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP and Co-Chair of the firm's Media Law Practice Group; *Michael H. Dore* is an associate in the firm's Los Angeles office and member of the group. The authors, along with Gibson Dunn associates William E. Thomson and Amanda M. Rose filed the brief of *amici curiae* Reporters Committee for Freedom of the Press, WIW Freedom to Write Fund, Society of Professional Journalists, and California First Amendment Coalition in support of Joshua Wolf in his Ninth Circuit appeal seeking reversal of the civil contempt order issued against him by the District Court for the Northern District of California.

## **BALCO Journalists Sentenced to 18 Months for Contempt**

### ***Punishment Stayed Pending Outcome of Appeal***

On September 25, Judge Jeffrey White sentenced *San Francisco Chronicle* reporters Lance Williams and Mark Fainaru-Wada to 18 months in jail for contempt of court for their refusal to testify about the identity of their confidential sources. *In re Grand Jury Subpoenas*, No. CR 06-90225 (N.D. Cal. Sept. 25, 2006).

In August, Judge White denied the reporters' motion to quash grand jury subpoenas in the ongoing criminal investigation into the leak of BALCO grand jury transcripts to the reporters. *See In re Grand Jury Subpoenas*, No. CR 06-90225, 2006 WL 2354402 (N.D. Cal. Aug. 15, 2006). Although Judge White stated he was mindful of the "important policy considerations" at stake, he concluded he was bound by *Branzburg*, and the facts of the case, and he systematically denied all claims of a qualified or common law privilege.

Following the court's ruling, the reporters advised the government that they would not comply with the order to appear before the grand jury for the reasons raised on the motion to quash and also because of Fifth Amendment concerns over self-incrimination. In response to the latter, on August 30, Judge White granted the government's *ex parte* application to grant the reporters testimonial immunity.

On September 1, the reporters and the government stipulated to a finding that the reporters be held in civil contempt to expedite their appeal. The government requested that the reporters be jailed; the reporters requested a nominal \$1 per day fine and suggested that the question of alternative lesser sanctions be revisited after appeal. Judge White rejected their request, saying "the Court will not engage in piecemeal litigation of that issue."

Judge White went on to hold that nominal fines would not be sufficiently coercive to win compliance with the court's orders. Instead, he ruled that based on their statements in court and to the public a "term of incarceration is the least coercive sanction that would reasonably win compliance." He sentenced the reporters to be jailed for up to 18 months.

The reporters are represented by Eve Burton, Jonathan R. Donnellan and Kristina E. Findikyan, The Hearst Corp., Floyd Abrams and Susan Buckley, Cahill Gordon & Reindel, New York, NY, and Gregory Lindstrom, Latham & Watkins, San Francisco.

### **IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

#### **ORDER HOLDING MARK FAINARU-WADA AND LANCE WILLIAMS IN CIVIL CONTEMPT**

.... Fainaru-Wada and Williams spoke of the fact that they were doing their jobs as investigative reporters and were attempting to bring a truth to light. The grand jury too is attempting to do its job and is on its own search for truth, *i.e.* to determine whether *or not* a crime has been committed or an order of the court violated. In ruling on their motions to quash and for clarification and in finding them in contempt and imposing a remedial sanction, this Court is doing its job, which is to interpret and apply the law to the facts before it. Fainaru-Wada and Williams also spoke of their respect for the law and the sanctity of the grand jury process, and stated that they do not believe themselves to be above the law. Yet this Court has ruled that the law requires them to comply with the subpoenas.

.... The Court does not fault Fainaru-Wada and Williams for their convictions. *Nor is it acting to punish them for maintaining those convictions.* ... However, both in their public statements and in their statements to the Court, Fainaru-Wada and Williams make clear that they will not reveal their confidential sources as required by this Court's Orders. The Court finds based on the record before it that a term of incarceration is the least coercive sanction that would reasonably win compliance with its orders.

## Judiciary Committee Holds Hearing on Federal Shield Law

By Laura Rychak

The Senate Judiciary Committee held a hearing on the Free Flow of Information Act of 2006 (FFIA) on September 20, making it the Committee's third hearing on a federal shield law. See *MLRC MediaLawLetter* May 2006 for a discussion and copy of the bill, S. 2831.

### *Hearing Testimony*

Paul J. McNulty, Deputy Attorney General with the Department of Justice, reiterated the DOJ's previous concerns over a federal shield law and acknowledged the department's continued opposition to FFIA despite Sen. Arlen Specter's repeated attempts to address their concerns. Sen. Specter (R-PA), Chairman of the Committee, emphasized his intention to proceed with the legislation despite the DOJ's opposition. He said he would continue to try to work with the DOJ on the FFIA.

The DOJ characterized the FFIA as a solution in search of a problem after noting the department's restrained use of media subpoenas – once again, the DOJ reiterated that they issued media subpoenas in less than 20 cases in the last 15 years. (However, this number does not include subpoenas issued by special prosecutors or civil litigants.)

FFIA 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 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 significant harm to national security; and the unauthorized disclosure of properly classified information by government employees.

The DOJ observed that the judiciary is ill-equipped to properly weigh national security concerns and that any balancing of national security interests with the First Amendment should remain in the Executive Branch.

Sen. Jon Kyl (R-AZ) embraced the DOJ's message and appeared to remain entrenched in his opposition to the bill. He registered his concerns over use of "properly classified information" in Section 9 and asked whether courts would be making judgments on "classified" information

beyond an assessment on whether the process was followed correctly. He also asked what tests the court would use to determine "significant harm" to national security.

McNulty responded to this inquiry by noting that the courts would have to make highly subjective decisions on what seriously harmed national security. Kyl also observed that – while Section 9 applies to acts of terrorism against the U.S. – he asked what would happen under the FFIA if the specific act of terror is against another country such as Canada or the U.K. He also speculated on whether the definition of an "attorney for the U.S." in Section 3 would apply to JAG attorneys and whether the FFIA might jeopardize military tribunals.

While Sen. Sam Brownback (R-KS) made a late appearance at the hearing, his remarks and questions were similarly critical of a federal reporter's privilege. Sen. Chuck Schumer (D-NY), a supporter of the bill, was the only democrat in attendance.

Joining McNulty in opposing the bill were Steven D. Clymer, professor at Cornell Law School, and Victor E. Schwartz of Shook, Hardy & Bacon, who appeared on behalf of the National Association of Manufacturers (NAM) and its interest in protecting trade secrets.

Professor Clymer, a former district attorney, cited the recent high profile NSA wiretapping and CIA black site stories shortly after Judith Miller's jail time as evidence that leakers and whistleblowers will continue to leak even without a federal shield law.

Clymer also contended that the FFIA's balancing tests are entirely unpredictable and that the reporters could not give assurances of confidential source protection even if enacted.

Schwartz claimed that the FFIA would have inadvertent consequences in civil litigation and maintained that a party could hamper the discovery process by handing information over to a reporter. A letter by the Chamber of Commerce, NAM and a few associations cautioned the impact of the FFIA on the ability of businesses to protect trade secrets.

### *Supporters' Testimony*

Former Solicitor General Theodore B. Olson of Gibson, Dunn & Crutcher and Former Assistant U.S. Attorney Bruce

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### Judiciary Committee Holds Hearing on Federal Shield Law

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A. Baird of Covington & Burling testified in support of the bill. They responded to DOJ concerns by recounting their own experiences inside and out of government.

Olson emphasized that while people may disagree on the scope of the privilege, everyone should agree uniform standards are needed in light of splits in the circuit courts. He also noted the DOJ's reluctance to have their judgment second guessed by judges. In response to Senator Brownback's concern that the FFIA would immunize

leakers, Baird emphasized the language of the bill does not immunize leakers and reiterated there are other tools at the prosecution's disposal to ferret out leakers.

Chairman Specter's staff reports that the Chairman remains interested in moving the legislation this session. But, it is unlikely that the bill will come up before the Senate recesses for the November 2006 elections.

*Laura Rychak is Legislative Counsel with the Newspaper Association of America.*

## Financial Newsletter Covered By Maryland Reporters Privilege

In September, the Maryland Court of Special Appeals held that a newsletter focusing on publicly traded companies was entitled to the protection of the "news media" privilege under the Maryland state shield law. *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, No. 2621, 2006 WL 2670955 (Sept. 19, 2006 Md. Ct. Spec. App.) (Murphy, C.J., Eyler, Meredith, JJ.)

Forensic Advisors publishes a subscription, internet-based newsletter, entitled The Eyeshade Report. The newsletter published a lengthy report about Matrixx Initiatives, a Delaware corporation that produces Zicam cold medicines.

Matrixx had filed a defamation suit in Arizona over anonymous comments posted about it on financial bulletin boards. The company sought to take discovery in Maryland from Forensic Advisors and depose its principal Timothy Mulligan, arguing that material published in the Eyeshade report about the company was the same as that published in the bulletin boards. It argued that discovery from Eyeshade would assist it in identifying the "John Doe" defendants in the Arizona action and was otherwise relevant to its claims.

Mulligan sought the protection of Maryland's reporter's privilege, but the Circuit Court for Montgomery County in Maryland ordered that the deposition take place.

After noting that state courts had not considered whether a financial newsletter was covered by the state shield law, Md.Code Ann., Cts. & Jud. Proc. § 9-112, the court ruled that

The Eyeshade Report satisfied the definition of "news media," as that term is defined in the statute. The Maryland statute defines news media as: (1) Newspapers; (2) Magazines; (3) Journals; (4) Press associations; (5) News agencies; (6) Wire services; (7) Radio; (8) Television; and (9) Any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.

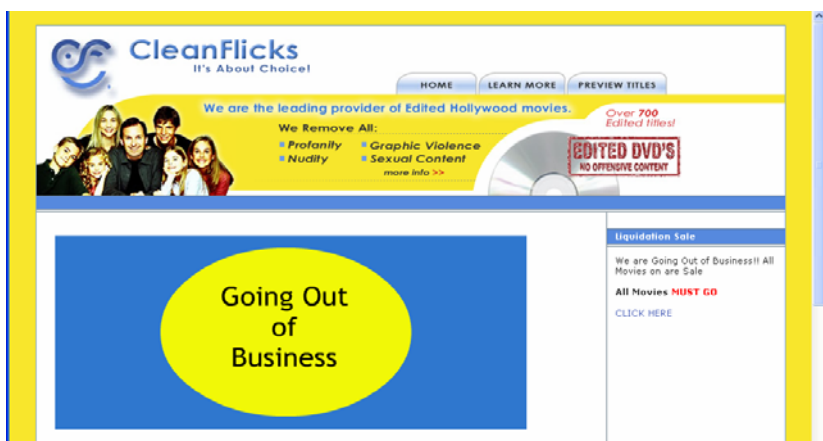
Finally the court ruled that Mulligan should sit for the deposition and could assert the privilege as necessary during the course of the deposition.



## Movie Studios Win Copyright Claim Over Sanitized “Family-Content” Movies

By Christopher P. Beall

The long-running litigation between the motion picture industry and the community of businesses that make and distribute edited, so-called “family content” copies of movies neared its end with a decision last month holding that such editing and distribution violates the Copyright Act and that the companies engaged in this industry should halt such operations because



“their business is illegitimate.” *Clean Flicks of Colorado v. Soderbergh*, 433 F.Supp.2d 1236 (D. Colo. July 6, 2006).

In a July 6 ruling, Judge Richard P. Matsch granted summary judgment in favor of eight motion picture studios that had argued that the unauthorized creation and distribution of fixed copies – in the form of new DVDs or VHS cassettes – of edited versions of hundreds of popular movies, from *Saving Private Ryan* to *Ghostbusters*, constituted an infringement of the studios’ right to control the content of the movies.

Judge Matsch ordered the businesses involved in such editing and distribution to halt their activities and to deliver over to the studios for destruction all copies of the edited movies. Judge Matsch said his injunctive remedy was warranted in light of the studios’ argument that they were suffering “irreparable injury to the creative artistic expression in the copyrighted movies” through the distribution of unauthorized edits.

### Background

The case was launched nearly four years ago when the “family content” editing industry began to expand out of its cradle in Utah and Arizona and move into markets in the Midwest and South. The industry got its

start in the late 1990s by taking VHS videocassettes and mechanically cutting and splicing the magnetic tape of movies to remove sexual content that some viewers found offensive.

By 2002, the industry had become far more sophisticated in its content manipulation and was relying increasingly on digital editing techniques such as replacement of portions of sound track with ambient noise, blending audio and visual content to provide transitions between edited scenes, fogging,

pixilation, or using a black bar to cover specific parts of a picture frame.

Two distinct groups of editing companies were involved in the “family content” industry. The original businesses had grown up around mom-and-pop video rental shops that worked on the original form of mechanical cut-and-splice techniques, although by 2002 such businesses had expanded into digitally edited DVDs as well.

These businesses had grown into multi-state chains of video outlets under names such as “Clean Cut Cinemas,” “Clean Flicks,” “Family Flix,”

“MyCleanFlicks,” and “Play It Clean Video.” Although these businesses were also using digital editing techniques by 2002, during the litigation they were referred to as the “mechanical editing” parties.

The other group of companies in the litigation had pursued an entirely different business model, developing software and DVD players that played existing DVDs in a manner that

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## Movie Studios Win Copyright Claim Over Sanitized “Family-Content” Movies

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skipped or silenced objectionable content in the movies but that did not create an actual fixed version of the movie. These businesses, which included ClearPlay, Family Shield Technologies, and Trilogy Studios, were referred to as the “player control” editing parties during the litigation because the DVD “players” that they sold or modified controlled the viewing experience, and they were not involved in distributing an actual fixed version of an edited DVD.

(The use of this terminology glossed over the fact that the principal mechanism by which the “player control” parties created an edited viewing experience for the home viewer was by loading into their special DVD players a fixed script of player control instructions so that the machine would play back the video in a set manner. Thus, the “player control” parties actually did create fixed works that would play back the movie in precisely the same way time after time. Only well into the litigation did these “player control” parties begin to offer consumer software tools that allowed the individual consumers to create individualized “player control” scripts that gave the consumer the ability to create his or her own unique set of edits independent of any editing choices by the companies distributing this software.)

The lawsuit began in August 2002, in a fluke that complicated the procedural posture of all the parties. At that time, the Directors Guild of America had been working on confidential plans to bring suit against a number of the editing companies in Los Angeles based on claims under the Lanham Act that the edited versions of the movies violated the moral rights of the Guild’s member directors. Because the movie directors do not own the copyrights in their films, the directors were limited to moral rights claims under the Lanham Act, based on the theory of an author’s right to control the integrity of his work in *Gilliam v. ABC*, 582 F.2d 14 (2d Cir. 1976).

Although the directors were the impetus for this litigation, their moral rights claims were soon superseded by the movie studios’ copyright claims, primarily because of the U.S. Supreme Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), which cast doubt on the viability of a Lanham Act moral rights claim that stems solely from the authorship of a copyrighted work.

In an inadvertent breach of confidentiality, a litigation planning memo was accidentally posted to a non-secure portion

of the Directors Guild website, thereby making the Directors Guild’s plans publicly available. Although this breach was quickly rectified, the “family content” industry was able to get a copy of the memo, and it provided a jurisdictional hook for the “family content” industry to beat the Directors Guild in a race to a courthouse by filing a declaratory judgment action.

Thus, on August 29, 2002, Robert Huntsman, the holder of two patent applications related to a process of editing objectionable movie content, and his company Clean Flicks of Colorado, LLC, filed a declaratory judgment action in Colorado against a group of movie directors, beginning with Steven Soderbergh. Other director defendants included Steven Spielberg, Robert Redford, and Robert Altman.

This declaratory judgment action was filed explicitly to avoid jurisdiction in Los Angeles. Once the battle was joined in Denver, the directors moved to have eight motion picture studios joined as necessary defendants because the studios were the owners of the copyrights in the directors’ films. Once in the case, the motion picture studios brought counter-claims against more than a dozen other “family content” editing businesses.

### *Family Movie Act*

Following the launch of the suit, a constant back drop to this litigation throughout the discovery phase was the intense lobbying that the “family content” industries and their supporters in the religious community brought to bear on Congress, and in particular on Utah Senator Orrin Hatch. Legislation was proposed in 2003 to protect the “family content” industry, but the bill did not emerge from committee during that legislative session. Following the 2004 election, revised legislation was reintroduced in Congress, and the ultimate legislative compromise resulted in the Family Movie Act of 2005, Pub. L. No. 109-9, 119 Stat. 218, amending 17 U.S.C. § 110.

This legislation provided an exemption from claims of copyright infringement for a person who provides the equipment or software that allows a member of a private household to edit – or in the statutory language, “mak[e] imperceptible” – portions of a motion picture so long as no fixed copy of the altered version of the motion picture is created. See 17 U.S.C. § 110(11). In approving this legislation, Congress explicitly considered and rejected proposals that also would have immunized persons such as the “mechanical editing” parties who

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## Movie Studios Win Copyright Claim Over Sanitized “Family-Content” Movies

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created fixed copies of their edited versions of the movies. See H.R. Rep. No. 109-22(I) at 6-7 (2005), reprinted in 2005 U.S.C.C.A.N. 220, 225.

The result of this legislation was to moot the movie studios’ claims against the “player control” parties, who were dismissed from the case in August 2005. See *Huntsman v. Soderbergh*, Case No. 02-cv-1662, 2005 WL 1993421 (D. Colo. Aug. 17, 2005). In his order dismissing the claims against the “player control” parties, Judge Matsch also rejected their claims for attorney’s fees against the motion picture studios, which had been based on a theory that the “player control” parties were a “catalyst” for the legislation that eventually mooted the studios’ copyright claims. Judge Matsch held that to accept such an argument “would disregard the fundamental separation of powers in the Constitution. Congress does not adjudicate cases or controversies and courts do not enact legislation.”

### Copyright Ruling

Following the dismissal of the “player control” parties, the studios brought a motion for summary judgment against the “mechanical editing” parties, seeking a declaration that those parties’ practices constituted a violation of the copyright owners’ exclusive rights to reproduce, distribute and make derivative works of their movies. In a tactical decision that met with approval from the court, the studios chose not to seek any monetary damages, either in the form of a disgorgement of the “mechanical editing” parties’ own profits or in statutory damages.

In granting the summary judgment motion, Judge Matsch concluded that the practices of the “mechanical editing” parties, both the old methods of cut-and-splice editing and their current digital editing techniques, violated the reproduction and distribution rights of the movie studios.

However, he ruled there was no violation of the right to create derivative works because the edited versions of the movies were not “transformative.” He distinguished the edited versions of the studios’ movies from other more transformative works, such as a coffee table book of Grateful Dead concert posters and tickets. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 498 F.3d 605 (2d Cir. 2006).

Judge Matsch held that in order to constitute a transformative use of the underlying work, and thereby constitute a derivative work, the new work must have originality. The Judge concluded that the defendants added nothing new to these movies; “They delete scenes and dialogue from them.”

### No Fair Use Defense

Having found infringement of the reproduction and distribution rights, the court moved on to reject the “mechanical editing” parties’ fair use defense, which had been their principal line of reasoning both in the litigation and in their comments to the news media.

The “mechanical editing” parties argued that their edits were fair because they constituted political and social commentary on the movies themselves, offering allegedly more socially acceptable versions of the films to viewers who would never otherwise choose to purchase or view the movies because of the alleged risks to their own sensibilities and those of their children.

The “mechanical editing” parties contended that there was no adverse market effect on the movie studios because each of them claimed to require a one-to-one correlation between the number of edited copies of a film that they produced and the number of original copies of the DVDs or VHS cassettes that they purchased on the open market. The “mechanical editing” parties argued that their activities actually increased the market for the studios’ films because their policies of one-to-one purchases of original copies for each edited copy meant that the studios were seeing sales that allegedly would never have occurred if the “family content” customers had no option for obtaining an edited version of a movie. The “mechanical editing” parties also loaded their summary judgment briefing with copies of correspondence and other testimonials from customers expressing their appreciation for the opportunity to view movies in a family setting without concern for offensive content.

Judge Matsch gave short shrift to these arguments. He concluded that he “is not free to determine the social value of copyrighted works. What is protected are the creator’s rights to protect its creation in the form in which it was created.” The court

**Both the old methods of cut-and-splice editing and their current digital editing techniques, violated the reproduction and distribution rights of the movie studios.**

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## Movie Studios Win Copyright Claim Over Sanitized “Family-Content” Movies

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also explained that the fair use arguments “ignore[] the intrinsic value of the right to control the content of the copyrighted work which is the essence of the law of copyright. Whether these films should be edited in a manner that would make them acceptable to more of the public playing them on DVD in a home environment is more than merely a matter of marketing; it is a question of what audience the copyright owner wants to reach.”

Relying on Judge Posner’s aphorism that the fair use defense does not permit “a person who dislikes Michelangelo’s statue of David ... to take a sledgehammer to it,” *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 630 (7th Cir. 2003), Judge Matsch pointed out that the fair use defense also would not permit “put [ting] a fig leaf on it to make it more acceptable for viewing by parents with young children.”

Finally, the court also rejected the “mechanical editing” parties’ assertion of the “first sale” doctrine under 17 U.S.C. § 109. The court noted that the movie studios had explicitly disclaimed any claim for copyright infringement in any mechanical manipulation or playing of the original copy of the films that the “mechanical editing” parties purchased. Rather, the studios’ claims were directed to the subsequent copying and distribution of edited copies of the films. The court held that this subsequent copying and distribution was not protected by the “first sale” doctrine.

Judge Matsch also acknowledged, but did not decide, the studios’ argument that the processes used by the “mechanical editing” parties to create their digitally edited DVDs copies also constituted violations of the anti-circumvention provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 1201(a).

### Aftermath

In the wake of Judge Matsch’ ruling, the remaining “mechanical editing” parties have entered into settlement discussions with the studios, and the deadline for the studios to file their attorney’s fees motion has been suspended during the pendency of those settlement negotiations. None of

the “mechanical editing” parties have publicly indicated that they intend to appeal Judge Matsch’s ruling or injunction.

This ruling is likely to be seen as confirming a fundamental distinction in copyright law between the in-home, private use that an individual purchaser or viewer may make of a copyrighted work – be that a movie or a song or a website – under the rubrics of the fair use and first sale doctrines, and the distribution of multiple unauthorized revised versions of such copyrighted works outside of the home.

The decision confirms that copyright infringement exists in the latter situation regardless of any asserted moral value in the revised versions of the works. In addition, despite the recent diminution of the moral rights theory, Judge Matsch’s opinion reminds copyright holders that they still have significant abilities to control the integrity of their works under copyright law.

Judge Matsch’s opinion points out that one of the central purposes of the copyright owner’s exclusive right to control reproduction and distribution of a work is to ensure that only those versions of the work that the copyright

owner intends and approves are actually distributed to markets the copyright owner wishes to reach, and that if there are other markets that the copyright owner wishes to ignore, such a decision does not provide an excuse for third parties to distribute unauthorized copies to the excluded market.

It is always the copyright owner, not someone else, who controls “what audience the copyright owner wants to reach.”

It is always the copyright owner, not someone else, who controls “what audience the copyright owner wants to reach.”

*Christopher P. Beall, Thomas B. Kelley and Natalie Hanlon-Leh, Faegre & Benson, Denver, and Jonathan Zavin and Jacques M. Rimokh, Loeb & Loeb, New York City, represented the eight motion picture studio defendants. The original plaintiffs Robert Huntsman and Clean Flicks of Colorado, LLC were represented by David N. Schachter and Scott J. Mikulecky of Sherman & Howard, Colorado Springs. The various “player control” editing companies were separately represented by Andrew P. Bridges of Winston & Strawn, San Francisco; Darwin “D.J.” Poyfair, Bennett L. Cohen and Jennifer A. Schaffner of Shughart, Thomson & Kilroy, Denver; Thomas P. Howard, of Garlin Driscoll Howard, Louisville, Colorado; and, Eric M. Bono, Denver.*

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***If there are other markets that the copyright owner wishes to ignore, such a decision does not provide an excuse for third parties to distribute unauthorized copies.***

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## \$11.9 Million Verdict Against Bar Review Course for Copyright Infringement

This past August a Pennsylvania federal district court found one of America's leading bar preparation companies liable for copyright infringement for copying questions from the national multistate bar exam, awarding \$11.9 million in damages. *Nat'l Conference of Bar Exam'rs v. Multistate Legal Studies, Inc.*, No. 04-03282, 2006 WL 2460903 (E.D. Pa. Aug. 22, 2006) (Fullam, J).

### Background

Plaintiff the National Conference of Bar Examiners ("NCBE") develops the testing materials used by more than 50 jurisdictions to evaluate bar applicants. The most widely used of these materials is the Multistate Bar Examination ("MBE"), a 200-question multiple-choice test administered twice annually.

Defendants Robert Feinberg and Donna Zimmerman are the founders of the popular bar review company "PMBR" (Preliminary Multistate Bar Review). PMBR offers a nationally available three-day supplementary course designed to help law students pass the MBE portion of their state bar exam. In their advertisements, defendants touted that their review course offered "nearly identical" practice questions as the MBE. And defendants and their employees regularly sat for nearly every administration of the MBE.

In 1993, Feinberg sat for the MBE in Alaska and was caught by a proctor leaving the exam with scratch paper with notes about questions. After that event, the NCBE reviewed PMBR's test preparation materials and concluded that more than 100 questions had likely been copied.

### Direct Evidence of Copying

Ruling after a non-jury trial, the court noted that this was "the rare case in which there is direct evidence that

defendant copied plaintiff's work." Three forms of direct evidence existed in this case: 1) defendant Feinberg and his employees took copious notes related to MBE questions; 2) PMBR advertised that its questions are closely modeled after MBE questions; and 3) many PMBR questions reproduce MBE questions nearly verbatim.

As to the substantial similarity between the questions, the court found that evidence of copying practically leapt from the page. The 113 questions at issue "duplicated pas-

sages nearly verbatim or reproduced labyrinthine fact patterns turn by turn."

The court summarily rejected defendants' argument that the MBE questions were not subject to copyright protection.

"Teaching the legal principles tested on the MBE is permissible. Doing so using the same fact patterns, prompts, and answer-choice combinations found in MBE questions is not."

### Damages

The multi-million dollar damage award was based on defendants' gross revenues over a three-year period at issue in the litigation. During this time, defendants' took in \$35.7 million in gross revenue for their three-day course. Because infringing questions made up nearly 40% of the review course, the court concluded that awarding one-third of defendants' revenues (plus attorney's fees) was appropriate.

Plaintiffs were represented by Barbara W. Mather and Christopher J. Huber, Pepper Hamilton LLP, Philadelphia, PA; and Caroline M. Mew and Robert A. Burgoyne, Fulbright & Jaworski LLP, Washington, DC. Defendants were represented by Anthony L. Press, Morrison & Foerster LLP, Los Angeles, CA, Cori A. Szczucki, Caesar Rivise Bernstein Cohen & Pokotilow Ltd., Philadelphia, PA.



## Verdict for Newspaper in Copyright Trial Over Use of Photographs in Book Reviews

By James Chadwick

On August 7, 2006, a federal jury sitting in the Northern District of California gave a verdict in favor of the *San Jose Mercury News* in a case regarding the fair use of photographs in newspapers. The case addressed a long-standing practice of the *Mercury News* – and many other major newspapers – of using photographs from books in reviews of those books, without seeking permission from the publisher or photographer. *Christopher R. Harris v. San Jose Mercury News*, Case No. C 04-05262 CRB.

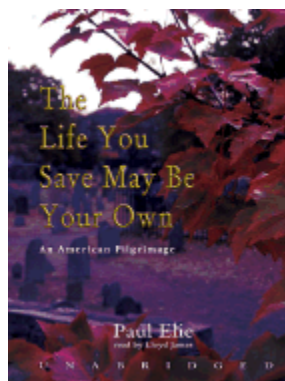
The jury deliberated for only 37 minutes before concluding that copying photographs from books for use in reviews was fair use.

### Background

The case arose from the use of a photograph of Walker Percy taken by Christopher R. Harris, a photographer and photojournalism instructor, while on assignment for *Esquire* magazine in 1982. The photograph had previously been published, but in April, 2003, it was reproduced in a book by Paul Elie entitled *The Life You Save May Be Your Own: An American Pilgrimage*. The book was about four prominent American Catholic authors, including Walker Percy. Harris's agreement with Elie specified that the photograph could not be used for promotional purposes.

The book was sent to the *Mercury News*, and the *Mercury News* decided to review it. Plaintiff's photo was one of about 40 photographs in the book. To illustrate the review, the *Mercury News* reproduced the cover, a jacket photo of Elie, and four photographs from the interior of the book, including Harris's photograph of Walker Percy.

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



Harris sued, asserting copyright infringement, violation of section 1202 of the Digital Millennium Copyright Act (removal of “copyright management information”), and state unfair competition claims. A motion for judgment resulted in dismissal of the state law unfair competition claims. Federal District Judge Charles R. Breyer then set a hearing on a motion for summary judgment focused on the defense of fair use, and ordered the parties to take discovery limited to the issue of fair use. After discovery was completed on the fair use issue, the *Mercury News* moved for summary judgment.

### Summary Judgment Denied

The motion for summary judgment was denied. See *MLRC MediaLawLetter* Jan. 2006 at 35. In an order denying the *Mercury News*' request that the case be certified for interlocutory appeal, Judge Breyer subsequently explained his reasons for denying the motion for summary judgment:

“The apparent disputes in the record regarding the majority of the traditional fair use factors ... support the Court's decision .... For example, with regard to the fourth factor of the photograph's potential market value, which is ‘undoubtedly the most important element of fair use,’ a proper analysis requires the decision-maker to judge the credibility of experts debating the nuances of the fine art collector's market. Although the court is skeptical of plaintiff's argument regarding the use's putative interference with the photograph's marketability or effect on future sales, it is not the court's role to judge the credibility of competing experts.”

After the motion for summary judgment was denied, plaintiff filed an amended complaint that asserted class action claims. On the *Mercury News*' motion, the court dismissed the class action claims. The court held that plaintiff lacked standing to seek injunctive relief on his own behalf, because there was no threat that his photograph of Walker Percy, or any other photograph he had taken, would be used again by the *Mercury News* without his permission. “Because plaintiff fails to establish standing, he may not seek relief on behalf of himself or any other member of the class.”

(Continued on page 30)

## Verdict for Newspaper in Copyright Trial Over Use of Photographs in Book Reviews

(Continued from page 29)

### Copyright Trial

On March 31, 2006, the court set the trial for June 12, 2006. The trial was subsequently continued to July 31. Jury selection was held on July 26, and the trial began on July 31.

In the course of the trial, the court granted the *Mercury News*'s motion for judgment as a matter of law with respect to plaintiff's DMCA claim. In addition, the court ruled that two ancillary defenses asserted by the *Mercury News* – the invalidity of plaintiff's copyright registration, and an implied license to use plaintiff's photograph – were not supported by sufficient evidence to be submitted to the jury.

Plaintiff's counsel made some unusual decisions in putting on his case. After opening arguments, the first evidence plaintiff put on was the videotape of two depositions: Paul Elie, the author and also an editor at the publishing house that put out his book, and the publicist for the book. Plaintiff subsequently called all but one of the current or former *Mercury News* employees involved in the case, including the two former book editors of the *Mercury News*, Charles Matthews and Carol Muller.

Only after all of these witnesses had testified did plaintiff himself testify. Although he appeared relaxed, confident, and convivial on direct examination, on cross-examination Harris was evasive, arrogant, and combative. The cross-examination focused on the hypocrisy of plaintiff's position. Examining him regarding his own textbook on "Visual Journalism," counsel for the *Mercury News* brought out the following:

Q. Did you help write the introduction to the book?

A. In parts, yes.

Q. And you had a co-author, Mr. Lester, right?

A. Correct.

Q. Now, here where it talks in the introduction about "a new role for journalism, the visual journalist"?

A. Uh-huh.

Q. It says: "As words and pictures become further merged, the combined role of writer, photographer, infographics creator, researcher, and graphic designer, demands a new job description; the visual journalist, the ease with which reporters, photographers, and graphic artists can work more closely together calls for a new definition and approach." Right?

A. Yes.

Q. And you would subscribe to that, right?

A. Sure.

Q. And then you go on, couple paragraphs later, says: "In this new technological age when it's easier, faster, to produce and distribute words and images than ever before in the history of communications, journalists cannot afford to know only how to report, write, and edit words, to know only how to find, take and crop a picture, or to know only how to create a layout for print and screen media." And here comes the part I want to ask you about. "Today's visual journalists understand that words and pictures form an equal partnership that can deliver the meaning of complex issues to readers and viewers." You subscribe to that, too; don't you?

A. Yes.

Q. So photography and text frequently go together to make meaning; isn't that right?

A. Make better meaning.

He was subsequently asked about his photograph, which contained an image of Walker Percy standing in front of a portrait of Mr. Percy painted by a friend, Lynn Hill:

Q. From your knowledge of visual journalism you know somebody—the person who painted this portrait—has a copyright, right?

A. Yes, you do.

Q. And Lynn Hill was the person who painted the portrait?

A. From what I understand.

Q. You didn't get permission from Lynn Hill to take a picture of that photograph and sell it; did you?

A. No, Mr. Percy did.

Q. How do you know that?

A. Because he told me.

Q. Did you see the writing that is necessary to pass a copyright?

A. No.

Q. You didn't bother to try to find out whether or not you were copying a copyrighted portrait; did you?

A. I'm not copying a copyrighted portrait.

Q. You're not copying it?

A. No.

(Continued on page 31)

### Verdict for Newspaper in Copyright Trial Over Use of Photographs in Book Reviews

(Continued from page 30)

- Q. That portrait is not in the photo?
- A. Sure it is. I'm not copying the portrait. I'm copying—I am photographing a scene that has that portrait involved in it.
- Q. You didn't think it was necessary to worry about it? Using and making money off of someone else's portrait?
- A. It was my understanding from Dr. Percy that it had been totally approved.
- Q. Did you get a model release from Mr. Percy?
- A. Don't need one.
- Q. Did you get one?
- A. No. Don't need one.
- Q. So you don't have anything in writing that says that Lynn Hill said to Mr. Percy, "you've got the copyright," and you don't have anything for Mr. Percy that is in writing that says, "you can go ahead and take a photograph of a copyrighted portrait," do you?
- A. No.
- Q. You thought it was fair use; didn't you?
- A. No.
- Q. You just didn't think it through?
- A. No. It was shot for editorial purposes.
- Q. Editorial purposes?
- A. Uh-huh.
- Q. Commentary with Mr. Percy?
- A. At his request.
- Q. Right. And Mr. Elie said the reason he wanted it, because Mr. Percy talked about the fact that this was an important portrait in his life, right?
- A. Uh-huh.
- Q. Pardon?
- A. Uh-huh. Yes.
- Q. So you were making a commentary about Mr. Percy and the portrait and its meaning to him when you took the photograph?
- A. A visual commentary.

Plaintiff's expert, mentioned in the court's order denying the *Mercury News* motion for summary judgment, testified that the appearance of plaintiff's photograph in the *Mercury News* seriously damaged his ability to license the photo-

graph in the future, or to sell "fine art" prints of the photograph. However, her assurance did not persist on cross-examination:

- Q. Thank you. Ms. Kinne, you're not aware of any other case in which the prior use of a photograph in the book review has harmed the market for licenses to use that photograph, are you?
- A. No such case.
- Q. You have no personal experience of the reproduction of a photograph in a book review causing lost sales of licenses for a photograph, do you?
- A. I do not, in a book review.
- Q. In fact, you're not aware of a single opportunity for licensing the Percy photograph that plaintiff has lost as a result of Mercury News book review, correct?
- A. I'm not aware of any.
- Q. And you're not aware of any instance in which a newspaper's use of a photograph or reproduction of a photograph has harmed the market for prints of the photograph, are you?
- A. Directly, no.
- Q. You don't believe publicity for Mr. Harris's photographs is harmful, do you?
- A. I don't believe general publicity is.
- Q. And you don't believe that's true with respect to Mr. Harris's photographic works either, do you?
- A. I'm sorry, would you repeat that?
- Q. Let me ask the question again. You don't believe that publicity for Mr. Harris's photographs is harmful, correct?
- A. General publicity, no.

The cross-examination of plaintiff's expert tied in the concept of editorial use brought out on plaintiff's cross-examination.

- Q. Now, you testified that you had an understanding of what fair use is, correct?
- A. Correct.
- Q. News reporting is also fair use, isn't it?
- A. It's considered one of the fair use situations.
- Q. You also have an understanding of the difference between a commercial use of a photograph and an editorial use of a photograph, correct?

(Continued on page 32)

## Verdict for Newspaper in Copyright Trial Over Use of Photographs in Book Reviews

(Continued from page 31)

A. Yes, that is correct.

Q. And a newspaper book review that includes a photograph from the book being reviewed is an editorial use, correct?

A. Correct.

The closing argument focused on the importance of fair use both generally, and in the everyday lives of the jurors. Counsel used examples to bring this home to the jury, such as a family sending a tape to a grandmother in a nursing home on her 90th birthday, with the whole family singing “Happy Birthday” (performing and copying a copyrighted work), or using Tivo to record a favorite television show (copying and displaying a copyrighted work).

The theme of fair use was pointedly underscored by revisiting plaintiff’s testimony in closing argument:

One of the best evidences that he doesn’t believe much of what he says is the fact that he himself made use of the concept of fair use, in this very photograph.

This is why I read these things and asked him these questions. That is a work of art. [Points to the portrait by Lynn Hill in the background of Plaintiff’s photograph.] It’s in the background. It was created by someone. That person has the exclusive right to control copying and reproduction. Mr. Harris has reproduced that portrait. That is, if there’s no fair use, that is copyright infringement. Using that portrait without fair use would be copyright infringement.

When I asked him why he did it, he said he didn’t have to have permission. He didn’t ask the portrait painter for permission, he said he didn’t need it, and I asked him why. You may remember why: he said, because it was for editorial purposes. What does that mean? What was he meaning? Without being able to admit it, to say it was, it was fair use. That’s why. Because he transformed it, right? But the fact is that if, in fact, fair use didn’t exist, that’s what the photograph would look like. [Displays a reproduction of the photograph in which the portrait disappears while Percy and the other elements remain.]

The whole point here is that in order to be able to take photographs like that, you’ve got to depend upon fair use.

After 18 months of highly contentious discovery and pre-trial proceedings and five days of trial, the case submitted to the jury was reduced to a single, fundamental issue: Was the *Mercury News*’ reproduction of Plaintiff’s photograph in its review of the book in which that photograph appeared fair use? (The Plaintiff had elected to seek statutory damages, so if the jury had determined that the reproduction was not fair use, it would also have had to determine the amount of statutory damages.)

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***The case submitted to the jury was reduced to a single, fundamental issue: Was the Mercury News’ reproduction of Plaintiff’s photograph fair use?***

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The court made two additional decisions that affected the presentation of the issue to the jury. First, finding that plaintiff had established a valid copyright registration and that copying was undisputed, the court determined that because the *Mercury News* had the burden of proof on the defense of fair use it would be allowed to present its closing argument first, and to have a brief rebuttal after plaintiff’s closing argument.

In other words, it reversed the usual order of final argument.

Second, the court bifurcated the jury’s deliberations. It decided to initially instruct the jury only on the issue of fair use, and to initially provide a verdict form asking only a single question: whether the *Mercury News*’ reproduction was fair use. Only if the jury answered negatively would the jury be instructed on statutory damages.

The jury retired at 4:05 PM, after being requested by the Court to select a foreperson and let the court know whether it intended to deliberate that afternoon or return the next day. A few minutes later a note was sent out, indicating that the jury intended to deliberate. At 4:42 PM, the judge received a note stating that the jury had reached a unanimous verdict. The jury was called and the verdict was read. The jury found that the *Mercury News*’ reproduction constituted fair use.

A story in Photo District News dated August 8, 2006, reported that Plaintiff has not determined whether he will appeal.

*James Chadwick and Gary Bostwick of Sheppard Mullin Richter & Hampton LLP represented the Mercury News. Robert A. Spanner, of Trial & Technology Law Group, in Silicon Valley, represented plaintiff.*



## AP Wins Latest FOIA Round Over Guantanamo Detainees

By David Tomlin

The Associated Press won another major victory in its Freedom of Information Act confrontation with the Department of Defense over identification of detainees at the U.S. military prison at Guantanamo Bay, Cuba. *Associated Press v. U.S. Dep't of Defense*, No. 05 Civ. 5468, 2006 WL 2707395, 34 Media L. Rep. 2251 (S.D.N.Y. Sept. 20, 2006).

In the latest case, as in an earlier one, U.S. District Judge Jed S. Rakoff of the Southern District of New York firmly rejected DOD's claims that FOIA privacy exemptions allowed DOD to black out detainee names in documents demanded by AP. "As before, the Court finds that AP is entitled to nearly all the information it seeks," Judge Rakoff wrote in his September 20 opinion.

### *SDNY Ruling*

The September ruling concerned detainee names and other identifying information that had been redacted from four distinct groups of documents first requested by AP as part of a FOIA request submitted in November 2004.

The first of the four groups recorded disciplinary actions taken against guards or other DOD personnel for detainee abuse. Judge Rakoff found that detainees had "minimal" privacy interest in such incidents.

On the other hand, the judge wrote, there is "considerable public interest in learning more about DOD's treatment of identifiable detainees, whether they have been abused, and whether such abuse has been properly investigated."

"By redacting the identities of the abused detainees," Judge Rakoff wrote, "DOD has seriously interfered with the ability of the public to engage in the independent fact-finding necessary to properly evaluate the allegations of abuse and DOD's response to it."

Documents in the second group concerned detainee complaints that they had been abused by other detainees. Again, DOD had withheld names on privacy grounds, but Judge Rakoff said the public interest in knowing the con-

text of the disputes and how DOD responded to the complaints trumped any privacy interest.

"How could a[] FOIA requester meaningfully evaluate the DOD response to a case of detainee-on-detainee abuse if he did not know the nationalities or religions of the detainees involved," the judge wrote.

Judge Rakoff also rejected DOD arguments in the third group of documents, which concerned decisions whether or not to release or transfer detainees.

DOD argued that those were exempt under FOIA as "deliberative process" or "pre-decisional" documents, since no actual release or transfer is made until assurances are received that the detainee will not be mistreated in his home country.

But Judge Rakoff said the decision to release upon such assurances is still a final decision, and the documents therefore are not exempt from FOIA disclosure. He also dismissed DOD's "conclusory speculation" that the privacy exemption should apply to this group because released or transferred detainees or their families might be harmed.

The fourth group of DOD-redacted documents included letters or other correspondence from detainee family members, delivered by the Red Cross and later offered by the detainees as evidence in hearings where DOD was considering whether to continue their detentions.

DOD argued that such documents were exempt from FOIA release because a separate federal statute bars disclosure of "sensitive information" of a "foreign government or international organization."

The Red Cross had asked that DOD not release the letters. But Judge Rakoff wrote that the statute applied only to documents that pertained to the Red Cross itself. He also noted that the detainees, not the Red Cross, had given the letters to DOD.

DOD also argued that the letters could be withheld under FOIA's privacy exemption. Judge Rakoff said this would only be true where DOD could offer specific evidence that the letter writer's privacy interest outweighed the public interest in disclosure.

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***There is "considerable public interest in learning more about DOD's treatment of identifiable detainees, whether they have been abused, and whether such abuse has been properly investigated."***

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*(Continued on page 34)*



**AP Wins Latest FOIA Round Over Guantanamo Detainees**

*(Continued from page 33)*

The judge concluded, “with some hesitation,” that DOD had made such a showing in the case of one letter from a detainee’s wife. That was the only document from any of the four groups to remain redacted under Judge Rakoff’s order.

The DOD had 60 days in which to consider whether it would appeal.

An earlier AP Guantanamo case involved transcripts of detainee hearings on which DOD had blacked out detainee

names and other identifying information before releasing the transcripts in response to an AP FOIA request, also filed in the fall of 2004. Judge Rakoff ordered the names provided in January 2006, and the unredacted transcripts were released last March.

*David Tomlin is Associate General Counsel of The Associated Press. David Schulz of Levine, Sullivan, Koch & Schulz represented AP throughout its Guantanamo FOIA effort.*

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## D.C. Circuit Finds FBI's FOIA Response Inadequate

### *FBI Could Have Used Google*

The D.C. Circuit reinstated a FOIA denial lawsuit last month, holding that the FBI had not made a reasonable attempt to determine whether two unnamed speakers depicted in the requested material were deceased. *Davis v. Dep't of Justice*, No. 04-5406, 2006 WL 2411393 (D.C. Cir. Aug. 22, 2006) (Randolph and Garland, C.J., Williams, Sr. C.J.).

The court found that the inadequate attempt rendered it unable to determine whether the agency had reasonably refused to grant the FOIA request based on the privacy interests of the unnamed individuals. The D.C. Circuit noted that the FBI could have taken the minimal step of "Googling" the names of the speakers.

#### **Background**

Plaintiff, author John Davis, requested four 25 year old audiotapes made in Louisiana during an FBI investigation. The tapes captured conversations between the investigation's subject, "a prominent individual," and an FBI informant. The FBI would not release the tapes, citing Freedom of Information Act privacy exemption 5 U.S.C. § 552(b)(7)(C), which enables the agency to refuse to release law enforcement records that "could reasonably be expected to constitute an 'unwarranted' invasion of privacy."

The issue, the Court stated, was "whether the FBI has undertaken reasonable steps to determine whether the speakers are now dead, in which event the privacy inter-

ests weighing against release would be diminished."

The FBI took three steps: 1) relying upon its "institutional knowledge of the death of certain individuals" as well as the book *Who Was Who*, 2) deducting from birth dates whether a person would be more than 100 years old, and therefore, presumably dead, and 3) checking the Social Security Death Index.

However, the FBI would only instigate these steps if the "responsive records" – here, the audiotapes – contained the identifying information necessary for the search. In this case, the tape recordings did not reveal the birth dates or social security numbers of the speakers.

***Even a quick Google search could have turned up an obituary.***

#### **Decision**

The Court held that not only were the FBI's three cited steps "plainly fated to reach a dead end (in a manner of speaking). . . " but there were "reasonable alternatives that the government failed to consider . . ." In fact, even a quick Google search could have turned up an obituary.

The Court remanded, directing the FBI to "evaluate alternative methods for determining whether the speakers ... are dead" and for the district court to judge whether the new search methods are reasonable.

Plaintiff was represented by James H. Lesar. The government was represented by U.S. Attorneys Heather Graham-Oliver, Kenneth L. Wainstein, Michael J. Ryan and Craig Lawrence.

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## California Passes Telephone Pretexting Bills in Wake of Hewlett-Packard Scandal

### *Federal Legislation Remains on Hold*

On September 29, 2006, following the revelations of Hewlett-Packard's spying on members of the press to discover the source of boardroom leaks, California Governor Arnold Schwarzenegger signed into law a statute designed to criminalize "pretexting," – the use of misrepresentation or deceit to obtain telephone records. The statute is effective January 1, 2007.

The statute is intended "to ensure that telephone companies maintain telephone calling pattern records or lists in the strictest confidence, and protect the privacy of their subscribers with all due care."

New Penal Code Section 638 provides in relevant part that:

Any person who purchases, sells, offers to purchase or sell, or conspires to purchase or sell any telephone calling pattern record or list, without the written consent of the subscriber, *or* any person who procures or obtains through fraud or deceit, or attempts to procure or obtain through fraud or deceit any telephone calling pattern record or list shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,5000), *or* by imprisonment in a county jail not exceeding one year, *or* by both a fine and imprisonment.

(emphasis added). The statute provides for a maximum fine of \$10,000 for a repeat offense. The new statute was added to California's pre-existing "Invasion of Privacy" laws, Cal. Penal Code §§ 630 – 637.9

A "telephone calling pattern record or list" is defined as "information retained by a telephone company that relates to the telephone number dialed by the subscriber" or someone permitted to use the subscriber's phone. Cal. Penal Code § 638 (c)(2). It also includes information about incoming calls, the length of any phone calls, and charges.

Section 638 (b) also provides that telephone calling information obtained in violation of the statute (and not otherwise authorized by law) is "inadmissible as evidence in any judicial, administrative, legislative, or other proceeding except when that information is offered as proof in an action or prosecution for a violation of this section...."

The statute also extends to employers to the extent "the employer or contracting entity knowingly allowed the employee or contractor to engage in conduct that violated subdivision (a)." Cal. Penal Code § 638(d),

As to law enforcement, the statute provides that it "shall not be construed to prevent a law enforcement or prosecutorial agency, or any officer, employee, or agent thereof from obtaining telephone records in connection with the performance of the official duties of the agency consistent with any other applicable state and federal law."

### *HP Indictment*

The California pretexting bill had been under consideration for almost a year and a half, but its ultimate passage coincided with the September events surrounding Hewlett-Packard. The company, in a much publicized scandal, acknowledged that as part of an internal leak investigation private investigators for the company obtained telephone records of Board Members and reporters.

On October 4, California's Attorney General filed a four count felony complaint against former HP CEO Patricia Dunn, in-house counsel Kevin Hunsaker and three outside investigators. They were charged with:

- Violation of Cal. Penal Code § 182(a)(1) ("Conspiracy to Commit Crime");
- Violation of Cal. Penal Code § 538.5 ("Fraudulent Use of Wire, Radio or Television Transmissions");
- Violation of Cal. Penal Code § 502(c)(2) ("Taking, Copying, and Using Computer Data"); and
- Violation of Cal. Penal Code § 530.5(a) ("Using Personal Identifying Information Without Authorization").

See [http://ag.ca.gov/newsalerts/cms06/06-087\\_0b.pdf](http://ag.ca.gov/newsalerts/cms06/06-087_0b.pdf)

### *Federal Bills*

Though Congress held hearings to investigate the Hewlett-Packard incident, no legislation was passed during this last session.

*(Continued on page 37)*

### California Passes Telephone Pretexting Bills in Wake of Hewlett-Packard Scandal

*(Continued from page 36)*

The Law Enforcement and Phone Privacy Protection Act of 2006, HR4709, was introduced by Representative Lamar Smith of Texas and passed the House and is awaiting Senate action.

The bill provides in relevant part that:

“whoever, in interstate or foreign commerce, knowingly and intentionally purchases or receives, or attempts to purchase or receive, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.”

#### *New York Statute*

Whether the Hewlett-Packard case will encourage other states to enact legislation similar to the new California law remains to be seen. In August 2006, New York amended its General Business Code to create a civil cause of action for pretexting.

The “Consumer Communication Records Privacy Act,” makes it a civil wrong for a person or business entity to

knowingly and intentionally procure, attempt to procure, solicit or conspire with another to procure, offer for sale, sell or fraudulently transfer or use or attempt to sell or fraudulently transfer or use, telephone record information from a telephone company, without written authorization from the customer to whom such telephone record information relates except as otherwise provided for by applicable law.

N.Y. Gen. Bus. Law § 399-dd(2) (2006).

Under the statute a court “may impose a civil penalty of one thousand dollars per violation.”  
N.Y. Gen. Bus. Law § 399-dd(3)(a).

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## The Trademark Dilution Revision Act of 2006

### *Clarification and Expansion of the Fair Use Exception*

By Mark E. Ackerman and Christopher Glancy

The Trademark Dilution Revision Act of 2006 (“TDRA” or the “Act”) was signed into law on October 6, 2006. The TDRA amends Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c), to clarify Congress’s intent in enacting the Federal Trademark Dilution Act of 1995 (“FTDA”), and to strike a balance between protecting proprietary rights of trademark owners and facilitating fair and free competition.

While the Act broadens the dilution cause of action in accordance with original legislative intent, consumers, small business advocates, ISP providers, and artists will find they have a stronger defense derived from explicitly enumerated exclusions and a broader fair use definition. Under the new language, defendants might also raise defenses not previously covered, such as fair commercial uses invoking the First Amendment.

#### *Cause of Action for Dilution*

The TDRA creates a cause of action for the owner of a famous mark against any person who uses a mark or trade name in commerce that is “likely to cause dilution” of the famous mark. This likelihood of dilution standard is the most significant aspect of the Act because it overrules the 2003 Supreme Court decision, *McClure v. Ketchum*, 537 U.S. 418 (2003), which interpreted the Lanham Act to require dilution and a showing of lost profits. Thus, under the Act, the owner of a famous mark need not wait until the damage is done before filing suit.

Furthermore, a greater number of owners will have a cause of action because the scope of protected famous marks is broader. To merit protection against dilution under the TDRA, a famous mark now may be either inherently distinctive or have distinctiveness. This amendment overrules Second Circuit precedent that excluded from federal dilution protection famous descriptive marks that have acquired distinctiveness or “secondary meaning” through extensive use, no matter how well-known the marks had become.

The Act also defines two types of dilution: “dilution by blurring” and “dilution by tarnishment.” This revision addresses dicta in *Moseley* that narrowly read the Lanham Act to bar only “dilution by blurring.” Under the Act, blurring occurs when an “association arising from the similarity of” the parties’ respective marks “impairs the distinctiveness of the famous mark”; tarnishment occurs when the similarity of the marks “harms the reputation of the famous mark.”

However, the benefit of this expanded language to a trademark owner is contingent on the mark being “widely recognized by the general consuming public of the United States.” The TDRA appears to lay to rest the so-called niche market theory of fame, approved by some Circuits

Courts of Appeal and rejected by others. The niche market theory allowed a trademark owner to assert a dilution claim if its mark was famous in a particular consumer market or localized area, even if the market or area was small and not widely known to the general public.

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***The broader protections afforded trademark owners are subject to fair use exceptions, which the TDRA redefines and expands.***

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#### *Fair Use Exception*

The broader protections afforded trademark owners are subject to fair use exceptions, which the TDRA redefines and expands. The Act broadly excludes from liability “any fair use, including a *nominative or descriptive* fair use, or *facilitation of such fair use*, of a famous mark by another person other than as a designation of source for the person’s own goods or services,” including use in comparative advertising or in “*identifying and parodying, criticizing, or commenting upon* the famous mark owner or the goods or services of the famous mark owner.” The Act also retains the exclusions for news reporting and commentary, and for noncommercial use of a mark.

The exclusion of “facilitation of fair use” is meant to address Internet service provider (ISP) concerns about secondary liability for the actions of ISP users. The exemption for parody, criticism, and commentary responds to free speech concerns and bolsters the exemption for noncommercial uses.

*(Continued on page 39)*



## The Trademark Dilution Revision Act of 2006

*(Continued from page 38)*

The exclusion for “noncommercial uses,” which existed in the FTDA, was omitted from earlier drafts of the TDRA, but was later reinserted in response to protests from consumer, artist, and small business advocates claiming the need to protect noncommercial speech that does not necessarily parody, criticize or comment on the trademark owner.

One group of advocates, including the American Library Association, Electronic Frontier Foundation, National Video Resources, Professional Photographers of America, Public Citizen, Public Knowledge, and the Society of Children’s Book Writers and Illustrators, cited as examples:

“Walter Mondale’s use of ‘where’s the beef’ to criticize Gary Hart is an example of the common usage that would be exposed to litigation. When Don McLean sang about driving his ‘Chevy’ to the levee and finding it dry, or when Muley told Tom Joad that his family had been ‘tractored out by the cats,’ they were not commenting on General Motors and Caterpillar.”

They argued that “artists commonly incorporate well-known brands into their works because it is often difficult to portray everyday life without referring to well-known goods and services.”

It is as yet unclear how the legislative history of “noncommercial uses” – its initial inclusion, subsequent removal, and final reinsertion – will impact analysis of “noncommercial use” defenses, although its apparent staying power may strengthen its viability as a fair use defense.

The TDRA’s redefinition of fair use exclusions as “any fair use” (and facilitation thereof) may be read to broaden fair use exclusions beyond those enumerated in the Act. Defendants may begin asserting new fair use defenses to dilution claims not previously covered by the statute, potentially including fair commercial use defenses invoking the First Amendment.

For instance, Marvin J. Johnson, Legislative Counsel of the American Civil Liberties Union, noted that, “as even commercial speech is protected under the First Amendment, it makes little sense to deprive it of protection under

the FTDA simply because it is commercial,” citing examples of speech that may have only “incidental commercial components”: “Activist groups routinely seek donations on a web site to support their work, sell T-shirts, stickers and books, and possibly even allow advertising on the web site.”

## Conclusion

The TDRA attempts to strike a balance between the protection of trademarks against both dilution by blurring and dilution by tarnishment, and the protection of First Amendment rights to use such marks in certain circumstances. The Act lightens the burden on trademark owners to demonstrate the fame of their marks, and the dilution of same by others, and expressly sets forth both a dilution by tarnishment claim and protections for marks with acquired distinctiveness, clarifying Congressional intent with respect to trademark dilution and resolving conflicting dilution case law.

At the same time, these protections are appropriately limited through the elimination of the niche market theory of fame and the expansion of fair use exclusions. How the courts will apply its provisions remains to be seen. Possible battlegrounds include the scope of protection courts will afford to a famous but descriptive mark, the meaning of “widely recognized by the general consuming public,” and the interpretation of the fair use provisions.

*Mark E. Ackerman and Christopher J. Glancy are partners at White & Case LLP in New York. Associates Jennifer Co and Gabriel Stern assisted in the preparation of the article which was adapted from a client alert sent by the Intellectual Property Group at White & Case LLP.*

### Join MLRC in Los Angeles, California

Thursday, January 25, 2007  
2-7:30pm (with reception to follow)

### "Taking Traditional Media and Entertainment Into a Digital Environment"

Presented with Southwestern Law School’s Donald E. Biederman Entertainment and Media Law Institute

## MLRC 2006 First Amendment Leadership Award

FOR EXTRAORDINARY CONTRIBUTIONS TO FREE SPEECH AND PRESS

### Solomon Watson IV of The New York Times

*On September 27, 2006, at the biennial NAA/NAB/MLRC Media Law Conference, Henry Hoberman presented MLRC's First Amendment Leadership Award to Solomon Watson IV of The New York Times. Here is a transcript of the presentation.*

**HENRY HOBERMAN:** I am Henry Hoberman, Chair of MLRC's Board of Directors. It is my honor to present MLRC's First Amendment Leadership Award this evening. MLRC's First Amendment Leadership Award was created to honor senior lawyers whose contributions to First Amendment law – and to the institutions that support the First Amendment – were and are stellar.

If you recall from past conferences, this is an award that is given to lawyers whose work, wisdom, leadership and unselfish mentoring of colleagues have made them true deans of the First Amendment Bar.

That's a fitting description of this year's recipient, Sol Watson, of The New York Times Company. Sol has had a remarkable 32-year career at The New York Times Company starting in the trenches of the company's Law Department, serving as corporate secretary for 14 years, and then from 1989 through 2005 as General Counsel of the company, where he guided The New York Times Company through a daunting maze of legal and business challenges.

And it is a remarkable career that continues today as Sol remains the company's Senior Legal Officer and a member of the company's governing Executive Committee. By the way, for 25 of those 32 years, Sol Watson has managed George Freeman. And for that remarkable feat alone he is richly deserving of this award.

In his 17 years at the helm of The New York Times' legal staff, Sol has set the tone for a law department that advises and



supports one of the most important media entities in America, known for its always assertive and sometimes controversial journalism and journalists.

Corporate Counsel Magazine has referred to Sol as, "An island of stability at the world's most watched newspaper company." And that seems like an apt description of Sol. He's been at the center of the storm but he's always the calm, unassuming, reassuring, steady influence that guides his colleagues through the crisis.

Testimonials of his steady hand and sage advice abound. Russ Lewis, the former President and CEO of The Times, has called Sol unflappable. He credits Sol with always admonishing him to fol-

low Rudyard Kipling's advice and, "Treat victory and defeat as the same imposter."

Kathy Darrow, Sol's predecessor as General Counsel, says that more people seek Sol's counsel at The Times than any other person. And it's not just the CEO who seeks him out, it's the cafeteria workers as well, according to Kathy.

Floyd Abrams, himself a rather steady and reliable hand, describes Sol in this way, "Sol has served the cause of protecting the First Amendment with wisdom, foresight and fierce dedication."

And Ken Richieri, Sol's successor as General Counsel, calls Sol, "The moral compass of the company for the past three decades."

Russ Lewis reports that in all the years he has known Sol, he has only seen Sol flustered on one occasion, and he was kind enough to share that occasion with us by email. So I'm going to read from Russ Lewis's email about the one occasion when Sol lost his legendary composure. Sorry, I need my glasses for this one.

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## MLRC 2006 First Amendment Leadership Award

*(Continued from page 40)*

“The only time we saw Sol lose his legendary composure was several years back at The Times Company’s annual shareholders’ meeting. As usual, Sol was prepared to answer every conceivable question relating to his vast responsibilities. Sitting on the stage next to his Chairman, Arthur Sulzberger, Jr., Sol’s face advertised his trademark imperturbable nature. “Mr. Watson,” a long time gadfly shareholder addressed Sol as he took the microphone, “Last year, the New York Times Company Legal Department had 125 lawyers. How many lawyers do you have this year?” asked the shareholder. Sol nearly fell off his chair. His colleagues on the stage, including Mr. Sulzberger, impatiently waited for Sol’s response. Struggling to catch his breath, Sol gasped to correct the record. Sol said, “The Legal Department had only 12 and a half lawyers last year. And that total remains the same in the current year.”

Maybe after this dinner, Sol, you can tell me who the half a lawyer is. [Laughter] With a rich history of giving us legal milestones, including *New York Times v. Sullivan* and the Pentagon Papers case, The Times has set the bar pretty high for Sol when he took over the Legal Department in 1989.

Sol has been more than up to the task. In his years as General Counsel, Sol has ably and courageously carried on The Times’ tradition of defending and expanding the rights of the press and the First Amendment. On his watch, Sol’s legal department preserved The New York Times newspaper’s remarkable streak of not losing or settling an American libel case for money, a streak that began over 50 years ago, well before *Times v. Sullivan*.

On his watch, The Times Company, which includes not just The New York Times, but also The International Herald Tribune, The Boston Globe and 15 other newspapers around the country, 18 television stations, two New York radio stations and more than 40 Web sites, successfully defended scores of libel and privacy cases, establishing important precedents in many areas of First Amendment Law.

I had the pleasure of working with Sol myself in the case of *Moldea v. New York Times*, a landmark opinion case. To name just a few others, he and his team won a hard fought libel lawsuit brought by Elliot Gross, New York City’s Chief Medical Examiner, over a series of articles critical of his handling of autopsies. In the case of *Sweeney v. New York*

*Times*, his team won a hard fought libel trial in Ohio brought by a sitting judge who had prosecuted Sam Shepard in the 1960s. The list goes on and on.

On its own and in conjunction with so many of the media companies in the room tonight, The Times under Sol’s leadership persistently fought to keep courts open and to compel government agencies to conduct their business in the public’s view, whether the agency was a local government board or among the highest power brokers in Washington, D.C. or NASA withholding the Challenger tapes.

And most recently, The Times steadfastly stood by its reporters as they stood behind their confidential sources during the most difficult of times and cases, the Valerie Plame case.

You won’t be surprised to learn then, that the humble guy piloting the hard charging ship has humble roots. He was born, as most great people are, in New Jersey [laughter] in a town called Woodstown, which is in Southern New Jersey. He grew up in the civil rights era and experienced the tumult of the Vietnam war firsthand. He went to college at Howard, then served in Vietnam as a lieutenant in the Military Police Corps, earning a Bronze Star.

He actually took the LSAT’s in Saigon and then applied to law school. Sol went on to Harvard Law School and was one of the first minority lawyers of the Boston law firm of Bingham Dana and then at The New York Times Company.

At The Times, Sol has been an extraordinary voice for inclusion, helping to create a company that has been singled out for recruiting and welcoming minorities into their ranks of its newsrooms and executive offices. He’s also championed inclusion within our bar, the Media Law Bar and within the legal profession as a whole.

In that last category, Sol’s efforts to create a better and stronger Media Bar include his longstanding and generous support for MLRC and its mission to educate and prepare lawyers to defend the press and the First Amendment.

Sol, for your extraordinary contributions to free speech and free press, I am honored to present to you with MLRC’s First Amendment Leadership Award. Congratulations. [Applause]

**SOLOMON WATSON:** Thank you, Henry, for those kind words – giving me credit for managing George might be rhetorical hyperbole. But more seriously, thanks to the Media Law Resource Center for this First Amendment Leadership Award.

*(Continued on page 42)*

### MLRC 2006 First Amendment Leadership Award

*(Continued from page 41)*

Now, I am a team player, so I accept this award on behalf of The New York Times Company, the efforts of whose journalists help the company achieve its mission of creating, collecting and distributing high quality news, information and entertainment. And since we are in this era, we do it internationally and across multiple platforms.

I also accept this award on behalf of The New York Times Legal Department, a place where I've worked for more than half of my life. The Legal Department, as many of you know, was started by Jimmy Goodale more than 40 years ago, and Jimmy continues to work for freedom of the press.

And it has included such other persons as Kathy Darrow, who succeeded Jimmy as General Counsel. And Russ Lewis, who ended up his career as CEO of The New York Times Company, who started out in the Legal Department.

And I accept this award with great gratitude, my own personal gratitude and the corporate gratitude, if you will, of the company. In large measure, I accept the award on behalf of the present members of the Legal Department – the members of the Legal Department here who are present. There is of course the sophisticated and urbane David McCraw. The veteran and inimitable George Freeman, an icon in his own right.

And of course, I do this on behalf of my good friend and successor, Ken Richieri who, as the fourth General Counsel in the history of The New York Times, is perfectly positioned and suited to lead the legal department and the company into the 21st Century.

One of the very good things about my job and our job, because all lawyers were created equal titles notwithstanding, is that we have access to the senior members of both the journalism staff and the business side.

Today, I had the pleasure of chatting a little bit with Arthur, who was chairing a meeting for the NAA's convention in New York next year and then I went to see Arthur's father, the former publisher, Punch.

Now Punch and I have a similar personal proclivity in that we are people of few words. So I went to Punch and told him about this award and he said, "That's good, Sol." And I said, "Punch, what should I say by way of an acceptance speech?" He said, "Say thank you and sit down." And indeed, I'm on my way to do that.

But before I do that, what I thought I would do, unknown to Punch, is to read to this group some of his words. They are as follows.



**Sol Watson and Henry Hoberman**

"The courts are becoming increasingly tough on questions involving newspapers and newspaper people and there is little comfort to be found for our causes and recent decisions of the U.S. Supreme Court. This being the trend, I believe we have no recourse but to ride out the storm. In so doing, it is obvious that we must continue to assure that fairness exists in our reports. At the same time, we must continue to call the shots as we see them. It remains our duty not to provoke, but to report. And threats of litigation or retaliation should not deter us when our cause is just."

So said Punch. Now if I may carry the "riding out the storm" figure of speech to the perfect storm, it is very clear that members of the mainstream media – the media overall – are, in fact, being attacked by many quarters. There are high seas, there are strong currents and hurricane-force winds. We, lawyers and journalists alike, have to captain that ship through those high seas, those strong currents and strong winds.

And to paraphrase another publisher of The Times, I'd like to give you what I believe is the profile of you, lawyers and journalists, captains of this ship. You have chosen an arduous and self-sacrificing profession that in its legitimate practice demands the highest standards of morals, that knows neither time nor season, that occupies all your waking hours and visits your dreams. Yours is a guiding profession dedicated to the public welfare whose moral can be, in the words of Jimmy Goodale, "Another great victory for freedom of the press."



## 2006 NAA/NAB/MLRC Media Law Conference Protecting the First Amendment in Challenging Times

MLRC would like to thank all those who contributed to making this year's Media Law Conference a great success. Over 300 delegates participated in the conference held on September 27-29, 2006.

This year's conference included breakout sessions on Access, Defamation and Privacy and Property. An expanded roster of boutiques included sessions on: Ethics, Internet, Pre-Publication/Pre-Broadcast Primer, Indecency and Edge Content, Libel and Privacy Depositions 101, Advertising/Promotions and Media Insurance.

Conference panels tackled the latest issues in international media law, protecting sources in criminal cases and discussed the tactics and results of some of the past years most interesting media trials. The conference concluded with a look at the hot issues for 2006 and the future. The power point from that session is reprinted in full below.

MLRC gives its special thanks to Conference Chairs Slade R. Metcalf, *Hogan & Hartson LLP*, Mary Ellen Roy, *Phelps Dunbar LLP* and Daniel M. Waggoner, *Davis Wright Tremaine LLP*

### **We thank our conference sponsors for their generous support.**

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### **And thanks to all our conference session chairs, panelists and facilitators.**

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Stuart Karle, Wall Street Journal  
Bruce P. Keller, Debevoise & Plimpton LLP  
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Sherrese M. Smith, Washingtonpost.Newsweek Interactive  
Nicole Wong, Google Inc.

#### **Pre-Pub/Pre-Broadcast Primer**

Jon L. Fleischaker, Dinsmore & Shohl LLP  
Jerald N. Fritz, Allbritton Communications Company

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**2006 NAA/NAB/MLRC Media Law Conference**

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**Indecency and Edge Content**

Robert L. Corn-Revere, Davis Wright Tremaine LLP  
Mace J. Rosenstein, Hogan & Hartson, LLP

**Trial Tactics**

Charles A. Brown, Esq.  
Nancy W. Hamilton, Jackson Walker L.L.P.

**Libel and Privacy Depositions 101**

Susan Grogan Faller, Frost Brown Todd LLC  
James E. Stewart, Butzel Long, PC

**Advertising and Promotion for Publishers**

Richard Constantine, Sabin, Bermant & Gould LLP  
Rick Kurnit, Frankfurt Kurnit Klein & Selz PC

**Media Insurance**

Chad E. Milton, Marsh Inc./Marsh & McLennan Companies  
Rick Fenstermacher, Risk Management Solutions, Inc.

**Trial Tales**

Thomas B. Kelley, Faegre & Benson LLP (Chair)  
Charles L. Babcock, Jackson Walker L.L.P.  
M. Robert Dushman, Brown Rudnick Berlack Israels LLP  
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**International Law**

Kevin W. Goering, Sheppard, Mullin, Richter & Hampton LLP (Chair)  
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Geoffrey Robertson QC, Doughty Street Chambers (Keynote)  
Peter Bartlett, Minter Ellison  
Murray Hiebert  
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David E. McCraw, The New York Times  
Gill Phillips, Times Newspapers Ltd.  
Lee Brooks Rivera, Cable News Network LP  
Jorge Colón, Telemundo, NBC Universal, Inc.  
Jan Johannes, Guardian Newspapers Ltd.  
Chris Newton, Media/Professional Insurance Agency, Inc.  
Brian MacLeod Rogers, Barrister & Solicitor

**Wednesday Night Program: Reporters Panel**

Clifford M. Sloan, Washingtonpost.Newsweek and Interactive  
Paul M. Smith, Jenner & Block LLP

**Thursday Night Program:**

**Crisis Management in the Newsroom**

Eric Lieberman, The Washington Post Company  
David Sternlicht, National Broadcasting Company, Inc.

**Reporter's Privilege:**

**Protecting Sources in Criminal Cases and the Risks for Lawyers and Journalists**

Stuart F. Pierson, Troutman Sanders LLP (Chair)  
David Vigilante, Turner Broadcasting System, Inc. (Chair)  
Laura R. Handman, Davis Wright Tremaine LLP  
Roscoe C. Howard, Jr., Troutman Sanders LLP  
Abbe D. Lowell, Chadbourne & Parke LLP

**The Next Big Thing – Hot Issues for 2007 and Beyond**

Lee Levine, Levine Sullivan Koch & Schulz, L.L.P. (Chair)  
Ronald Collins, Freedom Forum First Amendment Center  
Henry S. Hoberman, ABC, Inc.  
Jane Kirtley, University of Minnesota School of Journalism  
David C. Kohler, Southwestern University School of Law  
Marc Lawrence-Apfelbaum, Time Warner Cable  
Caroline Little, Washingtonpost.Newsweek Interactive  
Adam Liptak, The New York Times  
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## “The Next Big Thing” – Hot Issues for 2007 and Beyond

This year’s NAA/NAB/MLRC Media Law Conference concluded with an interesting panel discussion on the hot media law and policy issues of the year and beyond.

Here is their top ten list.

### “THE NEXT BIG THING”

1. Geo-Filtering
2. Citizen Journalism
3. Indecency
4. Portable Content
5. Regulation of Truth
6. Commercial Speech
7. Internet Prior Restraints
8. De-Nationalization of Defamation
9. Net Neutrality
10. U.K. Defamation Law

#### **Geo-Filtering**

Courts and legislatures throughout the world will increasingly permit content litigation against American media to be adjudicated pursuant to their own country’s laws, resulting in the withering of global publishing and the establishment as the norm of “geo-filtering,” the filtering/targeting of content to specific geographic markets by American media in an effort to avoid potential liability.

#### **Citizen Journalism**

A marked increase in “citizen journalism” – i.e., the posting of video, photographs and other content created by the users/consumers of media websites – will lead to significant litigation concerning media liability/immunity for such postings.

#### **Indecency**

The federal government will expand the reach of indecency regulation from the broadcast media to cable and satellite television and satellite radio as well.

#### **Portable Content**

The increasing ubiquity of portable devices for delivering content (e.g., photographs, video, books, music) will lead to a transformation in the concept of the exclusive rights of copyright holders, which will include the increased creation of compulsory licenses and a trend toward requiring copyright owners to opt out of granting such rights.

**Regulation of Truth**

The confluence of criminal prosecutions such as the AIPAC case and doctrinal developments such as the D.C. Circuit's decision in the *Boehner v. McDermott* case will lead to the prosecution of a journalist for the publication of accurate information about public matters.

**Commercial Speech**

The Supreme Court will move toward doing away with and may well actually abandon the commercial speech category by holding that commercial speech is entitled to full protection under the First Amendment.

**Internet Prior Restraints**

Courts will increasingly be asked to issue injunctions and mandatory "take down" orders in the context of defamation actions against the media arising from Internet publications.

**De-Nationalization of Defamation**

The Supreme Court will continue to decline to review defamation cases involving the press, with the practical consequence that libel law will become increasingly different from jurisdiction to jurisdiction, even with respect to issues ostensibly grounded in the First Amendment.

**Net Neutrality**

The "net neutrality" movement will lead to increasing calls for legislation regulating the content of Internet speech.

**U.K. Defamation Law**

There will be a judicial backlash against the recent spate of pro-plaintiff decisions in defamation actions against the press in the United Kingdom, such that a newspaper will actually prevail in such a case.

The session was chaired by Lee Levine, Levine Sullivan Koch & Schulz, L.L.P., and featured Ronald Collins, *Freedom Forum First Amendment Center*; Henry S. Hoberman, *ABC, Inc.*; Jane Kirtley, *University of Minnesota School of Journalism*; David C. Kohler, *Southwestern University School of Law*; Marc Lawrence-Apfelbaum, *Time Warner Cable*; Caroline Little, *Washingtonpost.Newsweek Interactive*; Adam Liptak, *The New York Times*; Keith Mathieson, *Reynolds Porter Chamberlain, LLP*; Adam Thierer, *The Progress & Freedom Foundation*; and Kurt Wimmer, *Gannett Co., Inc.*